Law Society of Scotland

Stage 3 Briefing

Prescription (Scotland) Bill

November 2018

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, 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.

The Society's Obligations sub-committee, with input from our other committees, has considered the Prescription (Scotland) Bill[1] and responded to the Delegated Powers and Law Reform Committee's call for evidence.[2] We note the Report of the Delegated Powers and Law Reform Committee at Stage 1.[3] We have the following observations at Stage 3 of the Bill process.

General comments

We welcome the introduction of this bill which would modernise and bring greater clarity to the Scottish law of prescription. We are supportive of the review of this area of law.

We support the policy underlying the principle in allowing a period of time for claims to be raised or rights to be asserted and then introducing a "cut-off" point which grants certainty and allows individuals and businesses to organise their affairs. Furthermore we emphasise the importance of encouraging parties to enforce rights or claims in early course, not least because many years after the fact, evidence will have deteriorated or disappeared and relevant individuals may no longer be traceable, or indeed have passed away.

For all of these reasons we are persuaded of the practical benefits of the law of prescription, while at the same time recognising that in certain individual cases it can produce results which could be considered unfair.

[1] http://www.parliament.scot/Prescription%20(Scotland)%20Bill/SPBill26S052018.pdf
[2] http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/107870.aspx
[3] https://sp-bpr-en-prod-cdnep.azureedge.net/published/DPLR/2018/6/14/Prescription--Scotland--Bill--Stage-1-Report/DPLRS05R32.pdf

Comments on the Bill

Approach taken in the Bill

Generally speaking, we support the approach taken in the Bill.

In relation to section 1, we welcome the amendment to Schedule 1 of the 1973 Act to include obligations arising from delict. In our previous response[4] we noted that this was the logical approach to ensure that causes of action would not persist when a party had arranged their affairs because they believed the claim had prescribed.

With regards to section 2, we support the inclusion of rights and obligations in Schedule 1 of rights and obligations relating to the validity of a contract.

However, we have identified a few issues which merit further consideration:

- the Council Tax exemption;
- outstanding questions in relation to the application of the test under section 5;
- claims that have prescribed under the existing law but which would not have prescribed under the new rules, or where the commencement of the prescriptive period under the new rules would be fixed at a later date.

These concerns are addressed in further detail below.

Section 3 - extension to the scope of the 5-year negative prescription to apply to all statutory obligations to make payment unless there are policy reasons to except them

Section 3 appears to strike a fair balance in response of the recovery of statutory debts.

In our previous response[5] we supported the view that the 1973 Act should be the default position in the absence of alternate statutory provision and that it should provide for rights and obligations arising under statute to prescribe under the rules for five year prescription.

Exceptions

We welcome the clarification that the Bill sets out the general rule but that primary or secondary legislation may provide for a particular test and/or prescriptive period in specific circumstances. We previously commented that while there might be political reasons for excluding, for example council tax or business rates, we could not see any logical or legal reason why that ought to be the case.

Having considered this further, we are concerned that the exemption may produce unfair results, in respect of which we note the following points:

[4] May 2016, https://www.lawscot.org.uk/media/9757/obl-slc-discussion-paper-on-prescription.pdf
[5] May 2016, https://www.lawscot.org.uk/media/9757/obl-slc-discussion-paper-on-prescription.pdf

- Non-payment of council tax attracts a high (10%) penalty charge;
- This could in fact act as a disincentive on the collecting council as the returns from the penalty will rise above inflation and therefore the effective value grows on non-payment;
- Practitioners identified potential situations where people might in good faith believe that they had paid the council tax[6];
- This is further compounded by the joint and several liability for council tax which means that a person could have paid "their share" of council tax but face a claim for payment (again with significant interest) because a joint tenant had not paid his;
- It could prove prejudicial to the interests of justice to incur such high penalties, many years later, if no steps to collect the tax or enforce an order have been taken in the interim;
- There is a discrepancy between the English prescriptive period (six years – equivalent to our five years) and the period of 20 years, which is difficult to justify;
- In many cases it might be expected that uncollected sums are quite small and if the council has not sought to enforce within 5 years, there may be little practical appetite to pursue them many years later.

Section 4 - effect of fraud or error on computation of prescriptive period

In our previous response we supported amending section 6(4) so that the prescriptive period would not run against a creditor who did not raise proceedings due to fraud or error, regardless of whether the debtor had done so innocently or otherwise.

Section 5 - the proposed discoverability test

The proposed test

We support the replacing "act, neglect or default", with the words "act or omission" which we consider to be a clearer formulation.

We note the decision in the case of *Gordon* v *Campbell Riddell*.[7] It seems to us that the comments made by the court regarding incurring expenditure on professional fees without awareness that it reflects a loss, could have a potentially harsh effect, particularly if that were to be the rule applied to different facts. We do, however, note that the decision is in line with the decision of the Supreme Court in *David T Morrison & Co Ltd* v *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 would benefit from 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.

[6] For example, if they moved house part of the way through the year and thought they had paid all sums due for the relevant property.
[7] [2017] UKSC 75
[8] [2014] UKSC 48
[9] [2015] CSOH 150

We welcome the alteration of subsections (3) and (3A) which produces a fairer and more logical result than the current law. The Bill therefore would remedy the situation where the potential claimant was not aware of one of the three key elements which would need to be known for a claim to succeed. In practical terms, the absence of any one of those – knowledge of the identity of the defender, the awareness of loss, or awareness of act or omission - would make drafting an action problematic.

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.

Unanswered questions

In relation to the first requirement, “that loss, injury or damage has occurred", it is unclear how that would play out in a situation where there had been expenditure on professional fees but not at the same time as awareness that this constituted a loss, expenditure as a loss not being obvious at that point. The question that has been cropping up in recent case law is as to whether it is (i) awareness of the fact of incurring expenditure or (ii) awareness of the fact that the expenditure amounts to "loss", that is required. We are not satisfied that this point has been answered fully by the existing case law[10] or is dealt with in the Bill.

Following on from this, section 5(5)(3A)(b) sets out the need for knowledge “that the loss, injury, or damage was caused by a person’s act or omission”. This gives rise to the situation where we could have different prescriptive periods running for different debtors if the creditor was aware of the identity of one debtor before another. We therefore welcome the recommendation contained in the Delegated Powers and Law Reform Committee’s Stage 1 Report that “the Scottish Government provides further clarification, ahead of Stage 2, on how the test would operate in situations of joint and several liability. In particular, that the Scottish Government provides further clarification on how the third strand of the test will operate in relation to the knowledge of the identity of a particular defender.”[11]

In the context of the third criterion, which requires awareness of identity, we note that it can be difficult to identify the correct respondent where there are group companies or complex contractual structures. It is not clear whether there is a duty to investigate to identify the relevant company, or whether general awareness of the corporation would suffice.

Practitioners report experiences where amendment had been allowed in cases where the correct entity had been identified but the incorrect party had been named. This is supported by the decision of the Court as set out by Lord Drummond Young in *Perth & Kinross Council* v *Scottish Water and Millglen (Glasgow) Limited*.[12] In this case, the defenders challenged the right to substitution on the basis that the period governing the pursuer’s claim had expired. The Court allowed the amendment. However, this does not seem to be a universally applicable rule.

Furthermore, in the context of the new test, the question arises as to whether the prescriptive period would only start when the correct entity had been identified. In any case, further clarification in the Bill would be

[10] See *Gordons Trustees* v *Campbell Riddell* [2017] UKSC 75 and *David T Morrison & Co Ltd* v *ICL Plastics*[2014] UKSC 48

[11] See page 3

[12] See https://www.scotcourts.gov.uk/search-judgments/judgment?id=5c9422a7-8980-69d2-b500-ff0000d74aa7

helpful.

We also note that the question of materiality of loss was addressed in the initial SLC consultation. Two potential policy issues arise in this context: should there be a materiality threshold to raise a claim and if so, what would be the impact where a very minor loss was discovered at a particular date and it only transpired at a later date that the total loss was material?

The Bill appears to proceed on the assumption that loss will be something material and not, for example, incurring professional costs. However, we consider that the comments made by Lord Hodge in the case of *Gordons Trustees* v *Campbell Riddell*[13] leave that open to doubt. The Bill does not make clear what "loss" is.

Finally, we do not consider that the Bill properly addresses claims that would have prescribed under the existing law but which would not have prescribed under the new rules, or where the commencement of the prescriptive period under the new rules would be fixed at a later date. In our view it would be preferable if these issues were dealt with explicitly in the legislation.

Section 5 and section 8 - changes to the starting date of the prescriptive period in relation to obligations to pay damages

We are content with the proposed change to the starting date of the prescriptive period, as outlined in our response to question 5 above.

In relation to section 8, we support the view that the starting date for the long-stop prescriptive period should be the date of the offender's act or omission or the last such date where more than one occurred.

We noted in our previous response[14] that a difficulty might arise with designating the starting date as the defender's (last) act or omission in cases of ongoing breach.

We agree that it should not matter whether the creditor is aware that the act or omission that caused the loss, injury or damage is actionable in law.

Sections 6 and 7 - 20-year negative prescription

Sections 6 and 7 provide a genuine long stop to prescriptive period and would deal with the mischief identified in the original discussion paper.

In relation to section 6, we welcome the introduction of the rule that a relevant claim or acknowledgement should not re-start the prescriptive clock.

[13] [2017] UKSC 75

[14] https://www.lawscot.org.uk/media/852290/obl-slc-discussion-paper-on-prescription.pdf

In relation to section 7, we agree that a relevant claim or acknowledgement should not re-start the prescriptive clock.

Section 12 - final disposal

We agree that cases should be allowed to proceed until finally disposed of and welcome the clarification of the definition of final disposal in section 12.

Section 13 - restrictions on contracting out

This section deals in what appears to be an effective way with the absence of standstill agreements which should reduce the requirement to raise protective proceedings.

For many years in Scotland we consider that parties have been exposed to unnecessary legal costs due to the absence of standstill agreements and the need for protective proceedings to be raised. In our previous submission[15] we considered that there is much wasted time and expense in raising protective proceedings. This, and other issues, has been exacerbated by the UK Supreme Court decision in *David T Morrison & Co Ltd* v *ICL Plastics Ltd*,[16] 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.

The need to raise protective proceedings would likely be unnecessary were the starting date for the prescriptive period clearer, and were there 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.

On the one hand, we do not see any reason in principle why contracting out 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.

Similar 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. The compromise is 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, which seems reasonable.

[15] https://www.lawscot.org.uk/media/852290/obl-slc-discussion-paper-on-prescription.pdf
[16] [2014] UKSC 48

Hard cases

We appreciate that cases will arise where a long time period passes between an error occurring and the person affected finding out about that error. For example, a conveyancing error which does not come to light until a house is sold many years later. The right to claim damages, from the original seller or from the solicitor responsible, may have been extinguished by twenty year prescription, without the right holder knowing the right to claim damages existed. This situation is often referred to as a 'hard case'.

In the experience of our practitioners, the vast majority of claims made against solicitors for alleged errors made in the process of a conveyancing transaction come to light, and claims are pursued, well before expiry of the 20 year long negative prescription period. The number of 'hard cases' is therefore limited.

It must be appreciated that the law will always result in 'hard cases', not only in this field. A rule of prescription will always give rise to cases where the merits of a claim are good but the claim has become time barred. It is unquestionably unfortunate for individuals to lose out on good claims as a result of a significant delay in knowledge of an issue giving rise to a claim. However, it is also important for parties, including individuals and commercial providers, such as solicitors and other professionals, to be protected against claims being pursued after many years. The underlying morality of the law of prescription is that the benefit of certainty and closure outweighs the, relatively rare, mischief of a good claim being lost. This was highlighted by the Scottish Law Commission (SLC) in their report on prescription.[17]

There are also practical considerations which must be borne in mind – for example, information will likely have been destroyed, individuals' memories faded, and relevant individuals moved on. Despite the right holder having lost a right to claim, it is likely that they will have experienced some kind of benefit, such as unchallenged occupation or enjoyment of the property or interest concerned for more than 20 years.

It remains important that we have the clarity and certainty of the 20 year stop date for claims. We consider that the incidence of 'hard cases' in which good claims are defeated by the 20 year prescription is limited and the law in this regard should remain untouched.

Section 14 - burden of proof

Section 14 provides helpful clarity of the burden of proof in various scenarios although we are not aware of the burden of proof having caused a particular issue in practice under the current law. In our previous response[18] we stated a provisional view that the burden of proof should continue to rest on the pursuer (as the default position) but with the option of asking the court to consider the defender to lead in appropriate cases.

[17] See paragraphs 1.7 and 1.8: https://www.scotlawcom.gov.uk/files/3414/9978/5138/Report_on_Prescription_Report_No_247.pdf

[18] https://www.lawscot.org.uk/media/852290/obl-slc-discussion-paper-on-prescription.pdf

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