

RESPONSE TO SCOTTISH LAW COMMISSION DRAFT PRESCRIPTION (SCOTLAND) BILL

1 Introduction

1.1 Scottish Water Business Stream Limited (Business Stream) supplies water and waste water services to business customers in Scotland. It will shortly (as of 1 April 2017) begin to operate in the English market also.

1.2 Business Stream has considered the draft Bill, explanatory notes and covering note. Our comments below address various provisions that are particularly relevant for Business Stream's operations. We hope that these comments will prove helpful to the Commission in its work to finalise the Bill.

2 Business Stream's initial response

2.1 The key points in our original submission to the Commission of June last year were:

- (i) the desirability of a statutory test on where the burden of proof should lie. We argued that the onus should rest on the pursuer to establish that an obligation had not prescribed after the 5 year period; and
- (ii) that in cases where the pursuer said there was fraud or error on the part of the defender which induced them not to make a claim, the debtor's state of mind should be a relevant factor.

2.2 Both of these points are addressed in the Bill. In relation to point (i), we note that section 14 of the Bill clarifies that where there is any question as to whether or not an obligation or right has been extinguished by prescription, it is for the creditor (i.e. Business Stream's customers) to prove that the obligation or right remains in force for whatever reason. This is consistent with our original submission and we welcome the clarity that this provides.

2.3 We have more substantive comments to make in relation to point (ii) and section 4 of the draft Bill.

3 Section 4 of the Bill

3.1 This provision gives effect to the Commission's policy proposal that section 6(4) of the 1973 Act should be reformulated to the effect that the prescriptive period should not run against a creditor who has been caused by the debtor, innocently or otherwise, not to raise proceedings.

3.2 Business Stream did not agree that section 6(4) should be reformulated in the way suggested. Having seen the draft Bill, Business Stream has concerns about how the new rule would operate in practice and whether it would provide the clarity intended.

- 3.3 The explanatory notes state that the policy intention is that the 5 year prescriptive period should not run against a creditor who has been *caused* by the debtor not to raise proceedings. It is said to be irrelevant whether the debtor's conduct was innocent or not.
- 3.4 The Commission will be aware that this point is most relevant to Business Stream in the context of repeat issuing of invoices for water services, an issue which was expressly considered by the Inner House in *Rowan Timber Supplies (Scotland) Ltd v Scottish Water Business Stream*¹. A point highlighted in our last submission was that Business Stream is not normally aware of invoicing errors at the time of issuing and often could not reasonably be expected to discover such errors unless and until concerns are raised by the customer. Nevertheless, we accept that the Commission's position is that the state of mind of the debtor is of no significance to the application of section 6(4)(a). We also agree that the proposed wording in section 6(4A) puts this point beyond doubt.
- 3.5 However, we consider that the proposed changes may go further than the stated policy intention, or may not fully achieve the intended effect. Replacing the words "was induced to refrain from making" with "failed to make" in section 6(4) seems to remove the "vigorous connection" between the debtor's conduct and the creditor's failure to raise proceedings (such as was referred to in *BP Exploration Operating Co Ltd v Chevron Shipping Company*²). In Business Stream's assessment, the effect of these new words may be to remove an important aspect of the evidential burden on the pursuer in cases of this nature, namely to prove the *specific effect* that the debtor's conduct had on the creditor's state of mind.
- 3.6 In *Rowan Timber* (paragraph 18), the Inner House stated, "It will in the end be for the respondents to prove what in fact induced them to refrain from making their several claims earlier than they did." (emphasis added) This was a matter upon which the respondents were to be put to proof.
- 3.7 The proposed amendments to the 1973 Act could mean that there is no longer any need for an error by the debtor to induce a creditor not to make a claim, in the sense of the debtor's conduct influencing the creditor's behaviour in some way. As presently drafted, it is not clear that the need to evidence the effect of the debtor's conduct on the creditor's state of mind will still be a necessary part of the pursuer's case.
- 3.8 There is still a requirement for there to be "error *induced* by words or conduct of the debtor". However, it is not clear to us whether this inducement is a purely factual assessment, in other words the fact of (in the typical Business Stream case) incorrect invoices having been issued, or whether the customer's state of mind in receiving those invoices would still be a relevant consideration.

¹ [2011] CSIH 26

² 2002 SC (HL) 19

- 3.9 The Commission may consider that the words “by reason of” in section 6(4)(a) are sufficient to maintain the requirement for the creditor to establish (i) that there was conduct by the debtor, (ii) that the creditor failed to make a claim, and (iii) that the debtor’s conduct was a cause of that failure. However, we do feel that section 6(4)(a) would benefit from greater clarity to avoid any uncertainty in its application in practice. We suggest that the words “was caused not to make” a relevant claim would be a better substitute than “failed to make”.
- 3.10 We would be happy to discuss our comments with the Commission in more detail, if that would be of assistance.

March 2017