

RESPONSE TO SCOTTISH LAW COMMISSION DISCUSSION PAPER ON PRESCRIPTION

1 Introduction

- 1.1 Scottish Water Business Stream Limited (Business Stream) supplies water and waste water services to business customers in Scotland and to a limited number of sites in England. Business Stream has the largest market share of Scotland's competitive water retail market.
- 1.2 Business Stream has prepared this response to the questions in the Scottish Law Commission Discussion Paper No 160 (the Discussion Paper). We have sought to answer only the questions that are most relevant to Business Stream and our customers. We hope that the comments will prove helpful.

2 Response to the Discussion Paper

- 1.1 Business Stream agrees that prescription plays an important role in the legal system. Business Stream has a settled policy on the application of the five year negative prescriptive period provided for by section 6 of the Prescription and Limitation (Scotland) Act 1973 (the 1973 Act), which is understood by our customers. We would also agree that as long as the law of prescription strikes a fair balance overall, it serves the wider interests of fairness, justice and certainty. We consider that the current five year negative prescriptive period strikes the right balance and provides for fairness, justice and certainty for Business Stream and its customers.

Q12. Do you agree that the present formulation of the test of “reasonable diligence” is satisfactory?

- 1.2 Business Stream provides retail water and waste water services but is not responsible for the water network and its infrastructure. The responsibility for the maintenance and operation of the water network lies with Scottish Water. Business Stream does face a limited number of claims in which the application of section 11(3) of the 1973 Act arises as an issue. That may happen, for example, where the wrong meter size is used in the calculation of charges and the customer argues that it could not with reasonable diligence have been aware of the use of that wrong meter size, and has suffered loss as a result.
- 1.3 Business Stream notes with interest the comments at 5.21 of the Discussion Paper as to whether the exercise of reasonable diligence might in some circumstances require a pursuer to obtain expert advice. We generally agree that making express provision in the 1973 Act about the need to obtain expert advice would be complex. However, whether an expert has been instructed by a pursuer should be a relevant factor in assessing: (i) whether the pursuer has done what an ordinary prudent person would do having regard to the circumstances; and as a consequence (ii) what knowledge ought to be imputed to a pursuer. Business Stream agrees with the SLC that the

statutory test is broad enough to allow the courts to place weight on the fact that a pursuer did not seek expert advice.

Q18. 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?

- 1.4 Business Stream considers that allowing parties to shorten the prescriptive period could create uncertainty and inconsistency. As noted above, the five year prescriptive period is well understood by Business Stream and our customers. Business Stream considers that the five year period is reasonable and does not see any particular advantage in allowing a shorter period to be agreed.

Q19. 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?

- 1.5 As above, Business Stream favours clarity and consistency in the application of the 1973 Act. Business Stream can see the commercial benefit in some industries of entering into a standstill agreement to avoid the need for protective court proceedings to be raised. However, as the need for standstill agreements is not a live issue for Business Stream it has no comment to make on the time limit that should be fixed.

Q20. Do you favour statutory provision on the incidence of the burden of proof?

- 1.6 Business Stream considers it would be helpful to set out clearly in statute where the burden of should proof lie.

Q21. 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?

- 1.7 Business Stream considers that the onus should rest on the pursuer. That is because it is the pursuer that is positively averring the existence of the rights or obligations which form the basis of his claim. Similarly, if the pursuer wishes to rely on section 6(4) or section 11(3) of the 1973 Act then the onus should rest on the pursuer to plead the relevant date and lead evidence to support it.
- 1.8 Business Stream considers that the onus should rest on the pursuer for both the five year and twenty year prescriptive periods.

Q23. 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?

- 1.9 Business Stream does not agree that section 6(4) should be reformulated in the way suggested.
- 1.10 At paragraph 10.6 the Discussion Paper refers to the case of *Rowan Timber Supplies (Scotland) Ltd v Scottish Water Business Stream (Rowan Timber)*¹. As noted in the Discussion Paper, Business Stream did not know that Rowan Timber had no connection to the network. There was no bad faith in the issuing of invoices by Business Stream. Business Stream could also not have reasonably discovered that there was no connection unless the issue was first raised by the customer.
- 1.11 Business Stream agrees that *Rowan Timber* places in sharp focus how broad the approach to section 6(4) should be. Business Stream favours a more restrictive approach than that set out in the Discussion Paper. Consistent with the observations in *BP Exploration Operating Co Ltd v Chevron Shipping Company*² Business Stream considers that the use of the words “induced” and “refrain” lead to the need for “a more vigorous connection” between a defender’s conduct and a pursuer’s failure to raise proceedings than is found in *Rowan Timber*.
- 1.12 Business Stream does not consider that the issuing of invoices on its own should be regarded as being enough to induce a customer from making a claim. Business Stream considers that what is relevant to whether a customer has been induced by a creditor is what the invoice says. If it is clear on the face of the invoice that the charges are not correct then in at least some situations the burden should rest on the customer to bring that to Business Stream’s attention in order that it can correct the charges. That would arise, for example, where the customer could have discovered the issue more readily than Business Stream e.g. where an invoice charges in respect of two business units at an address but the customer knows they are only leasing one unit.
- 1.13 Business Stream considers that its state of mind and the reasonableness of its knowledge should be factors relevant to the assessment of whether there was an induced error. While there need not be a positive intention to mislead, there should be some means of assessing whether the alleged inducing act was reasonable or not, in the same way that the creditor’s knowledge is relevant to the reasonableness of having refrained from making a claim.

¹ [2011] CSIH 26

² 2002 SC (HL) 19