

DISCUSSION PAPER ON PRESCRIPTION

SUMMARY

Introduction

1. The Scottish Law Commission is an independent statutory body the remit of which is to recommend reforms to improve, simplify and update the law of Scotland. At present, the Commission is conducting a project on aspects of the law of prescription. A Discussion Paper was published on 22 February 2016 requesting responses by **23 May 2016**. We would value your views.

What is prescription?

2. Prescription is an important doctrine in any legal system. 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. 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.

Scope of the Discussion Paper

3. The scope of the Discussion Paper is not a wholesale review of the law of prescription but a review of certain issues within the law of negative prescription which can cause difficulty in practice.

4. The project is concerned only with prescription and not with limitation of actions. Since in Scots law limitation applies principally to actions for personal injuries, it follows that in the Discussion Paper we are not concerned with actions of that kind. For the same reason, the paper does not address the question of time limits for claims relating to historical sexual abuse. Claims of that kind are affected only by the law on limitation of actions.

5. There is an important conceptual difference between prescription and limitation. Prescription has the effect, after a certain period of time has passed, of extinguishing a right or obligation completely. By contrast, limitation does not extinguish a right or obligation but creates a procedural bar on raising legal proceedings.

The scope of the five-year negative prescription (Chapter 2)

6. The scope of the five-year negative prescription of section 6 of the Prescription and Limitation (Scotland) Act 1973 (hereafter “the 1973 Act”) is the first topic examined in the Discussion Paper. That prescription does not apply to all obligations but only to those listed in paragraph 1 of Schedule 1 to the 1973 Act. The paper reviews the scope of Schedule 1

paragraph 1 and considers whether it is appropriate or whether there are gaps that ought to be filled. It looks at whether Schedule 1 paragraph 1 ought to provide for the prescription of statutory obligations and, if so, whether that provision should be general or specific to certain kinds of statutory obligation; whether it ought to refer, in subparagraph (d), to obligations arising from delict rather than obligations to make reparation; and whether it ought to extend to a number of miscellaneous (non-statutory) rights and obligations.

Prescription in relation to claims for latent damage (Chapters 3 to 5)

7. One of the main issues reviewed in the Discussion Paper is that of prescription in relation to claims relating to latent damage. This has become topical following the judgments of the UK Supreme Court in *David T Morrison & Co Ltd v ICL Plastics Ltd* ([2014] UKSC 48, 2014 SC (UKSC) 222). Until the decision of the Supreme Court, the Scottish courts had followed a consistent line in interpreting section 11(3) of the 1973 Act as giving creditors five years to sue from the date when they first knew (or should have known) of both the loss and that it was caused by negligence. The law is now different. One of the Justices in the UK Supreme Court urged that fresh consideration should be given to the recommendations on this topic which we made in a Report on Prescription and Limitation of Actions (Latent Damage and Other Related Issues) published in 1989. The Discussion Paper examines the law of prescription in relation to latent damage, asks whether the law as it is after the *Morrison* case is fair, and explores options for reform of the discoverability test of section 11(3).

8. Our preliminary view is that it would be desirable to adopt a test postponing the start of the prescriptive period until the creditor knows of the facts (a) of the loss and (b) of the act or omission which caused it and (c) the identity of the person who caused it. At first sight, this might appear more favourable to pursuers than to defenders. But this is not the whole story. Prescription at present can start to run before the pursuer has identified who is or may be at fault. Consequently, at a time when they are uncertain about the precise factual basis of their claims, pursuers may need to launch a raft of protective writs directed at numerous defenders, purely because of the need to protect their position against the running of prescription. This is inconvenient and wasteful of the resources of pursuers, but it is hardly satisfactory for defenders either. They have to investigate these claims and intimate them to their insurers, however little merit they believe them to have. The current law can therefore generate expense (both in litigation and in the form of increased insurance premiums) and administrative inconvenience or worse, for pursuers as well as defenders. We consider that this problem would be alleviated if the prescriptive period did not start to run until the creditor was aware of the identity of the defender.

9. The Discussion Paper also considers three other issues relevant to the detailed workings of the discoverability test: first, the meaning of loss or damage; second, materiality of loss or damage and its bearing on the discoverability test; and third, the question of reasonable diligence: in other words, the taking into account not just of what the pursuer actually knows but of what he or she would know had he or she acted with reasonable care and attention.

The long-stop prescriptive period under section 7 of the 1973 Act (Chapter 6)

10. The Discussion Paper also examines the structure of the long-stop prescriptive period under section 7 of the 1973 Act. Section 7 provides for a twenty-year prescription of obligations (with the exception of obligations to make reparation for personal injuries and imprescriptible obligations).

11. Prescription represents a balancing of the interests of the pursuer on the one hand and the defender on the other: so, for example, it seems fair to pursuers, if they do not know they have claims, to allow them some time to discover that in fact they do. It seems fair to defenders to allow that extension of time to go on only until the pursuers know or reasonably ought to know of the existence of their claims. 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. Consideration of the workings of section 7 is therefore an important element in the overall exercise of contemplating reform of the law on prescription in relation to claims for latent damage.

12. The twenty-year period runs from the date on which an obligation became enforceable. That is the date on which loss, injury or damage flowed from the act, neglect or default. It is sometimes described as a "long-stop" period, in the sense that it is an absolute cut-off and has no regard to the pursuer's state of knowledge.

13. The Discussion Paper seeks views on whether, as is the case in many jurisdictions, the long-stop prescriptive period should instead run from the date of a defender's last act or omission. Furthermore, in order to achieve the result that prescription under section 7 genuinely does operate as a long stop, our provisional view is that it should not be amenable to interruption either by claim or by acknowledgment. It 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.

14. In relation to construction contracts, it is sometimes suggested that a special rule should apply, namely that the long stop should run from the date of practical completion of the construction works. In general, on grounds of simplicity, clarity and reducing the scope for error about the particular prescriptive period involved, there seems to be much to be said for having a uniform prescriptive period, unless there are compelling reasons for treating some kinds of damage differently. The question is whether the issues that arise from construction contracts are sufficiently peculiar that the law of prescription ought to depart from a uniform prescriptive regime in favour of (a degree of) fragmentation. Our present view is that they are not.

15. The question arises how long the long-stop period should be. If ultimately the view is taken that the long-stop prescription should run from the date of the wrongful act or omission rather than, as at present, the date of the loss, the consequence is that prescription will in some cases start to run at an earlier date than under the present law. That being so, our provisional view is that, if the prescriptive period under section 7 were to be reduced, it should not be reduced substantially.

Should it be possible to contract out from the statutory prescriptive periods? (Chapter 7)

16. Section 13 of the 1973 Act prohibits agreements which purport to disapply the statutory rules of negative prescription. There is room for doubt about which agreements fall within the scope of the prohibition. There is also a wider issue: whether a prohibition of this kind is in fact necessary. Both issues are addressed in the Discussion Paper.

17. Agreements to shorten the prescriptive period may in fact be permitted by section 13 of the 1973 Act, but the position is not entirely clear. In principle, we see no objection to permitting such agreements.

18. Agreements to lengthen the prescriptive period do fall foul of section 13. It is not clear to us that it is necessary to have an absolute prohibition on agreements to lengthen the prescriptive period. Agreements of this kind can prevent the waste of resources which the use of protective writs brings about. They can serve the valuable purpose of reducing the volume of litigation and enabling settlement negotiations to be concluded without the creditor needing first to raise proceedings to preserve his or her right.

19. The Discussion Paper seeks views on whether consultees favour (i) permitting agreements to shorten the statutory prescriptive periods and, if so, whether there should be a lower limit on the period which can be fixed by such agreements; and (ii) permitting agreements to lengthen the statutory prescriptive periods and, if so, whether there should be an upper limit on the period which can be fixed by such agreements.

The burden of proof (Chapter 8)

20. It is generally accepted, and this seems correct in principle, that the burden of proof so far as section 11(3) and section 6(4) of the 1973 Act are concerned rests on the pursuer. In those cases it makes sense for the pursuer to have to establish when he or she became aware of the facts relevant under section 11(3) or the period for which he or she was led by fraud or error not to raise proceedings. But the question who bears the burden of proof in the ordinary case, where discoverability or alleged fraud or error are not in issue, is not clear. The 1973 Act says nothing about it. The Discussion Paper examines whether the burden of proof should rest on the pursuer; or rest on the defender; or for the 5-year prescription, rest on the pursuer, and for the 20-year prescription on the defender.

Unjustified enrichment and discoverability (Chapter 9)

21. As mentioned above, the Discussion Paper (in Chapters 3 and 4) examines the question of postponing the start of the prescriptive period on grounds of discoverability under section 11(3). That subsection applies only to obligations to pay damages. The Discussion Paper also considers whether it would be appropriate to have some equivalent provision for obligations to redress unjustified enrichment.

22. Unjustified enrichment may take different forms, including receipt of money, property or services. So far as obligations to redress unjustified enrichment are directed at money, it goes without saying that they are obligations not to pay damages but to make payment. They cannot be accommodated within section 11 of the 1973 Act: they are not directed at "loss, injury or damage" in the same sense as damages claims; and in many (perhaps most) cases there will be no "act, neglect or default". It follows that any discoverability provision

postponing the start of the prescriptive period would need to be entirely new, as opposed to a minor amendment to section 11(3).

23. For the reasons set out in paragraphs 9.17 to 9.22 of the Discussion Paper, we provisionally conclude that, in relation to obligations to redress unjustified enrichment, no provision should be made for postponement of the start of the prescriptive period on grounds of discoverability.

Miscellaneous issues (Chapter 10)

24. The Discussion Paper concludes with a number of miscellaneous points, including the formulation of section 6(4) of the 1973 Act, relating to the effect of fraud, concealment and error on the computation of the prescriptive period, and the possible expansion of the definition of “relevant claim” in section 9 of the 1973 Act to include the submission of a claim in an administration and the submission of a claim in a receivership.

25. The Discussion Paper also re-examines two recommendations put forward in the Commission’s 1989 Report on Prescription and Limitation of Actions (Latent Damage and Other Related Issues). The first is whether the words “act, neglect or default”, currently used in the formula for identifying the date when an obligation to make reparation becomes enforceable, should be replaced by the words “act or omission”. The second is whether the discoverability formula should incorporate a proviso to the effect that knowledge that any act or omission is or is not as a matter of law actionable, is irrelevant.

Legislative competence

26. In terms of section 29 of the Scotland Act 1998 a provision is outside the legislative competence of the Scottish Parliament if it relates to reserved matters (as defined in Schedule 5 to that Act) or is in breach of the restrictions in Schedule 4. The issues covered in the Discussion Paper relate to aspects of the Scots law of prescription. The law of prescription is not a reserved matter in terms of Schedule 5, and it accordingly falls, in our view, within the legislative competence of the Scottish Parliament. We explain our reasoning about legislative competence more fully at paragraphs 1.15 to 1.22 of the Discussion Paper.

How to respond

27. The Discussion Paper is available at <http://www.scotlawcom.gov.uk/publications/discussion-papers-and-consultative-memoranda/2010-present/> where there is also a downloadable electronic response form.

28. You can also write to: The Scottish Law Commission, 140 Causewayside, Edinburgh EH9 1PR. Or e-mail: info@scotlawcom.gsi.gov.uk.

29. Please note that information about the Discussion Paper, including copies of responses, may be made available in terms of the Freedom of Information (Scotland) Act 2002. Any confidential response will be dealt with in accordance with the 2002 Act.

30. We may also (i) publish responses on our website (either in full or in some other way such as re-formatted or summarised); and (ii) attribute comments and publish a list of respondents' names.