

Draft explanatory material to accompany draft Prescription (Scotland) Bill – for consultation purposes

Background

Sections 1-5 of the draft Bill deal with the five-year prescription provided for in section 6 of the Prescription and Limitation (Scotland) Act 1973 (“the 1973 Act”), as read with schedule 1 of that Act. The effect of the five-year prescription is to extinguish certain types of obligations (and their correlative rights) after a period of five years has elapsed, provided that various conditions are met. The first is that the obligation has subsisted for five years continuously from the date on which the prescriptive period started to run. The second is that during that time the creditor has not made a claim, as defined by section 9 of the 1973 Act, for implement or part-implement of it, nor has the debtor acknowledged the subsistence of the obligation in writing or through part performance. Moreover, only if an obligation falls within the scope of paragraph 1 of schedule 1 of the 1973 Act, and is not excluded by anything in paragraph 2 of that schedule, is it potentially subject to the five-year prescription in the first instance.

Section 1 Obligations to pay damages and delictual obligations

Currently, paragraph 1(d) of schedule 1 of the 1973 Act refers to obligations arising from liability to make reparation. The courts have interpreted “reparation” narrowly to mean only a claim for the payment of damages arising from a wrongful act. Consequently, obligations arising from delict other than the obligation to pay damages currently do not fall within the five-year prescription.

This section amends paragraph 1 of schedule 1 of the 1973 Act to the effect that the five-year prescription, in addition to applying to all obligations to pay damages, extends to any obligations arising from the law of delict which do not fall within any other subparagraph of paragraph 1. See new sub-paragraph (da) as inserted by subsection (2).

New sub-paragraph (d), as inserted by subsection (2), makes clear that obligations to pay damages fall within the scope of the five-year prescription regardless of their source; examples are obligations arising by virtue of any enactment, the common law, delict, breach of contract or promise.

Subsection (3) makes textual changes to section 11 of the 1973 Act to reflect new sub-paragraph (d).

Section 2 Obligations related to contract

This section amends paragraph 1 of schedule 1 of the 1973 Act to bring within the scope of the five-year prescription two further types of obligation.

The first is any obligation relating to the validity of a contract. Where a contract has been induced by error or innocent misrepresentation, the contract is voidable. In other words, the contract is valid until it is set aside by the party entitled to avoid it. It does not appear however that the right to reduce a contract on those grounds can in all cases be categorised as a right arising from contract and hence fall within the ambit of schedule 1 paragraph 1(g) of the 1973 Act. The policy is that such rights and obligations relating to the validity of a contract which do not fall within any other sub-paragraph of paragraph 1 should be subject to

the five-year prescription. Sub-paragraph (fa), as it will be inserted into paragraph 1 of schedule 1 so provides. The purpose of the qualification in the final part of the sub-paragraph is to deal with any potential overlap with obligations arising from delict, for example in cases of fraud or negligent misrepresentation. This sub-paragraph is not concerned with a situation where the error is so material as to preclude consent, meaning that there is no contract at all.

The second type of obligation to be brought within the five-year prescription by this section is the obligation to reimburse expenditure incurred as a result of dealings in anticipation of the coming into existence of a contract which does not in fact come into being. The situation in which this would apply would generally be where one party has in good faith incurred expenditure in reliance on an assurance by the other that there is a binding contract between them, but the contract does not come into being; in other words, the liability is pre-contractual in nature.

Section 3 Statutory obligations

This section brings within the scope of the five-year prescription all statutory obligations to make a payment in so far as they neither fall within any other sub-paragraph of paragraph 1, nor are excluded. A statutory obligation to make a payment should be interpreted broadly so as to include any statutory obligation to pay something or to repay something.

Subsection (2)(a) provides for the repeal of provisions of paragraph 1 of schedule 1 which relate solely to statutory obligations to make payment. This is a rationalisation of paragraph 1, given that these obligations will be covered by the general provision inserted by subsection (2)(b), discussed below. Those sub-paragraphs dealing with statutory obligations not involving payment, or involving something else as well as payment, remain in place.

Subsection (2)(b) inserts a new sub-paragraph (h) into paragraph 1 of schedule 1. Subject to exceptions set out in subsection (3) (on which see below), sub-paragraph (h) creates a default rule that all statutory obligations to make a payment prescribe under the five-year prescription. Statutory obligations to make a payment that fall within any other sub-paragraph of paragraph 1 will not fall within the scope of sub-paragraph (h). Moreover, as provided by section 9 of the draft Bill, obligations to make a payment deriving from statutes with their own provisions on prescription or limitation will continue to be subject to those provisions, to the exclusion of the five-year prescription.

Subsection (3) amends paragraph 2 of schedule 1 of the 1973 Act which sets out obligations to which the five-year prescription does **not** apply. Subsection (3)(a) makes consequential changes to sub-paragraph (e) to reflect the addition to schedule 1 paragraph 1 of statutory obligations to make a payment (sub-paragraph (h)); it also reflects the rationalisation of paragraph 1 as discussed above.

Subsection (3)(b) sets out further exceptions to the application of the five-year prescription. Notwithstanding schedule 1 paragraph 1(h) (statutory obligations to make a payment), obligations to pay taxes and duties recoverable by HM Revenue and Customs and Revenue Scotland, and any relative interest or penalty, are not subject to the five-year prescription. This reflects the current law as interpreted by the courts. Such an exception also exists in English law by virtue of the Limitation Act 1980, section 37(2)(a). Similarly, an exception is made for obligations underlying proceedings for forfeiture under the customs and excise

Acts or for forfeiture of a ship. Again, this aligns Scots law with the equivalent English law, namely the Limitation Act 1980, section 37(2)(b) and (c).

On the other hand, there is no exception in the draft Bill in relation to obligations to pay council tax and business rates as it is considered that there is no valid policy reason to make such an exception. Such obligations, as statutory obligations to make a payment, would be subject to the five-year prescription in terms of the draft Bill. This would be a change in the law which would bring Scots law into line with the law in England and Wales where such obligations are extinguished after 6 years (which is the period of limitation in English law equivalent to the five-year period of prescription in Scots law).

Section 4 Effect of fraud or error on computation of prescriptive period

Case law has drawn attention to the fact that the language of section 6(4)(a) of the 1973 Act is not as clear as it might be. This section amends that provision in a way which clarifies its underlying policy intention. The policy intention is that the five-year prescription should not run against a creditor who has been caused by the debtor, innocently or otherwise, not to raise proceedings.

Subsection (2) clarifies that, for the purposes of section 6(4), what matters is that the words or conduct of the debtor caused the failure by the creditor to make a claim for implement or part-implement of the obligation. The policy is that “conduct” includes an omission to act which breaches an obligation or duty. See *Heather Capital Limited v Levy & McRae* [2016] CSOH 107 at [46].

Subsection (3), which inserts new subsection (4A) into section 6, clarifies that it is irrelevant for the purposes of section 6(4)(a) whether or not the debtor *intended* to cause the failure on the part of the creditor. In other words, the debtor’s own state of knowledge as to the situation is irrelevant.

Section 5 Start point of prescriptive period for obligations to pay damages

This section alters the discoverability formula for determining what knowledge the pursuer must have before the five-year prescriptive period, in relation to obligations to pay damages, begins to run. This is currently set out in section 11(3) of the 1973 Act. It also implements two recommendations made for the purposes of clarification and increasing consistency of language within the 1973 Act.

Subsections (4) and (5) of section 5 replace the existing discoverability formula. This addresses concerns that the decision of the Supreme Court in *David T Morrison & Co Ltd v ICL Plastics Ltd* [2014] UKSC 48 has had the effect of potentially bringing forward the start of the five-year prescriptive period, thereby excluding potential claims that should be allowed to run in the interests of a fair balancing of the interests of creditor and debtor. In terms of the new formula, the five-year prescription does not begin to run until the date when the creditor became aware, or could reasonably have been expected to become aware, of the facts set out in new subsection (3A):

- (a) the occurrence of the loss, injury or damage;
- (b) the act or omission that caused the loss, injury or damage; and

(c) the identity of the debtor.

New subsection (3B) makes provision for any case in which there is more than one debtor and a claim is made against only one of them. Its result is that a separate period of prescription can run against each debtor.

New subsection (3C), for the avoidance of doubt, expressly states the current position which is that knowledge that any act or omission is or is not actionable as a matter of law is irrelevant for the purposes of the discoverability formula.

Subsections (2) and (3) of section 5 provide for the replacement of the words “act, neglect or default” with the words “act or omission.” This serves two purposes: It minimises fragmentation by establishing consistency with the language in section 17 of the 1973 Act; also, by focussing the test more clearly on matters of fact, it reflects that knowledge of the defender’s liability in law is of no relevance in relation to the discoverability formula. This latter point is put beyond doubt by new subsection (3C).

Background

Sections 6 to 8 of the draft Bill make provision in relation to the 20-year prescription in sections 7 and 8 of the 1973 Act. The 20-year prescription, in terms of section 7, currently extinguishes obligations 20 years after the date on which they became enforceable (other than those which are imprescriptible, in terms of schedule 3 of the 1973 Act, and those relating to reparation for personal injury/death and damage caused by defective products). Currently, as is the case with the five-year prescription, the 20-year prescription, in terms of section 7, is amenable to interruption by a claim, as defined by section 9 of the 1973 Act, for implement or part-implement of it, or by acknowledgement of the subsistence of the obligation in writing or through part performance. Similarly, section 8 of the 1973 Act deals with the extinction of certain rights relating to property by a 20-year prescriptive period; this period is amenable to interruption by a relevant claim as defined in section 9(2). This approach allows what should be a “long-stop” measure to be perpetuated; the period of prescription can be interrupted and, if that occurs, a new prescriptive period of 20 years begins. This is contrary to one of the key characteristics of a long-stop prescription which is that it should cut off a right of action clearly and absolutely after a defined period.

Section 6 Extinction of obligations by prescriptive period of 20 years

This section amends section 7 of the 1973 Act with a view to ensuring that the 20-year prescriptive period does function as a long-stop. It will no longer be amenable to interruption by a relevant claim or by relevant acknowledgement. See subsection (2)(a) which substitutes a new subsection (1) into section 7. The amendment is achieved through omitting any reference to such a claim or acknowledgement.

To complement this amendment, subsection (2)(b) provides for the insertion of new subsections (3) to (5) into section 7. Although the 20-year prescription will no longer be amenable to interruption by a relevant claim or by acknowledgement, it may be extended in certain circumstances. Where a relevant claim, as defined for the purposes of section 7 of the 1973 Act by section 9 of that Act, has been made during the prescriptive period of 20 years but, by the end of that period, has not been finally disposed of and the proceedings in which the claim is made have not otherwise ended, the extension will run until the claim has

been finally disposed of or until the proceedings otherwise come to an end. New subsection (5) is necessary as not all means by which a relevant claim, as defined for the purposes of section 7 of the 1973 Act by section 9 of that Act, may be made can be defined as “proceedings”. The circumstances in which a relevant claim will be taken to be disposed of finally are set out in section 12 of the draft Bill.

Subsection (3) of section 6 of the draft Bill provides for consequential amendments to section 10 of the 1973 Act. These reflect the fact that the 20-year prescriptive period will no longer be amenable to interruption by acknowledgement.

Section 7 Extinction of rights relating to property by prescriptive period of 20 years

In the same way as section 6 of the draft Bill amends section 7 of the 1973 Act with a view to ensuring that the 20-year prescriptive period functions as a long-stop, section 7 so amends section 8 of the 1973 Act.

Section 8 of the 1973 Act deals with the extinction of certain rights relating to property by a 20-year prescriptive period. Section 7 of the draft Bill provides that such a period of prescription will no longer be amenable to interruption by a relevant claim.

Subsection (3) replicates the provision made by section 6 of the draft Bill for the extension of the prescriptive period in certain circumstances. Where a relevant claim, as defined for the purposes of section 8 of the 1973 Act by section 9 of that Act, has been made during the prescriptive period of 20 years but, by the end of that period, has not been finally disposed of and the proceedings in which the claim is made have not otherwise ended, the extension will run until the claim has been finally disposed of or until the proceedings otherwise come to an end. The circumstances in which a relevant claim will be taken to be disposed of finally are set out in section 12 of the draft Bill.

Section 8 Start point of prescriptive period for obligations to pay damages

Where time runs from the date of loss or damage, it is quite possible for a very long period to pass without the prescriptive period even beginning to run. That is capable of undermining one of the principal rationales of prescription, namely that after a certain defined period a defender should be able to arrange his or her affairs on the assumption that any risk of litigation has passed.

Accordingly, this section substitutes a new subsection (4) into section 11 of the 1973 Act. Its effect is to introduce a separate start date for the running of the 20-year prescriptive period, but only in relation to claims involving recovery of damages. For such claims, time will run from the date of the act or omission giving rise to the claim or, where there was more than one act or omission or the act or omission is continuing, from the date of the last act or omission or the date when it ceased. For all other claims, however, the start date for the running of the 20-year prescription will remain as the date on which the obligation giving rise to the claim became enforceable.

The reason for this dual approach is that there are obligations which prescribe only under section 7 of the 1973 Act, such as claims for legal rights or against executors and claims under warrandice, where the act or omission approach would be unworkable.

Miscellaneous provisions

Section 9 Saving for other statutory provisions about prescription or limitation

This section clarifies the interaction between the five-year and 20-year prescriptive periods provided for in sections 6 and 7 of the 1973 Act and other prescriptive or limitation provisions set out in other enactments.

Subsection (2) provides for the insertion of a new section 7A in the 1973 Act. This makes clear that neither the five-year nor 20-year prescriptive periods (under sections 6 and 7 respectively of the 1973 Act) will apply where an enactment other than the 1973 Act expressly provides either for a specific limitation or prescriptive period or that an obligation is imprescriptible or not subject to any period of limitation.

Subsection (3) modifies the definition of “enactment” in section 15(1) of the 1973 Act; “Enactment” includes an enactment contained in, or in an instrument under, an Act of the Scottish Parliament. This is necessary to oust the restriction in the definition of “enactment” in the Interpretation Act 1978, which otherwise applies to the 1973 Act.

Section 10 Definition of “relevant claim”

Section 9 of the 1973 Act defines “relevant claim” for purposes of the Act. A relevant claim is a claim made by or on behalf of the creditor for implement or part-implement of the obligation, which claim must be made in one of certain specific ways. Although liquidation is mentioned in section 9(1)(d), it seems an anomaly that neither administration nor receivership is.

Accordingly, section 10(2) expands the definition of “relevant claim” to include the submission of a claim in an administration or receivership, and the acts that trigger administration or receivership.

Subsection (3) of section 10 inserts the expanded definition of “relevant claim” into section 22A(3) of the 1973 Act which sets out a separate definition in relation to the 10-year prescription which applies to obligations to make reparation for damage caused wholly or partly by a defect in a product.

Section 11 Prescriptive periods under sections 6 and 8A: interruption by relevant claim

This section stems from a suggestion by a respondent to the Commission’s Discussion Paper on Prescription although the topic was not raised in the paper. For periods of prescription which are amenable to interruption, in terms of section 6 or section 8A of the 1973 Act, section 11 clarifies the effect of the making of a relevant claim on the running of prescription. The current law on this matter is uncertain. On one view, the interruption of prescription takes place at an instant (the date when the relevant claim is made) from which prescription immediately begins to run again; on another view, the interruption of prescription endures until the claim has been finally dealt with.

To clarify the effect of the making of a relevant claim on the running of prescription, subsection (2) provides for the insertion of new subsection (2A) into section 9 of the 1973 Act. The effect of the new provision is that the making of a relevant claim for implement or part-implement of an obligation will interrupt the running of the five-year prescription, and the 2-year prescription (which applies, in terms of section 8A of the 1973 Act, to extinguish obligations to make contribution between wrongdoers) until the claim is disposed of finally. Only at that point will a fresh prescriptive period begin to run.

The various circumstances in which a relevant claim will be taken to be finally disposed of are set out in section 12 of the draft Bill.

Subsection (3) of section 11 updates the title of section 9 of the 1973 Act.

Section 12 Definition of “final disposal” of relevant claim

Section 12, by inserting a new section 9A into the 1973 Act, provides a definition of “final disposal” of a relevant claim which applies for the purposes of sections 7, 8 and 9 of the 1973 Act.

New section 9A(2) makes clear that, in the case of an appeal decision, the question of whether or not there is an onward right of appeal from that appeal decision must be examined in determining whether section 9A(1)(a) applies.

Section 13 Restrictions on contracting out

Section 13 substitutes a new section 13 into the 1973 Act. It makes clear that agreements to extend the five-year prescriptive period (section 6), and the two-year prescriptive period which applies to extinguish obligations to make contribution between wrongdoers (section 8A), are competent provided that certain conditions are met. Conversely, it provides that agreements to disapply those periods, or the 20-year prescriptive periods provided for by sections 7 and 8 of the 1973 Act, or to alter the effect of any of such periods, by any other means, are not competent.

Subsection (1) provides that agreements to lengthen the five-year prescriptive period, and the two-year prescriptive period which applies to extinguish obligations to make contribution between wrongdoers, are competent providing certain conditions are satisfied. These conditions are laid down in subsection (2): the appropriate prescriptive period must have started to run before the agreement to extend the period is made; the extension should be for no more than one year; and there may only be one extension of an agreement in relation to the same creditor and debtor. The extension binds only the parties to the agreement.

Subsection (3)(a) makes clear that where an agreement is reached for an extension of a prescriptive period, the prescriptive period will expire on the date agreed between the parties. Subsection (3)(b) clarifies that the extension of the prescriptive period affects only the length of the prescriptive period. It does not affect the operation of the remainder of the 1973 Act in relation to either the obligation or the prescriptive period. For example, it would be possible to interrupt prescription by a relevant claim or relevant acknowledgment during the agreed period of the extension.

Subsection (4) deals with the disapplication of, or alteration of, the operation of the five-year prescriptive period, the two-year prescriptive period which applies to extinguish obligations to

make contribution between wrongdoers and the 20-year prescriptive periods provided for by sections 7 and 8 of the 1973 Act (other than by means of agreement to lengthen certain prescriptive periods as discussed above). Agreements to do so, for example by shortening such periods, are not competent. The policy is that the basic statutory periods of prescription should be respected. This will not impact on the current practice in fields such as conveyancing where the parties enter into contractual limitation provisions. Such provisions do not extinguish obligations and, accordingly, are not provisions relating to prescription.

Section 14 Burden of proof

For clarity, section 14 inserts a new section 13A, dealing with the onus of proof, into the 1973 Act.

Subsection (1) of section 13A provides that the section applies to any proceedings for implementation of an obligation to which the five-year, 20 -year or two-year prescriptive periods (as provided for by sections 6, 7 and 8A respectively of the 1973 Act), or to any proceedings to establish a right to which section 8 (extinction of other rights relating to property by prescriptive periods of 20 years) applies.

Subsection (2) provides that where there is any question as to whether or not an obligation or right has been extinguished by prescription, it is for the creditor, in other words the enforcing party, to prove that the obligation or right has not been extinguished.

Subsection (3) extends the provision on burden of proof to proceedings for implementation of an obligation to make reparation for damage caused wholly or partly by defective products (section 22A).

1 March 2017