BRODIES' RESPONSE TO SLC CONSULTATION ON DRAFT PRESCRIPTION (S) BILL

Section 1 Obligations to pay damages and delictual obligations

We are content with the amendments proposed.

Section 2 Obligations related to contract

We are content with the amendments proposed.

Section 3 Statutory obligations

s.3(2) We are content with the amendments proposed.

s.3(3) We have no comment to make on the decision to exclude taxes and duties recoverable by the Crown; proceedings for forfeiture under the customs & excise Acts; and proceedings in respect of forfeiture of a ship from the 5 year prescription. We note that obligations to pay council tax and business rates will be within the scope of the 5 year prescription.

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

We have no comment to make on the merits of the amendments proposed

We wonder if the wording proposed will result in confusion (or questions as to interpretation) with three different expressions apparently being used in relation to issues of causation. Following amendment:

s.6(4)(a) of the 1973 Act will start by using the existing wording "by reason of";

s.6(4)(ii) will use the existing wording "induced";

s.6(4A) is a new sub-section introduced by amendment and it will use the term "cause".

The variety of terms used in the current version of the section did draw adverse comment from The House of Lords in BP Exploration [para 65].

Might the word "caused", with suitable re-phrasing of the section, be used in all three cases for clarity and consistency of language?

Section 5 Start point of prescriptive period for obligations to pay damages (s.11(2))

s.5(2) & (3) – We are content with the amendments proposed.

s.5(4) & (5)

In our response to the original consultation we favoured the solution proposed in the draft Bill (Option 3 in the Discussion Paper). s.5(4) & (5) are designed to effect that change.

We question the way in which knowledge of the three "facts" in proposed s.11(3A) may be interpreted. We have the following observations:

s.11 as amended will apply to "any obligation to pay damages…for loss, injury or damage…caused by an act or omission"

As we understand it, the intention is that prescription will start to run from the date when a pursuer first becomes aware, or could with reasonable diligence have become so aware, of each of the three facts. That is, all three of the facts.

They are referred to as "facts" which tends to suggest that they are objectively knowable without reference to any legal consequences which may flow from each fact.

(3A)(a) The occurrence of the loss injury and damage

We take it that the intention is that the expression "loss, injury and damage" here is intended to be "descriptive" in the sense that it will not be necessary for the creditor to be aware that the physical or financial event which has occurred and of which they have knowledge will in fact turn out to be loss, injury or damage. A creditor will simply need to have been aware that an "event" (whether physical or financial) has occurred which is subsequently classified as loss, injury or damage.

That appears to be the current law following Morrison v ICL as recently interpreted by the Inner House. The Supreme Court is due to consider the issue later this year. The effect of the proposed wording may change depending upon the result of that appeal.

(3A)(b) The act or omission that caused the loss, injury or damage

We take it that the words "caused the loss, injury or damage" are intended to identify the act or omission which the creditor knows or ought to know about. The creditor's knowledge of other acts or omissions which turn out not to be causally connected are not relevant to the commencement of the prescriptive period.

We assume it is not intended that the creditor must know/ought to know of the causal connection between a known act or omission and a known "event" (even an event which, at that stage, is not yet viewed as loss injury or damage) before the creditor can be held to have knowledge of each of the first two of the three facts? If we are correct in that assumption, can this be clarified? As currently drafted, we can foresee possible disputes regarding whether the creditor also needs to know about the causal connection, as a matter of fact. This would be a similar argument to that which arose in *Morrison* as to whether "caused as aforesaid" was merely descriptive.

We can also foresee disputes regarding the level of generality at which the creditor needs to be aware of the relevant act or omission. For example, in cases of defective services which cause loss, does the

creditor merely need to be aware of the relevant service having been provided, or does the creditor require to be aware that the service was *defective*. Section 11(3C) confirms that knowledge of legal actionability is not relevant or required. However, it might be argued that knowledge of the *defective* performance which caused the loss, injury or damage is a separate point and is not covered by section 11(3C).

(3A)(c) The identity of the debtor in the obligation to pay damages

This wording seems to carry with it the possibility that the creditor does not merely have to know the name of the party whose act or omission is the subject of (3A(b) but must also know that the party has an obligation to pay damages.

It may not be caught by the terms of proposed new subsection (3C) which provide that it does not matter for the purposes of s.11 (3) and (3A) whether the creditor is aware that the act or omission that caused the damage is actionable in law. Using the "obligation to pay damages" as a descriptive term to define the particular debtor whose identity must be known seems to add a level of uncertainty.

We consider that doubts expressed regarding (3A)(c) might be avoided if it read:

"(c) the identity of the debtor whose act or omission is referred to in (3A)((b)"

Alternatively the wording could reflect that used in new subsection (3C) so that it would read

"(c) the identity of the debtor against whom the creditor seeks to enforce the obligation to pay damages"

Interaction between the three limbs of 11(3A)

Is the creditor's knowledge of these matters to be assessed separately? Or are at least some of the three limbs inter-related. For example, in relation to limb (c), does the creditor require knowledge of the identity of the debtor *as the party who was responsible for the relevant act/omission*, thus linking it with limb (b)? Unless that link is required, limb (c) would appear to be capable of being discharged merely because the creditor was aware of the debtor's existence as a matter of generality. In contrast, it does not appear that knowledge of limb (a) falls to be assessed as being interdependent with any of the other limbs. We wonder whether this can be clarified as part of the drafting.

Proposed subsection s.11(3B)

We are content with the amendments proposed.

Section 6 Extinction of obligations by prescriptive period of 20 years

This section creates a definitive and final cut- off date for all obligations covered by s.7. Obligations will prescribe 20 years after the date on which the obligation became enforceable.

As we understand it the only change to the current law proposed in this section is that the making of a relevant claim during the 20 year period will not halt the running of the prescriptive period. The 20 year period will however be extended to allow any such relevant claim to be concluded.

On the assumption that this option is to be adopted in the Bill then we are content with the proposed amendments.

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

We have no comment.

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

We have no comment.

Section 9 Saving for other statutory provisions about prescription or limitation

We are content with the amendments proposed.

Section 10 Definition of "relevant claim"

We are content with the amendments proposed.

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

We are content with the amendments proposed.

Section 12 Definition of "final disposal" of relevant claim

We are content with the amendments proposed.

Section 13 Restrictions on contracting out

The proposal to introduce an ability to allow parties to extend the s.6 and 8A short negative prescriptive periods is welcome.

As far as the wording of the draft Bill is concerned the general rule contained in section 13(4) prohibits the general disapplication of section 6, 7, 8 or 8A by agreement and prevents parties agreeing to alter the operation of those sections and any other provision of the Act.

We agree with that general approach.

The only exception to the general rule is an agreement entered into by a creditor and debtor under section 13(1) to (3) to extend the prescriptive period.

The one year period and the allowance of a single extension

From the point of view of some of our litigators who are involved in construction disputes parties should be given the right to agree and put in place further extensions thereafter – albeit that each extension would again be limited to one year in length. Even if a maximum extension of one year is imposed there seems no particular reason, in their view, why parties could not agree extensions shorter than one year (each time).

The concept of extending the prescriptive period

The use of the word “extended” suggests to us that it is envisaged that a maximum of one year is being added on to the end of the usual prescriptive period. That is, the usual period will run and then, by agreement, it will be extended either to a specified date or for a specified period of time (as implied by section 13(3)(a)).

If we take s.6 of the 1973 Act as an example, whether the extension agreed is to a particular date or whether a period of time is added to the statutory prescriptive period, the extension must not result in the total prescriptive period exceeding 6 years.

Agreeing an extension to a particular date is the most attractive option since it brings with it absolute certainty. The problem for parties is that the precise commencement date for the prescriptive period may be uncertain. They cannot always be sure that in agreeing a particular date for the expiry of the extended prescriptive period they are agreeing to an extension which does not exceed one year.

For example, parties may assume on the evidence available to them at the time that loss, injury and damage was sustained on 1st January 2015 so that the first day of the relevant prescriptive period is 2nd January 2015. The last day of the prescriptive period (ignoring holidays and weekends for current purposes) will normally be 1st January 2020. They agree in 2019 that the prescriptive period will actually expire on 1st January 2021 – an extension of one year.

If it later becomes apparent that the loss, injury and damage was actually sustained on an earlier date then the agreed extension will fall foul of section 13(2)(b). The statutory prescriptive period will end sooner than parties had anticipated and the extension will in fact turn out to be for a period longer than one year.

The only way that parties can avoid that difficulty is by agreeing to add on a period of, say, one year to the existing statutory 5 year period. However, neither party is then provided with the certainty of knowing either the precise date from which their agreed extension starts to operate nor the date on which it will end. That is, of course, no different from the position under the statutory 5 year period but we think that greater certainty regarding the start and finish dates of the agreed period would be useful.

In our view it would be more helpful for section 13 to be structured to allow parties to agree to suspend the running of prescription for a particular specified period as opposed to extending the period. To reach that agreement there will not need to be any definitive knowledge of the correct start date.

Assuming a one year limit is imposed then a suspension can be agreed for one year at any point after commencement and prior to expiry of the prescriptive period. Parties will have the certainty of knowing the precise dates/period which will not count towards calculation of the 5 year prescriptive period.

We note that section 13 does not explicitly state that an agreement to extend the prescriptive period must be entered into prior to the statutory period expiring. There may be no need to do so since on expiry of the prescriptive period the obligation will no longer exist but there seems no reason not to make the position clear in s.13(2)(a).

Section 14 Burden of proof

We are content with the amendments proposed.

Additional comments

We note that the Bill does not clarify the law in relation to “relevant acknowledgement”. Clarity would be helpful given the scope for that particular device to be relevant in defect cases. Richardson v Quercus 1999 SC 278 tends to be the practitioners’ guide when, in fact, the legislation could be usefully updated.

We also note that the Bill does not address materiality. That issue was raised on question 9 in the consultation paper. Many of those responding to the consultation felt the issue should be addressed. Since the consultation closed the issue of materiality was addressed by Lord Doherty in Stewart Milne v Halliday Fraser [2016] CSOH 76. The Lord Ordinary proceeded on the basis that materiality is a threshold test. We appreciate the difficulties in dealing with “materiality” in any legislation but it would be useful to understand the thinking of the SLC in relation to that point.

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