OUTER HOUSE, COURT OF SESSION

[2024] CSOH 13

CA75/22

OPINION OF LORD SANDISON

In the cause

(FIRST) THE ENGINE YARD EDINBURGH LIMITED; and (SECOND) ALLENBUILD LIMITED

Pursuers

against

BAYNE STEVENSON ASSOCIATES LIMITED

Defender

Pursuers: D Thomson KC et Manson; DLA Piper Scotland LLP
Defender: MacColl KC; Brodies LLP

13 February 2024

Introduction

[1] In this commercial action the pursuers seek declarator that a *ius quaesitum tertio* in favour of the first pursuer was created by a contract between the second pursuer and the defender, to the extent that the first pursuer may demand the execution and delivery of a collateral warranty by the defender in its favour. The pursuers also sue for the delivery of the collateral warranty, and the first pursuer sues for payment to it of sums said to be due in respect of the defender's allegedly defective performance of the contract. The matter came before the court for a debate on the relevancy of the parties' pleadings.

Relevant statutory provisions

[2] The Prescription and Limitation (Scotland) Act 1973 as amended provides:

> "**6.— Extinction of obligations by prescriptive periods of five years.**
>
> (1) If, after the appropriate date, an obligation to which this section applies has subsisted for a continuous period of five years—
>
> (a) without any relevant claim having been made in relation to the obligation, and
>
> (b) without the subsistence of the obligation having been relevantly acknowledged,
>
> then as from the expiration of that period the obligation shall be extinguished:
>
> …
>
> **s. 15 Interpretation of Part I.**
>
> (2) In this Part of this Act, unless the context otherwise requires, any reference to an obligation or to a right includes a reference to the right or, as the case may be, to the obligation (if any), correlative thereto.
>
> …
>
> **Schedule 1**
>
> **OBLIGATIONS AFFECTED BY PRESCRIPTIVE PERIODS OF FIVE YEARS UNDER SECTION 6**
>
> 1. Subject to paragraph 2 below, section 6 of this Act applies—
>
> …
>
> (g) to any obligation arising from, or by reason of any breach of, a contract or promise, not being an obligation falling within any other provision of this paragraph."

Background

[3] On 8 March 2017 the second pursuer entered into a contract with Places for People Developments Limited ("PPDL") in which it was appointed as the design and build contractor for a building project known as The Engine Yard Edinburgh. On 8 September

2017 the first pursuer, which is a special purpose vehicle formed in connection with the project and which owns the land upon which it was built, entered into a contract with PPDL in terms of which PPDL agreed to manage the project on its behalf. Both pursuers are wholly owned subsidiaries of PPDL.

[4] By letter of appointment executed by the defender and the second pursuer on 14 April and 22 May 2017 respectively the defender (then known as Scott Bennett Associates (Group 1) Limited) was appointed as the structural engineer for the project. The first pursuer was not a party to the letter, which provided *inter alia* as follows:

> "This letter sets out the terms of your appointment as Structural Engineer in connection with the project on the site at The Engine Yard, Leith, Edinburgh.
>
> WHEREAS
> A. The Engine Yard Edinburgh Ltd ('the Employer') is desirous of obtaining the construction of 344 flats, Gym and Edinburgh Masonic Club. ('the Project')
>
> B. The Employer has issued to **Allenbuild Ltd** ('the Contractor') his requirements for the Project ('the Employer's Requirements')
>
> C. The Contractor has submitted proposals to the Employer for carrying out the Project ('the Contractor's Proposals')
>
> D. The Employer has employed the Contractor to complete the design for the Project and carry out and complete the construction of the Project under an agreement [described in the schedule of information annexed to this agreement.] and dated ('the Contractor Agreement')
>
> E. The Contractor wishes to appoint Scott Bennett Associates ('the Engineer') as its Structural Engineer for the Project and the Engineer has agreed to accept such appointment upon and subject to the terms set out in this letter ('the Appointment').
>
> [...]
>
> 1.2 The Engineer is familiar with the Contractor Agreement [described in the schedule of information annexed to this agreement]. and accepts that it has

full knowledge and understanding of the Contractor Agreement insofar as it is material to the Engineer's duties and obligations under the Appointment.

[...]

2.1 The Engineer shall provide:

2.1.1 the services set out in Schedule A (annexed) taken from the ACE Agreement 3: Design and Construct 2009 Edition, Second Revision Civil/Structural Engineering Consultant Appointed by Design and Construct Contractor, Part G(f) Schedule of Services and as further defined within the 'DM02 Consultant Design Interface and Responsibility Schedule' for the whole of the Project and all external works and drainage.

2.1.2 an analysis of the ground conditions report in relation to all matters of structural and civil engineering design including ground contamination and any statutory requirements, co-ordinate and arrange for provision of a remediation strategy to the satisfaction of the Local Authority Environmental Health Office/SEPA/The Planning Officer/The NHBC, or any other bodies that are required to approve the remediation strategy in order for the contractor to discharge their duties under the contract.

(together 'the Services').

[…]

3.1 The Engineer:-

3.1.1 warrants that it has exercised and will exercise in the performance of its duties and obligations under the Appointment all the reasonable skill and care to be expected of a qualified and competent structural engineer undertaking such duties and obligations on developments of a similar size, cost and complexity to the Project. This warranty includes and extends to all work done in connection with the Project prior to the date of the Appointment whether or not such work was done pursuant to instruction from the Contractor or from any other person and not withstanding that such work has been paid for by any other person;

[...]

3.1.3 shall use all reasonable skill and care to see that the design of all elements of the Project for which it has a responsibility complies with the Building Warrant and other applicable statutory and regulatory requirements;

3.1.4 acknowledges that the Employer and the Contractor shall be deemed to have relied on its skill and care in respect of the performance of its professional services under the Appointment;

[...]

6.1 The Engineer shall promptly execute in a self proving manner and deliver a Collateral Warranty in the form annexed or in such other form as the Contractor reasonably requires within 7 days of written request in favour of the Employer and/or any lessee and/or purchaser and/or provider of finance for the Project acquiring from the Employer an interest in or charge over the Project Development or any part of the Project. 'self proving manner' shall mean the execution of a document in accordance with the Requirements of Writing (Scotland) Act 1995 so as to confer upon the document signed in such a manner the benefit of the presumption as to validity.

6.2 Execution and delivery of the Collateral Warranties in accordance with clause 6.1 shall be a condition precedent to payment of the Fee or any instalment thereof pursuant to clause 8.

[...]

10.1 The Contractor shall be entitled at any time by service in writing on reasonable notice to terminate the Engineer's employment under the Appointment. Such termination shall not determine the operation of clauses 4, 5, or 6 above which shall continue to apply but only insofar as they relate to duties falling due for performance prior to the date of termination"

[5] No form of collateral warranty was in fact annexed to the letter as envisaged by clause 6.1. The second pursuer made a written request to the defender for the provision of a collateral warranty on 25 August 2022, but no such warranty has been delivered to either pursuer. The pursuers allege that the defender breached its duty to exercise an appropriate standard of skill and care in the performance of its functions under the appointment letter

in September 2017 and that issues consequent upon that breach of duty became apparent in February 2020, requiring remedial works to be carried out between September 2020 and January 2021 at considerable cost, which would not have been incurred had the defender fulfilled the duties incumbent upon it.

[6] The defender contends that the first pursuer has no title or interest to sue for the delivery of the collateral warranty mentioned in clause 6.1 of the appointment letter, or for damages for alleged breach of the defender's obligations in terms of the letter. It maintains that no *ius quaesitum tertio* was created by the letter. It argues that any right which the second pursuer had to require delivery of the collateral warranty (or, if it ever existed, any such right which was enjoyed by the first pursuer) has been extinguished by operation of prescription.

Defender's submissions

[7] Senior counsel for the defender moved the court to assoilzie it from the conclusion of the summons seeking delivery of the collateral warranty and to dismiss the remaining conclusions.

[8] Any right to require delivery of a collateral warranty had been extinguished by operation of prescription. In terms of clause 6.1 of the appointment letter between the second pursuer and the defender, the former had the right as from the date of conclusion of the contract, being 22 May 2017, to require the defender to execute and deliver up to it a collateral warranty in favour of, *inter alios*, the first pursuer. On the pursuers' own averments, no relevant claim for implement of the second pursuer's such right was made within the period of 5 years after the date that it came into existence. In these circumstances, any right which the second pursuer had to require execution and delivery of

the collateral warranty by the defender had been extinguished by operation of prescription, in terms of sections 6(1) and 15(2) of, and paragraph 1(g) of Schedule 1 to, the Prescription and Limitation (Scotland) Act 1973. If there ever had been a *ius quaesitum tertio* enjoyed by the first pursuer directly to demand delivery to it of the collateral warranty, the same logic applied and the same result ensued. The defender should, therefore, be assoilzied from the relative conclusion of the summons.

[9] Further, the pursuers had also failed to set forth any relevant case in support of the conclusions of the summons founded on the assertion of the existence of a *ius quaesitum tertio* in favour of the first pursuer entitling it to sue the defender for delivery up of a collateral warranty.

[10] The contractual structure that had been put in place pointed squarely away from there having been any intention on the part of the parties to the contract to create any directly enforceable rights under the contract in favour of the first pursuer (cf *Gloag on Contract* (2nd Edition), p235ff). Here, the first pursuer was in a contractual relationship with PPDL, with contractual rights and obligations flowing therefrom. Separately, the second pursuer and the defender were in a distinct contractual relationship. There was no direct contractual relationship between the first pursuer and the defender. There was not even a direct contractual relationship (or at least one that was condescended upon) between the first pursuer and the second pursuer. That was the deliberate structure that the various parties had agreed to put in place to regulate their affairs. In these circumstances, the general rule of privity of contract pointed squarely away from there being any enforceable right on the part of the first pursuer against the defender.

[11] The structure that had been agreed was not to be undermined by the implication and imposition of any *ius quaesitum tertio*. Reference was made to the *Stair Memorial*

Encyclopaedia, Volume 15, paragraph 836 and to *Laurence McIntosh Limited* v *Balfour Beatty Group Limited* [2006] CSOH 197 at [35]ff. There was nothing in the appointment letter to indicate any intention on the part of the second pursuer and the defender to create directly enforceable rights by way of a *ius quaesitum tertio* enforceable by the first pursuer against the defender. There was nothing in the letter to preclude it being terminated by agreement between the second pursuer and the defender (cf *Gloag on Contract* (2nd Edition), p235).

[12] Clause 3.1.4 of the letter was not, in terms of its language or purpose, intended to give rise to any directly enforceable right on the part of the first pursuer against the defender. As its language made plain, this was merely an acknowledgement that the first and second pursuers had relied upon the defender's skill and care in respect of the performance of its functions. The purpose of such a provision was not to give rise to a right on the part of the first pursuer (which was not a party to the letter) to sue the defender if the latter failed to act to the required standard. Were this to have been the goal of the parties, there would have been be no reason for it to have been done in what was, even on the pursuers' analysis, an opaque fashion, when it could have been done clearly and directly (either by way of the first pursuer being a party to the letter or by way of the grant of a collateral warranty - an approach which was, of course, provided for by the letter). Rather, the purpose of this provision was to preclude the defender, if sued by the second pursuer for any losses arising from breach of its obligation to act with reasonable skill and care, from seeking to argue that any loss incurred was not recoverable for want of reliance on the part of either pursuer.

[13] Moreover, there was nothing in the terms of clause 6.1 of the letter (or, indeed, elsewhere in it) to suggest that there was any intention to confer upon the first pursuer a directly enforceable right to seek and obtain a collateral warranty from the defender.

Clause 6.1 entitled the second pursuer to call upon the defender to deliver up to the second pursuer a collateral warranty in favour of a party specified by the second pursuer. It was a matter for the second pursuer when or whether it then passed that collateral warranty on to the party in whose favour it had been written - that would, no doubt, be an issue regulated by the contractual (or other) relationship which subsisted between the second pursuer and such other party. However, clause 6.1 did not provide any direct right in the hands of the first pursuer (or, indeed, any of the other potential parties in whose favour a collateral warranty might have been called for under clause 6.1) to demand that a collateral warranty be provided to it directly by the defender. For all of these reasons, the pursuers' case concerning a *ius quaesitum tertio*, as set forth in its first conclusion, was irrelevant and should be dismissed.

[14] There being no relevant case setting up the existence of a *ius quaesitum tertio* in favour of the first pursuer, there was no basis upon which the first pursuer could relevantly seek damages by way of reparation from the defender. The loss in respect of which reparation is sought was loss suffered by the second pursuer. *Prima facie*, the first pursuer had no title to sue for such losses and the relative conclusion fell to be dismissed.

Pursuers' submissions

[15] On behalf of the pursuers, senior counsel moved the court to repel the defender's pleas relating to the first pursuer's title to sue, to the claimed irrelevance of the averments in support of the existence of a *ius quaesitum tertio*, to the absence of any duty on the part of the defender to make reparation to the first pursuer, and to the supposed extinguishment by prescription of any obligation to deliver a collateral warranty. Counsel noted that the

prescription issue was of the greatest importance in the debate, since the pursuers' case would fall if that issue was determined against them.

[16] However, both that issue and the question of the first pursuer's *ius quaesitum tertio* should be resolved in favour of the pursuers. Firstly, the obligation to execute and deliver the collateral warranty had not been extinguished by the operation of prescription. On a proper construction of clause 6.1 of the appointment letter, the obligation incumbent on the defender did not crystallise until a written request was made. On the pursuers' averments, the action was raised within the quinquennium running from the date of that written request on 25 August 2022. Secondly, the pursuers had a relevant basis upon which to contend that a *ius quaesitum tertio* was intended to be created and conferred upon the first pursuer in relation to the delivery of a collateral warranty under clause 6 of the letter. The terms of clause 6 were of benefit only to the first pursuer when it came to the creation of a collateral warranty. Dealing with these matters in more detail:

[17] The obligation to deliver the collateral warranty arose out of clause 6.1 of the letter. There was no dispute that the short negative prescription applied to the obligation in question. The enquiry should be concerned with the time at which the obligation in question became enforceable on a proper construction of the letter: Johnston, *Prescription and Limitation* (2nd Edition) at 4.07. A proper construction of clause 6.1 required to give effect to the natural and ordinary meaning of the words which had been used. Those words were clear and unambiguous in identifying a "written request" as the trigger which operated to crystallise the obligation to deliver. The situation was analogous to that of a loan repayable on demand; in that case, maintained senior counsel (but without citing any supportive authority) the obligation to repay the loan only came into existence when the relative demand was made.

[18] This conclusion that this was the proper construction of clause 6.1 was reinforced by the fact that the clause comprehended a set of circumstances in which the pursuers could identify unilaterally a form of wording for the warranty and issue a request for the same: "……deliver a Collateral Warranty in the form annexed or in such other form as the [pursuers] reasonably requires". The defender would not know the form of warranty to issue if it was not first given a request or demand. Absent a request the defender would be left unsure as to the performance required of it and the nature of its obligation: what form of warranty should it anticipate that the pursuers might require? The defender would not know the content which should be given to the special form of warranty if the pursuers had not requested any. This all served to underscore the criticality of the request or demand in constituting the obligation to make delivery. Accordingly, the natural and ordinary meaning of the words adopted in the contract plainly confirmed that the relevant prescriptive period was initiated upon the making of the written request. On the pursuers' pleadings the written request was made on 25 August 2022, which was well within the quinquennium.

[19] There was nothing surprising or unusual about that interpretation and the state of affairs which it would produce. At all events and regardless of the court's view on any question of balance or commerciality, it was obliged to give effect to the words which had been used where there was no ambiguity: *Scanmudring AS* v *James Fisher MFE Ltd* [2019] CSIH 10, 2019 SLT 295 per Lord Menzies at [81]. There was no ambiguity here. Even if it was relevant to attach weight to considerations of fairness and balance when considering the meaning and effect of the clause, there would still be nothing problematic about the conclusion that prescription of the obligation to deliver ran from the date of the request. That was because the general law in this context operated such as to ensure that the

defender would not be left with a perpetual prospective liability under the putative warranty. The defender enjoyed the protection that time-bar would operate in relation to the obligations to which the collateral warranty granted access: *British Overseas Bank Nominees Ltd* v *Stewart Milne Group Ltd* [2019] CSIH 47, 2020 SC 24. Indeed, the defender invoked this very argument in its defences ie that the damages claim which the pursuers wanted to make under the warranty not yet received had prescribed. The defender's right to seek to defend the underlying damages claim drawing on the scheme of prescription would remain unaffected by the fact that a demand for a warranty could still be made many years after the completion of the works. Accordingly, there was nothing objectionable about prescription starting to run on the obligation to issue the warranty from the date of the demand. The timing of the delivery of the warranty was neutral when it came to the question of substantive time-bar on the underlying damages claim. As the obligation sued upon did not crystallise until the written request was made, it followed that the correlative right to receive the demanded warranty did not exist until the same was done: section 15(2) of the Prescription and Limitation (Scotland) Act 1973. Once such a demand was made, the right (created by the demand) would be susceptible to extinction, by operation of prescription, as being the right correlative to the obligation to deliver the demanded warranty. It was erroneous and unsound in law to characterise the right to make the demand in the first place as the right correlative to the defender's obligation to execute and deliver a warranty, once a demand was made of the defender. For these reasons, the defender's plea in relation to prescription of the right to demand delivery of the warranty should be repelled and its related averments excluded from probation.

[20] In relation to the defender's challenge to the existence of a *ius quaesitum tertio*, it was limited to the claimed absence of an intention on the part of the second pursuer and

defender when contracting to confer rights upon the first pursuer to obtain delivery of a collateral warranty under clause 6.1. The primary beneficiary of that clause was the first pursuer. That benefit was not merely incidental to the fulfilment of the terms of the letter as between the parties to it. The first pursuer was identified by name in the clause and was the person who would come to enjoy the benefits of the contemplated warranty. By contrast, the second pursuer would not derive any benefit from receipt of a warranty drawn in favour of the first pursuer. Its practical interest in the creation of the collateral warranty was non-existent or negligible: cf *Gloag on Contract* (2nd Edition) at 236. Clause 6.1 did not specify that only the second pursuer could demand delivery of a collateral warranty from the defender. The first pursuer had the substantial interest in the fulfilment of the obligation to deliver the warranty: cf McBryde, *The Law of Contract in Scotland* (3rd Edition) at 10-10. That brought the present case into the class of "obvious" cases where a benefit was intended to be conferred on a third party. The first pursuer not only had an interest in clause 6.1, but the primary and substantive interest in the obligations created by the clause. The parties plainly intended to confer upon the first pursuer the right to seek delivery of the collateral warranty.

[21] The factors identified by the defender should not determine conclusively the absence of a *ius quaesitum tertio*. First, the fact that a particular contractual structure was created did not, in and of itself, determine the absence of a *ius quaesitum tertio*. If the relevant intention could be identified from the terms of the contract and position of the parties then the existence of a particular contractual structure between certain parties should not override the intention to confer rights. Any "general" rule which might be said to arise from a structure which involves provision for the grant of collateral warranties (see, for example, *Stair Memorial Encyclopaedia of the Laws of Scotland*, Volume 15, paragraph 836) was, rather,

dependent upon it being shown (i) that the employer had merely an interest in the sub-contract (for the reasons already given that was not the case here); and (ii) that the parties to the sub-contract had no intention of conferring benefit upon the employer. This second criterion also was not satisfied in the present case standing the combined effect of clauses 3.1.4 and 6.1 of the letter, viewed in the context of its whole terms. Second, if it was correct that the terms of clause 6.1 strongly indicated an intention that the first pursuer was to enjoy rights and recourse therefrom then, in fact, that served manifestly to reinforce the conclusion that a *ius quaesitum tertio* was intended in terms of the clause. Third, whilst it is true that there was no express provision precluding termination of the letter by the second pursuer or defender, the first pursuer would, on the pursuers' analysis, be entitled to object and would have title to do so insofar as any termination was going to affect the position in relation to clause 6. The first pursuer would have title and interest to seek interdict preventing termination given its interest in performance of the obligations in that clause. The defender's pleas as to the absence of a *ius quaesitum tertio* should be repelled and its relative averments excluded from probation.

Decision

Ius quaesitum tertio

[22] The contractual conferral of rights on a stranger to the contract is now governed by the Contract (Third Party Rights) (Scotland) Act 2017. However, the contract in issue in the present case was concluded before that Act came into force, and the question of what rights it may have conferred upon the first pursuer is one that falls to be determined by the application of the common law.

[23] The core question in that context is whether it was the intention of the contracting parties, discerned by considering the words used in their contract in the context in which they were used, to secure a benefit for a third party, or whether any such benefit was rather the incidental result of a stipulation conceived primarily for some other purpose? Unless the substantive intention was to secure a benefit for a third party, the normal or default position of privity of contract applies.

[24] The primary focus in the present case is on clause 6.1 of the appointment letter. In essence, it requires the defender to execute and deliver a collateral warranty in favour of the first pursuer or of a member of one or other identified groups which might come to have an interest in the project. *Prima facie*, that clause might be thought to indicate an intention to confer a substantive benefit on the first pursuer or the others indicated, it not being immediately obvious what interest of its own the second pursuer would have in securing the execution and delivery of such a warranty to the first pursuer or any other member of the identified groups. However, it is clear from the contract which PPDL had already entered into with the second pursuer in connection with the project (and which thus formed part of the relevant background against which the terms of the appointment letter fall to be considered) that the second pursuer had obliged itself to procure, if so required, warranties from any party in such form as might reasonably be approved by PPDL for its own benefit or that of any funders, tenants or purchasers of the development. Although the terms of that contract were not referred to in the course of the debate before me, they were incorporated into the Summons by the pursuers, who also produced the contract to the court. Once one is aware of that obligation which the second pursuer had previously undertaken to PPDL, it becomes apparent that it had its own substantive reason for stipulating as it did with the

defender - namely, to ensure that it was not at risk of breaching its obligation to PPDL and incurring such liability as might flow therefrom.

[25] The defender acknowledged, by clause 3.1.4 of the appointment letter, that both pursuers should be regarded as having relied on its skill and care in respect of the performance of its professional services under the appointment. The explanation advanced by the defender for the presence of that clause in the contract appeared to me to be unconvincing, and I am prepared to regard it as an adminicle strengthening the conclusion that, in making the arrangements which they did, the second pursuer and the defender were plainly conscious of the acute interest which the first pursuer would have in the proper performance by the defender of its contractual functions. However, while acknowledging that that interest was recognised by the parties to the appointment letter, one must ask oneself the further question of what their contract reveals as to how they intended it to be accommodated.

[26] In that connection, the defender argued at a fairly abstract level that the fact that a particular and distinct contractual structure had been set up amongst the various parties involved in the Engine Yard project strongly militated against the suggestion that the parties to the appointment letter between the second pursuer and the defender ought to be taken to have intended to confer a *ius quaesitum tertio* on the first pursuer. It is certainly true that, as a matter of generality, it may be the purpose of contractual and sub-contractual structures to prevent the creation of direct legal relationships except between contracting parties (see McBryde at paragraph 10-11 and *Laurence McIntosh Limited*). However, such a generality must, as always, yield to the specific arrangements under consideration, and is not in itself capable of excluding the conclusion that the creation of a *ius quaesitum tertio* was objectively

intended by parties to a particular contract, even if that contract is but one part of a greater set.

[27] Turning from the abstract to the particular, it has already been noted that the second pursuer had previously undertaken an obligation to PPDL to procure warranties for the benefit of it and others from any party involved in the project. To that may be added the fact that PPDL undertook the same obligation to the first pursuer in the contract entered into between them. It is further worthy of note that in both the contract between PPDL and the second pursuer and that between PPDL and the first pursuer (both of which were governed by English law) the parties expressly excluded the provisions of the Contracts (Rights of Third Parties) Act 1999, being the English legislation dealing with the issue of third party rights, and for good measure stipulated expressly that those contracts were not to confer any rights on third parties. While that contractual structure still leaves some unanswered pertinent questions, a group of contracts providing for a chain of obligations to procure warranties, in which two expressly exclude the conferral of third party rights and the last makes no mention of the subject, forms an awkward background into which to imply a *ius quaesitum tertio*, all the while being assured that one is not upsetting whatever balance it was that the parties were intending to strike by what they actually set down in their contractual arrangements.

[28] Some reference was made in argument, again somewhat faintly, to the impact of the second pursuer's right to terminate the defender's appointment by giving reasonable notice under clause 10.1 on the question of the existence of a putative *ius quaesitum tertio*, it being commonly accepted that the existence of a right to terminate a contract is regarded as antithetical to the existence of a *ius* flowing from that contract. However, the right to terminate in the present case is expressed as not determining the operation of, *inter alia*,

clause 6.1, which is to continue to apply but only insofar as it relates to duties falling due for performance prior to the date of termination. Although it would *prima facie* appear that a termination of the contract before any demand for execution and delivery of a collateral warranty had been made would result in performance of the relevant obligation not having fallen due prior to the date of termination, I did not have the benefit of parties' submissions on the interaction of clauses 6.1 and 10.1 and accordingly do not treat this as a matter militating against the possibility of the existence of a *ius quaesitum tertio* in the contract in question.

[29] Ultimately, however, two considerations weigh heavily, individually and cumulatively, against the conclusion that the parties to the appointment letter ought to be regarded as having intended the creation of a *ius quaesitum tertio* in the first pursuer. The first such consideration is that the second pursuer plainly had its own substantive interest in being able to demand the execution and delivery of a collateral warranty from the defender, pointing towards the conclusion that whatever benefit the first pursuer might gain from such execution and delivery was incidental rather than essential to the purpose of the relevant stipulation. The second is that the appointment letter formed only one part of a pattern of linked contractual rights and obligations amongst various parties, including the present litigants, and it cannot be said with any confidence that the implication of a *ius quaesitum tertio* would not undermine the essential structure of the arrangements which those parties decided to put in place. I accordingly reject the proposition that the appointment letter conferred any *ius quaesitum tertio* on the first pursuer to demand the execution and delivery of a collateral warranty directly to it.

Prescription

[30] The defender's case in relation to prescription is straightforward; its contractual obligation under clause 6.1 of the appointment letter to furnish a warranty having subsisted for a continuous period of 5 years from 22 May 2017 without any relevant claim or acknowledgement, it was extinguished at the end of that period. The pursuer's case is equally simple; there was, on a proper construction of clause 6.1, no obligation to furnish the warranty unless and until a written demand was made for it, which happened on 25 August 2022, and so no question of the obligation having subsisted for any continuous period of 5 years. Both parties agreed that the issue of the subsistence of the relevant obligation was a matter to be determined by a proper construction of the contract.

[31] The suggestion that the subsistence of that obligation depended on the fulfilment of a supposed condition which consisted of nothing more than a demand for its performance seems to me to be attended by considerable conceptual difficulty. *Gloag* observes at 270 that a "contractual obligation is termed pure when it can be enforced at once, and is not subject to any condition" and adds that in the absence of any provision to the contrary an obligation is deemed to be pure, and enforceable at once. I do not understand it to be in dispute that the second pursuer could have enforced the defender's obligation to execute and deliver a warranty as soon as the contract constituted by the appointment letter was entered into. It did not have to await the occurrence of any uncertain extraneous event before being able to enforce the obligation; the matter was entirely dependent on its will. From the defender's point of view, it was liable to be called upon at any point from 22 May 2017 to perform the obligation which it had undertaken to execute and deliver a warranty, which I understand is what *Gloag* is referring to when he further observes at 272 that, even in the case of a

condition which is truly contingent and suspensive, "looking at the matter from the point of view of the debtor, the obligation exists from the time when it was undertaken".

[32] If one approaches the question by asking what provision to the contrary displaces the presumption that an obligation is pure and enforceable at once, the pursuers can only point to those parts of clause 6.1 requiring the making of a written request by the second pursuer, which will have the consequences of settling the terms of the warranty (within the bounds of reasonableness) and fixing the point in time (7 days after the request) by which performance of the obligation is required. However, none of these mattes displaces the presumption that the obligation in question is a pure one. The second pursuer could not validly call for performance of an obligation which was not already in subsistence. The fact that it could call for performance at any time from conclusion of the contract rather indicates that the underlying obligation was in subsistence from the outset. The language of clause 6.1 does not provide any particular support for a construction that the making of a written request should be considered at once as making the obligation enforceable and calling for its performance. The terms of the request will, at the point of its being made, either be reasonable or not, with the contract providing for arbitral determination should there be any dispute about the issue. The potential uncertainty which the contract allows for as to the precise terms of the warranty to be granted (a double uncertainty given that no standard warranty was in fact attached to the contract as contemplated) does not render the underlying obligation unenforceable unless and until that uncertainty is resolved; *certum est quod certum reddi potest*. The 7 day period allowed for delivery of the warranty appears clearly to be a stipulation concerned with the performance of the relative obligation rather than about its subsistence.

[33] Counsel for the pursuers sought to draw an analogy between clause 6.1 and the case of a loan repayable on demand. However, even if one were to accept the validity of the analogy, the conventional view is that the underlying obligation to repay in such a case subsists from the outset and the demand for repayment affects only the performance of that obligation, rather than creating it (cf *Neilson* v *Stewart* 1991 SC (HL) 22, per Lord Jauncey at 40).

[34] I did not find considerations of commercial sense, or of what prescriptive regime would have been applicable to any warranty which might have been granted, helpful in arriving at the true construction of clause 6.1, simply because it seemed to me that the terms of that clause were sufficiently clear in themselves and that the commercial consequences of one or other construction were not so obviously extreme as to be capable of displacing the natural meaning of the words used.

[35] I conclude for the reasons stated that, on a proper construction of clause 6.1 of the appointment letter, the defender's obligation to execute and deliver a warranty subsisted for a continuous period of 5 years from 22 May 2017 without any relevant claim or acknowledgement having been made in relation to it, and was accordingly extinguished at the end of that period.

Conclusion

[36] I shall sustain the defender's sixth plea-in-law and assoilzie it from the second conclusion of the Summons, sustain its first plea-in-law and dismiss the rest of the extant conclusions, and repel the pursuers' pleas.