OUTER HOUSE, COURT OF SESSION

[2024] CSOH 60

CA37/23

OPINION OF LORD RICHARDSON

In the cause

TECJET LIMITED

Pursuer

against

KIER CONSTRUCTION LIMITED

Defender

Pursuer: Smith KC, Black; Lindsays LLP
First Defender: MacColl KC, Steel; Kennedys Scotland LLP

13 June 2024

Introduction

[1] This case arises out of the fire at the Mackintosh Building of the Glasgow Art School in Renfrew Street on 15 June 2018.

[2] In June 2018, the pursuer was the tenant of premises known as the 02 Building at 300 Sauchiehall Street, Glasgow. The premises are adjacent to the Art School. The pursuer operated the premises as a nightclub and music venue. The pursuer is part of a group of companies which is ultimately owned and controlled by Live National Entertainment, Inc, a US company. That group of companies includes Academy Music Group Limited and Live Nation (Music) UK Limited. In June 2018, both of these companies also operated from the premises.

[3] In June 2018, the defender was employed as principal contractor at the site of the Art School. At that time, the defender was carrying out remedial work following an earlier fire in May 2014. On 15 June 2018, fire again broke out at the School of Art site. The fire caused extensive damage and spread to adjoining buildings including the premises.

[4] In the present action, the pursuer sues the defender for loss and damage which it claims resulted from the fire in 2018. The pursuer sues both in its own right and also as assignee of claims by Academy Music Group Limited and Live Nation (Music) UK Limited.

[5] In summary, the pursuer's case is based on the maxim *res ipsa loquitur*: the pursuer contends that the occurrence and spread of the fire when the defender was in sole control of the site was evidence of the defender's negligence. (For completeness, I note that shortly before the debate, the pursuer indicated that it no longer insisted on an alternative case, pled in Article 2 of condescendence, that the defender was liable for the failings of its subcontractor, Arrest Fire and Security Limited.)

[6] At debate before me, the defender challenged the relevancy of the pursuer's case on a number of bases.

No title to sue for its own alleged losses

[7] The defender's first argument is that, at the point at which the summons was served (on 10 May 2023) the pursuer had failed to set out the nature or basis of the right upon which it was, in its own right, entitled to claim damages from the defender. When the summons was served, the pursuer's averments on this point, at their highest, comprised solely an unsupported averment that the pursuer (together with its assignors) "occupied" the premises "as tenants". The pursuer averred:

> "As at June 2018, the Pursuers and their assignors occupied premises known as the O2 Building, as tenants, at 300 Sauchiehall Street, Glasgow ('the premises')." (Article 2)

These averments were, it was contended, insufficient to establish the pursuer's title to sue.

[8] In developing this argument, senior counsel drew attention to the fact that the pursuer had only introduced averments relating to the pursuer's lease of the premises by adjustment on 21 September 2023. At this point, the pursuer had added by way of adjustment to Article 2:

> "The Pursuer leased the premises from the proprietors conform to a Lease. The pursuer and its assignees are part of a group of companies which is ultimately owned and controlled by Live National Entertainment, Incorporated, a US Company. The pursuer held the lease and was involved in operating the premises which traded from the O2 ABC Glasgow, a nightclub and music venue. A copy of the relevant Lease is produced herewith and incorporated herein for the sake of brevity under reference to clauses 2, 3, and 6.22;".

By reference to the lease itself (6/10 of process), senior counsel noted that the opening sentence of Article 2 was self-evidently wrong. In terms of the lease, only the pursuer was the tenant. Senior counsel highlighted that the additional averments had, in any event, only been added more than five years after the date of the fire, which was the date from which the prescriptive period ran (see sections 6(1) and 11(1) of the Prescription and Limitation (Scotland) Act 1973).

[9] On this basis, the defender contended that there had been no interruption of the prescriptive period in respect of the pursuer's claim. This was because the summons as served, having failed relevantly to set out the basis of the pursuer's title, did not constitute a "relevant claim" for the purposes of section 6(1) of the Prescription and Limitation (Scotland) Act 1973. The summons as served did not include averments which were capable of establishing the pursuer's title to sue.

[10] The prescriptive period having expired, it was not now open to the pursuer to attempt to cure the issue by adding adjustments which referred to the pursuer's lease of the premises. Senior counsel referred to the observations of Lord Guthrie in *Bentley* v *Macfarlane* 1964 SC 76 (IH) at 81 and 83.

The pursuer's response

[11] As a starting point, senior counsel noted that the pursuer made claims both in respect of the building and its contents (see Article 5). Accordingly, this part of the defender's argument, even if correct, would only affect the pursuer's claim insofar as it related to the damage to the premises.

[12] However, in any event, senior counsel submitted that the defender has conflated two separate issues: first, whether the pursuer had title to sue for its losses at the point at which the action was raised; and second, whether, if the pursuer's averments detailing the basis of its title were lacking at the point at which the claim was raised, it followed that the summons was not a "relevant claim" in terms of section 6(1) of the 1973 Act.

[13] In the present case, the defender's argument was focussed on the second of these issues and not the first. The pursuer submitted that, as a matter of law, there was no authority which supported the defender's position that a lack of specification by the pursuer as to its title prevented the pursuer's claim from being "relevant" in terms of section 9 of the 1973 Act. On the contrary, it was clear that a claim which was irrelevant as a matter of law could still interrupt prescription (see D Johnston, *Prescription and Limitation* (2nd Edition) at 5.13). Provided the obligation founded upon by the pursuer was adequately brought into issue, what mattered was the substance of the position not perceived inadequacies in the

pleadings (see *Royal Insurance (UK) Limited* v *Amec Construction (Scotland) Ltd (No 2)* 2008 SLT 825; and *Prescription and Limitation* (2nd Edition) at paragraph 5.19).

Decision

[14] This part of the defender's argument proceeds on the basis that the claim by the pursuer articulated in the summons as served cannot constitute a "relevant claim" for the purposes of section 6(1) of the 1973 Act.

[15] For present purposes, "relevant claim" was defined in section 9(1) as:

> "in relation to an obligation, means a claim made by or on behalf of the creditor for implement or part-implement of the obligation, being a claim made-
> (a) in appropriate proceedings, or…".

Again, for present purposes, section 9(4) defined "appropriate proceedings", by reference to section 4 of the act, as:

> "any proceedings in a court of competent jurisdiction in Scotland or elsewhere, except proceedings in the Court of Session initiated by a summons which is not subsequently called".

[16] In light of the definition contained in section 9(1), it is apparent that the "relevance" of a claim is to be determined by reference to the obligation in respect of which it is made rather than by reference to the legal relevance of the averments used to frame it. I respectfully agree with Lord Emslie in *Royal Insurance UK (No 2)* at paragraph 21 that the requirements of section 9 are that: (1) the person making the claim must objectively be the creditor in a given obligation; (2) the claim must be made in "appropriate proceedings"; and (3) the claim must relate to the obligation in question. It follows that if a claim which satisfies the second and third of these requirements is brought by someone who satisfies the first requirement, it will be sufficient to interrupt prescription (see also *Prescription and Limitation* (2nd Edition) at 5.13 and the authorities cited there).

[17] Approaching the question of what is a "relevant claim" by considering what falls outwith the definition, the authorities suggest that a writ which was "fundamentally null" (see *British Railways Board* v *Strathclyde Regional Council* 1981 SC 90 at 93 per Lord Kincraig) or "incurably incompetent" (see *Prescription and Limitation* (2nd Edition) at 5.19) would not be sufficient to interrupt prescription.

[18] Against this background, I consider that the defender's argument in respect of the pursuer's title to sue for its own losses is misconceived. The summons as served fulfils each of the requirements identified by Lord Emslie for a relevant claim. In the summons, as served, the pursuer avers that it is suing in its own right (Article 1). The pursuer avers that it, along with the assignors, occupied the premises as tenants (Article 2). There is no dispute that the pursuer was in fact the tenant of the premises. The summons also identifies the defender's obligation to make reparation for the loss and damage which the pursuer contends was caused by the defender's negligence (Articles 4, 5 and the first plea-in law).

[19] The main thrust of the criticism of the summons made by the defender was that the lease itself had not been incorporated into the pleadings and that, when the terms of the lease were considered, it appeared that the assignors were not, in fact, tenants. These points are very far from rendering the summons either "fundamentally null" or "incurably incompetent". In respect of the first point, it is notable that the consequence provided in the Rules of Court for the failure to lodge documents founded upon within a pursuer's possession is not dismissal but rather the risk of being found liable for the expenses of an order for the production or recovery of the document concerned (Rule 27.2). As to the second, this would seem, at most, to be a criticism of the title of the assignors rather than the pursuer (these claims being the subject of the defender's second argument which I consider below).

[20] Accordingly, I reject the defender's first argument.

No title to sue in respect of the assignors' claims

[21] The defender's second argument challenged the pursuer's title to sue on behalf of the two assignor companies: Academy Music Group Limited and Live Nation (Music) UK Limited, for their alleged losses.

[22] The pursuer's position is that the assignor companies each conveyed their rights to sue the defender by two assignations dated 2 May 2023 and 14 June 2023 respectively. The pursuer's averments in relation to the assignations are as follows:

> "The Pursuers sue in their own right, and also as assignees of Academy Music Group Limited and Live Nation (Music) UK Limited. A copy of the relevant Assignation, dated 02 May 2023, is produced herewith and incorporated herein for its terms for the sake of brevity, which Assignation was intimated to the Defenders prior to raising of this action by letter dated 2 May 2023, produced herewith, and at the time of raising this action. *Esto* the assignation dated 02 May 2023 was ineffective to transfer the property rights in and to the Claims (which is denied), an Assignation, produced herewith and incorporated herein for its terms for the sake of brevity, dated 14 June 2023 was effective. Said assignation was intimated on the Defenders and lodged in process on 14 June 2023. The Assignations of 02 May 2023 and 14 June 2023 were signed by Stuart Douglas, a director of the pursuer and its assignors." (Article 1 of condescendence)

[23] Senior counsel submitted that there were fundamental problems with both purported assignations.

The first assignation

[24] In respect of the first assignation, the defender's principal argument was that, properly construed, it did not convey any property rights to the pursuer. The material clause provided as follows:

> "1. Academy Group Limited and Live Nation (Music) UK Limited hereby assign to Tecjet Limited all rights to bring proceedings in the Litigation including the right

> to conduct the Litigation on their behalf including compromise and settlement of The Claims, as though Tecjet were pursuing their own rights."

[25] The defender's short point was that this wording did not convey any property right to the pursuer. Rather it amounted to no more than a mandate to the pursuer to pursue the litigation against the defender. The defender highlighted the different wording which had been used in the second assignation:

> "1. Academy Music Group Limited and Live Nation (Music) UK Limited hereby assign to Tecjet Limited all rights in the property of all and any Claims that they have or will have, which have a cumulative value of approximately £4.5m and the right to bring proceedings in the Litigation including the right to conduct the Litigation if necessary on their behalf including compromise and settlement of The Claims."

Senior counsel also contrasted the language in the first assignation with that which had been considered in *Slattadale Limited* v *Tilbury Homes (Scotland) Limited* 1997 SLT 153.

[26] Senior counsel submitted that in construing the first assignation, the intention of the parties was to be gleaned from the words used (*Lagan Construction Group Limited* v *Scot Roads Partnership Project Limited and another* [2023] CSIH 28 at paragraph 10). It was not for the court to assume what the underlying purpose of the document was and then seek to drive the exercise of construction to achieve that end.

[27] Senior counsel submitted further that there were a number of other issues in respect of the first assignation. To begin with, clause 1 (quoted above at [24]) bore to refer to "Academy Group Limited". This was materially different from "Academy Music Group Limited". I was advised that there were limited companies with each of these names registered at Companies House.

[28] Secondly, the first assignation had not been intimated on the defender in compliance with section 2 of the Transmission of Moveable Property (Scotland) Act 1862. Section 2 of the 1862 Act offered two valid forms of intimation: notarial or postal transmission of a certified copy and written acknowledgement thereof. The pursuer's averments only made

reference to intimation under cover of a letter dated 2 May 2023 which had been produced (6/4) and which did not comply with section 2 of the 1862 Act.

[29] Finally, the defender also challenged the first assignation on the basis that it did not bear to have been validly executed by the parties by a properly authorised individual. The document bore to have been signed by the same individual for all three parties. The signature was not witnessed. There was no indication of when and where the document had been executed. There was nothing to indicate who the signatory was and what position or authority (if any) he or she held in respect of each of the three parties. In these circumstances, the presumption contained in paragraph 3, Schedule 2 of the Requirements of Writing Act 1995 did not apply and the pursuer was not offering to prove that the document had been validly executed.

The second assignation

[30] In respect of the second assignation, although the defender referred in its written note of argument to the arguments made in respect of the first assignation (see [28] and [29]), as the argument was developed in oral submissions, it was considerably simpler. The second assignation was neither executed nor intimated until after the date on which the present proceedings had been raised. The summons had passed the signet on 4 May 2023. The second assignation was dated 14 June 2023. As such, it could not cure any defect in the pursuer's title in respect of the assignors' claims (see *Bentley* v *Macfarlane*, at [10] above).

[31] Accordingly, the defender's position was that as the first assignation had not transferred ownership of the assignors' claims to the pursuer prior to the action being raised, the pursuer had no title to sue for the assignors' losses in the present proceedings. That absence of title in these proceedings could not be cured retrospectively by the second

assignation. Therefore, in respect of the assignors' claims, no claim having been raised in the five years following the fire on 15 June 2018, those claims had prescribed in terms of section 6(1) of the 1973 Act.

The pursuer's response

The first assignation

[32] In respect of the first assignation, the pursuer submitted that, properly construed, the operative wording did convey the purported assignors' rights to the pursuer. Any alternative construction was artificial. It was clear that the intention of the parties to the first assignation was that the pursuer was "to pursue all the Claims on their behalf" (paragraph 3 of the preamble). The "Claims" were, in turn, defined as meaning:

> "all and any claims for damages and consequential losses which Academy Music Group Limited and Live Nation Limited had or have following upon and consequent to a fire which occurred at or near to the Glasgow School of Art on or about 15th June 2018 which claims are made or will be made against all or any third party and whether such claims have been settled or become settled by any policy of insurance from which they have or will benefit as an insured."

[33] Construed against this background, the pursuer stressed the fact that clause 1 assigned to the pursuer

> "all rights to bring proceedings in the Litigation including the right to conduct the Litigation on their behalf including compromise and settlement of The Claims, as though Tecjet were pursuing their own rights." (emphasis added).

It was submitted that this wording was broad enough to confer title and interest on the pursuer, as assignee, to bring these proceedings. Nothing should be taken from the fact that the parties had, in an abundance of caution, entered into the second assignation.

[34] In respect of the other points taken in relation to the first assignation, senior counsel submitted that none of them had any substance. The first point, the reference in clause 1 to "Academy Group Limited", was self-evidently a typographical error when one considered

the rest of the document. In respect of the 1862 Act, it was clear from section 3 that the forms of intimation prescribed in section 2 were not prescriptive. The authorities made clear that no formal method of intimation was required and that the question of whether there had been intimation was a matter of fact (see *Cabot Financial UK Limited* v *MacLennan and another* [2021] SC ABE 6 at paragraph 69 and following). As to the defender's arguments relating to the execution of the first assignation, the defender was not challenging the formal validity of the assignation and, in those circumstances, it was a matter for the pursuer to prove that the assignation was signed by a properly authorised individual.

The second assignation

[35] The pursuer submitted for the reasons which I have noted above (at [34]), that the defender's arguments relating to the validity of the second assignation were misconceived.

[36] In the event that, contrary to the pursuer's primary position, the first assignation had not been effective, senior counsel submitted that the critical question was not whether the pursuer originally had title to pursue the present proceedings, but rather, whether that position could subsequently have been addressed by way of amendment following the second assignation.

[37] Senior counsel submitted that there was a line of authority which established that there were circumstances in which proceedings may be brought by a pursuer who, at the time proceedings are initiated, did not have title but did have an entitlement to obtain title and then subsequently obtained title while proceedings were ongoing. In this regard, senior counsel referred to Lord Coulsfield's judgment in *Slattadale.* The facts of this case were somewhat involved. Proceedings had been raised by the purchaser, Cityploy, a limited company, in a contract of missives against the repudiating vendor for breach of those

missives. Cityploy had then assigned its rights to the pursuer, Slattadale. However, before the assignation was intimated, Cityploy was struck off the companies register and dissolved. Slattadale was subsequently sisted to the action. The Queen's and Lord Treasurer's Remembrancer then assigned the whole right, title and interest of Cityploy to Slattadale.

[38] In considering whether Slattadale could obtain title to pursue the action, Lord Coulsfield had referred to comments of Lord President Clyde in *Bentley* that:

> "There have, of course, been cases where a pursuer's title to sue has been affirmed although that title was not complete or was subject to some qualification. Provided that basically the title is in the pursuer, his title to sue will be vindicated, and he may complete the steps required to clear his title of defects or qualifications during the action." (at 79)

The Lord President had given two examples of situations in which a pursuer's title to sue, although not complete or requiring some kind of qualification, could be perfected during the course of the action. The first was an executor who had not completed confirmation. The second was that of a pursuer who had granted an assignation which was subsequently reduced on the ground of misrepresentation. His Lordship had gone on to distinguish between this type of case, on the one hand, and cases, such as *Bentley*, where the pursuer had, at the date of raising the action, no right or title at all. In *Slattadale*, Lord Coulsfield considered that the facts of the case before him meant that it was the first type of case: in other words, any issues with the title of the pursuer could be cured.

[39] Senior counsel submitted that Lord Coulsfield's analysis in *Slattadale* in relation to the issue of title to sue was consistent with the approach to be taken to the question of prescription. The issue was whether any defect in the pursuer's title to sue in respect of the assignors' losses was curable (see *Prescription and Limitation* (2nd Edition) at 5.15 and 5.19).

[40] On this basis, senior counsel submitted that, even if the first assignation had not been effective in conveying title to the assignors' claims to the pursuer, the present case fell into

that category of cases identified in *Slattadale* in which any defect in the pursuer's title could be cured after the proceedings had been commenced. This had occurred by way of the second assignation. As any issue with the pursuer's title was, on this analysis, curable, the summons in the present action fell to be regarded as a "relevant claim" in respect of the assignors' claim in terms of section 6(1) and 9(1). Accordingly, the defender's pleas of prescription in respect of these claims ought to be repelled.

Decision

The first assignation

[41] The first issue raised by the defender's arguments in relation to the pursuer's title to sue on behalf of the assignors is what, if anything, was conveyed to the pursuer by the first assignation.

[42] The parties both submitted that resolution of this issue turns on the proper construction of the document and I agree that this is the correct approach (*Slattadale* at 156E-F). The rules as to the interpretation of contracts are well-established and have been re-stated in a number of recent cases (see *FES Ltd* v *HFD Construction Group Limited* [2024] CSOH 20 at paragraphs 50 and 51 and the authorities cited there). In carrying out this exercise of construction, the court requires to ascertain the intention of the parties which can most obviously be found by determining the objective meaning of the language which the parties have chosen to express their agreement. That task involves considering what a reasonable person, who had all the background knowledge reasonably available to the parties, would have understood the parties to have meant by the language used. In *Lagan* (above at [26]) the Lord President made the following observation in this regard:

> "Parties' intention is most obviously gleaned from the language which they have chosen to use. The court should not normally search for drafting infelicities in order

> to justify a departure from the natural meaning of that language. It should identify what the parties agreed, not what it thinks that common sense may otherwise have dictated. Contracts are made by what people say, not what they think in their inmost minds (*Muirhead & Turnbull* v *Dickson* (1905) 7F 686 (LP (Dunedin) at 694 cited in Paterson at para [37])". (at paragraph 10)

[43] Approaching the first assignation on this basis, I am satisfied that it did not convey the assignors' property rights in their claims arising out of the fire on 15 June 2018 to the pursuer. The material clause of the first assignation is clause 1 which is in the following terms:

> "Academy Group Limited and Live Nation (Music) UK Limited hereby assign to Tecjet Limited all rights to bring proceedings in the Litigation including the right to conduct the Litigation on their behalf including compromise and settlement of The Claims, as though Tecjet were pursuing their own rights."

[44] I consider that the plain meaning of this clause is to convey to the pursuer the right to bring and conduct claims on behalf of the assignors and does not go beyond that. I reach this conclusion for three principal reasons. First, there is the obvious point that the clause does not refer to the assignors' right and title to the claims. Second, if the assignors had intended to convey their whole right and title to the claims to the pursuer, the second part of clause 1 would have been entirely unnecessary. The part of the clause from "including" is only necessary because the assignors are mandating the pursuer to conduct proceedings on their behalf in respect of the claims which they, the assignors, have retained. Finally, I consider that the final phrase of the clause is significant "as though Tecject were pursuing their own rights". This wording clearly indicates that the assignors' rights are not, in fact, the pursuer's own but the pursuer is being empowered by the assignation to treat the claims as if they were. I do not consider that the definition of "Claims" either affects or alters this conclusion.

[45] In passing, it will be apparent from this conclusion that I reject the defender's argument based on the fact that clause 1 refers to "Academy Group Limited" whereas the

assignation bears to have been granted by the assignor Academy Music Group Limited. The omission of the word "Music" in the name of the assignor company seems to me to be an obvious mistake akin to Mrs Malaprop's "allegory" on the banks of the Nile to which Lord Hoffman referred in *Mannai Investment Co Limited* v *Eagle Star Life Assurance Co Limited* [1997] AC 749 at 774 D-F. As with the allegories, I do not consider that a reasonable person, having all of the background knowledge available to the parties, would be at all in doubt that the parties intended to refer to the assignor company, Academy Music Group Limited.

[46] On the basis of this conclusion, I do not require to consider the two other arguments advanced by the defender in respect of the first assignation concerning, respectively, the intimation and execution of the first assignation. However, lest it subsequently prove to be of significance, I would not have upheld either argument.

[47] In respect of the first, section 2 of the 1862 Act is permissive and not prescriptive (*Christie, Owen and Davies PLC* v *Campbell* 2009 SC 436 at paragraph 14). Beyond the means of intimation provided in the 1862 Act, the fact of intimation is a matter of fact which the pursuer would require to prove.

[48] I consider that the same answer also disposes of the second argument. The pursuer offered to prove that the first assignation was granted by the assignors and makes averments concerning the identity of the individual who executed it. Resolution of this aspect of the defender's argument would require proof.

The pursuer's title to sue in respect of the assignors' claims

[49] In light of my conclusion as to what was conveyed to the pursuer by the first assignation, it is necessary to consider two related issues: first, what title, if any, did the

pursuer have to raise proceedings in respect of the assignors' claims; and second, was this position capable of being altered by the second assignation.

[50] I consider that the answer to both issues is authoritatively determined by the decision of the Inner House in *Bentley*. The facts of *Bentley* were that a motorist who was involved in a collision with another car assigned his right of action arising out of the collision to a third party, a Mr Brown. The motorist subsequently raised an action of damages against the driver of the other car, who pleaded no title to sue. Thereafter the third party reassigned his right of action to the pursuer. The Inner House upheld the defender's plea of no title to sue. The Lord President, Lord Clyde, referred to and approved the statement of Maclaren in *Court of Session Practice:* "If at the date of raising an action the pursuer has no title to sue, the defect cannot be cured by a subsequent assignation." His Lordship went on to make clear that:

> "The proposition expresses a matter of substance, and not a mere matter of procedure, for, if the action when it starts is a nullity, because the pursuer has no title at all to initiate it, nothing that is subsequently done can cure the fundamental defect in it." (at page 79)

[51] It follows from my conclusion in respect of the first assignation that, just as in *Bentley*, as at the date the present proceedings were raised, the pursuer had no title to sue in respect of the assignors' claims. The pursuer had been assigned the right to bring proceedings and conduct those proceedings on behalf of the assignors. However, the present proceedings were raised only in the name of the pursuer. It also follows that, as in *Bentley*, the present proceedings were a nullity so far as the assignors' claims are concerned and nothing that was done subsequently could cure that fundamental defect.

[52] I do not consider that the pursuer's position in this case is comparable with the situations discussed by Lord Coulsfield in *Slattadale* in which a pursuer had an incomplete or unqualified title to sue which is subsequently perfected after proceedings have been

raised (*Slattadale* at 156F-L). The pursuer's position falls to be distinguished from those situations precisely because no title of any kind to the assignors' claims had been passed to the pursuer in terms of the first assignation. As I have concluded above, all that was passed to the pursuer was the right to raise and conduct proceedings on behalf of the assignors.

Prescription

[53] The final issue, which follows from my conclusion that the pursuer had no title to sue in respect of the assignors' claims when the present proceedings were raised, is whether any obligations to make reparation owed by the defender to the assignors arising out of the fire on 15 June 2018 have prescribed.

[54] There is no dispute in the present case that the prescriptive period began to run on the date of the fire – 15 June 2018 – this being the date on which any obligation incumbent on the defender to make reparation became enforceable (see section 6(1) and (3) and section 11(1) of the Prescription and Limitation (Scotland) Act 1973; *Gordon's Trustees* v *Campbell Riddell Breeze Paterson LLP* 2017 SLT 1287 at paragraphs 16 and 17). The only answer by the pursuer to the defender's plea of prescription is that the present proceedings – being a relevant claim – interrupted the prescriptive period on 10 May 2023 in respect of both the pursuer's own claims and the claims of the assignors.

[55] Accordingly, the sharp issue is whether the present proceedings, having been raised by the pursuer without title to sue in respect of the assignors' claims, fall within the definition of a "relevant claim" in terms of section 9 of the 1973 Act in respect of those claims.

[56] In short, I consider that they do not. As a matter of construction, I do not consider that proceedings in respect of an obligation raised by someone who has no title to sue can

fall within the relevant part of the definition as being: "a claim made by or on behalf of the creditor". This construction is consistent with the authorities. It fits with the characterisation by Lord President Clyde in *Bentley* of a claim brought without title as being "a nullity" so fundamentally defective that it cannot subsequently be cured (see above at [50]). It is also consistent with Lord Emslie's analysis in *Royal Insurance (No 2)* at paragraph 21 where his Lordship said:

> "Short of fundamental nullity, therefore, it seems to me that the precise form and presentation of a claim are unlikely to be material considerations for the purposes of s9." (my emphasis)

The point being that a claim raised by a person with no title to sue is precisely, as is made clear by Lord President Clyde, such a nullity. I note also that the learned author of *Prescription and Limitation* has the same view (see at 5.16 and 5.19).

[57] In light of the foregoing, I will sustain the defender's third plea-in-law and dismiss the action insofar as it relates to the losses of the assignors, Academy Music Group Limited and Live Nation (Music) UK Limited.

The second assignation

[58] In light of my conclusion in respect of the pursuer's title to sue in respect of the assignors' claims and prescription, it becomes unnecessary for me to deal with the other arguments advanced by the defender in respect of the second assignation (see [30]). However, for completeness, for the reasons I have given in respect of those arguments as applied to the first assignation (see [46] to [48]), I would have rejected these arguments.

Relevancy of the pursuer's averments

Duty of care

[59] The defender challenged the relevancy of the pursuer's averments in three respects.

[60] First, in respect of duty of care, senior counsel acknowledged that the pursuer's case proceeded on the basis of *res ipsa loquitur*. However, he highlighted what he described as a contradiction in the pursuer's pleadings. In Article 4, the pursuer averred:

> "Despite significant investigations into the cause of the fire, those investigations have failed to establish the precise cause of the fire. However, a properly managed building site does not permit the outbreak of fire; and if fire does break out, on a properly managed site it will be detected and suppressed quickly by use of detection and suppression equipment thus preventing it from causing significant damages."

The second sentence contradicted the first one. Insofar as the pursuer was not offering to prove the cause of the fire, senior counsel questioned on what basis could the pursuer aver that fires did not break out and/or were detected and suppressed quickly on a well-managed site. Essentially, all the pursuer averred was that there had been a fire and that the defender was in control of the site.

[61] In Article 5, the pursuer sought losses under two heads: first £2,705,494.34 in relation to what was described as "property damage". The second was a claim for £1,719,388 in respect of an alleged loss of profit. The pursuer had made no averments which linked these losses with damage to the premises itself. The schedule of loss which had been produced and incorporated into the pleadings was not a particularly detailed document. It did not specify which person had suffered which loss. The nature of the losses claimed was also unclear. On this basis, senior counsel characterised the pursuer's claim as "global".

[62] In these circumstances, the pursuer had not given fair notice of the case against the defender and, in particular, the pursuer had failed to establish on what basis the defender owed either the pursuer or the assignors a duty of care. This was a necessary preliminary

step before the pursuer's contentions in respect of *res ipsa loquitur* could be considered. The pursuer had not offered any analysis in its pleadings of the nature and scope of any delictual relationship which might be said to give rise to that duty.

[63] At its highest, the pursuer's case was that the pursuer itself had a possessory interest (as tenant) in the premises at 300 Sauchiehall Street. The assignors were not even tenants and no explanation was offered by the pursuer as to the basis on which they occupied the premises. Senior counsel emphasised that this was not what he described as "procedural point taking". Separate proceedings had been raised against the defender by the owner of the building. No duty of care existed in respect of "secondary" economic losses – in other words, losses caused by the damage to another's property (see, for example, *Dynamco Ltd* v *Holland & Hannen & Cubitts (Scotland) Ltd* 1971 SC 257).

Quantum

[64] Second, senior counsel submitted that the pursuer's averments in relation to quantum were so lacking in specification as to be irrelevant. It was for the pursuer to set out its stall. He submitted it had failed to do so adequately. The pursuer's pleadings did not set out the "bare bones of the case" (to quote Lord Glennie in *Heather Capital Limited* v *Levy & McRae* [2017] CSIH 19 at paragraph 100).

CDM Regulations

[65] Finally, the defender challenged the relevancy of the pursuer's averments in respect of the Construction (Design and Management) Regulations 2015. In Article 2, the pursuer averred as follows:

> "They had responsibility for all aspects of health and safety on the site, and were responsible in terms of the Construction (Design and Management) Regulations 2015

> for taking suitable and sufficient steps to prevent, so far as reasonably practicable, the risk if [sic] injury to persons. Reference is made to regulation 29. The CDM regulations are relevant as evidence of the standards to be expected of principal contractors in fulfilment of their common law duties. The obligation to take such steps is not limited to prevention of harm to persons. With reference to the averments in answer, the terms of regulation 29 are admitted."

[66] The defender's short submission in respect of these averments was that the CDM regulations and, in particular, regulation 29, could not be relevant to the pursuer's case. Regulation 29 concerned a statutory duty to prevent, so far as reasonably practicable, the risk of personal injury during the carrying out of construction work. This regulation could have no relevance to the pursuer's claim in respect of property damage.

The pursuer's response

Duty of care

[67] Senior counsel submitted that there was nothing novel or unusual in the pursuer's case: the pursuer claimed for losses caused by a fire on an adjacent property for which, the pursuer contended, the defender was responsible. Senior counsel rejected the suggestion that there was any inconsistency in the pursuer's averments in Article 4. The pursuer averred that, although the cause of the fire was unknown, the fire would have been detected and extinguished had the site been properly managed.

[68] The duty of care on which the pursuer's case was based was the neighbour principle articulated in *Donoghue* v *Stevenson* 1932 SC (HL) 31 (at page 44). The general duty on an occupier of land in relation to hazards, including fire, occurring on his land to remove or reduce those hazards to his neighbour was well recognised (see, for example, *Goldman* v *Hargrave* 1967 1 AC 645).

[69] In respect of the losses claimed, senior counsel submitted that the claim for property damage related to the contents of the building. It was, accordingly, a primary loss to the

pursuer and its assignors. In respect of the claim for loss of profit, the pursuer's principal position was that it arose from the property damage. In the alternative, the pursuer contended that it was entitled to sue for these losses as a result of the possessory right which the pursuer had in the premises as a tenant. Senior counsel made reference to *Nacap Ltd* v *Moffat Plant Ltd* 1987 SLT 221; and *Devon Angling Association* v *Scottish Water* 2018 (SAC) 35 at paragraph 27.

[70] The pursuer having pled a relevant case, it was entitled to proof of those averments.

Quantum

[71] In response to the arguments made by the defender in respect of the lack of specification in the pursuer's quantum averments, senior counsel submitted that the pursuer had, through the schedule of loss, together with the associated vouching, provided fair notice to the defender. If there were further issues of specification to be addressed then these could, if necessary, be addressed in a number of ways including the preparation of witness statements or in expert reports.

CDM Regulations

[72] The pursuer's position in respect of its averments relating to the CDM Regulations was straightforward. These averments were relevant to the pursuer's position in respect of the exercise of control over the site by the defenders. The fact that regulation 29 required the defender to take suitable and sufficient steps to prevent, so far as is reasonably practicable, the risk of injury to a person from fire during the carrying out of construction work was plainly relevant to the pursuer's case. This was particularly so when the defender had refused to admit and thus had put in issue the control of the site.

Decision

Duty of care

[73] In respect of the pursuer's case in relation to its own claims, I am satisfied that a relevant case has been pled.

[74] I consider that, as a matter of averment, the pursuer's case is relatively straightforward. As the tenant of premises adjacent to the site which, according to the pursuer, was controlled by the defender, the pursuer has averred a basis upon which, if proved, it could establish that the pursuer was owed a duty of care by the defender to avoid causing damage to the pursuer's property by fire. I tend to agree with the submission made on behalf of the pursuer that the existence of a duty of care in these circumstances would seem neither novel nor controversial (*cf Cunningham* v *Cameron* [2013] CSOH 193).

[75] On the basis of my conclusions in respect of the assignors' claims, I do not strictly require to deal with this aspect of the defender's arguments. For completeness, essentially for the reasons I have outlined above in respect of the pursuer, I would not have dismissed the pursuer's case in respect of the assignors' claims on this basis but I would have required the pursuer to clarify the basis upon which the assignors were present in the premises.

Quantum

[76] I consider that the pursuer's averments in respect of the losses claimed, together with the schedule of loss which is incorporated into the pleadings, do give fair notice of its position.

[77] However, at present, the sums claimed by the pursuer encompass both its own losses and those which were incurred by the assignors. For the reasons set out above, I have

concluded that the assignors' claims fall to be dismissed. In these circumstances, I consider that it is reasonable that the pursuer be given an opportunity to revisit its averments in respect of quantum in light of my decision.

CDM Regulations

[78] Finally, I reject the defender's arguments as to the relevancy of the pursuer's averments in respect of the CDM Regulations. I am not prepared at this stage to dismiss these averments as irrelevant. I consider that they may cast light on the nature of the control exercised by the defender over the site.

Disposal

[79] Accordingly, I will, for the reasons set out above, sustain the defender's third plea-in-law and dismiss the action insofar as it relates to the losses of the assignors, Academy Music Group Limited and Live Nation (Music) UK Limited.

[80] The parties were agreed that in the event I upheld either of the defender's first two arguments, the case should be put out by order to enable the parties to address me on further procedure in light of my decision. I consider that this would also be appropriate in light of my decision in respect of the pursuer's averments on quantum.

[81] Accordingly, I will order this to be done and will reserve all questions of expenses meantime.