

REPORT ON PRESCRIPTION

SUMMARY

Introduction

1. The Scottish Law Commission has published recommendations for the reform of aspects of the law of negative prescription. The recommendations are set out in its Report on *Prescription* (Scotlawcom No 247) to which a draft Bill, and extracts from the Prescription and Limitation (Scotland) Act 1973 as that Act might look if the recommendations were implemented, are appended.

What is negative prescription?

2. Negative prescription establishes a time-limit within which a person who is aggrieved must raise his or her claim in court. If the time-limit is missed, the ability to pursue the claim is lost. This is because, once the prescriptive period has expired, the right or obligation is extinguished completely. That may at first sight seem unfair, but it should not be, provided that the choice of time-limit strikes a fair balance between competing interests. But there is more to prescription than justice between the parties to a court action; there are the wider interests of fairness, justice and certainty.

What topics does the Report cover?

3. The Report is not a wholesale review of the law of negative prescription but a review of certain issues within that area of the law which can cause difficulty in practice. The current law is set out in the 1973 Act. It should be noted that the Report does not cover the separate topic of limitation of actions which applies principally to actions for personal injuries.

4. The topics covered in the Report are the scope of the five-year and 20-year negative prescriptive periods; the discoverability test, that is to say the knowledge which a pursuer must have before the prescriptive period begins to run where damages are sought for loss or damage which was initially latent; the starting date of the 20-year prescriptive period in relation to obligations to pay damages, and how best to ensure that the 20-year prescriptive periods operate as true “long stops”; whether it should be possible to contract out from the statutory prescriptive periods; and the burden of proof. The Report also covers some miscellaneous issues including the reformulation of section 6(4) of the 1973 Act (which deals with fraud, concealment and error), the definition of “relevant claim”, and clarification of the effect of a relevant claim. The aim of the Report is to bring increased certainty, clarity and fairness resulting in a reduction in the need to resort to court action; and to promote a more efficient use of resources.

The scope of the five-year and 20-year negative prescriptions (Chapter 2)

5. In the context of considering the scope of the five-year and 20-year negative prescriptions, the Report considers the situation where statutes specify time limits for the particular areas which they regulate, and recommends additions to and further exceptions from the five-year prescription. The policy is that all obligations should be covered by prescription unless there are policy reasons for excepting them. The Report recommends that:

- there should be a provision in the 1973 Act which puts beyond doubt that the 1973 Act is not to apply where other primary or secondary legislation makes its own provision for prescription or limitation. This would ensure that no problem arises from the fact that the provisions in the 1973 Act are different from those in that other legislation.
- the five-year prescription should extend to all statutory obligations to make payment unless they are specifically excluded. Recommended exceptions include obligations to pay taxes and duties recoverable by the Crown, council tax and non-domestic rates, sums recoverable under specified social security and tax credit legislation, and child maintenance support.
- in addition to applying to any obligation to pay damages, the five-year prescription should extend to any obligation arising from delict.
- the five-year prescription should extend to any obligation to reimburse expenditure incurred in reliance on a representation about the existence of a contract, and any obligation relating to the validity of a contract.

The discoverability test (Chapter 3)

6. The Report recommends a new test in order to address concerns about the fairness of the current discoverability test. The discoverability test sets out the knowledge which a pursuer must have before the prescriptive period begins to run where damages are sought for loss or damage which was initially latent. The recommended test has three strands; before the five-year prescriptive period begins to run, the creditor must be aware, as a matter of fact, that loss, injury or damage has occurred, that the loss, injury or damage was caused by a person's act or omission, and of the identity of that person. Whether the creditor is aware that the act or omission that caused the loss, injury or damage is actionable in law should be irrelevant.

The long-stop prescriptive periods under sections 7 and 8 of the 1973 Act (Chapter 4)

7. Prescription represents a balancing of the interests of the pursuer on the one hand and the defender on the other. Fairness also seems to require a cut-off at an appropriate point in time, in the interests of legal certainty and of preventing a defender's liabilities from continuing indefinitely. This is the purpose of the long-stop prescriptive periods of 20 years under sections 7 and 8 of the 1973 Act.

8. In terms of section 7, the 20-year period runs from the date on which an obligation became enforceable, namely for obligations to pay damages the date on which loss, injury or damage flowed from the act, neglect or default in question. This has been criticised. One disadvantage of the rule is that it is possible for a long period to pass without the prescriptive period even starting to run. This can undermine one of the principal rationales of prescription which is that after a certain period a defender should be able to arrange his or her affairs on the assumption that the risk of litigation has passed. The Report therefore recommends that for obligations to pay damages in respect of loss, injury or damage caused by an act or omission, the 20-year prescriptive period should begin on the date of the act or omission giving rise to the claim.

9. Furthermore, in order to achieve the result that the 20-year prescriptions genuinely do operate as long stops, the Report recommends that they should not be amenable to interruption either by relevant claim or by relevant acknowledgment (in the case of section 7) or by relevant claim (in the case of section 8). These prescriptive periods should, however, be capable of being extended, where a claim has been made during the prescriptive period, until such time as that claim is finally disposed of or the proceedings otherwise come to an end. Fairness requires this; and it would not be consistent with the underlying principles of the law of prescription for a right or obligation to be extinguished when the holder of the right or creditor in the obligation was taking active steps to enforce it.

Should it be possible to contract out from the statutory prescriptive periods? (Chapter 5)

10. Currently there is room for doubt about which agreements fall within the scope of the provision in the 1973 Act which prohibits agreements which purport to disapply the statutory rules of negative prescription. The Report recommends clarification of this issue.

11. First, the Report recommends that it should be competent to extend the short prescriptive periods (the five-year prescription of section 6 and the two-year prescription of section 8A) but only for a limited period and subject to certain other conditions. Such agreements would enable parties to seek to negotiate an end to their dispute without the need to raise proceedings to preserve their rights. Secondly, the Report recommends that, except as provided by the foregoing recommendation, agreements to disapply or in any way alter the operation of any of the short prescriptive periods or the long-stop prescriptive periods, for example by shortening them, should not be permitted.

The burden of proof (Chapter 6)

12. The 1973 Act says nothing about who bears the burden of proof in the ordinary case of prescription. The Report rectifies this by recommending that where a question arises as to whether an obligation or right has been extinguished by prescription, it should be for the creditor to prove that the obligation or right has not been so extinguished.

Miscellaneous issues (Chapter 7)

13. The Report concludes with recommendations on a number of miscellaneous points, including the following:

- The current wording of section 6(4) of the 1973 Act, relating to the effect of fraud, concealment and error on the computation of the prescriptive period, has given rise

to difficulties. The Report recommends that the policy intention behind the provision should be clarified. In other words, the five-year prescription should be suspended in terms of section 6(4) for any period during which a creditor has been caused by the debtor, innocently or otherwise, not to raise proceedings.

- Prescription can be interrupted by the making of a “relevant claim”. The Report recommends that the definition of “relevant claim” should include the submission of a claim in an administration or receivership and the acts which give rise to administration or receivership. These categories of relevant claim appear to be logical additions to the current law.
- Currently there are two possible views about the effect of a relevant claim in relation to the running of prescription; the first is that a claim is an instantaneous event which is made on the day the action is raised; the second is that court proceedings constitute a relevant claim which is made for as long as an action is before the court. The Report recommends that the latter view should prevail in relation to the effect of all kinds of relevant claim as defined in the 1973 Act.