THE LAW SOCIETY of SCOTLAND
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Consultation Response

Scottish Law Commission Discussion Paper No 160: Prescription

The Law Society of Scotland's response

May 2016

Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession

We have a statutory duty to work in the public interest[1], a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom governments, parliaments, wider stakeholders and our membership.

We welcome the opportunity to consider and respond to the Scottish Law Commission's Discussion Paper on Prescription. This response has been prepared on behalf of the Law Society by members of our Obligations Law Sub-Committee.

General Comments

We are wholly supportive of the Scottish Law Commission's review of this area of law. For many years in Scotland we consider that parties have been exposed to unnecessary legal costs due to the absence of standstill agreements and therefore the need for protective proceedings to be raised. This, and other issues, has been exacerbated by the UK Supreme Court decision in *David T Morrison & Co Ltd v ICL Plastics Ltd*,[2] which has led to considerable uncertainty surrounding the commencement date for prescriptive periods. It seems to us that many actions are currently being raised to avoid a time-bar argument that could otherwise be dealt with out of court.

[1] Solicitors (Scotland) Act section 1
[2] [2014] UKSC 48, 2014 SC (UKSC) 222

Question 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?

Yes, we consider that the 1973 Act ought to be the “default” position in the absence of alternate statutory provision.

Question 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.

Question 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?

This is a difficult question to answer from a legal stand point. We would certainly think there are political reasons why, for example, council tax or business rates would not prescribe but we see no logical reason or legal reason why that ought to be. As we understand it, council tax and business rates are generally caught by long negative prescription but in England and Wales they "prescribe" after 6 years in the usual way.

Question 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?

Yes we consider this to be logical, as otherwise the choice of potential remedies available means that causes of action could persist long after a party had arranged their affairs on the basis the claim had prescribed.

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

Yes we see no reason in principle why this should not be the case. We suspect that this is not a common problem given the now regular use of "entire agreement clauses" or exclusion of pre-contract representations etc. in commercial matters at least. However, that would not be applicable where no contract was ultimately entered into so this proposal is sensible.

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

We think this is finely balanced but we consider that it is desirable that such claims should also be subject to the five-year prescriptive period.

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

We do not think so.

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

Yes. We consider that option 3 is the most logically consistent but also the most practical for those facing or advising in possible litigation. The decision in *David T Morrison & Co Ltd v ICL Plastics Ltd*[3] has spawned a series of litigations such as *Heather Capital Ltd (in liquidation) v Burness Paull & Williamsons LLP*,[4] *Heather Capital Ltd (in liquidation) v Levy & McRae*,[5] *Gordon v Campbell Riddell Breeze Paterson LLP*[6] (and other cases) many of which are pending appeal. It strikes us that the approach taken by the courts in the cases above can have a somewhat harsh (and in places unfair and illogical) result. It would seem unfair for a party to have a claim prescribe where there was no awareness on their part of one of the three key elements for a claim to succeed and the absence of any one of those (the defender, the awareness of loss and awareness of act or omission) would make drafting an action problematic.

Question 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. Materiality by its nature will vary by the context but it seems a sensible threshold.

[3] [2014] UKSC 48, 2014 SC (UKSC) 222
[4] [2015] CSOH 150
[5] [2015] CSOH 115
[6] [2016] CSIH 16

Question 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.

Question 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. We do not consider that the strength or otherwise of the financial covenant of a possible defender is relevant. There is always a risk that a defender will be unable to meet an award but we do not see why that should impact on this area of law.

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

No. The decision in *Gordon v Campbell Riddell*,[7] it seems to us, produces a harsh and unfair result though in line with the decision of the Supreme Court in *ICL Plastics*.[8] The example given by the Commission in paragraphs 5.3 *et seq.* of the Discussion Paper also emphasises that this is an area which could do with review. Lender claims are a frequent feature of litigation but there is no clarity as to whether "reasonable diligence" is a subjective or objective test or what obligations are incumbent on a lender and when. Combined with the decision in *Heather Capital v Burness Paull*[9] it seems to us that this already grey area of the law has become more clouded and needs clarifying.

Question 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?

Yes. The only occasion upon which we see this proving difficult is in the case of ongoing breaches, but on balance fairness favours the period starting at the last act or omission.

[7] [2016] CSIH 16
[8] [2014] UKSC 48, 2014 SC (UKSC) 222
[9] [2015] CSOH 150

Question 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 acknowledgement?

We agree that a relevant claim or acknowledgement should not re-start the prescriptive clock. However, if this rule is to be abolished, it would be desirable for the new rule to be clear in its operation. We consider this in more detail in answer to Question 15.

Question 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?

We agree in principle with this suggestion, but it will be important to clarify what is meant by 'disposal'. For example, if a case remains sisted through no fault of the pursuer (such as for legal aid) for a considerable period, would the clock continue to run? Would 'disposal' mean final order of the court, or expiry of any appeal period against that final order? If it is intended to keep the claim live only for the duration of the proceedings, would provision be made for inadvertent disposal such as by failure of representation resulting in decree in absence? While we think it would be desirable to prevent a renewal of the prescriptive period, it would be undesirable for that certainty to be replaced by lack of clarity over when the period did come to an end.

Question 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 think there is advantage in the same periods applying across the board to give certainty.

Question 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?

20 years appears neither significantly longer nor significantly shorter than comparative systems. For this reason, and in the absence of a compelling reason to change it, we would support its retention.

Question 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 do not see any reason in principle why this should not be possible between consenting parties. However, we would not want to see it being routinely inserted into contracts with uneven bargaining power (but which fell short of unfair contracts) and we consider there may be a risk of the period becoming routinely reduced, which would reduce some of the advantage of the present blanket policy in providing certainty.

Question 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?

The same considerations apply to extending the prescriptive period as to reducing it. We would support the possibility of 'standstill' agreements allowing parties a period of review without the need for protective proceedings. A compromise could be to allow extension of the period but only once a claim is known so, for example, it would not be possible to routinely extend the period at the outset of a contract.

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

It may be helpful to do so though we are not aware of it having been a particular issue in practice. As is stated in the Discussion Paper, the burden of proving that he or she has a case to answer would usually rest on the pursuer and addressing the possibility of prescription is just one facet of that. That said, there will always be cases where it is appropriate on the facts of that case for the burden of proof to shift and we would not be in favour of any rule which prevented the court from ordaining the defender to lead.

Question 21: If you 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?

Our provisional view is that the burden of proof should rest on the pursuer, but with the option of asking the court to consider ordaining the defender to lead in appropriate cases.

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

Yes.

Question 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?

Yes, for the reasons given in paragraph 10.9 of the discussion paper. This will require careful drafting and clarity will be required as to, for example, what period of time the clock stops running and how that is triggered at either end

Question 24:
(a) Do you agree that "relevant claim" should extend to the submission of a claim in an administration?
(b) Do you agree what "relevant claim" should extend to the submission of a claim in a receivership?

Yes. There is no logical reason to treat one insolvency process differently from another.

Question 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, we consider this to be a clearer formulation.

Question 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.

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

We consider that there is much wasted time and expense in raising protective proceedings against parties which would be unnecessary were the starting date for the prescriptive period clearer and an ability to postpone the period by use of standstill agreements. Currently the costs are borne by commercial parties, individuals' insurers and the public purse by the use of judicial resources.