

## RESPONSE TO THE ONLINE CONSULTATION ON THE WORKING DRAFT OF THE PRESCRIPTION (SCOTLAND) BILL

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### Comments

- (i) Sec 1 - prefer reference to "damages" as opposed "reparation";
- (ii) Sec 4 (2) - is this not prejudicial to those induced or is that covered under 4 (a) (ii)?;
- (iii) Sec 4 (3) – it is considered that this assists in terms of clarification;
- (iv) Sec 5 – we are in favour of cause of negligent act or omission as trigger for prescription purposes. Clarification is sought however as to whether require knowledge of loss in legal sense or rather require knowledge that there was (a) a loss (b) act or omission and (c) identity of debtor. Following on from that section 5(5) appears somewhat sensible in the main. It is, however, considered that certain areas require clarification:

- (1) 3(b) Is simple knowledge of the act or omission sufficient to commence the prescriptive period or does the creditor have to be aware that the act or omission that actually caused the loss identified at (a)?

By way of example, in the factual circumstances of *Gordon Trs v CRBP* and on the assumption that it was not known that the notices were defective, was knowledge of the issue of notices sufficient to constitute an act in terms of b) or would the period only commence at the date it was known that the notices were defective? It seems in many circumstances you could be aware of advice services provided where b) as knowledge of the advice and c) identity of advisor are met but be unaware that b) is connected to a loss if it is not revealed that the advice was negligent or otherwise incorrect.

- (2) 3(c) Is identity of the actual debtor in law required as surely tricky if disputed and rather matter for judicial determination? Is reference to a potential defender preferred?
- (3) Is knowledge of a causal connection between (a), (b) and (c) required to commence the prescriptive period or rather is simple knowledge of each of the factors (a), (b) and (c) all that is required?

- (v) Sec 6 - This sections could be particularly harsh for those affected in situations involving e.g. long terms leases and mortgages if there is status quo post 20 yrs and issue (e.g. title) only becomes apparent at the end of the term. It is not unusual for a borrower to remain with the same lender within the same property for in excess of 20 years on the basis of a 25 year mortgage term. If a mortgage is so serviced without default for 21 years and re-mortgage occurs during 22<sup>nd</sup> year which unveils lack of security/title etc what then?;
- (vi) Sec 13 – This section is of particular interest and concern. Does reference to the "period of no more than one year" add on to the supposed prescriptive date rather as a holiday type period/period of grace in any given period up until the claim prescribes? It appears to be similar to E&W equivalent of a standstill albeit more limited. However, the view being that it is not a matter for parties to agree the supposed prescriptive date and rather an issue for the court to determine? One concern being a situation whereby the respective parties agree an incorrect prescriptive date and one such party is prejudiced by such agreement?

Would it be preferable, to avoid any agreement of the relevant prescriptive period, to agree that the period of up to a year is simply discounted for the purposes of calculating prescription as opposed to extending the prescriptive period?