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RESPONSE FORM

DISCUSSION PAPER ON PRESCRIPTION

We hope that by using this form it will be easier for you to respond to the questions set out in the Discussion Paper. Respondents who wish to address only some of the questions may do so. The form reproduces the questions as set out in the summary at the end of the paper and allows you to enter comments in a box after each one. At the end of the form, there is also space for any general comments you may have.

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This response has been copied without any personal data which it contained.

Name:

«»

Organisation:

«Royal Incorporation of Architects in Scotland (RIAS)»

I have taken the RIAS Original response to the SLC Consultation on Latent Defects and reviewed it in the light of the SLC Draft Bill amending the Prescription and

Limitation (Scotland) Act 1973 relative to latent Defects, and have added a further response (underlined in the text) which has been circulated around the RIAS for comment.
Address:
Email address: «»

Summary of questions

1. Do you agree that the 1973 Act should provide that its provisions on prescription are not to apply to rights and obligations for which another statute establishes a prescriptive or limitation period?

(Paragraph 2.14)

Comments on Question 1
«[yes because: (i) where people are applying a statute it is to the statute that they go for time limits and procedures; (ii) some statutes cross the border and they take precedent under English Law and so should also take precedent under Scots Law; and (iii), as the Commission does, that they take precedence anyway and to make express provision would avoid ambiguity and doubt. It will mean that any cross border statutes will need to use provisions which are compatible with the 73 Act (such as the appropriate use of prescription and of limitation)]» See new Section 7A of Prescription and Limitation (Scotland) Act 1973 ("P&L(S)A") introduced by Section 9 of Draft Prescription (Scotland) Bill ("Draft Bill)

2. Do you agree that the 1973 Act should provide generally for rights and obligations arising under statute to prescribe under the five-year prescription?

(Paragraph 2.46)

Comments on Question 2
«[Yes, because of the reasons set out in the paper, in particular in the interests of clarity, for example, rights to interim payment under Housing Grants, Construction and Regeneration Act could be said to arise under statute, but the statute does not give the right directly, but requires that the contract make such provision, and if it does not, it is implied into the contract by statute. The right is therefore a contractual right, albeit the term is implied by statute. Thus it would be covered by Schedule 1]» See new paragraphs in Schedule 1 to P&L(S)A introduced by Section 3 of Draft Bill

3. If the 1973 Act were to provide generally for rights and obligations arising under statute to prescribe under the five-year prescription, are there rights and obligations which ought to be excepted from this regime?

(Paragraph 2.46)

Comments on Question 3
NO COMMENTS»

4. Do you agree that Schedule 1 paragraph 1(d) should refer not to obligations arising from liability to make reparation but to obligations arising from delict?

(Paragraph 2.59)

Comments on Question 4
«[Yes because there is no good reason why the limitation should be restricted to one form of delict]» See amendments to Schedule 1 to P&L(S)A introduced by Section 1 of Draft Bill

5. Do you agree that Schedule 1 paragraph 1 should include obligations arising from pre-contractual liability?

(Paragraph 2.77)

Comments on Question 5

«[Yes]» See addition of paragraph (fb) to Schedule 1 to P&L(S)A introduced by Section 2(2) of Draft Bill

6. Do you agree that Schedule 1 paragraph 1 should include rights and obligations relating to the validity of a contract?

(Paragraph 2.77)

Comments on Question 6
«[Yes]» See addition of paragraph (fa) to Schedule 1 to P&L(S)A introduced by Section 2(2) of Draft Bill

7. Are there other obligations to which Schedule 1 paragraph 1 ought to be extended?

(Paragraph 2.77)

Comments on Question 7
«We have no other obligations to add]»

8. Do you agree that it is appropriate to revisit the discoverability test of section 11(3)? If so, which option do you favour?

(Paragraph 4.24)

Comments on Question 8
«[Yes.]»

§ [Option (2) This has the advantage that time starts to run when the damage and its cause are known, and there is an incentive on the pursuer to find who is responsible, but the danger is that when in doubt the pursuer will sue everyone concerned just to be on the safe side.
Option (3) This has the advantage that the client is less likely to raise an action just to halt prescription, and any action will be more clearly focused, but the danger is that they have no incentive to focus any action against those responsible. Option (3) would be attractive as long as it was combined with a robust requirement that the prescriptive period started when the creditor knew, **or ought with reasonable diligence to have known**, the facts required to start the time running]

See new SubSection 11(3A) to P&L(S)A introduced by Section 5(5) of Draft Bill. *Option (3)* has been adopted by the SLC and the wording in SubSection 11(3) of P&L(S)A is retained postponing the start of the prescriptive period until the creditor first became, or could with reasonable diligence have become, aware of the facts set out in *Option (3)*.
It should be noted that, in relation to building defect cases, the requirement for physical damage caused by the debtors act or omission, will still be necessary before the short prescriptive period can start. (there may be circumstances where reliance upon defective advice, relative to buildings, could lead to loss, injury or damage immediately upon that advice being relied upon by the creditor – such as where a negligent survey is relied upon to purchase a defective building). However in both cases the short prescriptive period is subject to the 'discoverability' requirement.
The new SubSection 11(3B) to P&L(S)A introduced by Section 5(5) of Draft Bill allows for different prescriptive periods to apply as further facts are uncovered indicating that further debtors, not apparent at the beginning of any investigation, may have an obligation to pay damages. This is a circumstance which is likely to

occur in building defects cases where the complete list of potential delinquents may only be apparent upon further investigation.
The new SubSection 11(3C) to P&L(S)A introduced by Section 5(5) of Draft Bill makes clear that it should only be lack of knowledge of the facts listed in SubSection 11(3A), which with reasonable diligence could have been known, which postpones the start of the short prescriptive period and that a lack of awareness that such facts are actionable in law should not postpone the start of the short prescriptive period.
There is potential for confusion as to what constitutes the fact of the act or omission causing a loss, injury or damage by an identified debtor without considering whether or not such act or omission is actionable in law. It is normal, when there are building defects for the creditor to commission an expert to investigate the acts and/or omissions of several debtors to see if they caused any of the loss, injury or damage and any such investigation will concentrate on those acts or omssions which are actionable in law as if they are not then there will not normally be a legal remedy against the debtor available to the creditor. It remains to be seen how this is developed by the courts.

9. Do you agree that the 1973 Act should provide that loss or damage must be material before time starts to run under section 11(1)?

(Paragraph 5.17)

Comments on Question 9
«[Yes because, although this may delay the start of the prescriptive period, it would avoid premature actions to protect the creditors' rights. It is normal for buildings to have initial shrinkage and cracks and, to a lay person, these may be confused with long term settlement cracks due to defective structure. However if such defects persist and increase then it would be reasonable for the building owner to seek expert advice]» NO PROVISION IN BILL. As noted at paragraph 5.8 of SLC Discussion Paper on Prescription (“DP 160”) the courts normally interpret actionable damage as material and not trivial damage. However where there is gradual damage (such as settlement over time) it may be difficult to say when exactly the damage became material. Given the technical complexity of the issues it appears that the SLC have passed this over to the courts to solve on a case by case basis

10. Do you agree that the discoverability formula in section 11(3) should refer, for time to start running, to the need for the pursuer to be aware that he or she has sustained material loss or damage?

(Paragraph 5.17)

Comments on Question 10
«[Yes, as long as the test is an objective one based on such awareness as a person acting reasonably might have.]» NO PROVISION IN BILL. See comments above

11. Do you agree that the discoverability formula in section 11(3) should provide that the assessment of the materiality of the loss or damage is unaffected by any consideration of the pursuer’s prospects of recovery from the defender?

(Paragraph 5.17)

Comments on Question 11
«[Yes, because the materiality of the damage is unconnected with any prospects of recovery, which prospects are too subjective]» <u>NO PROVISION IN BILL. See comments above</u>

12. Do you agree that the present formulation of the test of "reasonable diligence" is satisfactory?

(Paragraph 5.23)

Comments on Question 12
«Yes, because there is some case law giving guidance on what 'reasonable diligence' means and because the expression is flexible enough to cover the many and various circumstances and to give the courts sufficient discretion. A more directive provision could hamper the courts]» <u>NO PROVISION IN BILL. RIAS agree with SLC approach</u>

13. Do you agree that the starting date for the long-stop prescriptive period under section 7 should be the date of the defender's (last) act or omission?

(Paragraph 6.20)

Comments on Question 13
«[Yes for the reasons set out in the discussion paper especially, in relation to building defects where physical damage is required to start prescription running (*Renfrew Golf Club*) leading to the possibility that, where there is a wrongful act, such as the under designing of a column, the prescriptive time limit only starts to run when there is physical damage (if the defect is discovered and remedied before damage occurs (as per *DoE v Thomas* Bates) does time ever start to run and is there a remedy in Delict (if the contractual remedy is barred)? This situation produces a cut off date which is neither clear (in that its starting point is unclear) nor final (as there is scope for arguing about the starting point). It also makes it difficult to obtain insurance cover for a liability of indeterminate length]» <u>See new Sub-Section 11(4) P&L(S)A introduced by Draft Bill Section 8 – This starts the long-stop prescription running from the date of the last act or omission (no need for physical damage to have occurred). It also, in relation to a continuing act or omission, starts prescription when that ceases. Thus, where there is building or design defect which can be remedied whilst the works are in progress then long-stop prescription will start when it is no longer possible to remedy it under the contract (see discussion relative to *Scottish Equitable* below)</u>

14. Do you agree that the long-stop prescriptive period under section 7 should not be capable of interruption by a relevant claim or relevant acknowledgment?

(Paragraph 6.25)

Comments on Question 14
«Yes, because of the reasons set out in the discussion paper. The rational for the longstop is to give certainty to the cut off to liability and to avoid stale claims.]» <u>See amendments to Section 7 P&L(S)A introduced by Draft Bill Section 6(2)(a) – the</u>

period once started can no longer be unterrupted by claims or acknowledgements.

15. Where a relevant claim is made during the long-stop period, do you agree that the prescriptive period should be extended until such time as the claim is disposed of?

(Paragraph 6.25)

Comments on Question 15
«Yes, but only relative to the relevant claim and any associated proceedings (such as third party actions). Any other unconnected claims should be subject to the fixed longstop. Otherwise an action commenced near the end of the longstop could be used to extend liability generally]» see amendments to Section 7 P&L(S)A introduced by Draft Bill Section 6 (2)(b) - Where a claim has been commenced before the end of the long-stop then the prescriptive period can be extended to allow the matter to be finally disposed of. Section 12 of the Draft Bill introduces a new Section 9A of P&L(S)A which defines 'final disposal'. The extension applies only to a relevant claim, already defined, relative to Section 7 (amongst others) in Section 9(1) of P&L(S)A

16. Do you agree that construction contracts should not be subject to any special regime in relation to the running of the long-stop prescriptive period?

(Paragraph 6.31)

Comments on Question 16
In relation to the comments in paragraph 6.27 on practical completion, sectional completion is the equivalent of practical completion (albeit for a section only) and in both cases they or their equivalents, have significant legal effects, especially in relation to commercial agreements such a agreements for lease or development agreements or finance agreements, as well as the legal effects they have under the building contract. They have the merit that under most building contracts the Works are complete at this stage (before this the Works can be varied to remedy any design defects. After this only defects arising from a failure to conform to contract can be remedied under the contract). A precedent has now been set with Part II of the Housing Grants Construction and Regeneration Act 1996 (as currently amended) which has already set up a special regime for construction contracts.
However, the main problems in relation to precription of rights and liabilities relative to latent defects associated with construction contracts are that: (i) commencement of both the long and the short (separate from the discovery principle) prescriptive periods is postponed until an indeterminate date unrelated to any wrong committed by the wrongdoer, but subject to the vagaries of the physical world (weather, gravity and other unexpected natural phenomenon) and that the time taken to discover such defects, relative to the short prescriptive period, is also indeterminate. Neither of these points allow for clarity or certainty with regard to liability and the ability to obtain insurance cover for such liability.
However if these points can be addressed under the general prescription regime then it would be preferable to have construction included as part of the general prescription regime rather than being in a ghetto of its own.]» The present proposal is to have the long-stop run from the date the act or omission occurred (or the last such date where there was more than one act or omission) or, where the act

ormission is a continuing one, when it ceased. In relation to construction, even without a special regime, this can lead to a number of different dates, depending upon the form of contract.

However in *Scottish Equitable v Miller Construction* [2001] ScotCS 214, the Inner House looked at prescription of rights arising under an earlier version of the current SBCC building contract. The claim involved was one for loss and expense under clause 26 and was submitted to arbitration over five years after practical completion but under 5 years after the issue of the last interim certificate and before the final account had been agreed and the Final Certificate issued. The arbiter had submitted a 'stated case' to the inner house for its opinion as to whether time started to run upon the issue of the Final Certificate or that the claim was only enforceable upon the issue of the last interim certificate. The court held that given the nature of this form of contract (sums only due as certified and interim certificates being interim and superseded by successive certificates up to the Final Certificate) the prescriptive period (in this case the 5 year period, but equally applicable to the 20 year period) could not run from an earlier period when delay was apparent but no ascertainment included in a certificate and that as each certificate superseded the previous one it created a fresh prescriptive period. "*The whole structure of the contract appears to us to allow such subsequent challenges, notwithstanding that a challenge on the same basis could have been made earlier, for more limited or different purposes. The availability of arbitration or even litigation for those earlier purposes, even if regarded as the assertion of an enforceable right, does not result, by the elapse of a prescriptive period, in loss of a separate right to challenge any subsequent certificate*" (paragraph 29).

It is therefore possible, depending upon the wording of the particular contract, to have a number of different dates when the last act or omission could be considered to have occurred as, under such a building contract, an ascertainment of loss and/or expense could be included in any certificate up to and including the Final Certificate and could be a different ascertainment under each such certificate. In relation to defects, these could be remedied at any stage up to the issue of the certificate of making good (and, one could argue, any financial adjustment to take account of defects could be made right up to the issue of the Final Certificate).

17. (a) Do you regard 20 years as the appropriate length for the prescriptive period under section 7?
    (b) If not, would you favour reducing the length of that period?

(Paragraph 6.34)

Comments on Question 17

This is a question for RIAS Insurers but we agree with the comments below:

The bulk of claims for damages are, at present, the subject of indemnification by insurance companies. In respect of insurance in respect of any professional liabilities then the cover which may respond is that in place not at the date of the wrongful act (or omission) but that in place at the date when any claim is intimated. Where the claim is directed against a continuing economic entity (or one which has inherited the liabilities of an earlier economic entity) then this should present no particular issue however a particular problem is presented in those cases where the professional person (for example an architect or a vet) operates as a sole practitioner. At the date of their retirement then their existing business generally closes and any continuing

insurance requires to be funded from retirement income on a run-off basis. A feature of the present legislation is that any such cover should be maintained for a period of 20 years following upon the date of retiral. Failure to do so would result in either the retired person or their estate becoming personally liable in respect of any claim presented. Many such sole practitioners find the economic burden of continuing to fund the premiums for professional liability cover from retirement income to be extremely difficult and any reduction in the long-stop prescriptive period would therefore be welcomed by them. It is noted that the long-stop period has been retained at 20 years. **This is more a matter for RIAS Insurance to comment upon.**

18. 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?

(Paragraph 7.23)

Comments on Question 18

«[Yes. This is already done in commercial construction contracts and professional appointments and could be related to PII cover. There should be a lower limit extending beyond completion of the contract or the services but again the insurers may be best placed to advise]»

In respect of claims arising out contractual obligations then there seems no good reason why the law should not respect an earlier decision on the part of the parties to adopt a separate prescriptive period whether shorter or longer than that prescribed by statute. That being the case there is no good reason for legislation to prescribe either a lower or upper limit in respect of the period which could be fixed by the parties themselves. See new Section 13 of P&L(S)A introduced by Section 13 of Draft Bill. The provisions allowing the extension of the short prescriptive period by agreement under strict conditions is meant to give parties a breathing space to negotiate a settlement and, if effective, could reduce the volume of litigation. It should be noted that otherwise the prescriptive periods, including the long-stop cannot be varied, however that does not stop parties agreeing to shorter contractual time bars (such as prohibiting parties raising actions relative to contracts after the expiry of a specified period).

19. 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?

(Paragraph 7.23)

Comments on Question 19

«[No. Whilst it is fine to have freedom to contract, parties often are not contracting on equal terms and there is a danger that professionals will be obliged to accept extensions to their liability. This would adversely affect the premiums and even the availability of their PII. However there is something to be said for stand still agreements to stop the short prescriptive period from running (as long as the long stop is unaffected) whilst the parties negotiate. However, this would only work in construction disputes if everyone involved entered into the agreement. Otherwise those on the perifery would need to raise actions just to protect their position.]» See the special provisions in the new Section 13 referred to above allowing limited

extension to the short prescriptive period. It should be noted that this can only be invoked with the consent of all and after the obligation has arisen.

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

(Paragraph 8.10)

Comments on Question 20
«[Yes. The case law appears sufficiently confused for their to be benefit from statutory clarification]» See new Section 13A of P&L(S)A introduced by Section 14 of the Draft Bill. Where there is doubt it is for the enforcing party to demonstrate that the obligation or right they wish to enforce has not prescribed

21. 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?

(Paragraph 8.10)

Comments on Question 21
«[The burden should fall on the pursuer to prove they have a right to vindicate because they are the party averring the breaches and/or wrongs and the damage flowing from them]» See new Section 13A of P&L(S)A introduced by Section 14 of the Draft Bill. Where there is doubt it is for the enforcing party to demonstrate that the obligation or right they wish to enforce has not prescribed

22. Do you agree that no discoverability test should be introduced in relation to obligations arising from unjustified enrichment?

(Paragraph 9.23)

Comments on Question 22
«[We have no strong views on this matter but are inclined to agree with Commission for the reasons stated in their discussion paper]»

23. 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?

(Paragraph 10.10)

Comments on Question 23
«[Yes]» see amendments to Section 6(4) and new Section 6(4A) of P&L(S)A introduced by Section 4 of Draft Bill

24. (a) Do you agree that “relevant claim” should extend to the submission of a claim in an administration?

(b) Do you agree that "relevant claim" should extend to the submission of a claim in a receivership?

(Paragraph 10.16)

Comments on Question 24
«Yes to both (a) and (b)» See amendments to Section 9(1) and 22A(3) of P&L(S)A introduced by Section 10 of Draft Bill

25. Do you agree that the words "act, neglect or default", currently used in the formula for identifying the date when an obligation to make reparation becomes enforceable, should be replaced by the words "act or omission"?

(Paragraph 10.20)

Comments on Question 25
«Yes, for the reasons given in the discussion paper (focusing on fact rather than looking at the legal liability)» See amendments to Section 11(1) & (2) of P&L(S)A introduced by Sub-Sections 5(2) & 5(3) of Draft Bill

26. Do you agree that the discoverability formula should incorporate a proviso to the effect that knowledge that any act or omission is or is not as a matter of law actionable, is irrelevant?

(Paragraph 10.24)

Comments on Question 26
«Yes. It is noted that sections 22B & 22C (relative to Limitation) contain similar provisions]» See new Section 11(3C) of P&L(S)A introduced by Section 5(5) of Draft Bill

27. Do you have any observations on the costs or benefits of any of the issues discussed in this paper?

Comments on Question 27
«[If the Longstop had a more certain starting point, and if any interuption of that period did not lead to the period starting again from scratch, then this could have an effect on the availability and cost of PII]» See amendments to Section 7 of P&L(S)A introduced by Sub-Section 6(2) of Draft Bill

General Comments
«Our only comment is to note that in section 9 (by way of section 4) 'appropriate proceedings' expressly includes arbitration along with court proceedings as interupting prescription. Should the status of adjudication under the Housing Grants Construction and Regeneration Act 1996 relative to the interuption of prescription be addressed?]» **Adjudication has not been addressed in the draft Bill**. The P&L(S)A as presently amended specifically refers to particular procedures under the Arbitration Rules introduced under the Arbitration (Scotland) Act 2010. Perhaps there should be something regarding Adjudication with reference to the default Scheme Rules introduced under the Statutory Adjudication Scheme for Construction Contracts (Scotland) Regulations1998 as presently amended.

Thank you for taking the time to respond to this Discussion Paper. Your comments are appreciated and will be taken into consideration when preparing a report containing our final recommendations.