Response to Scottish Law Commission

Discussion Paper on Prescription

I write to offer some comments on this Paper. I regret that the response is more limited than I had hoped. Unfortunately time has not allowed for analysis in the way I might have anticipated.

As always, any comments are my own and do not necessarily represent those of my Firm or any of my colleagues. Time will also not allow for cross checking of consistency; the responsibility for any inconsistency between or among comments is mine.

Preliminary

No doubt I am telling you something you know already, (given David Johnston's involvement) but Gordons Trustees looks likely to go to the Supreme Court . Given that a significant part of the impetus for the present paper was ICL, that may have some impact on how the Commission proceeds. I have been acting in another case in which it has been accepted that if Gordons Trustees stands, the claim fails. The central issue seems to focus around the identification of- a cost as a loss. There are different categories, for instance, replacing items at a point before it was known that these demonstrated a failure which would be subject of legal proceedings or, perhaps, incurring investigatory costs into the cause of a problem. As the law stands, the matter is of significance.

The Balance

The Paper discusses the balance between different interests. To an extent it suggests that there may be something desirable in, for instance, being more generous to claimants with the 5-year rule and less generous with the 20-year rule. The observation I offer is that in the real world (at least so far as indicated by my years in practice) cases which could conceivably fall within the ambit of the 20-year rule are rare, whereas those which could fall within the 5-year rule are depressingly common. Accordingly, if the balance is to be tilted, a claimant-friendly concession on 5 years is in the real world far more significant than a defendant-friendly concession on 20 years (I touch on recent experience on the 20-year rule elsewhere).

Specific Questions

(1) Yes.

(2) I understand the logic of this proposition; although it strikes me that it raises a range of potential complications. In the context of an obligation to make payment, the logic may be most compelling. If it is extended to "all rights and obligations under statute" my impression - and it is only an impression - is that that could create a series of

issues. Perhaps that is well illustrated by the discussion in the Paper about including a right to implement (but only in relation to a claim for damages). Rights and obligations under statute may be infinitely variable.

(4) I have no strong view on this issue, although again the point I make above about payment lending itself to simpler analysis probably applies. Reform ought to be aimed at making the law simpler, not opening up more complications. I regret that time has not allowed analysis of the extent to which complications might occur.

In passing I mention the issue touched upon in paragraph 2.58 in relation to "obligation relating to land". I suspect I am among a relatively small band who have litigated on this topic - see the case in footnote 56 and also one or two others. I endorse the view at present that it is sufficiently rarely litigated on to justify statutory intervention.

(8) I preface my discussion on this point by touching on the question - what is the purpose of the 5-year period? I ask that question in part influenced by a case in which I was recently involved. The Pursuers (to paraphrase) were aware that they had sustained a loss and then spent a great deal of time trying to sort out whether it was due to anyone's fault (in my case, as in quite a few others, there was no issue potentially arising over identity - it could only have been one party). The case the Pursuers propounded under the pre ICL Law was, after they had done all of that, they then had 5 years to commence proceedings. As an aside, that actually led to the first intimation the Defenders received of the claim being the service of a Summons more than 20 years after they had last been on site! Be that as it may, why should 5 years have been allowed to the party after they had come on that view to their conclusions? That would be the result of a test which focusses on the start of the prescriptive period not arising until a conclusion is reached that loss has been caused by an actionable wrong. The alternative way of approaching the matter is accordingly to suggest that the purpose of the 5 years is to allow the party to investigate the known loss, ascertain whether it is actionable and then commence proceedings. The alternative approach, of course, would be to suggest that either a longer prescriptive period should arise or a short period after that decision had been reached should be added, either producing the same effect. So, for example, if the period became 6 years, but the test remained as before, that might involve some element of concession.

That leads me to favour option (1) failing which, reluctantly, option (2). Clearly the construction industry has a view on the consequences of option (3). I am somewhat cynical about this, because although it may be that writs are fired at numbers of parties, in many other situations it will not become clear who is responsible until well into an action in which a variety of parties are pursued actively on alternative or additional bases.

Option (4) is productive of undue uncertainty.

(5.2) I agree this is a prior question. It continues to cause difficulties. Let me illustrate by three current examples:-

(1) A claim is made that a firm of lawyers, when drafting a will, have drafted it in such a way that in certain circumstances the intended beneficiary will not receive the benefit. Is that an immediate failure giving rise to loss or is it one which does not give rise to loss until many, many years later, perhaps when the testator dies and the intended beneficiary at that stage receives the unwelcome news? That is perhaps not the best example.

(2) Perhaps more reflective of the issue, changes require to be made to a pension scheme to meet the equal pay rules imposed by Barber under EU law. That requires certain steps to be taken. The obligations to do so are incumbent on the trustees but the ultimate funding obligation in due course will fall on the employing company. The steps are not taken. Does that immediately give rise to a loss on the basis that at that point there is immediately a contingent liability on the employer or that in some way the trustees suffer a loss? and;

(3) In the case I mentioned earlier under the 5-year rule, bolts were subject to inappropriate stresses. That created micro-cracking. Was that loss? If not, when did it become loss? (The bolts were in a critical location where failure could lead to catastrophic consequences).

I do not seek answers to any of these questions. Mainly these are to illustrate that there are very different scenarios but it does remain a problematic area of debate. Reluctantly I have to come to the same view that it would be difficult to regulate this by statute.

(9) My inclination is to leave this as it stands, because inevitably questions will be asked of what the definition of "material" is, and without a clear definition any addition by statute does not advance matters from the current position. If I go back to my example of the bolt, is damage "material" as soon as it has created more weakening of the bolt that would otherwise have existed absent the (assumed) fault? Or at the other extreme, does it have to wait until there is an actual crack visible from the outside arising from the internal problem. Or is it somewhere in between? Or does it depend on the function of the bolt, or even on the cost of replacing it?

(10) See above.

(11) If this change is to be made, I agree.

(12) This matter also arises in the case in question because there was an argument between parties as to whether things said by an expert at one point should have led a competent party to have reached a particular conclusion. The matter remains debateable but on reflection I agree that the present formulation takes the matter as far as is feasible.

(13) I recall litigation over the Kingston Bridge in Glasgow in which the alleged fault had taken place a great many years ago. I can likewise recall the enormous difficulties that this brought in trying to recover relevant information. It may be argued that with the adoption of electronic communications it will prove easier in future to obtain historic material, but a talk I recently heard on Technology and the Law as to the volumes of electronic material now being produced and retained somewhere, and the real difficulties in searching that material, suggest that that benefit may be illusory.

Again, one of the examples I touched on briefly before may help to illustrate the potential difficulties. We were recently approached over an assertion that a will, drafted some 47 years ago, had been negligently drafted, but it was said the loss did not arise until such time as the testator died and the problem was then discovered. To anyone advising on the receipt of such a claim it will be apparent that the prospects of finding materials so long ago are negligible. Accordingly, on balance I agree with the proposed change.

(14&15) I can see the logic which says that if a claim has persisted for a very long time and is then interrupted by action, it should only continue in existence until a point has been reached where the action has been disposed of. Acknowledgement seems to me to be more problematic. Once acknowledged the claim is in the sense accepted. I confess I have not come up with a solution which resolves that conundrum.

(16) Yes. The more specialities are created the less logically consistent the law is.

(17a) Yes.

(18) I suggest it is unnecessary to legislate in this area. The wording of the Act is probably rarely considered in that context. Parties will regularly, particularly in commercial contracts, conclude arrangements by which claims not made by particular times, with or without other conditions, cannot be brought. That is not normally regarded as "prescription" in the legal sense, but has precisely the same effect. There is no particular reason to interfere with that arrangement which seems to work well.

(19) When one uses the term "lengthen the statutory prescriptive period" one perhaps give a different message from that which arises from the phrase "standstill agreement". In my experience, such an agreement could be extremely useful. They are very regularly used in England and Wales. They are capable (presuming agreement) of

avoiding the need to issue proceedings. The position is more critical in Scotland where service of proceedings is necessary to interrupt prescription (compared to issuing at the Court in England and Wales). Service can be problematic. Companies may have moved, changed name, turn out to be abroad or in a remote location. In circumstances where the parties are content that the time bar should not come into effect for a period they are (with the benefit of legal advice) prepared to agree, I see no reason why that should not be permitted and very strong practical reasons in favour of it. It should however only be employed in the kind of circumstances used in England i.e. where a claim or possible claim has arisen and investigations are in hand.

(20) No. Issues of onus and burden of proof are, in practice, rarely decisive and I can envisage circumstances depending on the precise situation where it will be obvious one way or another where the burden in reality lies. The courts can be relied upon to deal with that. It is usually possible to ascertain without difficulty whether there is a *prima facie* issue of prescription and, in that event, one party will almost certainly raise it and the other be required to deal with it.

(21) If it was to be introduced it should rest on the Pursuer.

(22) Yes.

(23) Yes.

(24(a)) It is inevitable that I will say yes to this question! I add two things. Firstly, in my experience, administration is now the most frequent corporate insolvency process, so regulation of the effect of a claim therefore seems overdue. Administration does bring with it, at least in statutory objective, a different approach to the "wind up and distribute" approach of a liquidator, which may in turn militate against the administrator focussing on ordinary claims. As you will recall, the instance which led me to raise this point arose where the circumstances of the company had materially altered. It had been highly unlikely that there would be any dividend for ordinary creditors (and accordingly it would not matter whether a claim prescribed) but now there was likely to be a fund available. That led to an unholy scramble to persuade the administrator to grant a "relevant acknowledgement". That seems an unnecessary effort. The second point I would make, *quantum valeat* is to indicate that since I raised the point, it has cropped up in discussion with quite a number of colleagues. Leaving them anonymous to avoid their blushes, I can say that the vast majority seemed to be unaware that there was any distinction and they were universally horrified that it existed.

(25) I have no view on this drafting.

(26) See 25.

I apologise for the fact that this response is not as full as I might have hoped. In the event of my being able to assist on any issue, please do not hesitate to let me know.

Regards,

Craig Connal QC