RESPONSES TO SCOTTISH LAW COMMISSION DISCUSSION PAPER ON PRESCRIPTION

The following responses to the questions posed in the SLC Discussion Paper are made with a view to assisting the SLC in their consideration of reform of the law of prescription. They have been collated by Brodies LLP following informal internal discussions of the issues raised in the Paper and are intended only to represent the views expressed by the individuals who contributed to those discussions. They are submitted on that basis. We hope that the comments will prove helpful.

1. Do you agree that the 1973 Act should provide that its provisions on prescription are not to apply to rights and obligations for which another statute establishes a prescriptive or limitation period?

It seems sensible that where a prescriptive period is established for particular rights and obligations by another statute then the 1973 Act should be explicitly dis-applied in relation to such rights and obligations..

If statutory obligations generally are to be brought within the 5 year prescriptive period as proposed then it also seems sensible that where another statute provides for a limitation period for particular rights or obligations then the 1973 Act should be explicitly dis-applied.

It is not entirely clear to us whether it is intended that any such rights and obligations would be subject to the 20 year prescription or whether, by dis-applying the 1973 Act it is intended to make such rights and obligations imprescriptible and subject only to the specific statutory limitation period. Whilst there are good reasons to exclude them from the 5 year prescription we are not sure that there is any reason to render all statutory rights and obligations which are subject to their own limitation period imprescriptible. There is a risk of further confusion regarding the distinct concepts of prescription and limitation. It may however be appropriate to exclude certain statutory provisions from the 20 year prescriptive period.

2. Do you agree that the 1973 Act should provide generally for rights and obligations arising under statute to prescribe under the five-year prescription?

Yes.

3. If the 1973 Act were to provide generally for rights and obligations arising under statute to prescribe under the five-year prescription, are there rights and obligations which ought to be excepted from this regime?

Of the examples given in the discussion paper it seems to us that both the obligation to pay child support maintenance under Child Support Act 1991 and the right of a consumer right to seek relief from a credit agreement on basis that the relationship between creditor and debtor is unfair are examples of the type of obligation that may have to be excluded from the 5 year prescriptive period.

It is not entirely clear to us when it would be intended that the prescriptive period should commence in relation to such rights and obligations but in any event, a 5 year period may be considered too short a timescale given the aims of these statutory provisions.

It is likely that other statutory provisions will also fall to be excluded but much will depend on the terms of the provisions contained in any draft Bill.

4. Do you agree that Schedule 1 paragraph 1(d) should refer not to obligations arising from liability to make reparation but to obligations arising from delict?

We agree that it is odd that delict is not specifically mentioned in the 1973 Act.

Having said that, an obligation to make reparation is one of the most common claims made through the Scottish courts.

Subject to what we have to say below we wonder whether it would not make more sense to introduce obligations arising from delict as an additional category in Schedule 1 to sit alongside the current "obligation arising from liability…to make reparation. It might also be helpful to expand Schedule 1(1)(d) to cover all obligations to make reparation irrespective of the source of the obligation (so as to encompass obligations arising under both contract and delict). That would have the advantage of effectively giving obligations to make reparation their own regime courtesy of Sch 1 and s.11.

We tend to agree that it would be better to use the term "damages" rather than "reparation" for the sake of clarity (p.18 fn 47)

The examples used in the Discussion Paper (p18) to justify the change from "reparation" to "delict" throw up some difficult issues and, to our mind, tend to support the retention of "reparation" as a separate category.

In relation to fraudulent or negligent misrepresentation for example it is understandable that the 5 year prescription should apply to claims for reparation. Pursuers are given specific protection by the discoverability provisions of s.11 and the terms of s.6 (although in s.6 the degree of protection is subject to argument about the meaning of "induced to refrain") and it can easily be accepted that the current 5 year period, with its slightly flexible start date, is long enough for any damages claim.

We are not sure though that the same can necessarily be said of a right of reduction or specific implement.

Should a pursuer who has suffered from fraud or negligent misrepresentation lose the right to reduce the resultant contract after only 5 years? When is that 5 year period to commence? What is the status of a contract which one party has been induced to enter into by fraud/negligent misrepresentation but has taken no steps to reduce within the 5 year prescriptive period?

These questions can perhaps all be dealt with by careful drafting but do illustrate the potential for problems arising from the expansion of the application of the 5 year prescriptive period from mere reparation to the more general "obligations arising from delict". It may be that the proposals outlined in para 2.58 of the

Discussion Paper regarding continuing wrongs and postponement of the start of the prescriptive period will deal with any difficulties.

5. Do you agree that Schedule 1 paragraph 1 should include obligations arising from pre-contractual liability?

We see no difficulty with such obligations being included within the 5 year prescriptive period. Careful consideration will be needed as to the commencement date.

6. Do you agree that Schedule 1 paragraph 1 should include rights and obligations relating to the validity of a contract?

We agree that it would be helpful to clarify the position in relation to rights or obligations relating to the validity of a contract. The concerns expressed above in relation to fraud/negligent misrepresentation may not be as acute in cases where reduction is based on error or innocent misrepresentation.

7. Are there other obligations to which Schedule 1 paragraph 1 ought to be extended?

No comment

8. Do you agree that it is appropriate to revisit the discoverability test of section 11(3)? If so, which option do you favour?

We agree that the discoverability test needs to be reviewed.

We would favour Option 3.

9. Do you agree that the 1973 Act should provide that loss or damage must be material before time starts to run under section 11(1)?

Yes

10. Do you agree that the discoverability formula in section 11(3) should refer, for time to start running, to the need for the pursuer to be aware that he or she has sustained material loss or damage?

Yes

11. Do you agree that the discoverability formula in section 11(3) should provide that the assessment of the materiality of the loss or damage is unaffected by any consideration of the pursuer's prospects of recovery from the defender?

Yes

12. Do you agree that the present formulation of the test of "reasonable diligence" is satisfactory?

Yes

13. Do you agree that the starting date for the long-stop prescriptive period under section 7 should be the date of the defender's (last) act or omission?

We would agree that this would have the advantage of a more certain commencement date for the 20 year prescriptive period in the very limited number of cases affected. We do wonder however just how often the issue causes real practical difficulties?

The hard cases rehearsed on p.43 of the Discussion Paper seem unaffected by the oddity that the long stop period commences at the same time as the 5 year period.

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14. Do you agree that the long-stop prescriptive period under section 7 should not be capable of interruption by a relevant claim or relevant acknowledgment?

This seems likely to affect an extremely limited number of cases.

Our view is that the suggestion does have some merit insofar as it gives certainty to a defender. However, we would observe that the proposal does seem to sit better in the context of limitation rather than prescription. In personal injury actions, for example, the limitation period continues to run notwithstanding that an action has been raised. That is more easily accepted because limitation is simply a procedural bar to raising proceedings. It seems odd that an obligation could be extinguished by prescription even while a pursuer was seeking enforcement of that same obligation. (The proposal to automatically extend the prescriptive period to the conclusion of proceedings would merely deal with the practical difficulty caused by the 20 year period expiring during the course of the action).

One possible alternative might be for the long-stop prescription to merely be interrupted by a relevant claim (as opposed to starting a fresh 20 year period) and might re-commence running once the court action has concluded.

15. Where a relevant claim is made during the long-stop period, do you agree that the prescriptive period should be extended until such time as the claim is disposed of?

If a relevant claim is not to interrupt the 20 year prescriptive period then it is essential that there is provision to prevent a pursuer's cause of action disappearing during the course of proceedings.

We would tend to favour a system like that described in Germany where an additional period is added from the end of the action. That would allow pursuers time to assess their options while giving defenders comfort.

16. Do you agree that construction contracts should not be subject to any special regime in relation to the running of the long-stop prescriptive period?

We agree that construction contracts should not be subject to their own prescription regime. Provided the underlying law is sound and well understood then the construction industry will have little difficulty in ensuring that their contractual arrangements make acceptable provision for the sharing of risk.

It is already clear that the construction industry arranges its affairs with an eye on English law including contractual limitation periods. That seems unlikely to change.

A plethora of different prescription regimes is unlikely to prove helpful.

17. (a) Do you regard 20 years as the appropriate length for the prescriptive period under section 7? (b) If not, would you favour reducing the length of that period?

(a) We are not persuaded that there is any good reason for altering the current 20 year period under s.7. Some jurisdictions have a shorter period and others have longer. Changing the 20 year period seems unlikely to bring any real benefit.

(b) We are not in favour of a reduction but if the figure were to be reduced we think that it should not be reduced below 15 years.

18. Do you favour permitting agreements to shorten the statutory prescriptive periods? Should there be a lower limit on the period which can be fixed by such agreements?

We proceed on the assumption that such agreements will almost always be entered into before any dispute has arisen.

We tend to consider that clarity and uniformity are best served by refusing to allow parties to shorten the prescriptive period.

We can see that for some industries an ability to shorten the long negative period may be advantageous but in effect contractual limitation periods are achieving the need for shorter liability periods.

An ability to shorten the 5 year prescriptive period is perhaps most problematic. The Discussion Paper mentions the need to protect consumers but we would have similar concerns regarding small businesses who may be forced to accept very short prescriptive periods when working with larger organisations.

The 5 year period is already relatively short and we do not see any particular benefit in allowing a shorter period to be agreed.

Were parties to be allowed to agree a shorter period we would suggest a minimum period of 3 years would be appropriate.

19. Do you favour permitting agreements to lengthen the statutory prescriptive periods? Should there be an upper limit on the period which can be fixed by such agreements?

We proceed on the assumption that such agreements will almost always be entered into after any dispute has arisen and will largely be used to avoid the need for protective court proceedings to be raised. It is also likely that such agreements will be finalised close to the end of a prescriptive period.

Historically Scottish courts have taken a relaxed approach to the progress of court actions raised to prevent the expiry of a prescriptive period. Improved (and more extensive) case management of actions by the courts has meant that parties are less likely to be allowed to let actions languish while they seek to resolve their differences. Once raised, the courts are keen to ensure that actions are processed through the courts as speedily as possible.

We tend to think that many clients would like to have the option of entering into a standstill agreement in respect of the 5 year prescriptive period. This may however run contrary to the current prevailing view that stale claims and delay in settlement should be avoided.

We consider that, if allowed, such agreements should only be capable of being entered into after the standard 5 year period has already started to run.

Any period of standstill should be limited. We would favour a maximum 6 month period.

The standstill agreement should not be capable of being renewed or extended. This will help avoid claims becoming stale.

One risk that we can foresee is that a pursuer who is offered but refuses the opportunity to enter into a standstill agreement with a defender may later be accused of having raised proceedings unnecessarily or prematurely. That may seem unlikely but arguments about expenses based on prematurity or unnecessary litigation are now commonplace in the sheriff court (where cases settle for at or near a pre-litigation offer for example). We do not consider that pursuers who choose to interrupt the prescriptive period by court action rather than extend it by standstill agreement should run the risk that their decision will be criticised or punished by an adverse modification of recoverable expenses.

20. Do you favour statutory provision on the incidence of the burden of proof?

We think it would be helpful to have clear statutory guidance on where the burden of proof lies.

21. If you do favour statutory provision on the incidence of the burden of proof, do you favour provision to the effect: (i) that it should rest on the pursuer; or (ii) that it should rest on the defender; or (iii) that for the 5-year prescription it should rest on the pursuer, and for the 20 year prescription on the defender?

When a pursuer raises a court action he is positively asserting that the rights/obligations underlying his claim are still in existence. If he accepts that relevant obligations have prescribed then he is not entitled to bring proceedings to enforce them. He does not require to explicitly raise and deal with the point in his pleadings. It is implicit in the raising of the action that he considers there is an obligation to enforce. It is logical therefore that the burden of proof must rest with the pursuer. The fact that a plea of prescription is one which it is *pars judicis* to take reinforces that view.

We do not see any distinction between the 5 year and 20 year prescriptive periods in this regard.

Any provision whereby a prescription plea could only be sustained if a defender chooses to raise the point and goes on to prove that the obligation has been extinguished by prescription would render prescription voluntary. Agreement could be reached between parties to a dispute that no reliance would be placed on the passage of time or on the passage of certain periods of time. Prescription would become no different from limitation in that regard.

The burden does not seem unduly onerous. It can be satisfied by leading evidence that establishes that the action has been raised within 5 years of the breach of the obligation or, in cases of reparation, within 5 years of the date when loss injury or damage occurred. If the pursuer wishes to rely on s.11(3) or s.6(4) then he can plead the relevant date and lead evidence in support of that later date.

22. Do you agree that no discoverability test should be introduced in relation to obligations arising from unjustified enrichment?

Yes

23. Do you agree that section 6(4) 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?

No comment.

24. (a) Do you agree that ”relevant claim“ should extend to the submission of a claim in an administration? (b) Do you agree that ”relevant claim“ should extend to the submission of a claim in a receivership?

Yes

The role of declarator in interrupting prescription

There is one issue in relation to the definition of “relevant claim” which is not touched on in the Discussion Paper but which may be worth consideration.

In Highlands & Islands Airports Ltd v Shetland Islands Council 2015 SC 588 the Inner House held that a summons containing only declaratory conclusions was sufficient to interrupt prescription. Brodies acted for the unsuccessful defenders.

As narrated in the report in Session Cases, the declarators sought were in the following terms

'(1) for declarator that the defender is in breach of its contract with the pursuer entered into in or about January 2005 for the provision by the former to the latter of professional services relative to the extension of runway 09/27 at Sumburgh Airport, Zetland, et separatim is in breach of its duty of care to the pursuer in relation to the provision of those services; and that it is accordingly liable to the pursuer in damages et separatim in reparation for the loss suffered by the pursuer as a result of those breaches or either of them;

(2) for declarator that in the provision of services by the defender to the pursuer under the contract for the provision of professional services by the former to the latter in connection with the extension of runway 09/27 at Sumburgh Airport, Zetland, entered into between them in or about January 2005, "defects" within the meaning of clause 41 of that contract have arisen, and that the defender having failed to correct the same, it has become liable to pay the pursuer the cost of repairing the same pursuant to that clause.'

The pursuers told the court they had chosen this route because the extent of the alleged loss could not then be properly quantified. It was agreed that the action was raised within the prescriptive period.

A subsequent Minute of Amendment intimated outwith the 5 year period added a conclusion for payment of the sum of £14,210,000.

It was accepted by the Inner House that to be a relevant claim it must be "a claim made in implement or part-implement of the obligations, contractual and delictual, on which the action is founded"

It would be useful if further consideration could be given by the SLC to the advantages and disadvantages of the use of actions of declarator to interrupt prescriptive periods in situations where the obligation concerned is to make reparation.

In the judgment, the Lord President states:

"If the pursuer when raising this action had simply made its best estimate of its loss on the information then available and had made a formal averment that the sum sued for was a reasonable estimate of the loss and damage sustained by it, the question of time-bar would not have arisen. The pursuer would then have been free to adjust or amend the claim, even after the expiry of the prescriptive period, in the light of further and better information (Devos Gebroeder NV v Sunderland Sportswear Ltd (No 2) , p 303). That, I think, indicates how contrived the case for the defender is. "

Making a best estimate of loss when raising proceedings is of course precisely what pursuers require to do on a regular basis. There seems nothing contrived about requiring a pursuer to actually sue for reparation rather than merely seeking a declarator that there is an existing obligation of reparation.

It is interesting to consider what might have happened if the pursuers had not introduced a conclusion for payment and declarator in the terms sought had been granted. One possibility is that a decree of declarator would have converted the obligation to make reparation into an obligation which would subsist and be enforceable for a further period of 20 years. There may have been nothing to prevent the pursuers from delaying for up to 20 years before raising further proceedings to enforce their declared right of reparation.

25. Do you agree that 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"?

Yes

26. Do you agree that 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?

Yes

27. Do you have any observations on the costs or benefits of any of the issues discussed in this paper?

No