Scottish Law Commission

promoting law reform

(SCOT LAW COM No 247)

Report on Prescription

report

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SCOTTISH LAW COMMISSION

Item No 7 of our Ninth Programme of Law Reform

Report on Prescription

To: Michael Matheson MSP, Cabinet Secretary for Justice

We have the honour to submit to the Scottish Ministers our Report on Prescription.

(Signed) PAUL B CULLEN, *Chairman*
C S DRUMMOND
D E L JOHNSTON
HECTOR L MACQUEEN
ANDREW J M STEVEN

Malcolm McMillan, *Chief Executive*
3 July 2017

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Abbreviations

1973 Act,

> Prescription and Limitation (Scotland) Act 1973 (c. 52)

1970 Report,

> Report on *Reform of the Law Relating to Prescription and Limitation of Actions* (Scot Law Com No 15 (1970)), available at: http://www.scotlawcom.gov.uk/files/5012/7989/7430/rep15.pdf

1989 Report,

> Report on *Prescription and Limitation of Actions (Latent Damage and Other Related Issues)* (Scot Law Com No 122 (1989)), available at: http://www.scotlawcom.gov.uk/files/3512/8015/1839/26-07-2010_1443_345.pdf

Discussion Paper,

> Discussion Paper on *Prescription* (Discussion Paper No 160 (2016)), available at: https://www.scotlawcom.gov.uk/files/3514/5614/9429/Discussion_Paper_on_Prescription_DP_No_160.pdf

Morrison,

> *David T Morrison & Co Limited v ICL Plastics Limited* [2014] UKSC 48

Johnston, *Prescription*,

> D Johnston, *Prescription and Limitation* (2nd edn, 2012)

MacQueen, “Latent defects”,

> H MacQueen, “Latent defects, collateral warranties and time bar”, 1991 SLT (News) 77-80, 91-93, 99-103

Mullany, “Latent Damage”,

> N Mullany, “Reform of the Law of Latent Damage”, (1991) 54 MLR 349

Chapter 1 Introduction

Introduction

1.1 Time limits are essential in any legal system. Prescription and limitation are the means by which Scots law gives them effect.

1.2 In order to make the scope of this Report clear, we begin with a few words about prescription and limitation generally. There are two kinds of prescription: negative prescription and positive prescription. Negative prescription establishes a time-limit within which a person who is aggrieved must raise his or her claim in court. If the time-limit is missed, the ability to pursue the claim is lost. This is because the right or obligation is extinguished completely once the prescriptive period has expired. Negative prescription is the subject-matter of this Report.

1.3 In positive prescription, the passage of time also has a substantive impact on rights. The difference is that, once the prescriptive period has been completed, a possessor who satisfies certain conditions acquires (rather than loses) property rights.

1.4 Limitation on the other hand is conceptually quite different from prescription. While, in common with negative prescription, it establishes a time-limit within which a person must raise a claim in court, the consequences if the time-limit is missed are different. The right or obligation is not extinguished. Instead, there is only a procedural barrier to raising proceedings. In Scots law limitation applies principally to actions for personal injuries. Since the Prescription and Limitation (Scotland) Act 1984 came into force on 26 September 1984, prescription has not applied to any action for personal injuries, and claims of that kind are affected only by the law on limitation of actions.

1.5 A topical example of the application of the law of limitation is the question of time limits for claims relating to historical sexual abuse. In response to a reference from the Scottish Ministers, in an earlier Report[1] we considered the question of prescription in that context under the pre-1984 law. The Scottish Government has recently consulted on limitation of claims of this kind, and the Limitation (Childhood Abuse) (Scotland) Bill has now been passed by the Scottish Parliament. Its purpose is to remove the three-year limitation period in relation to claims of that kind.

Scope of this Report

1.6 This Report is concerned solely with negative prescription. It is not a wholesale review of that area of the law but a review of certain issues within the law of negative prescription which have caused or may cause difficulty in practice.

1.7 Negative prescription plays an essential part in balancing individual interests on the one hand and serving the public interest on the other. Justice between the parties to a

[1] Report on *Personal Injury Actions: Limitation and Prescribed Claims* (Scot Law Com No 207 (2007)).

litigation means that after a certain lapse of time it is actually fairer to deprive a pursuer of a right than to allow it to trouble a defender. That is connected with concerns about stale or missing evidence and the difficulties facing a court in trying to administer justice in those circumstances. There is another dimension too: there is more to prescription than justice between the parties to a particular case. There is a wider public interest in having litigation initiated promptly if it is to be initiated at all. That is conducive to legal certainty. Even if in an individual case prescription may seem to involve hardship, as long as the law of prescription strikes a fair balance overall, it serves the wider interests of fairness, justice and certainty.

1.8 It is for the legislature to decide what the appropriate time-limits should be, and what should be the exceptions or qualifications to them. A well moderated law of prescription will serve the public interest by promoting legal certainty and the efficient use of resources. In this way it can make a valuable contribution to a strong sustainable economy.

Background to this project

1.9 In 1970 we published our Report on *Reform of the Law Relating to Prescription and Limitation of Actions*.[2] That led to the enactment of the Prescription and Limitation (Scotland) Act 1973 ("the 1973 Act"). The Act has over the years been substantially amended. We have also carried out further work on the subject of prescription. In particular, in 1989 we published a Report on *Prescription and Limitation of Actions (Latent Damage and Other Related Issues)*.[3] The recommendations put forward in that Report have not been implemented.[4]

1.10 Recently, the issue of prescription in relation to claims for latent damage has become topical. That follows the judgments of the UK Supreme Court in *David T Morrison v ICL Plastics*.[5] As a result of that case, the law on prescription in relation to claims for latent damage is not as it had previously been thought to be. One of the Justices in the UK Supreme Court urged that fresh consideration should be given to the recommendations we made in the 1989 Report.[6]

1.11 Against that background, the proposal that we should re-examine this and certain other aspects of the law of prescription attracted support in the responses to the consultation on the Ninth Programme of Law Reform.[7] It was duly included in the Programme, which was approved by the Scottish Government.

1.12 Our Discussion Paper on *Prescription* was published in February 2016.[8] We asked for views on a number of questions and are grateful to all those who took time to respond to the consultation. In March 2017 we published a consultation draft of the Prescription (Scotland) Bill (appended in revised form to this Report) and requested comments on it.

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[2] Scot Law Com No 15 (1970) (hereafter "1970 Report").
[3] Scot Law Com No 122 (1989) (hereafter "1989 Report").
[4] More recently, we have published a Report on *Prescription and Title to Moveable Property* (Scot Law Com No 228 (2012)).
[5] *David T Morrison & Co Limited v ICL Plastics Limited* [2014] UKSC 48 (hereafter "*Morrison")*.
[6] *Morrison*, at para [101] (Lord Hodge).
[7] Scot Law Com No 242 (2015), available at: http://www.scotlawcom.gov.uk/files/6414/2321/6887/Ninth_Programme_of_Law_Reform_Scot_Law_Com_No_242.pdf.
[8] Discussion Paper No 160 (2016) (hereafter "Discussion Paper").

During March and April 2017 we also met some of those with an interest in the project and heard their views on various points arising from the draft Bill. In formulating the recommendations set out in this Report, we have attempted to take all of these views into account. In what follows, where appropriate, we refer to consultation responses. They are published in full on our website.

Structure of the Report

1.13 The Report is split into seven further Chapters and four Appendices. Chapter 2 concerns the scope of the five-year and 20-year negative prescriptive periods. In that context, it examines the situation where statutes specify time limits for the particular areas which they regulate; and possible additions to and further exceptions from the five-year prescription. Chapter 3 puts forward recommendations for amending the discoverability test, that is to say the knowledge which a pursuer must have before the prescriptive period begins to run where damages are sought for loss or damage which was initially latent. Chapter 4 makes recommendations about the starting date of the 20-year prescriptive period in relation to obligations to pay damages, and how best to ensure that this prescription does operate as a true "long stop". Chapter 5 deals with the topic of contracting out of certain prescriptive periods and Chapter 6 makes a recommendation to clarify the issue of the burden of proof. The final substantive chapter, Chapter 7, covers some miscellaneous issues including the reformulation of section 6(4) of the 1973 Act (which deals with fraud, concealment and error), the definition of "relevant claim", and clarification of the effect of a relevant claim. Chapter 8 lists all the recommendations made in the previous chapters. Appendix A contains the draft Prescription (Scotland) Bill, Appendix B contains relevant extracts of the 1973 Act as that Act might read if the draft Prescription (Scotland) Bill were implemented, Appendix C lists those who responded to the Discussion Paper and Appendix D lists those who responded (in writing or in person) to the consultation on the draft Prescription (Scotland) Bill.

Legislative competence

1.14 The issues covered by this Report fall within the legislative competence of the Scottish Parliament. In the Discussion Paper we set out the detail of our reasoning on legislative competence in relation to three points. It may be helpful to summarise those points again here.

1.15 The first related to the question whether there should be express provision in the 1973 Act that, where another statute applies a period of prescription or limitation to a particular right or obligation, the 1973 Act should not apply.[9] We explained that, even if provision of this kind were regarded as changing the law, it would in our view be within competence owing to the terms of section 29(3) and (4) of the Scotland Act 1998 (on which see the next two paragraphs).

1.16 The second related to the question whether the 1973 Act should provide generally for statutory rights and obligations to prescribe under the five-year prescription.[10] Chapter 2 makes a recommendation to that effect, although for reasons explained there it is restricted

[9] Discussion Paper, paras 2.11-14.
[10] Discussion Paper, paras 2.15-46.

to statutory obligations to make payment. We pointed out that it is quite clear that, if provision of this kind were to be made, it would affect obligations that relate to reserved matters. The question was whether such a provision is permitted by the Scotland Act 1998. We observed that section 29(3) permitted it because the purpose of a provision of this kind would not relate to reserved matters; the purpose would relate to the Scots law of prescription. But that was not the end of the matter, since section 29(3) is subject to section 29(4).

1.17 The effect of section 29(4) is that modifications of Scots private law as it applies to reserved matters are outside competence unless the purpose of the provision is to make the law in question apply consistently to reserved matters and otherwise. The provision under discussion - that is, that the five-year prescription should apply to statutory obligations to make payment, unless they are expressly excluded from it - clearly falls within the scope of section 29(4), so we pointed out that the issue was whether it is saved by the exception. We concluded that it is: provision of this kind would deal consistently with all statutory obligations, whether they relate to devolved or reserved matters. We also noted that it appears to be precisely this sort of provision that section 29(4) is intended to permit; and that in commentary on the Scotland Act 1998 it has been suggested that section 29(4) is directed at "a general enactment making new private law or criminal law rules across the board and the aim is that such an enactment should not be held to be outside the competence of the Parliament."[11] The same applies to provisions in the draft Bill which amend section 22A (prescription of obligations under the Consumer Protection Act 1987).

1.18 The third point was the question whether the definition of a "relevant claim" should be extended so as to apply to a claim in a company administration or receivership.[12] We noted that, if viewed as relating to the law of insolvency, this provision would relate to a reserved matter (namely, schedule 5 section C2) and that it did not appear to be saved by the kinds of argument under section 29(3) and (4) mentioned above. Nonetheless our considered view was that provision of this kind would be within competence. First, because we did not think that it would properly be characterised as a provision dealing with insolvency. It is a rule about what kinds of claim interrupt prescription. That is not a reserved matter. Second, we took the view that provision of this kind would be permitted by virtue of schedule 4 paragraph 2(3), because the rule in question is not "special to a reserved matter". That provision too, as explained during the passage of the Scotland Bill, was intended to enable the Scottish Parliament to legislate on the general rules of Scots law across the board, excluding only certain specified issues and rules "which are special to reserved matters – those which result in a distinct and separate treatment of a reserved matter".[13]

1.19 In the course of consultation on the draft Bill we were also asked to comment on the legislative competence of one aspect of the section which applies the five-year prescription to statutory obligations to make payment, namely the proposed exclusion from that regime of obligations to pay taxes or duties recoverable by the Crown (including any penalty, interest

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[11] CMG Himsworth and CR Munro, *The Scotland Act 1998* (2nd edn, 2000), 41.
[12] Discussion Paper, paras 10.11-16.
[13] Himsworth and Munro, *The Scotland Act 1998* (2nd edn, 2000), 41; Hansard HL vol 592 col 821, 21 July 1998.

or other sum that is recoverable as if it were an amount of such taxes or duties) as well as certain proceedings for forfeiture.[14]

1.20 In our view that provision too is within legislative competence. The first reason for this conclusion relates to section 29(3), which we have already mentioned. In our view the proposed exception does not "relate" to a reserved matter, when that expression is properly construed. It may be worth recalling that the statement made by Lord Sewel during proceedings on the Scotland Bill spelled out the Government's intention that the courts should not interpret the word "relate" literally, since this would severely fetter the powers of the Scottish Parliament. As the Minister explained, a provision does not relate to reserved matters merely because it makes provision for purposes relating to devolved matters which incidentally affect reserved matters.[15] The provision under discussion here is a general provision about the prescriptibility of certain statutory obligations to make payment. We think it can be correctly described as not relating to reserved matters. Even if that is not correct, the following further arguments appear to us to support that view.

1.21 Second, the provision is intended to preserve the status quo, by ensuring that the extension of five-year prescription to statutory obligations to make payment does not apply to obligations to pay taxes or duties. As we note in our discussion of the substantive provision below, the current legal position is that obligations to pay taxes and duties recoverable by HM Revenue and Customs ("HMRC") and Revenue Scotland are not subject to the five-year prescription.[16] When one has regard to the effect of the recommended provision in all the circumstances, in our view it is outside the scope of a provision relating to a reserved matter, because the provision has in fact no effect on reserved matters.

1.22 Third, so far as section 29(4) is concerned, we reach the same conclusion, namely that the provision does not modify Scots private law as it applies to reserved matters, because it leaves the statutory obligations in question subject to the existing regime, which is prescription under the 20-year prescription only.

1.23 Fourth, paragraph 2 of schedule 4 of the Scotland Act provides that an Act of the Scottish Parliament cannot modify the law on reserved matters. For reasons already mentioned we take the view that the provision under question does not in fact modify the law relating to reserved matters at all. Instead, it may be thought that it falls within paragraph 7(1) of schedule 4, which provides that "Part I of this Schedule does not prevent an Act of the Scottish Parliament – (a) restating the law (or restating it with such modifications as are not prevented by that Part) …".

1.24 In the course of consultation the Department for Work and Pensions ("DWP") also suggested that, if there were to be a general five-year prescription of statutory obligations to make payment, it would be appropriate to make further exceptions from it in relation to

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[14] On the substantive proposal, see below paras 2.25-2.27.
[15] Hansard HL vol 592 col 819, 21 July 1998.
[16] Para 2.27; also Discussion Paper, para 2.26. While the case law referred to there is concerned with specific types of tax, the conclusion is reached on the general ground that liability to pay the tax in question did not fall under any of the headings in sch 1 para 1 (such as being an obligation of accounting). That conclusion appears to apply equally to any type of liability to taxation, since the taxpayer's obligation is simply to pay the sum assessed. *Cf Cullen v Advocate General for Scotland* [2016] CSOH 170 in relation to an (unsuccessful) argument that a claim to recover undue payments of income support was a claim for unjustified enrichment and so fell within the 1973 Act sch 1 para 1(b).

recovery of sums recoverable under certain social security, tax credit, and child support maintenance legislation.[17] These obligations are not currently within the scope of the five-year prescription because they do not fall under any of the headings in the 1973 Act schedule 1 paragraph 1. The points made in paragraphs 1.21-23 above in relation to preservation of the status quo are therefore equally applicable here.

Convention rights

1.25 It may be helpful to add some comment on European Convention rights, since they also touch on the issue of legislative competence. In our view nothing in the present Report is incompatible with Convention rights.

1.26 First, it is clear that rules of prescription are not *per se* incompatible with Convention rights. The Grand Chamber of the European Court of Human Rights has rejected the contention that the English law of adverse possession is incompatible with Article 1 of the First Protocol as an interference with the peaceful enjoyment of possessions: "The Court accepts that to extinguish title where the former owner is prevented, as a consequence of the application of the law, from recovering possession of land cannot be said to be manifestly without reasonable foundation. There existed therefore a general interest in both the limitation period itself and the extinguishment of title at the end of the period. … Such arrangements fall within the state's margin of appreciation, unless they give rise to results which are so anomalous as to render the legislation unacceptable."[18]

1.27 The jurisprudence of the European Court therefore accepts that extinction of property rights by prescription can be compatible with Article 1. The same should apply to the extinction of personal rights.

1.28 Second, compatibility with the Convention requires a legislative measure which does engage Article 1 to pursue a legitimate aim in the public interest and to strike a fair balance between the public interest and the rights of affected individuals. We are satisfied that the measures proposed here meet that test.

1.29 Third, we note that the European Court has found legislative measures to be incompatible with Article 1 where they have a retroactive effect which could not be justified when striking the balance between the general interest and individual interests.[19] Nothing proposed in this Report would have retroactive effect. The recommendations relate to the future only.

Commencement and transitional provisions

1.30 If the Scottish Government decides to implement the recommendations contained in this Report, it will clearly be important to make appropriate commencement and transitional provisions. It is therefore worth mentioning the provisions made in the 1973 Act as well as the recommendation made in our 1989 Report. First, in the 1973 Act the provision was that the substantive Parts of the Act should come into operation three years after the Act was

[17] For the substantive proposals, see paras 2.21 and 2.27 below.
[18] *JA Pye (Oxford) Ltd v United Kingdom* (2008) 46 EHRR 45 at paras [74] and [83].
[19] See eg *Stran Greek Refineries v Greece* (1995) 19 EHRR 293; *Pressos Compañía Naviera SA v Belgium* (1996) 21 EHRR 301.

passed.[20] That date was 25 July 1976. The 1973 Act also included a transitional provision relating to the computation of prescriptive periods: its effect was that time which occurred before 25 July 1976 could be counted towards the prescriptive period, but the whole prescriptive period could not pre-date 25 July 1976.[21] That provision was needed because the 1973 Act reduced the length of some prescriptive periods and introduced a new five-year prescriptive period in place of a variety of earlier prescriptive regimes.

1.31 Second, the draft Bill annexed to our 1989 Report (which has never been implemented) contained the following provision: "This Act shall not apply in relation to an obligation arising or right accruing from anything which occurred before the commencement of this Act." The Report gives no explanation of the reasons for this provision.

1.32 It seems to us that the provisions made in the draft Bill accompanying this Report which are in need of transitional arrangements are:

(i) provisions which apply the five-year prescription to rights and obligations to which it was previously inapplicable;[22]

(ii) the provision which advances the starting date of the 20-year prescription for obligations to pay damages to the date of a defender's act or omission (as opposed to the date on which loss flowed from it);[23] and

(iii) the provision that the 20-year prescriptions should not be amenable to interruption by relevant claim or acknowledgment (section 7 of the 1973 Act) or relevant claim alone (section 8).[24]

1.33 So far as the first point is concerned, we think it will be sufficient if an adequate transitional period is put in place, such as the three years for which the 1973 Act allowed. That would give ample time for a creditor in an obligation which had not previously been but now was subject to the five-year prescription to take steps to ensure that it was not extinguished.

1.34 In relation to points (ii) and (iii), we think that a provision such as was recommended in 1989 would be inappropriate. As we explain in Chapter 4, our recommendations for reform of the 20-year prescriptions are aimed at making them operate as true long-stop measures which cut off rights and obligations definitively. It seems to us that it would be undesirable if these measures were to come into operation only in relation to rights and obligations accruing or arising after commencement, since many years might pass before the effect of the recommended reform was felt at all. We therefore take the view that here too the best approach is to allow for an adequate transitional period, as was done in 1973. Since the draft Bill does not alter the length of any prescriptive periods, we do not think it need make provision of the kind made in the 1973 Act about how the periods are to be computed.

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[20] S 25(2).
[21] S 14(1)(a).
[22] Ss 1-3 of the draft Bill.
[23] S 8 of the draft Bill.
[24] Ss 6(2) and 7(2) of the draft Bill.

1.35 Sections 15 and 16 of the draft Bill contain powers for Scottish Ministers to make regulations including transitional, transitory or saving provisions. Our Discussion Paper did not invite views on what transitional arrangements should be put in place, and for that reason this Report does not contain a recommendation on the matter; and nor does the draft Bill make substantive provision about it. It may be that Scottish Ministers will wish to consult on this issue. Following any consultation, substantive transitional provision could of course be made in the Bill itself rather than in secondary legislation.

Business and Regulatory Impact Assessment

1.36 The Scottish Government requires a business and regulatory impact assessment to accompany proposed legislation. This is published on our website. We are grateful to those who provided information that assisted in its preparation. Its principal conclusions are:

- maintaining the existing law is not desirable;
- our recommendations can only be achieved by the introduction of new legislation;
- our recommendations would bring increased clarity, certainty and fairness and reduce the need to resort to court action; and
- the implementation of our recommendations would be likely to reduce costs.

Acknowledgments

1.37 We are grateful to all those who have assisted us in the course of this project. In particular, our thanks go to those who attended the seminar held on 25 June 2015, those who responded to the Discussion Paper, and those who responded to the consultation on the draft Bill whether in writing or in person. The knowledge and experiences shared with us and views expressed were of enormous assistance as we developed our policy and formulated our recommendations.

Chapter 2 The scope of the five-year and the 20-year negative prescriptions

Introduction

2.1 This chapter is concerned with the scope of the five-year and 20-year negative prescriptions. The 20-year negative prescription applies to all obligations other than those specifically excluded from it.[1] By contrast, the five-year negative prescription applies only to the obligations specified in paragraph 1 of schedule 1 of the 1973 Act.[2]

2.2 In the Discussion Paper we raised four main issues, the first of which is relevant to both the five-year prescription and the 20-year prescription. The other three apply only to the five-year prescription:

(i) whether the 1973 Act should state that its provisions are not to apply where another enactment makes provision for prescription or limitation in relation to particular rights or obligations;

(ii) whether schedule 1 ought to provide generally for the prescription of statutory obligations and, if so, whether that provision should be general or specific to certain kinds of statutory obligation;

(iii) whether schedule 1 paragraph 1(d) ought to refer to obligations arising from delict rather than obligations to make reparation; and

(iv) whether schedule 1 paragraph 1 ought to extend to a number of miscellaneous (non-statutory) rights and obligations.

Time limits in other enactments

2.3 Many statutes specify time limits for the particular areas which they regulate. For instance, there is a one-year limitation period for claims for loss of or damage to goods carried at sea;[3] there are 4 and 10 year periods of limitation for breach of planning control;[4] and there is a 6-year time limit on an action for delivery up of material infringing copyright or performance rights.[5]

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[1] For the 20-year prescription see further Ch 4.
[2] Other sections of the 1973 Act also contain rules of negative prescription which apply only to certain types of obligation (eg s 8A on obligations to make contribution between wrongdoers; s 22A on obligations arising from liability under the Consumer Protection Act 1987): we are not concerned with these here.
[3] Carriage of Goods by Sea Act 1971, sch, art III, para 6.
[4] Town and Country Planning (Scotland) Act 1997, s 124.
[5] Copyright, Designs and Patents Act 1988, ss 113 and 203.

2.4 There is no provision in the 1973 Act stating that it is not to apply where another enactment establishes a prescriptive or limitation period for a particular statutory right or obligation. By contrast, in England and Wales, section 39 of the Limitation Act 1980 provides precisely that.

2.5 In the Discussion Paper, we pointed out that, even without a provision of this kind in the 1973 Act, it seemed arguable on general principles of statutory construction that an enactment of a special nature (for instance, a statute governing carriage of goods by sea or planning or copyright) would take precedence over one of a general nature (the 1973 Act and its general provisions on prescription).[6] The time limit set out in the particular legislation would therefore apply, to the exclusion of the 1973 Act. Nonetheless we suggested that it would be conducive to clarity if this were to be spelled out in terms. We therefore asked consultees whether they agreed 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.[7]

2.6 All responses on this issue agreed with that suggestion. Brodies raised the question "whether it is intended that any such rights and obligations would be subject to the 20 year prescription or whether by disapplying the 1973 Act it is intended to make such rights and obligations imprescriptible and subject only to the specific statutory limitation period".

2.7 Our view is that a specific statutory prescriptive or limitation period should exclude any prescriptive period provided by the 1973 Act. There are several reasons for this.

2.8 First, it would be consistent with the general principle of statutory construction mentioned already.

2.9 Second, an example may help to show why we think this is the correct approach. Directive 2014/104/EU deals with private actions for enforcement of competition law. It makes its own provisions for limitation of actions of this kind, including specifying when time should start to run and the knowledge the claimant must have before that occurs.[8] It also stipulates that the limitation period must be not less than five years. The United Kingdom has transposed the terms of the Directive by making the Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017.[9] The provision made by these regulations is not identical to that of the 1973 Act. That poses the question, for those considering an action under the implementing regulations, what the appropriate regime of prescription or limitation is. For example, the regulations provide that the limitation or prescriptive period for a competition claim against an infringer begins on the later of (a) the day on which the infringement of competition law that is the subject of the claim ceases and (b) the claimant's day of knowledge.[10] The regulations also set out the facts by reference to which the claimant's day

[6] *Fisher v Brooker* [2009] 1 WLR 1764 at para [4]; *Martin v Most* 2010 SC (UKSC) 40 at para [135].
[7] Question 1, para 2.14.
[8] See in particular Directive 2014/104/EU article 10 and recital 36.
[9] SI 2017/385. Reg 2 and sch 1 para 4 insert a new sch 8A into the Competition Act 1998; Part 5 of that schedule deals with prescription and limitation.
[10] Sch 8A para 19(1).

of knowledge is established.[11] These facts are considerably more extensive than the awareness test set out in section 11(3) as understood following the decision in *Morrison*.[12]

2.10 The advantage of having a provision in the 1973 Act that it is not to apply where other primary or secondary legislation makes its own provision on prescription or limitation is this: it is at once clear that no problem arises from the fact that the provisions in the 1973 Act are different from those in that other legislation. This will avoid difficulties which might otherwise be cured only by the somewhat uncertain operation of the general principle of statutory construction which we mentioned earlier. To return to the competition-law example: suppose that, owing either to lack of knowledge on the part of the pursuer or to the suspension provisions of the Directive, the limitation period started to run a significant time after the breach of competition law first occurred. Then the minimum limitation period of five years might still not have been completed by the time the 20-year prescriptive period under the 1973 Act had run. If the right were extinguished by prescription, that might involve a conflict with the requirement in the Directive of a minimum five-year limitation period. Issues of this kind may arise only infrequently but, if it were made clear that a single regime of prescription or limitation applies to an obligation or action depending on its source, these difficulties could be avoided.

2.11 Equally, to adopt this approach would make it unnecessary to subject the 1973 Act to a process of continual amendment in order to keep up with legislative change elsewhere.

2.12 Third, for the same reasons, it does not seem to us that the provision excluding the application of the 1973 Act should distinguish according to whether the other legislation contains a limitation or a prescriptive period. The point of principle just made applies equally to both. The difference is that, if the 1973 Act is excluded, it follows that (to use the competition law example again), the right in question, while subject to limitation in accordance with the terms of the implementing regulations, will not be amenable to extinction by prescription. But it does not seem to us that it is necessary for all obligations to be subject to prescription: for example, obligations to make reparation for personal injuries are not. Statutory limitation provisions themselves reflect a judgment of the legislature that a right of action should be barred (rather than amenable to extinction by prescription) after a specified period of time. It is therefore far from clear that the general law of prescription should be superimposed on such provisions.

2.13 Fourth, we recommend that the provision excluding the application of the 1973 Act should apply regardless whether the other legislation takes the form of primary or secondary legislation. Again, the example above – and awareness of the fact that much important legislative change now takes the form of secondary legislation – illustrates why this is appropriate.

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[11] Sch 8A para 19(2) *"The claimant's day of knowledge"* is the day on which the claimant first knows or could reasonably be expected to know—
(a) of the infringer's behaviour,
(b) that the behaviour constitutes an infringement of competition law,
(c) that the claimant has suffered loss or damage arising from that infringement, and
(d) the identity of the infringer."

[12] For discussion see B. Rodger, "Implementation of the Antitrust Damages Directive in the UK: limited reform of the limitation rules?", (2017) 38 European Competition Law Review 219, 225-7.

2.14 We therefore recommend:

1. The 1973 Act should be amended to make clear that neither the five-year nor 20-year prescriptive periods will apply where an enactment other than the 1973 Act provides for a specific limitation or prescriptive period or that an obligation is imprescriptible or is not subject to any period of limitation.

(Draft Bill, section 9)

Statutory obligations to make payment

2.15 Paragraph 1 of schedule 1 of the 1973 Act spells out exhaustively the categories of obligations to which the five-year prescription applies; paragraph 2 lists certain obligations to which it does not apply. As we noted in the Discussion Paper, the consequence of this style of drafting is that, for the five-year prescription to apply to an obligation, it has to fall within one of the categories listed in paragraph 1. Whether a particular statutory obligation is subject to the five-year prescription therefore depends on whether, properly analysed, it falls into one of the specified categories. By contrast, in English law there is general provision for limitation of actions which are based on statutory obligations, subject to certain exceptions.[13]

2.16 As we explained in the Discussion Paper,[14] there are numerous statutory obligations which we think cannot be accommodated within the scope of schedule 1 paragraph 1. We drew attention to a number of general points, two of which are worth reiterating here. First, the consequence of drafting by reference to specified categories of obligations is that schedule 1 needs constantly to be amended: in recent years there have been numerous additions, in particular to take account of the legislation abolishing the feudal system and related reforms. Second, our review suggested that there are statutory rights and obligations which do not fall within the five-year prescription but where no policy grounds appear to explain or justify this.

2.17 Our provisional conclusion, on which the Discussion Paper invited comment,[15] was that it would be appropriate to introduce a general rule that statutory obligations prescribe under the five-year prescription. We suggested that it should apply to all kinds of statutory rights and obligations, not just obligations to make payment. We noted that the effect of this reform would be limited by two factors: the existing statutory lists of exclusions from the five-year prescription would remain in place;[16] and, if our recommendation mentioned in paragraph 2.14 above were accepted, there would also be no effect on statutory rights and obligations which were subject to their own specific time-limits. Legislative change of this kind would necessarily shift the emphasis to making express exceptions where appropriate. Among likely candidates for exceptions to the general rule we mentioned obligations to pay tax.

2.18 We therefore asked two related questions. The first was whether consultees agreed that the 1973 Act should provide generally for rights and obligations arising under statute to

[13] Limitation Act 1980, ss 8 and 9.
[14] Paras 2.25-43.
[15] Para 2.45.
[16] Sch 1 para 2; sch 3.

prescribe under the five-year prescription. The second was, assuming the 1973 Act were to provide generally for rights and obligations arising under statute to prescribe under the five-year prescription, whether there were rights and obligations which ought to be excepted from the regime.[17]

2.19 On the first question, all but one agreed that the 1973 Act should provide generally for rights and obligations arising under statute to prescribe under the five-year prescription. HMRC, while agreeing in general, expressed the view that "a longer prescriptive period is appropriate to sums due to HMRC". Morton Fraser also agreed but observed that introducing such a change "would have a significant effect on the debt collection functions of public authorities and may require changes to the operation of these functions". They therefore noted that it would be necessary for transitional provisions to be put in place to enable there to be a review of outstanding debts before any change came into force. Craig Connal observed that rights and obligations under statute may be infinitely variable and thought the proposals raised a range of potential complications of the sort raised in the Discussion Paper. We return to these points below.[18]

2.20 On the question whether there were any rights and obligations which ought to be excepted from the regime, several responses mentioned exceptions, notably obligations to pay taxes and duties; interest on unpaid tax and national insurance contributions; and obligations relating to forfeiture. Several responses stated that the existing exceptions from the five-year prescription (set out in schedule 1 paragraph 2 and in schedule 3) remained appropriate. Burness Paull (Dispute Resolution) pointed out that there should also be no effect on statutory rights and obligations which are subject to their own specific time limits.[19] Brodies commented that, of the instances given in the Discussion Paper, both obligations to pay child support maintenance and the right of a consumer to seek relief from a credit agreement were instances of the type of obligation that might have to be excluded from the five-year prescriptive period; much would depend on the terms of the draft Bill. The Law Society of Scotland regarded the question as difficult to answer from a legal standpoint and explained:

> "We would certainly think there are political reasons why, for example, council tax or business rates would not prescribe but we see no logical reason or legal reason why that ought to be. As we understand it, council tax and business rates are generally caught by long negative prescription but in England and Wales they 'prescribe' after 6 years in the usual way."

2.21 In the course of consultation on the draft Bill, we received two further comments about exceptions to the proposed regime. First, HMRC stated that the statutory exception for taxes and duties should be drafted in such a way as to cover not only taxes and duties in the narrow sense but also National Insurance contributions[20] and various other debts recoverable by the Crown as if they were taxes and duties.[21] Secondly, DWP put forward for consideration exceptions relating to the recovery of social security overpayments and social

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[17] Questions 2 and 3, para 2.46.
[18] Paras 2.22-23.
[19] This co-ordinates with our first recommendation; see para 2.14 above.
[20] NICs are recoverable as if they were tax: see s 16(1) of the Social Security Contributions and Benefits Act 1992 and para 16(1) of sch 4 of the Social Security (Contributions) Regulations 2001 (SI 2001/1004).
[21] See HMRC Debt Management and Banking Manual para 450010 (https://www.gov.uk/hmrc-internal-manuals/debt-management-and-banking/dmbm450010).

security debt, tax credit overpayments, and child maintenance debt. DWP pointed out that social security and child maintenance debt recovery often takes place over long periods of time; as a result DWP were concerned by the proposal that a five-year period should apply instead of the current 20 years, in particular since it is not clear whether recovery of sums by compulsory deduction from benefit payments or earnings would interrupt the prescriptive period. DWP also pointed out that in England and Wales the ordinary six-year limitation period does not apply to such debts.[22] Child maintenance debts are also not subject to the six-year limitation period.

2.22 There is evidently strong support for the proposal that statutory rights and obligations should generally be subject to the five-year prescription, subject to ensuring that appropriate exceptions and transitional provisions are in place. We have, however, given further thought to the appropriate scope of this kind of provision. That has led us to the view that, although limitation provisions of similar breadth have long been applicable in England and have apparently been applied without difficulty, to apply the five-year prescription to all statutory obligations of any kind might give rise to problems. The policy reasons mentioned in the Discussion Paper for applying the five-year prescription to obligations which are essentially of a private-law character yet which are given expression on a statutory rather than common-law basis seem to us to remain valid. But it is important that any reform of this kind should not extinguish rights, powers and duties that arise in the public sphere. In particular, it would clearly be inappropriate for our recommendations to extend to an obligation to perform a duty which a statute requires a Minister or public body to perform. We note that the Interpretation and Legislative Reform (Scotland) Act 2010 provides that a duty imposed by an Act of the Scottish Parliament or a Scottish instrument may be performed from time to time;[23] this clearly speaks against the application of prescription in that context.

2.23 It therefore becomes necessary to distinguish between statutory rights of a private-law nature on the one hand and a public-law nature on the other. We have not identified a touchstone for the purposes of drawing this distinction which seems to us sufficiently robust to withstand close scrutiny. We have therefore concluded that our original proposal should be reduced in scope. Our recommendation is that the draft Bill should bring within the scope of the five-year prescription only statutory obligations to make payment, insofar as they are not otherwise excluded. This more limited recommendation seems still to serve a worthwhile purpose: it addresses the important issues mentioned above in paragraph 2.16, albeit only in relation to obligations of payment.[24]

2.24 We therefore recommend:

2. The five-year prescription should extend to all statutory obligations to make payment in so far as they are not expressly excluded.

(Draft Bill, section 3 (1) and (2))

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[22] Limitation Act 1980, s 38(11), which excludes sums recoverable under (a) Part 3 of the Social Security Administration Act 1992; (b) section 127(c) of the Social Security Contributions and Benefits Act 1992; and (c) Part 1 of the Tax Credits Act 2002.

[23] S 7(2).

[24] It also means that there is no need to consider making an exception for the consumer's right to relief from a credit agreement (mentioned in para 2.20 above) since that is not an obligation to make payment.

Exclusions from the five-year prescription

2.25 So far as exceptions are concerned, in light of the responses received we recommend that the following should be excluded from the general rule, with the consequence that they will not be subject to the five-year prescription:

(i) the existing exclusions in schedule 1 paragraph 2 and schedule 3 of the 1973 Act;

(ii) obligations subject to their own statutory prescriptive or limitation period;[25]

(iii) obligations to pay taxes and duties that are recoverable by the Crown, including any penalty, interest or other sum that is recoverable as if it were an amount of such taxes or duties, and obligations underlying proceedings for forfeiture under the customs and excise Acts or proceedings for forfeiture of a ship;

(iv) any obligation to pay sums recoverable under Part 3 of the Social Security Administration Act 1992; section 127(c) of the Social Security Contributions and Benefits Act 1992; or Part 1 of the Tax Credits Act 2002;

(v) any obligation to pay a sum of child maintenance arising under the Child Support Act 1991 and regulations made under it; and

(vi) any obligation to pay council tax or non–domestic rates and any surcharge, fees, expenses or other sum recoverable in connection with its enforcement.

2.26 We should make it clear that our recommendations in relation to taxes and duties apply to taxes and duties collected by both HMRC and Revenue Scotland.

2.27 The current legal position is that obligations to pay taxes and duties recoverable by HMRC and Revenue Scotland are not subject to the five-year prescription. That is also the position in England and Wales.[26] The recommended exception will leave this position unchanged. The exception applies not only to taxes and duties but also to penalty or interest which is recoverable as if it were a tax or duty. This would include obligations to pay National Insurance contributions. Further exceptions are made for obligations underlying proceedings for forfeiture under the customs and excise legislation and proceedings for forfeiture of a ship. These, and the definition of "ship" employed in the draft Bill, align Scots law with the position in England and Wales.[27] We also see the force of the observations made by DWP,[28] and our recommendations therefore except obligations to pay sums recoverable under certain social security and tax credit legislation, and any obligation to pay child support maintenance under the Child Support Act 1991, from the five-year prescription. Again, this means that Scots law remains aligned with the law of England and Wales.

[25] See Recommendation 1 above at para 2.14.
[26] Limitation Act 1980, s 37(2)(a).
[27] Limitation Act 1980, s 37(2)(b) and (c).
[28] See para 2.21 above.

2.28 In relation to exceptions from the general rule, two further points arise. First, council tax or business rates. In consultation on the draft Bill we drew attention to the fact that the draft Bill did not at that time except from the five-year prescription obligations to pay council tax or business rates. We received a number of responses from local authorities. Among the points they made were that the policy reasons which justify excepting taxes payable to the Crown from the five-year prescription apply equally to taxes payable to local authorities; and that, while it was acknowledged that as a rule five years should be sufficient time to collect these taxes, there were cases in which local authorities faced difficulty in collecting the taxes when they fell due as well as arrears of tax from previous years.

2.29 We note that, while it is generally assumed that taxes payable to local authorities do not at present fall within the scope of the five-year prescription, there appears to be no authority on the point. It seems to us at least possible that they are in fact within the scope of the five-year prescription.[29] For present purposes, however, the issue is whether it is appropriate that the draft Bill should exclude such taxes from the five-year prescription.[30] We have come to the view that it is. As already noted, essentially the same policy reasons as apply to taxes payable to the Crown apply here. Both kinds of taxes benefit from the same special provisions for enforcement by diligence and by summary warrant procedure.[31] It seems appropriate that their amenability to prescription should also be the same.[32]

2.30 Second, we have considered whether further exceptions should be introduced. We do not recommend that this should be done. A powerful general reason is that we do not think it desirable to introduce further complexity into the law by embarking on lists of exceptions. These would almost inevitably be elaborate, and this would undo much of the good that our recommended simplification of the law is intended to achieve.

2.31 We therefore recommend:

3. The following should be excluded from the five-year prescription:

(i) obligations to pay taxes and duties that are recoverable by the Crown, including any penalty, interest or other sum that is recoverable as if it were an amount of such taxes or duties, and obligations underlying proceedings for forfeiture under the customs and excise Acts or proceedings for forfeiture of a ship;

(ii) any obligation to pay sums recoverable under Part 3 of the Social Security Administration Act 1992; section 127(c) of the Social Security Contributions and Benefits Act 1992; or Part 1 of the Tax Credits Act 2002;

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[29] See 1973 Act, sch 1 para 1(a)(vi).

[30] This is a devolved matter, since one of the exceptions to the reservation of fiscal, economic and monetary policy is "Local taxes to fund local authority expenditure (for example, council tax and non-domestic rates)": Scotland Act 1998, schedule 5 head A section A1 (second exception).

[31] Crown taxes: Finance Act 2008, s 128; local authority taxes: Local Government Finance Act 1992, s 97(5) and sch 8 para 2.

[32] This appears to us to cover the point made by Morton Fraser referred to in para 2.19 above.

(iii) any obligation to pay child support maintenance arising under the Child Support Act 1991 and regulations made under it; and

(iv) any obligation to pay council tax or non-domestic rates and any surcharge, fees, expenses or other sum recoverable in connection with its enforcement.

(Draft Bill, section 3(1) and (3)(b))

Obligations arising from delict

2.32 The next issue is whether, in relation to obligations arising from delict, the five-year prescription ought to be reformulated. In the Discussion Paper we pointed out that in schedule 1 of the 1973 Act there is no reference to delict as a source of obligation: instead it refers to "any obligation arising from liability (whether arising from any enactment or from any rule of law) to make reparation".[33]

2.33 Although "delict" and "reparation" are often regarded as synonymous and although our 1970 Report (which led to the 1973 Act) refers throughout to actions, rights and obligations based on delict, nonetheless the 1973 Act refers to "reparation" and the case law on schedule 1 construes the word "reparation" narrowly, to mean only payment of damages. The consequence of this interpretation of the expression "reparation" is that obligations arising from delict other than the obligation to pay damages do not fall within the five-year prescription. In the Discussion Paper we gave various examples.[34] We therefore raised the question whether schedule 1 ought to refer not to obligations arising from reparation but to obligations arising from delict.[35]

2.34 Our preliminary conclusion was that obligations arising from delict generally – and not just obligations to pay damages – should fall within the five-year prescription, unless there was some good reason why they should not. The effect of such a reform would be reduced by the existing exclusion from the five-year prescription of "obligations relating to land" (in relation to which we did not propose any change). We asked whether respondents agreed that schedule 1 paragraph 1(d) should refer not to obligations arising from liability to make reparation but to obligations arising from delict.[36]

2.35 All but one response to this question agreed. The Senators of the College of Justice added a caveat that it was not clear to them whether we were proposing that the five-year prescription should apply to the obligation of trustees to restore property to a trust estate. We are happy to clarify that no such proposal was intended. We agree with the analysis in *Hobday v Kirkpatrick's Trustees*[37] to the effect that a claim of this kind is a claim not for damages but for restoration of property. That being so, it does not fall within schedule 1 paragraph 1.

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[33] Sch 1 para 1(d).
[34] Para 2.53.
[35] A subsidiary question, if this question were answered in the negative, would be whether it would be preferable for the Act to refer to obligations to pay damages rather than obligations to make reparation.
[36] Question 4, para 2.59.
[37] See *Hobday v Kirkpatrick's Trs* 1985 SLT 197.

2.36 The Law Society of Scotland considered this proposal to be logical, as otherwise the choice of potential remedies available means that causes of action could persist long after a party had arranged his or her affairs on the basis that the claim had prescribed.

2.37 The Faculty of Advocates agreed with the policy but suggested it would be more appropriate for schedule 1 paragraph 1(d) to remain unchanged and for a further provision to be added to encompass delictual obligations other than the obligation to make reparation. Brodies also suggested additional separate provision for delictual obligations and that:

> "[i]t might also be helpful to expand Schedule 1 paragraph (1)(d) to cover all obligations to make reparation irrespective of the source of the obligation (so as to encompass obligations arising under both contract and delict). That would have the advantage of effectively giving obligations to make reparation their own regime courtesy of Sch 1 and s.11".

2.38 We have concluded that it is appropriate to recommend (i) a revised provision referring not to reparation, but to any obligation to pay damages regardless of the source of the obligation; and (ii) a new provision which brings within the scope of the five-year prescription any obligations arising from the law of delict which do not otherwise fall within the 1973 Act, schedule 1 paragraph 1.

2.39 We therefore recommend that:

> **4. Paragraph 1 of schedule 1 of the 1973 Act should be amended to the effect that the five-year prescription, in addition to applying to any obligation to pay damages (whatever the source of the obligation), should extend to any obligation arising from delict.**
>
> (Draft Bill, section 1)

Obligations arising from delict: continuing wrongs and discoverability

2.40 The Faculty also commented on one of the consequential points raised in the Discussion Paper,[38] that it might be appropriate to extend section 11(2) (continuing wrongs) and section 11(3) (discoverability) beyond obligations to pay damages to obligations arising from delict. The Faculty pointed out that, if an obligation was contractual or arose from unjustified enrichment, then there would be an inconsistency if the discoverability and continuing wrong provisions applied only to obligations arising from delict. Where an obligation could be located in both contract and delict, this could result in very similar obligations having different prescriptive periods.

2.41 On section 11(2) and 11(3) Brodies took a different view:

> "… [I]t can easily be accepted that the current 5 year period, with its slightly flexible start date, is long enough for any damages claim. We are not sure though that the same can necessarily be said of a right of reduction or specific implement. Should a pursuer who has suffered from fraud or negligent misrepresentation lose the right to reduce the resultant contract after only 5 years? When is that 5 year period to commence? What is the status of a contract which one party has been induced to

[38] Para 2.58.

enter into by fraud/negligent misrepresentation but has taken no steps to reduce within the 5 year prescriptive period? These questions can perhaps all be dealt with by careful drafting but do illustrate the potential for problems arising from the expansion of the application of the 5 year prescriptive period from mere reparation to the more general 'obligations arising from delict'. It may be that the proposals outlined in para 2.58 of the Discussion Paper regarding continuing wrongs and postponement of the start of the prescriptive period will deal with any difficulties."

2.42 We have considered further whether the provisions for postponing the start of the five-year prescriptive period where there is a continuing act or omission (section 11(2)) or where the pursuer is unaware of certain facts (section 11(3)) should apply to obligations arising from delict other than obligations to pay damages. Our conclusion is that they should not.

2.43 First, it is important to note that in the law as it currently stands there are different basic starting dates for obligations to pay damages and other obligations. For example, an obligation to abate a delict (such as nuisance) becomes enforceable when the delict is committed; but the obligation to pay damages prescribes only from the date of loss. Similarly, an obligation to perform under a contract becomes enforceable when the contract says it does and it prescribes from that time; but prescription runs against a claim for damages under the same contract only when loss has flowed from a breach of the contract.

2.44 Second, the question arises whether section 11(2) should apply to non-damages obligations. If there is a continuing omission to do something and that constitutes a delict, it might seem reasonable that the right to interdict that delict should begin to prescribe only when it has ceased. But by then there is no need for an interdict. The same is true of contract: if there is a continuing omission to implement a contractual term, it does not make much sense to say that the right to seek implement should begin to prescribe only when the omission to implement it has ceased. By parity of reasoning, if there is to be no derogation from the basic rule for claims for interdict or implement, there should be none for claims for reduction, which is the obverse of implement. While some oddities may arise from having different prescriptive periods in relation to reduction and damages, as noted above the reality is that in the existing law damages are already subject to a different regime. Our conclusion is that it is unnecessary to have any equivalent of section 11(2) for these types of obligation.

2.45 There is also a question whether section 11(3) should apply to non-damages obligations. This arises only for section 6. It can be ruled out on principle for section 7, given that that is a long stop; and indeed under the current law section 11(3) has no application to section 7.[39] Take the examples of abatement of a nuisance or reduction of a contract: is it reasonable to say that the right to seek abatement or reduction should start to prescribe only when the pursuer has knowledge of specified facts? If so, what facts?

2.46 It is clear that the relevant knowledge cannot be knowledge of the section 11(3) facts, since they relate to loss, injury or damage. Here, by definition, there may not be any of those things. The question is: what would the relevant knowledge be? Presumably, it would have to be knowledge of the fact of a nuisance (or of a ground for reduction of a contract), but not knowledge of the actionability as a matter of law of that nuisance (or ground for reduction).

[39] See s 11(4).

2.47 We think it is difficult to identify any principled basis on which there should be postponement of the starting date for prescription on these grounds, unless the law were to be reformed generally to the effect of making the default starting date for prescription the date of knowledge of the cause of action, rather than (as it now is) the date when an obligation became enforceable. In the Discussion Paper, in discussing unjustified enrichment, we concluded that a reform of this broad scope should not be recommended, since it might be seriously detrimental to legal certainty.[40] We remain of that view. Accordingly, we conclude that section 11(3) should apply only to obligations to pay damages. This is the current law.

Schedule 1 and some miscellaneous rights and obligations

2.48 The final issue about the scope of schedule 1 which we raised in the Discussion Paper is whether it should be extended to include a number of non-statutory rights and obligations. In our review we identified only three cases where we thought it would potentially be appropriate for this to be done.

2.49 *(i) Third party rights in contract*. Schedule 1 paragraph 1(g) applies to "any obligation arising from, or by reason of any breach of, a contract or promise". It is not certain that third party rights under a contract are covered by this expression. In our Report on that subject we have already recommended that the schedule should be amended so as to make it clear that they are.[41] We therefore make no further recommendations about that here.

2.50 *(ii) Pre-contractual liability*. Many legal systems recognise the possibility of liability arising at the pre-contractual stage. Scots law does so too.[42] If parties have been negotiating a contract, the expectations to which their pre-contractual dealings give rise may found liability. If one in good faith incurs 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, the law may recognise a liability to reimburse that wasted expenditure.[43] Elsewhere a doctrine of this kind is better known as *culpa in contrahendo*.

2.51 For reasons more fully explained in the Discussion Paper[44], we came to the view that pre-contractual liability does not fall within schedule 1 paragraph 1 as it currently stands. Since we saw no reasons of policy why such liability should not prescribe under the five-year prescription, we provisionally proposed that it should. We therefore asked whether consultees agreed that schedule 1 paragraph 1 should include obligations arising from pre-contractual liability.[45]

2.52 All but one response to this question agreed that it should. The Law Society of Scotland suspected that this was not a common problem given the regular use at least in

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[40] Para 9.22.
[41] *Review of Contract Law* - Report on *Third Party Rights* (Scot Law Com No 245 (2016)), paras 6.38-40. The recommendation is being implemented by the Contract (Third Party Rights) (Scotland) Bill 2017, s 10.
[42] *Walker v Milne* (1823) 2 S 379.
[43] *Dawson International plc v Coats Patons plc* 1988 SLT 854, 865-6. In *Khaliq v Londis (Holdings) Ltd* 2010 SC 432 at paras [26] and [37]-[38] the court expressed doubts about whether this type of liability was still part of Scots law, a suggestion which is subject to trenchant criticism by M Hogg and H MacQueen, "Melville Monument liability: some doubtful dicta", (2010) Edin LR 451.
[44] At paras 2.69-71.
[45] Question 5, para 2.77.

commercial practice of entire agreement clauses or clauses excluding reliance on pre-contractual representations. Brodies commented that careful consideration would be needed as to the commencement date. The Faculty of Advocates agreed with the proposal in principle but also observed that the modern law is unclear and that it might not be appropriate for legislation about it to be passed in the field of prescription: it was suggested that it would be more appropriate for the law to be developed by the courts or by other primary legislation.

2.53 Our recommendation is that obligations of this kind should be subject to the five-year prescription. In that event, the start of the prescriptive period would, as for other obligations, be the date on which they became enforceable. That would appear to be the date on which the pursuer incurred expenditure in reliance on the defender's representations or conduct to the effect that there was a contract between them. In relation to the question whether or not the modern law is clear, it is true that the case of *Khaliq v Londis Holdings Ltd*[46] has cast some doubt on the existence of this kind of liability. Earlier cases had expressed no such reservations. Liability of this kind is a standard feature of continental codes and reflects a widely shared perception that there are cases in which good faith requires that expense incurred by one party in reliance on the representations or conduct of another should be made good by the other. It would seem odd if this kind of liability were subject to a prescriptive period different from the one that applies to contractual and delictual obligations generally. It does not seem to us that there is any reason to hold back from extending the five-year prescription to such obligations: this does not in any way pre-empt the development (or otherwise) of the doctrine by the courts. It simply extends the five-year prescription to apply to any such obligations from the date on which they became enforceable.

2.54 *(iii) Error, innocent misrepresentation, and setting aside transactions*. The five-year prescription relates to rights and obligations rather than to actions or remedies. The action or remedy ceases to be available because the right or obligation on which it is founded ceases to exist.

2.55 In the Discussion Paper we gave the example of setting aside a contract on grounds of innocent misrepresentation.[47] In this situation damages are not available. The only remedy is reduction of the contract. Since the misrepresentation was innocent, it does not amount to a delict. There may well be no unjustified enrichment either. So far as contract is concerned, while the right to reduce a contract in these circumstances is a right under the general law of contract, depending on the particular facts and the terms of the contract, it may not be possible to describe it as a right "arising from a contract". Similarly, in relation to contracts vitiated by error, while certain types of error make a contract voidable, we pointed out that the right to reduce a contract on those grounds did not appear to be a right "arising from a contract" which would always fall within the scheme of schedule 1 paragraph 1.

[46] 2010 SC 432.

[47] See para 2.73. Setting aside of deeds at least in relation to land appears to be in a different position, because they (or at least some of them) appear to fall within the scope of the term "obligation relating to land": Sch 1 para 2(e).

2.56 We therefore raised the possibility of introducing into schedule 1 paragraph 1 an additional category of prescriptible right or obligation relating to the validity of a contract[48] or, alternatively, making it clear that the five-year prescription applies not just to rights arising from "a contract" but to rights that arise under the general law of contract. (By rights arising under the general law of contract we had in mind error, innocent misrepresentation and setting aside transactions; we did not intend to refer to pre-contractual liability.) We mentioned that a possibility would be to follow a route similar to that taken in England and Wales, where section 32(1)(c) of the Limitation Act 1980 makes specific provision for actions "for relief from the consequences of a mistake". We therefore asked whether consultees agreed that schedule 1 paragraph 1 should include rights and obligations relating to the validity of a contract.[49]

2.57 All but one respondent to this question agreed that it should; some noted that clarification would be welcomed. The Senators of the College of Justice agreed and noted "that it is undesirable in principle that transactions should be amenable to reduction without limit of time".

2.58 The Faculty of Advocates disagreed, taking the view that reform would create considerable additional complexities and the possibility of unjust results and that these disadvantages outweighed the advantages of the suggested reform.

2.59 We have given further thought to these issues. We are not persuaded that the disadvantages of the proposed reform outweigh its advantages. On the contrary: we agree that it is undesirable in principle that transactions should be amenable to reduction without limit of time. It is also important to note the limited scope of the proposed reform. As the drafting of the recommended provision makes clear, what is brought within the five-year prescription is "any obligation relating to the validity of a contract, not being an obligation falling within any other provision of this paragraph". Other provisions in schedule 1 paragraph 1 already apply to obligations arising from delict[50] and from unjustified enrichment.[51] This reference to the other provisions of schedule 1 paragraph 1 therefore removes a potential overlap with delictual obligations (such as cases of fraud or negligent misrepresentation) as well as cases which would properly be dealt with under the law of unjustified enrichment (such as adjustment of the rights of the parties to a void contract).

2.60 The existence of these other provisions also appears to us to support the conclusion that, on grounds of consistency, the reform proposed is appropriate. If the rights of parties under a void contract are already subject to the five-year prescription, it is difficult to see why the rights of a party affected by an innocent misrepresentation should not be. In the first case, the materiality of the error is such as to exclude parties' consent, while in the second it is not. But no reason of principle seems to justify the law of prescription adopting a different approach in one instance from the other.

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[48] See, by way of example, Limitation Act 1980, s 32(1)(c). It is now settled that, for an action to fall into this category, mistake must be an essential ingredient in the cause of action: *FII Group Test Claimants v HMRC* [2012] 2 AC 337.

[49] Question 6, para 2.77.

[50] Sch 1 para 1(d) – on the existing wording, this applies only if they relate to damages. Our recommendations would extend the five-year prescription to other delictual obligations.

[51] Sch 1 para 1(b).

2.61 We therefore recommend:

5. The following should be brought within the scope of the five-year prescription:

(i) Any obligation to reimburse expenditure incurred in reliance on a representation about the existence of a contract; and

(ii) Any obligation relating to the validity of a contract.

(Draft Bill, section 2)

Other rights and obligations?

2.62 The final question asked about the scope of schedule 1 was whether there were other obligations to which schedule 1 paragraph 1 ought to be extended.[52]

2.63 None of the responses suggested any further extensions to the scope of schedule 1 paragraph 1, and, accordingly, we make no recommendation in that regard.

[52] Question 7, para 2.77.

Chapter 3 Section 11(3) of the 1973 Act and the discoverability test

Introduction

3.1 Scots law, like many other legal systems, operates with a basic period of prescription which runs from the date on which loss flowed from a defender's act or omission. The period is five years.[1] But it is widely recognised that it is unsatisfactory and unjust to have a basic regime for prescription under which people who have suffered loss as a result of another's negligence or wrongful act may, before they even know they have a claim, lose it owing to the operation of prescription. Scots law, in common with many other legal systems, therefore provides some mitigation of the strict rules of prescription, by postponing the start of the prescriptive period until the pursuer has a degree of knowledge about the existence of the claim.

3.2 A critical question is precisely what knowledge is relevant for these purposes. In Scots law that is a matter of the correct construction of section 11(3) of the 1973 Act. Until the decision of the UK Supreme Court in *David T Morrison & Co Limited v ICL Plastics Limited*,[2] there was a more or less consistent line of decisions of the Scottish courts to the effect that section 11(3) postponed the start of the five-year prescriptive period until the date on which the pursuer was aware both (a) that he or she had sustained loss and (b) that the loss had been caused by fault or negligence.[3] On the other hand, the start of the prescriptive period was not postponed until the pursuer knew the identity of the defender (although clearly, given that knowledge of fault or negligence was needed, in some but not all cases this awareness would accompany awareness of the fault or negligence).

3.3 As we explained in the Discussion Paper, following the judgments in *Morrison* the authoritative interpretation of section 11(3) is that the start of the prescriptive period is postponed until the creditor knows of the fact that he or she has sustained loss, injury or damage – but nothing more. This interpretation of section 11(3) has given rise to concern in practice and, as we noted in Chapter 1, one of the Justices of the UK Supreme Court urged that fresh consideration should be given to the recommendations about discoverability made in our 1989 Report.[4]

Options

3.4 We take it for granted that on grounds of fairness there needs to be some discoverability provision such as section 11(3). In Chapter 4 of the Discussion Paper we

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[1] 1973 Act, s 6.
[2] [2014] UKSC 48.
[3] *Dunfermline District Council v Blyth & Blyth Associates* 1985 SLT 345; *Greater Glasgow Health Board v Baxter Clark & Paul* 1990 SC 237*; Kirk Care Housing Association Ltd v Crerar & Partners* 1996 SLT 150; *Glasper v Rodger* 1996 SLT 44*; ANM Group Ltd v Gilcomston North Ltd* 2008 SLT 835*; Pelagic Freezing Ltd v Lovie Construction Ltd* [2010] CSOH 145.
[4] *Morrison*, at para [101] (Lord Hodge).

suggested that there were four main options, namely to postpone the start of the prescriptive period:

(1) until the creditor knows of the fact of the loss; or

(2) until the creditor knows of the facts (a) of the loss and (b) of the act or omission which caused it; or

(3) until the creditor knows of the facts (a) of the loss and (b) of the act or omission which caused it and (c) the identity of the person who caused it; or

(4) until such time as seems to the court to be just and reasonable having regard to all the circumstances of the case.

3.5 After discussing these options, we came to the preliminary view that it would be desirable to adopt Option (3) as the discoverability test under section 11(3). We therefore asked consultees whether they thought it appropriate to revisit the discoverability test of section 11(3). If they did think it appropriate, we asked which option they would favour.[5]

3.6 Of the responses to this question, a majority favoured revisiting the discoverability test. Option 4 attracted no support. The other options attracted the following responses.

3.7 *Option 1*. Craig Connal raised the question "what is the purpose of the 5-year period?". He mentioned two possibilities: (i) that the prescriptive period does not start "until a conclusion is reached that the loss has been caused by an actionable wrong''; (ii) "that the purpose of the 5 years is to allow the party to investigate the known loss, ascertain whether it is actionable and then commence proceedings". He questioned why, once a pursuer had come to a view about whom to sue, he should then still have five years to do so. That led him to favour Option 1 failing which, reluctantly, Option 2.

3.8 *Options 2 and 3*. The Senators of the College of Justice noted that their impression following the decision in *Morrison* is that there is "considerable unease that section 11(3) may unduly favour the interests of potential defenders to the disadvantage of pursuers". They stated that it was inappropriate for them to express any firm policy preference but suggested that Option 2 deserved closer attention. They pointed out that Options 1, 2 and 3 were points on a continuum and that, following consultation, the general view might be that Option 2 resulted in a fairer balancing of interests than the other options. They added that they agreed with the point made in the Discussion Paper that deciding which option is most appropriate must depend on examining the checks and balances in the system as a whole; and, in particular, that regard should be had to the combined effect of the discoverability test and the rules governing the long-stop prescription. If the long-stop period were to be reduced significantly, that would be likely to strengthen the case for Option 3.

3.9 The Faculty of Advocates saw merit in both Option 2 and Option 3. It commented that Option 2 had the advantage that it was widely understood to represent the law prior to *Morrison*. Furthermore, the five-year period should give the pursuer ample time to identify the relevant party and raise an action. Option 3 was regarded as a logical reformulation,

[5] Question 8, para 4.24.

although it raised the prospect of delaying the date from which prescription commenced. The Faculty also expressed reservations about how Option 3 would interact with reasonable diligence and asked how a pursuer who becomes aware of one of the facts must act thereafter.

3.10 Burness Paull (Construction and Projects) were of the view that either Option 2 or Option 3 would be acceptable. CMS favoured revisiting the test and emphasised that the most important objective was certainty.

3.11 *Option 3*. In addition to the three responses already mentioned which saw merit in this option, Option 3 was favoured outright in seven responses.[6] The Law Society of Scotland thought that the case law following *Morrison* could have a "somewhat harsh (and in places unfair and illogical) result" and concluded:

> "It would seem unfair for a party to have a claim prescribe where there was no awareness on their part of one of the three key elements for a claim to succeed and the absence of any one of those (the defender, the awareness of loss and awareness of act or omission) would make drafting an action problematic."

RIAS commented that Option 3 would be attractive provided it was combined with a robust requirement relating to reasonable diligence.

3.12 *None of the above*. Three responses were not in favour of revisiting the discoverability formula. BLM were of the view that *Morrison* provided legal certainty. Clyde & Co commented that *Morrison* provided clarity and balanced the rights of pursuer and defender: if there was any merit in revisiting the test, it was simply in order to clarify the statutory language: Option 1 was favoured. Charles McGregor thought the suggestion in the Discussion Paper that Option 1 involved potential unfairness not just to pursuers but also to defenders was misplaced or at least overstated. He pointed out that modern forms of communication mean that parties can investigate not only the physical cause of any loss but also legal liability much more quickly than in the past. He suggested that five years from the date on which the creditor knows of the fact of the loss is a sufficient period in which to make a proper assessment of where responsibility is likely to lie. Option 1 had the advantage of being the clearest and most easily applied of the options under consideration and so was less likely than the others to generate litigation about the operation of the prescriptive period.

3.13 As is apparent from the preceding paragraphs, there is a clear majority in favour of revisiting the discoverability test as it is now understood following *Morrison*. The reason for doing so is not that the current test is unclear: indeed it may be that the current law (what we describe as Option 1) is the simplest and clearest of the available options. The reason for revisiting the test is fairness: there is a perception that the current law is "somewhat harsh", and that it has given rise to "considerable unease" about whether it strikes a fair balance. We therefore conclude that the test does need to be revisited.

3.14 We have given further thought to the question whether to recommend Option 2 or Option 3, accepting that they represent points on a continuum. The fact that Option 2 is widely understood to represent the law prior to *Morrison* does not appear to us to point

[6] Morton Fraser; Burness Paull (Dispute Resolution); NFU Mutual; Brodies; Zurich; FSCM; and the Law Society of Scotland.

towards adopting it. The reality is that it has already been necessary for those concerned with matters of prescription to adapt to the new post-*Morrison* position. We think there would be reason to return to the pre-*Morrison* position only if it were thought to be fairer than or otherwise preferable to the other options.

3.15 On balance we have come to the view that Option 3 is preferable. No doubt it is true, as Burness Paull (Construction and Projects) observed, that the most difficult task is usually identifying why something has gone wrong rather than who caused it. Identifying why something has gone wrong, often by means of expert evidence, may sometimes at the same time identify who is responsible. In cases of this kind the choice between Option 2 and Option 3 will not make a practical difference.

3.16 Nonetheless, we think that on balance Option 3 is to be preferred, for the following reasons. First, there is the logical point that section 11 is concerned with the date on which an obligation to make reparation became enforceable. It is odd to speak of an obligation being "enforceable" before the pursuer knows whom to sue. The identity of the defender is, as the Law Society of Scotland put it, one of the three "key elements" for raising a claim.

3.17 Second, in cases in which the difference between Option 2 and Option 3 does lead to a different outcome, considerations of fairness seem to us to point to postponing the start of the prescriptive period until the pursuer is aware of the identity of the defender. Here we also bear in mind that the comparative material briefly reviewed in the Discussion Paper predominantly follows Option 3.[7]

3.18 Third, the apparent generosity, so far as a pursuer is concerned, of Option 3 as compared with Option 1 needs to be seen in the context of two significant limitations. The first is that the discoverability test is subject to a test of reasonable diligence, so a court may find that the relevant date for the purposes of section 11(3) is not the date on which the pursuer had actual knowledge of the three elements but instead an earlier date on which he or she could in the exercise of reasonable diligence have had that knowledge. The second is that obligations to make reparation are subject to the long-stop prescription of section 7 of the 1973 Act. While considerations of discoverability may extend the prescriptive period, there is always a definite time-limit on a defender's liability. As noted earlier, it is important that there should be a balance in the system of prescription as a whole: that requires the discoverability test to be seen in the wider context of the rules governing the long-stop prescription too.[8]

3.19 In terms of the recommended discoverability test, the intention is that the creditor must be aware (actually or constructively) of both (i) the fact of loss, injury or damage and (ii) its factual cause by an act or omission.[9] These are matters of fact not law, and the creditor's awareness or otherwise of the legal significance of these facts is not relevant to the application of the test. In the same way, knowledge of the identity of the person whose act or omission has caused the loss, injury or damage is knowledge of a fact; it does not matter whether the creditor is aware that the act or omission that caused the loss, injury or damage is actionable in law. Where the act or omission is the act or omission of more than one

[7] Paras 4.8-16.
[8] See below Ch 4.
[9] *Cf Morrison* at para [87] per Lord Hodge.

person, if the creditor gains knowledge about the identity of one person earlier than that of another, the starting point for prescription for each person will be different.

3.20 In a recent case the issue has arisen whether creditors are aware of "loss, injury or damage" when they know that they have incurred expenditure but do not know that it was caused by the act, neglect or default of the debtor.[10] In that case the pursuers knew that they had incurred a liability to their solicitors in the form of legal expenses but they argued that, since they thought they were simply paying for the solicitors' services, they did not know that they had suffered "loss" within the meaning of section 11(3), until such time as they became aware that the legal expenses had been incurred as a result of the solicitors' breach of duty. At the time of publishing the present Report, that case is under appeal to the UK Supreme Court. We do not know how the Court will determine the question, which relates of course to the existing wording of section 11(3). Our view, so far as the draft Bill attached to this Report is concerned, is that the recommended new test addresses this point by requiring that there be awareness of the factual cause of loss by an act or omission. If creditors are aware that they have incurred expenditure but do not know that the reason they incurred it was an act or omission of the debtor (as opposed, for instance, to simply paying the debtor's invoice for services rendered), then they do not yet have the awareness necessary for time to start to run against them under the recommended test.

3.21 We therefore recommend:

6. The discoverability formula currently set out in section 11(3) of the 1973 Act should be replaced by a new formula to the effect that, in relation to obligations to pay damages, before the five-year prescriptive period begins to run the creditor must be aware, as a matter of fact, (i) that loss, injury or damage has occurred; (ii) that the loss, injury or damage was caused by a person's act or omission; and (iii) the identity of that person. Whether the creditor is aware that the act or omission that caused the loss, injury or damage is actionable in law should be irrelevant.

(Draft Bill, section 5(1), (4) and (5))

Act or omission

3.22 As indicated by the preceding paragraph, the revised discoverability formula is set out in section 5 of the draft Bill attached to this Report. Section 5 also implements two further proposals, which we raised in the Discussion Paper,[11] namely (i) the replacement of the statutory expression "act, neglect or default" with "act or omission"; and (ii) provision that knowledge about the actionability of an act or omission is irrelevant.

3.23 These proposals were originally put forward in our 1989 Report. The first is set out in the following quotation from that Report:[12]

[10] *Gordon v Campbell Riddell Breeze Paterson LLP* 2016 SC 548.
[11] Paras 10.18-24 of the Discussion Paper.
[12] 1989 Report, para 2.15 (footnote omitted).

> "2.15 We propose that the use of the words 'act, neglect or default', as they arise at present under section 11 of the 1973 Act should be replaced by the words 'act or omission'. This proposal if implemented will establish consistency with the language adopted by the limitation rules applicable to personal injury claims arising under section 17 of the 1973 Act, thus helping to minimise fragmentation in this area of the law."

3.24 As noted elsewhere in the 1989 Report,[13] the language of act and omission also has the advantage of going "some way towards excluding knowledge of the defender's liability in law from the discoverability formula" and focusing the test more clearly on matters of fact. The 1989 Report made a recommendation to that effect, which we support. We therefore asked consultees whether they agreed 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".[14]

3.25 Of the fourteen respondents who answered this question, twelve (including the Senators of the College of Justice and the Law Society of Scotland) were in agreement.

3.26 The Faculty of Advocates was not in agreement, being of the view that the meaning of "act, neglect or default" is well settled. The substitution of the words "act or omission" would be likely to give rise to litigation.

3.27 We propose to proceed with our recommendation. We are not persuaded that the introduction of "act or omission" will cause any difficulty: the terms are quite clear. Another point which speaks in favour of making the change is that the existing formula has a rather archaic air about it. By contrast, the words "act" and "omission" represent ordinary English usage and should be clear to members of the public generally.

3.28 We therefore recommend:

7. The words "act, neglect or default", currently used in section 11 of the 1973 Act should be replaced by the words "act or omission".

(Draft Bill, section 5(1), (2) and (3))

Knowledge that an act or omission is actionable

3.29 The second proposal derived from the 1989 Report was that the discoverability formula should incorporate a proviso to the effect that knowledge that any act or omission is or is not actionable as a matter of law is irrelevant.[15] Again, we support this recommendation, if only for the avoidance of doubt. We therefore asked consultees whether they agreed 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.[16]

3.30 Of the fourteen respondents who answered this question, nine (including the Senators of the College of Justice and the Law Society of Scotland) were in agreement.

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[13] 1989 Report, para 2.55.
[14] Question 25, para 10.20.
[15] 1989 Report, paras 2.52-55.
[16] Question 26, para 10.24.

3.31 The Faculty of Advocates was of the view that such a proviso is unnecessary, because the interpretation of section 11 is well settled on this point.

3.32 We propose to proceed with our recommendation. We are influenced by the substantial support for it. We accept that the point appears to have been settled by the case law. Nonetheless we attach importance to improving, where possible, the clarity of the legislation. In this instance we think there is much to be said for spelling out what the law is rather than assuming that it is well understood.

3.33 We therefore recommend:

8. The discoverability formula should incorporate a proviso to the effect that knowledge that any act or omission is or is not actionable as a matter of law is irrelevant.

(Draft Bill, section 5(1) and (5))

Further issues about discoverability

3.34 In Chapter 5 of the Discussion Paper we asked four further questions relating to the detailed workings of the discoverability test. The first three were concerned with materiality, and the fourth with reasonable diligence.

Materiality and the test for knowledge

3.35 In the Discussion Paper we pointed out that, for a system of prescription to operate fairly, in the context of a well-established rule that all damages must be sued for in a single action,[17] it seems appropriate that the prescriptive period should begin only when the creditor has sustained material (rather than trivial or minimal) damage. This is in practice how the courts interpret the legislation. While we recognised the complexity involved in drafting a suitable definition of "material" damage, we raised the question whether the legislation should state this requirement expressly.

3.36 In the Discussion Paper we sought views on the following preliminary proposals:

(i) that statutory provision should be made to the effect that time starts to run under section 11(1) of the 1973 Act only where the loss or damage sustained is material;

(ii) that the discoverability formula should refer to the need for a pursuer to be aware that he or she has sustained material loss or damage; and

(iii) that it should be stated in terms that the materiality of the loss or damage is unaffected by any consideration of the pursuer's prospects of recovery from the defender.[18]

[17] *Stevenson v Pontifex & Wood* (1887) 15 R 124.
[18] See Questions 9 to 11, para 5.17.

3.37 Opinion was divided. Eight of fifteen responses agreed with the first proposal, namely that statutory provision should be made to the effect that time starts to run under section 11(1) of the 1973 Act only where the loss or damage sustained is material. Three did so with some qualification, essentially to the effect that in any given case it may be difficult to advise or determine what is material.[19] The Faculty of Advocates expressed agreement, pointing out that the "situation where any loss, however minor, can commence the running of the prescriptive period can produce harsh results for pursuers"; the Faculty also described the sort of test that might work satisfactorily, namely a test that referred to loss which was not trivial or *de minimis*.

3.38 Six responses disagreed.[20] The concerns expressed were in essence that any qualification of the terms "loss" or "damage" would not be conducive to certainty and could give rise to unnecessary complexity with attendant cost; that it is impossible to define "material" adequately; that arguments about that might give rise to uncertainty and delay; and that the assessment of damage should be objective, whereas introducing materiality raised the likelihood that it would be determined on a subjective basis. While neither agreeing nor disagreeing, Morton Fraser commented that any statutory definition of "material" would need careful consideration.

3.39 The responses to the second proposal, namely that the discoverability formula should similarly make reference to the need for the pursuer to be aware that he or she has sustained material loss or damage, were along the same lines. Of the fifteen respondents, eight agreed, Charles McGregor adding that it should be made clear that the test should not simply be subjective but, preferably, objective and therefore incorporate a reference to the "ought reasonably to have known" formula. RIAS also favoured an objective test. Six respondents disagreed, referring to their answers to the previous question, and Morton Fraser reiterated the comment that any statutory definition of "material" would need careful consideration.

3.40 There was substantial agreement on the third proposal, namely that it should be stated in terms that the materiality of the loss or damage is unaffected by any consideration of the pursuer's prospects of recovery from the defender. As the Senators of the College of Justice put it:

> "…[T]he assessment of materiality is an assessment confined purely to the extent of the loss which has been sustained and has nothing to do with the prospects of recovery from the defender".

Of the fifteen respondents, fourteen expressed their agreement. But of these fourteen six were opposed (as they had explained in their answers to the two previous questions) to the notion that reference to materiality should be introduced into the legislation at all.

3.41 We have given further thought to the issues of materiality focused in each of these questions. As we noted in the Discussion Paper, as a matter of fact the courts appear routinely to interpret the 1973 Act to the effect that the prescriptive period begins only when

[19] Burness Paull (Construction and Projects); Charles McGregor; Faculty of Advocates.
[20] BLM; Clyde & Co; Craig Connal; FSCM; NFU Mutual; Zurich.

the pursuer has sustained material as opposed to trivial or minimal damage.[21] So it might be thought that there is no need for legislative intervention. Nonetheless it is important to note that the Senators of the College of Justice thought that "clarification would be useful".

3.42 We have therefore approached the issue by asking whether we can devise a test that would represent clarification of the law. The difficulty lies in devising a test that works fairly and effectively and does not at the same time introduce uncertainty and the prospect of an increase in litigation exploring what the test means.

3.43 It is not clear to us how the introduction of a test of materiality would (as some of the responses suggest) make it more likely that the assessment of damage would become subjective rather than objective. But we do recognise the force of other points put forward in opposition to the introduction of a test of materiality. Even an objective test of materiality of damage is not free from difficulty: it still raises the question what, objectively, a reasonable person would have done in the circumstances. The facts of individual cases are infinitely variable, so one cannot be sure of anticipating all the problems with which a statutory test may be confronted. It may be difficult to apply the same test of materiality to physical and non-physical defects. As the Faculty of Advocates noted, where there is more than one head of damage, especially where some of the damage is consequential, the application of a test of materiality is likely to be more difficult than it would be in a simple case with one head of damage.

3.44 It is clear that no statutory test can obviate the risk that it will give rise to argument and litigation about the meaning or scope of the test. On balance we have come to the view, against the background of a reasonably well-settled approach to materiality in the case law and the difficulty of devising a clear and useful test, that we should not make any recommendation for legislative change on this issue.

3.45 We therefore recommend:

9. There should be no legislative change by introducing a test of materiality in the context of the discoverability formula.

Reasonable diligence

3.46 The existing test in section 11(3) makes reference to "reasonable diligence". As part of the balancing of the interests of pursuer and defender, it is widely accepted that the test ought to take account not just of what the pursuer actually knows but of what he or she would have known, had he or she acted with reasonable care and attention.

3.47 In the Discussion Paper we mentioned that our 1989 Report had expressed the view that the test for imputing constructive knowledge to a pursuer was unsatisfactory: "it seems to impose upon the claimant a positive duty to go searching for damage even where there may not be reasonable grounds for suspecting its existence".[22] We went on to point out that in practice since 1989 the courts do not appear to have found the reasonable diligence test problematic. In *Adams v Thorntons WS and Others* the test was construed as meaning that

[21] Discussion Paper, para 5.8. For recent instances, see *Stewart Milne v Halliday Fraser Munro* [2016] CSOH 76 at para [67]; and *Huntaven Properties Ltd v Hunter Construction (Aberdeen) Ltd* [2017] CSOH 57 at para [45].
[22] 1989 Report, para 2.58; Discussion Paper, para 5.19.

the pursuer would have done enough if he or she did what an ordinary prudent person would do having regard to all the circumstances.[23] We therefore inclined to the view that introducing a re-worded test would not be likely to improve the clarity of the existing test as interpreted by the courts. We also drew attention to the fact that the Limitation Act 1980 makes express provision for England and Wales about when the exercise of reasonable diligence might require a pursuer to obtain expert advice;[24] and to the fact that the Law Commission, in its review of the law of limitation, observed that these provisions are "extremely complex and do not always achieve fair results".[25] Our preliminary view was that the statutory test as currently formulated is broad enough to allow the courts in an appropriate case to place weight on the fact that the pursuer did not seek expert advice.[26] We asked consultees whether they agreed that the present formulation of the test of "reasonable diligence" is satisfactory.[27]

3.48 Of the respondents who answered this question all but one agreed. The Faculty of Advocates pointed out that, if section 11(3) is reformulated, the test of reasonable diligence will be applied to a new set of criteria. The Law Society of Scotland disagreed. It observed:

> "The decision in *Gordon v Campbell Riddell*, it seems to us, produces a harsh and unfair result though in line with the decision of the Supreme Court in *ICL Plastics*. The example given by the Commission in paragraphs 5.3 et seq. of the Discussion Paper also emphasises that this is an area which could do with 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* it seems to us that this already grey area of the law has become more clouded and needs clarifying."

3.49 As the Law Society of Scotland noted, in *Heather Capital v Burness Paull*[28] consideration was given to the reasonable diligence test. In paragraph [30] of his opinion Lord Tyre dealt with the point in this way:

> "[H]as the pursuer averred circumstances in which it could not, with reasonable diligence, have become aware more than five years before November 2014, that the funds had been paid to accounts in the name of Mr Levene and Mathon, and not to the four SPVs? In my opinion, it has not. As was pointed out by Millett LJ in *Paragon Finance plc* v *D B Thakerer & Co* [1999] 1 All ER 400 at 418, a case concerning an English limitation statute, the question is not whether the pursuer *should* have become aware sooner but whether they *could* with reasonable diligence have done so. By the end of 2007 all of the directors of the pursuer were in

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[23] 2005 SC 1 30 at paras [23]-[24].

[24] Section 14A(10): "For the purposes of this section a person's knowledge includes knowledge which he might reasonably have been expected to acquire—
(a) from facts observable or ascertainable by him; or
(b) from facts ascertainable by him with the help of appropriate expert advice which it is reasonable for him to seek; but a person shall not be taken by virtue of this subsection to have knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice."

[25] See Report on *Limitation of Actions* (Law Com No 270 (2001)), para 3.51; *cf* N Mullany, "Reform of the Law of Latent Damage", (1991) 54 MLR 349 at 351-2 (hereafter "Mullany, "Latent Damage"").

[26] *Cf* the discussion in W Jajdelski, "Reasonable diligence under section 11(3) and professional advice", (2015) Civil Practice Bulletin 2.

[27] Question 12, para 5.23.

[28] [2015] CSOH 150.

possession of information from its auditors – and, indeed from Mr King himself – that a fraud had, at the very least, been attempted. The auditors had issued a qualified opinion and indicated that further investigations would take place. The pursuer's averment that "all avenues of enquiry were considered to have been pursued by [the pursuer's] board of directors" does not address the question of whether the loss *could*, with reasonable diligence, have been discovered. It is not averred that the information obtained from Mr Wilson in 2012 could not or would not have been obtained earlier if he had been asked for it earlier. No explanation is offered for why this could not have been done by the company or, latterly, by the liquidator within five years after the transfers of funds in 2006."

3.50 On appeal, the Inner House decided that determination of the various issues in relation to prescription required proof; it therefore allowed the reclaiming motion in this and the related case of *Heather Capital v Levy & McRae*.[29] As a result it did not address the section 11(3) question in great detail.[30]

3.51 We have considered the suggestion made by the Law Society of Scotland that this case indicates that the present law is uncertain, since it is unclear whether "reasonable diligence" is subjective or objective and what obligations are incumbent on a lender when. It does not seem to us that the law is in fact unclear.[31] As explained in *Adams v Thorntons WS and Others*,[32] a pursuer will satisfy the test of reasonable diligence if he or she does what an ordinary prudent person would do having regard to all the circumstances. This formulation shows that the test combines objective and subjective elements: on the one hand, it takes account of the circumstances of the individual pursuer; on the other, it assesses what he or she *could*[33] have done by reference to an ordinary prudent person, which is an objective standard.

3.52 It is true that, because application of the test depends on all the circumstances, there is no absolute rule about what a pursuer must do in order to satisfy it: it all depends on the circumstances. Although we can see that it might in principle be attractive for there to be an absolute statutory rule, we do not think that that would be either appropriate or possible. First, because fairness seems to us to require that account be taken of the particular circumstances of a case. Second, because we doubt if it is possible to devise a test which would offer greater clarity without introducing its own complications. As we explained in the Discussion Paper,[34] while it would be possible to introduce a more elaborate test of reasonable diligence (such as the one quoted above in footnote 24), experience in other jurisdictions does not suggest that this is an easy route to attaining clarity or certainty. Particular difficulties arise when there is a question whether a pursuer should have instructed an expert and especially where a pursuer has actually instructed an expert but received inadequate or incorrect advice. Our review of the case law suggests that the courts have been able adequately to take account of issues such as these by applying the existing test.

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[29] [2016] CSOH 107.
[30] [2017] CSIH 19 at paras [56]-[61].
[31] On the points raised about the case of *Gordon v Campbell Riddell Breeze Paterson LLP*, we refer to our comments in para 3.20 above.
[32] 2005 1 SC 30 at paras [23]-[24].
[33] We emphasise "could" for the reason set out in the quotation from *Heather Capital* above.
[34] Para 5.21.

3.53 For these reasons, we consider that the "reasonable diligence" test should be left as it stands. It is of course true, as the Faculty pointed out, that under our recommendations "reasonable diligence" will apply to a different set of criteria. But we do not think this involves any substantial change to the way in which the test operates. Under our recommendations the issue will be when the pursuer knew or ought to have known that (a) loss, injury or damage has occurred; (b) the loss, injury or damage was caused by a person's act or omission; and (c) the identity of that person. That the test involves three elements means that analysis of whether it has been satisfied in an individual case can be conducted stage by stage: for example, one might ask what a pursuer who is aware only of fact (a) ought in the exercise of reasonable diligence to do; or what one who is aware of both (a) and (b) ought to do. The three elements therefore allow the application of the test to be broken down in a structured way. But fundamentally the application of the test appears to us to remain the same: when the court has heard evidence about what the pursuer actually knew on particular dates, it is a matter of drawing a conclusion on the evidence about whether the pursuer could with reasonable diligence have satisfied the test at an earlier date than he or she actually did. No doubt the more a pursuer knows, the less latitude he or she will have to invoke the test, since the greater his or her level of knowledge, the less will be required to complete his or her knowledge of all three elements of the test.

3.54 We therefore recommend:

10. There should be no legislative change to the test of "reasonable diligence".

Chapter 4 The long-stop prescriptive periods under sections 7 and 8 of the 1973 Act

Introduction

4.1 Prescription represents a balancing of the interests of the pursuer on the one hand and the defender on the other. That is why it seems fair to pursuers, if they do not know they have claims, to allow them some time to discover that in fact they do. It seems fair to defenders to allow that extension of time to go on only until the pursuers know or reasonably ought to know of the existence of their claims. Fairness also seems to require a definitive cut-off at an appropriate point in time, in the interests of legal certainty and of preventing a defender's liabilities from continuing indefinitely. Consideration of the workings of section 7 is therefore an important element in the overall exercise of contemplating reform of the law on prescription in relation to claims for latent damage.

4.2 Section 7 of the 1973 Act provides for a 20-year prescription of obligations (with the exception of obligations to make reparation for personal injuries and death resulting from such injuries; damage caused by defective products; as well as imprescriptible obligations). The 20-year period runs from the date on which an obligation became enforceable. For obligations to pay damages, that is the date on which loss, injury or damage flowed from the act neglect or default. It is sometimes described as a "long-stop" period, in the sense that it is an absolute cut-off and has no regard to the pursuer's state of knowledge.

4.3 One consultation response, by Mr Hugh Paterson, drew to our attention a situation that bears on a pursuer's state of knowledge. This is where the owner of a house discovers only when placing the house on the market more than 20 years after buying it that he or she does not have good title. As we noted in the Discussion Paper,[1] in many cases after 10 years positive prescription will have secured the possessor's title against challenge. But that will not apply if, for example, the purchaser's solicitor failed to register the title. On buying a house a purchaser cannot reasonably be expected to review or scrutinise the work done by the conveyancing solicitor, so there is every justification for him or her to be entirely ignorant of the title defect. We appreciate that, since many years may pass between sales of a particular house, the effect of the long-stop prescription is that a purchaser's claim against the solicitor may be cut off before he or she even knows that there is a problem.

4.4 This is a difficult situation, in which prescription operates harshly. We have sympathy with the affected purchaser. The question is whether this case (or similar cases) lead to the conclusion that the long-stop prescription should be reconfigured so as to take account of the state of knowledge of the person affected. We have considered this matter closely. We are clearly of the view that that is not a reform which could be recommended. The long-stop

[1] Discussion Paper, para 6.3.

prescription serves an important purpose, that of bringing about certainty and finality. It does so by fixing a clear limit on the period within which a claim can be brought. That clarity and certainty cannot be achieved if the length of the period takes account of factors specific to an individual pursuer, in particular his or her state of knowledge. If that were done, no defender would ever be able to be sure that a potential liability had gone; and it would not be possible safely to dispose of records that might potentially be relevant to a claim from many years earlier. While we recognise that there will be cases in which individuals suffer loss as a result of this rule, we have to take account also of the wider public interest which the doctrine of prescription serves. We therefore do not recommend that the law be changed so as to address this issue.

4.5 In the Discussion Paper[2] we pointed out that there are two unusual features of the long-stop prescription under section 7 of the 1973 Act. The first is the starting date and the second the fact that the prescription can be interrupted by a relevant claim or acknowledgment in just the same way as the five-year prescription of section 6.

4.6 The second of these points applies with equal force to the 20-year prescription of rights relating to property under section 8. We discuss this further below.

The starting date

4.7 In Scots law the long-stop period runs from the same date as the basic five-year prescriptive period of section 6. Questions of knowledge aside, for obligations to pay damages both the short and the long prescription run from the date of loss. More commonly, legal systems employ different starting dates, so that (for instance) the short prescriptive period runs from the date of loss, while the long-stop period runs from the date of the act or omission in question. Clearly, this will never be later – and may sometimes be much earlier – than the date of loss. To that extent it is more favourable to the defender.

4.8 There are some oddities about having the long-stop period run from the date of the loss. In the Discussion Paper[3] we gave the example of latent damage to a building. The notion that the long stop should run from the date of loss or damage has been severely criticised, on the grounds that "[t]here may be no damage in the *Pirelli* sense, and so the long stop will not start running until the building fails – that is to say, the long stop will start at the same time as the short period. This makes the long stop fundamentally irrelevant".[4]

4.9 We went on to point out that, where time runs from the date of loss or damage, it is quite possible for a long period to pass without the prescriptive period even starting to run. That is capable of undermining one of the principal rationales of prescription, namely that after a certain period a defender should be able to arrange his or her affairs on the assumption that the risk of litigation has passed. That rationale is based on considerations of general fairness, as well as the practical consideration that with the passage of time witnesses may no longer be available and documentary evidence may be lost.

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[2] Discussion Paper, para 6.4.
[3] Discussion Paper, para 6.17.
[4] H MacQueen, "Latent defects, collateral warranties and time bar", 1991 SLT (News) 77-80, 91-93 and 99-103, 92 (hereafter "MacQueen, "Latent defects"").

4.10 In the Discussion Paper we set out our provisional view that the long-stop prescriptive period should run from the date of a defender's last act or omission and we asked whether consultees agreed.[5]

4.11 Almost all responses were in agreement. Among those agreeing, the Law Society of Scotland commented that "[t]he 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." Brodies wondered how often the issue causes real practical difficulties.

4.12 Two, however, had some doubts about the application of the proposal to last "omission". Charles McGregor was of the view that this proposal should be confined to the defender's last act. He considered that referring to the defender's last omission would introduce an unwarranted degree of doubt in the calculation of the relevant day; depending on the nature of the obligation, the calculation of the last omission might be difficult. The Faculty of Advocates, while agreeing with the proposal in the interests of certainty, also queried whether "omission" could be treated in the same way here. They asked when a failure to comply with a continuing duty to review a building's design or a failure to warn of a dangerous design flaw would prescribe.

4.13 We do not think that the treatment of omissions raises any new issue. The notion of time running from the date of an omission is not conceptually different from the current law, under which it runs from the date of a neglect or default. Where there is a failure to comply with a continuing duty, the current law already requires the court to identify the starting date for prescription. What that date is in a particular case will depend on such things as whether the duty had to be performed by a certain date and, if not, on what date it became impossible for it to be performed.[6] Equally, in terms of section 11(2) time runs against a continuing failure to comply with a duty from the date when the neglect or default ceased. For the purposes of that sub-section too, it is already necessary to identify when something negative (a neglect or default) ceased to be the case. For these reasons, we consider that, in relation to obligations to pay damages for loss, injury or damage caused by an act or omission, the prescriptive period should run from the date of the last act or omission. For all other obligations, the starting date for the 20-year prescription of section 7 remains the date on which the obligation became enforceable.[7] Clearly, not all obligations subject to prescription under section 7 are obligations to pay damages, and for them an analysis in terms of act or omission and loss, injury or damage is inappropriate (see also our comments in paragraphs 2.45-46 above). The obligations which underlie claims (for example) for legal rights or under warrandice will therefore continue to prescribe from the date on which they became enforceable.

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[5] Question 13, para 6.20.
[6] *Cf* the discussion in D Johnston, Prescription and Limitation (2nd edn, 2012), paras 4.46-62 (hereafter "Johnston, *Prescription*").
[7] S 7(1).

4.14 We therefore recommend:

> **11. For obligations to pay damages in respect of loss, injury or damage caused by an act or omission, the 20-year prescriptive period should commence on 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 other obligations the date of commencement of the 20-year prescriptive period should remain unchanged.**
>
> (Draft Bill, section 8)

The possibility of interruption

4.15 The second unusual feature of the Scots law on the long-stop prescription is that, under the existing provisions of the 1973 Act, it is amenable to interruption by a relevant claim or acknowledgment in just the same way as the five-year prescription of section 6.[8] So, for instance if, 19 years after the 20-year prescriptive period has started to run, a pursuer raises a relevant claim in court, that interrupts prescription.[9] The consequence is that a new 20-year period begins from the date of interruption. The long stop will now end not earlier than 39 years after the date on which the loss or damage occurred. This being so, in the Discussion Paper we asked in what sense the current Scottish provisions could truly be described as a "long stop".[10]

4.16 We pointed out that the problem does not arise in other jurisdictions in which the legislation is drafted simply to state that after the long-stop period no proceedings can be brought.[11] In Germany the approach is different but the problem is addressed by providing that if the prescriptive period is interrupted by a claim, the period ends six months after the claim has been disposed of.[12] On either of these approaches, there is no scope for the supposed long stop to be perpetuated indefinitely.

4.17 In the Discussion Paper we set out our provisional view that the long-stop prescription should not be amenable to interruption either by claim or by acknowledgment. It should, however, be capable of being extended, where a claim has been made during the prescriptive period, but only until such time as that claim is finally disposed of. We asked two related questions, the first of which was whether consultees agreed that the long-stop prescriptive period under section 7 should not be capable of interruption by a relevant claim or relevant acknowledgment.[13]

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[8] This is in terms of s 7(2) of the 1973 Act, read with ss 9 and 10.
[9] *Cf* the comments of MacQueen in MacQueen, "Latent defects", 101.
[10] Discussion Paper, para 6.21.
[11] England: Limitation Act 1980, s 14B(1); New Zealand: Limitation Act 2010, s 11(3)(b); Australian Capital Territory: Limitation Act 1985 (ACT), s 40(1); British Columbia: Limitation Act [SBC] 2012, s 21(1); Ontario: Limitations Act [SO] 2002, s 15(2); Alberta: Limitations Act [RSA] 2000, s 3(1)(b); France: Code civil Art 2232.
[12] BGB § 204(2). In the case of acknowledgment, the prescriptive period begins again on the date of the acknowledgment, on the view that a debtor who acknowledges a debt is not in need of the protection of prescription: BGB § 212 (*cf* the case of an agreement to lengthen the prescriptive period: below, Ch 5).
[13] Question 14, para 6.25.

4.18 Of the respondents who answered this question, almost all agreed. The Senators of the College of Justice commented that "this approach would enable a long negative prescription to operate in a clearer way as a genuine long-stop of a clearly determinate length". As the Faculty of Advocates put it: "In theory, to allow the prescription clock to be re-started by a relevant claim is to make potential liability indefinite at the whim of the pursuer and so defeat the object of prescription altogether". Morton Fraser pointed out that making the 20-year prescription incapable of interruption could have an impact on some cases involving enforcement of decrees: at present the prescriptive period for decrees can be interrupted by carrying out diligence on the decree; so in a small number of cases creditors might in future have to look to alternative forms of diligence rather than, for example, simply continuing to renew an inhibition to give them protection to recover funds when a debtor's property was sold.

4.19 Brodies observed:

> "It seems odd that an obligation could be extinguished by prescription even while a pursuer was seeking enforcement of that same obligation. (The proposal to automatically extend the prescriptive period to the conclusion of proceedings would merely deal with the practical difficulty caused by the 20 year period expiring during the course of the action). One possible alternative might be for the long-stop prescription to merely be interrupted by a relevant claim (as opposed to starting a fresh 20 year period) and might re-commence running once the court action has concluded."

4.20 Craig Connal recognised the logic that, if a claim had persisted for a long time and was then interrupted by action, it should only continue until the action had been disposed of. He thought the issue of acknowledgment more problematic.

4.21 Most of the comments to which we have just referred reflect a concern which we attempted to address in the next question in the Discussion Paper. The concern is how to deal with a situation where a claim in relation to the relevant obligation is pending at the time that the 20-year period expires. There seems little doubt that it would be unfair and unsatisfactory for a pursuer to lose his or her right, when the claim had (by definition) been brought before the long stop came into operation. In the Discussion Paper we therefore went on to ask whether consultees agreed that where a relevant claim is made during the long-stop period, the prescriptive period should be extended until such time as the claim is disposed of.[14]

4.22 Of the respondents who answered this question, almost all were in agreement. Morton Fraser added that such an extension should allow any appeal directly related to the relevant claim to be completed. Clyde & Co, Charles McGregor and RIAS commented that, whereas time should cease to run for that claim in respect of that obligation, any other obligations should continue to be governed by the long-stop prescription unaffected by the existence of any such proceedings.

[14] Question 15, para 6.25.

4.23 The Law Society of Scotland observed:

> "…[I]t will be important to clarify what is meant by 'disposal'. For example, if a case remains sisted through no fault of the pursuer (such as for legal aid) for a considerable period, would the clock continue to run? Would 'disposal' mean final order of the court, or expiry of any appeal period against that final order? If it is intended to keep the claim live only for the duration of the proceedings, would provision be made for inadvertent disposal such as by failure of representation resulting in decree in absence? While we think it would be desirable to prevent a renewal of the prescriptive period, it would be undesirable for that certainty to be replaced by lack of clarity over when the period did come to an end."

Brodies favoured a system like that in Germany where an additional period is added from the end of the action, adding that "[t]hat would allow pursuers time to assess their options while giving defenders comfort".

4.24 NFU Mutual, Zurich and FSCM disagreed. Zurich and FSCM stated that it should be made clear that after the 20-year prescriptive period no claim can be brought, thus preventing a claim potentially existing in perpetuity.

4.25 Our provisional recommendation that the long-stop prescription should not be amenable to interruption attracted strong support. We therefore propose to proceed with it. As can be seen from our summary above, most comments received in response to the Discussion Paper, with the exception of those from Morton Fraser, were directed at the issue of claims pending before a court at the time of expiry of the long-stop prescriptive period. It should be clear that the effect of this recommendation is not to allow a claim potentially to exist in perpetuity: the recommendation sets out narrow grounds on which an obligation may survive the expiry of the 20-year prescriptive period. So far as the point made by Morton Fraser is concerned, we agree that where a creditor is seeking to enforce a decree, the effect of our recommendation is that he or she will have 20 years to do so, without the benefit of additional time gained by interruption. We think the cases in which this is likely to cause difficulty are few; and in general we think 20 years should be time enough to enforce a decree. So this consideration does not lead us to depart from our recommendation.

Extension of the long-stop prescriptive period

4.26 So far as claims pending before a court at the time of expiry of the long-stop prescriptive period are concerned, there was substantial support for our provisional recommendation that the long-stop period should be capable of extension until such time as the claim has been finally disposed of. We do not think the point made by Clyde & Co, Charles McGregor and RIAS needs to be reflected in any drafting: any interruption of prescription by raising legal action affects only the particular obligation to which the action relates; the same must apply to any extension of the prescriptive period until the disposal of that action. We do not think that legislation need spell out that other obligations are unaffected.

4.27 It might be helpful to note here that we have considered whether it would be appropriate to recommend an approach along the lines of German law, where, if the prescriptive period has been interrupted by a claim, the period ends six months after the claim has been disposed of. This allows the claimant time to make other arrangements to advance the claim. In the context of a long-stop prescription, however, we do not think this

approach is appropriate. The reason is that the overall policy objectives are (i) that the long-stop prescription should not be amenable to interruption by a claim, and (ii) that nonetheless, if a claim is made during the 20-year period and is pending when that period ends, the obligation to which it relates is extinguished not at the end of the 20-year period but only on final disposal of the claim. It seems to us that there is no point in having the six-month period of grace unless it is to be possible to raise a new claim after the 20-year period has been completed. But that would not be consistent with the policy objectives.

Final disposal and the end of proceedings

4.28 Our view is that the long-stop period should be capable of extension until such time as the claim has been finally disposed of. The critical issue is therefore the meaning of "final disposal" of a claim. We have reviewed various statutory formulae. The one already employed in the 1973 Act in relation to prescription of obligations under the Consumer Protection Act 1987 appears to us to be the most appropriate. It provides that:[15]

> "a claim is finally disposed of when—
>
> (a) a decision disposing of the claim has been made against which no appeal is competent;
>
> (b) an appeal against such a decision is competent with leave, and the time limit for leave has expired and no application has been made or leave has been refused;
>
> (c) leave to appeal against such a decision is granted or is not required, and no appeal is made within the time limit for appeal; or
>
> (d) the claim is abandoned".

4.29 This formulation appears to us to address the main issues raised by the Law Society of Scotland (see above, paragraph 4.23).

4.30 We consider that it is necessary to refer both to final disposal of a relevant claim (based on section 22A(3) of the 1973 Act) and to the end of the proceedings in which a claim is made. A summons (or other document of claim such as a counterclaim)[16] may advance a number of different claims. In relation to prescription, however, a relevant claim always relates to a particular obligation. Final disposal of the claim does not necessarily take place at the same time as proceedings come to an end: a relevant claim may be finally disposed of before the proceedings in which it is advanced have come to an end for all purposes. Or the proceedings may end without the claim having finally been disposed of at all.

4.31 Such a dual approach – final disposal and the end of proceedings – means that the claimant has the benefit of the extension to the long-stop prescriptive period only if the claim has not been finally disposed of and the proceedings in which it is made have not otherwise come to an end. In other words, if the proceedings have ended by the time the prescriptive period expires, it does not matter that there has not been a final disposal of the relevant claim; it is enough that the proceedings have ended. This seems to us to be necessary to

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[15] 1973 Act, s 22A(3).

[16] To cover this eventuality we use the expression "claimant", without intending to advocate any Anglicisation of Scottish legal terminology.

ensure that what is intended to be a narrow exception from the long-stop prescription is kept within tight bounds.

4.32 The approach applies not just to litigation but to claims made by one of the other methods recognised by the 1973 Act, such as a claim in a sequestration or liquidation. Here too it will be necessary to consider whether there has been a final disposal or whether the process has come to an end. For example, an adjudication by the liquidator on a claim in a liquidation will not be a "final disposal" if there is a right of appeal against it. On the other hand, if the liquidation process ends without a "final disposal", then that is sufficient to prevent a claimant from further reliance on the extension of time provision.

4.33 Accordingly, we consider that there should be provision for prescription of obligations under section 7 of the 1973 Act to the effect that, if a relevant claim is made in relation to the obligation before the 20-year prescriptive period has expired, and at the expiry of the 20-year period that claim 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. Fairness seems to us to require this. And it would scarcely be consistent with the underlying principles of the law of prescription for an obligation to be extinguished when the creditor in the obligation was taking active steps to enforce it.

Extinction of rights relating to property

4.34 In the relevant chapter of the Discussion Paper, Chapter 6, we focused purely on the extinction of obligations by the 20-year prescription of section 7. In the course of preparing this Report, it has become clear to us that it is appropriate to put forward amendments to the same effect for the extinction of rights relating to property under the 20-year prescription of section 8. As mentioned above,[17] in order for the long-stop prescription to work effectively, it is necessary to exclude the interruption of prescription. This rationale applies equally to the long-stop prescription of section 8. Similarly, our view that the long-stop period should be capable of extension until such time as the claim has been finally disposed of[18] applies equally to the long-stop prescription of section 8. The discussion above refers mainly to the extinction of obligations by section 7. Unless otherwise noted, the points made are equally applicable to the extinction of rights in terms of section 8.

The underlying structure of the law

4.35 It may be helpful to set out our understanding of the underlying structure of the law on this matter. Where a claim is made in "appropriate proceedings", the subsistence of the right or obligation on which it is based is unaffected until such time as the court pronounces decree or the case is formally settled or abandoned.[19] When a court does pronounce decree, an unsuccessful pursuer will by definition have no right or obligation to enforce.

4.36 So far as a successful pursuer is concerned, the right or obligation is at the point of decree transformed into an obligation based on the decree. Conversely, the unsuccessful

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[17] Paras 4.15-25 above.
[18] Paras 4.26-33 above.
[19] See eg *Dick v Burgh of Falkirk* 1976 SC (HL) 1, 26; *Coutts' Trs v Coutts* 1998 SC 798, 804-5; Johnston, *Prescription*, para 6.43.

defender comes under an obligation to obtemper the decree, and in terms of the 1973 Act schedule 1 paragraph 2(a) the obligation to do so is not subject to the five-year prescription. That applies regardless what kind of right or obligation is in issue, since the obligation to comply with the decree is stated in general terms.

4.37 Although the cases do not appear to discuss the point, in principle it seems to us that, where an appeal is available, the underlying obligation cannot be superseded until such time as the appeal is disposed of, since a decision by a judge at first instance in favour of a pursuer might be reversed on appeal (or vice versa). The underlying obligation must therefore subsist until final disposal of any appeal, at which point it will be superseded by the obligation based on the decree.

4.38 Since from the date of decree the underlying obligation is superseded by the defender's obligation to obtemper the decree, it follows that it would make no sense to introduce a provision that extended the validity of the underlying right or obligation beyond the date of decree. That is of course not what we are recommending.

4.39 What we are recommending is that, where a claim has been raised within the prescriptive period, there should be an extension of the prescriptive period so that the underlying right or obligation is not extinguished at the end of the prescriptive period if the claim is still pending.

4.40 It seems to us that there is no conflict between a provision of that kind and the law on supersession of underlying rights or obligations by obligations based on decrees provided that the provision does not extend the subsistence of the underlying obligation beyond the date of decree.

4.41 We therefore recommend:

12. The 20-year prescription under section 7 of the 1973 Act should no longer be amenable to interruption either by relevant claim or by relevant acknowledgment, and the 20-year prescription under section 8 of the 1973 Act should no longer be amenable to interruption by relevant claim.

13. For the purpose of the 20-year prescription under sections 7 and 8 of the 1973 Act, where a relevant claim has been made during the prescriptive period but by the end of that period has not been finally disposed of, and the proceedings in which the claim is made have not come to an end, the prescriptive period should be extended so that it expires when the claim is finally disposed of or the proceedings otherwise come to an end.

(Draft Bill, sections 6, 7 and 12)

The case of construction contracts

4.42 The Discussion Paper raised the question whether special provision should be made in relation to construction contracts. The reason for asking the question was that in the past it has sometimes been suggested that in such cases the long stop should run from the date

of practical completion of construction works.[20] After reviewing the reasons on which these suggestions were based, in the Discussion Paper we expressed the view that there was much to be said for having a uniform prescriptive period, unless there were compelling reasons for treating some kinds of damage differently, and that the reasons here did not appear to be sufficiently compelling. Accordingly, we asked consultees whether they agreed that construction contracts should not be subject to any special regime in relation to the running of the long-stop prescriptive period.[21]

4.43 All respondents answering this question were in agreement. Burness Paull (Construction and Projects) agreed that a special regime was not required, provided that there was no doubt about the ability to shorten the long-stop prescriptive period (on which see below, paragraphs 5.18-5.25). The Senators of the College of Justice added that the changes proposed above (to the start of the long negative prescription and to preclude its interruption) should address the difficulties that might have justified a special rule for construction contracts.

4.44 Charles McGregor pointed out that some uncertainty arose from the case of *Strathclyde RC v Border Engineering Contractors Ltd*[22] regarding prescription running from the issue of the final certificate. Zurich and the FSCM commented that consistency and certainty were required when procuring insurance. The Law Society of Scotland too commented on the desirability of certainty. Brodies added:

> "Provided the underlying law is sound and well understood then the construction industry will have little difficulty in ensuring that their contractual arrangements make acceptable provision for the sharing of risk. It is already clear that the construction industry arranges its affairs with an eye on English law including contractual limitation periods. That seems unlikely to change. A plethora of different prescription regimes is unlikely to prove helpful."

4.45 RIAS made a number of points. First, that in construction cases difficulties can arise from the fact that the ordinary starting point for prescription (the date of loss) may be postponed until an indeterminate date which is unrelated to the date of any act or omission by a defender; and that the date when defects actually emerge is also indeterminate. If these deficiencies in the law were addressed under the general prescriptive regime, RIAS supported having construction contracts fall under that general regime. Second, RIAS pointed out that, depending on the wording of a particular contract, there might be more than one date when a (last) act or omission could be considered to have occurred. For example, claims for loss and expense could be included in any certificate, up to and including the Final Certificate; and each certificate might contain a different ascertainment of loss and expense and give rise to a distinct prescriptive period.[23] RICS made the point that ordinarily claims would be made against a contractor once the defects liability period had come to an end, the employer had resumed possession of the works, and the contractor had left the site, so making it clear that it was not intending to make good any remaining defects. RIAS added that the contractor could remedy defects up until the issue of the certificate of making good,

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[20] Consultative Memorandum on *Prescription and Limitation of Actions (Latent Damage)* (Consultative Memorandum No 74 (1987)), paras 5.26-28; *Limitation of Actions* (Law Com Consultation Paper No 151 (1998)), paras 12.106-108; Mullany, "Latent Damage", 382.
[21] Question 16, para 6.31.
[22] 1998 SLT 175.
[23] *Scottish Equitable plc v Miller Construction Ltd* (2001) 83 Con LR 183 at para [29].

and that any financial adjustment to take account of defects could arguably still be reflected in the Final Certificate.

4.46 The responses to consultation make it clear that there is no need for us to recommend that construction contracts should be subject to a different regime of prescription. This conclusion is welcome, since ideally the law of prescription should be as clear and straightforward, and as free from special rules and exceptions, as possible. The facts that construction contracts often run for lengthy periods, and routinely involve the contractor in making good defects in work previously done, indicate only that it is necessary to take a pragmatic view in all the circumstances and in light of the terms of the contract about when any wrongful act was done or any loss arose. We think our recommendation about the starting date of the 20-year prescription addresses the first point made by RIAS. So far as the other points just summarised are concerned, our recommendation that the prescriptive period should run from the date of the last act or omission is, we think, consistent with ordinary practice in the construction industry allowing the contractor to remedy defects until such time as it becomes clear that it is not going to do so. The precise date on which the prescriptive period begins in any given case will depend on the facts and on the terms of the parties' contract.

4.47 We therefore recommend:

14. Construction contracts should not be subject to any special regime in relation to the running of the long-stop prescriptive period.

The length of the long-stop prescription

4.48 In the Discussion Paper we also raised the question how long the long-stop period should be. We did not make any recommendation about the appropriate length. Instead, we confined ourselves to making two main points. First, that in comparison with some other jurisdictions the current period of 20 years is actually quite long. Other jurisdictions operate variously with periods of 10, 15, 20 and 30 years, generally reserving the longest periods for obligations relating to personal injuries. Second, that, if ultimately the view is taken that the long-stop prescription for obligations to pay damages should run from the date of the wrongful act or omission rather than (as at present) the date of the loss, prescription will in some cases start to run at an earlier date than under the present law. We asked consultees whether they regarded 20 years as the appropriate length for the prescriptive period under section 7 and, if not, whether they would favour reducing the length of that period.[24]

4.49 Views were divided. Of the fourteen respondents who answered this question, six favoured retaining the 20-year period. The Senators of the College of Justice, although they had no strong view, observed that retaining the period of 20 years, taken together with the reforms suggested (above), would produce an overall result which appears to be fair and balanced. Brodies and Morton Fraser were not persuaded that there was any good reason for altering the current 20-year period. Brodies added that if the figure were to be reduced, it should not be reduced below 15 years.

[24] Question 17, para 6.34.

4.50 Six respondents were of the view that the period should be reduced. Clyde & Co stated that the current 20-year period is too long and is weighted too heavily in favour of the pursuer. It is also too far removed from the 5-year prescription. They suggested that a 10-year period would provide certainty for defenders and their insurers. Zurich and FSCM favoured a 15-year period, again on the basis that the current 20-year period is too long, is weighted too heavily in favour of the pursuer and is too far from the 5-year prescription. NFU Mutual also suggested that the period should be 15 years. Charles McGregor thought the current 20-year period too long and that it could cause hardship, for example by requiring a retired professional to fund continuing liability cover for 20 years after retirement. RIAS made the same point, although they thought this was primarily a matter for insurers.

4.51 Burness Paull (Construction and Projects) stated that they would welcome contractual freedom to limit the 20-year period; currently, it is routinely reduced to 10 or 12 years in construction contracts. We deal with these issues in the next chapter.[25]

4.52 Determination of the appropriate length of the long-stop prescription is clearly a matter of legislative policy. The result of our consultation, however, suggests to us that there is no strong reason to alter the existing period of 20 years.

4.53 None of the reasons given for reducing the length of the period appears to us to be compelling. The notion that there is too great a disparity between the five-year and 20-year periods does not seem to help in deciding how the prescriptive periods should respectively be structured. We also have reservations about the hardship which is said to arise from the need to retain insurance cover. Our understanding is that even small professional practices typically pay for run-off insurance cover, rather than leaving this to the individual in his or her retirement. Since claims are intimated to firms rather than retired partners, firms ordinarily ensure that insurance cover remains in place, not least to protect their own brand. Furthermore, the fact that contracts routinely contain contractual limitation periods short of 20 years suggests to us that the current position is not creating difficulties in practice.

4.54 As various responses noted, the 20-year period is well understood and long established. While other systems have somewhat shorter (or less frequently, somewhat longer) periods, there appears to be no reason of principle that dictates a period of a particular length.

4.55 We therefore recommend:

15. The length of the long-stop period of prescription should remain 20 years.

[25] Paras 5.26-27.

Chapter 5 Contracting out and standstill agreements

5.1 Section 13 of the 1973 Act prohibits agreements which purport to disapply the statutory rules of negative prescription. As we explained in the Discussion Paper,[1] there is room for doubt about which agreements fall within the scope of the prohibition, and we therefore think the drafting of section 13 could usefully be clarified. There is also a wider policy issue as to whether and to what extent agreements of this kind should be prohibited.

5.2 We asked two separate questions concerned respectively with the permissibility of agreements to lengthen and to shorten the statutory prescriptive periods. In each case we asked a supplementary question about whether, if this was permissible, there should be limits on the extent to which it was permitted.

Agreements to lengthen the prescriptive period

5.3 Agreements of this kind clearly do fall foul of section 13.[2] At present the only way, short of litigation, in which parties can bring about an extension of the prescriptive period is for the debtor in the obligation to make a relevant acknowledgment which complies with the requirements of section 10 of the 1973 Act. That would interrupt the running of prescription. But the debtor may not be willing to do this, since the effect of an interruption of prescription is that the prescriptive period starts again from the beginning. In effect, therefore, the parties can by means of section 10 bring about an extension of the prescriptive period, but only for a minimum period of 5 years. This seems unduly cumbersome.

5.4 As we explained in the Discussion Paper, the main practical issue here is the validity of so-called standstill agreements, of which extensive use is made in some other jurisdictions. They enable parties to agree that prescription (or in other jurisdictions limitation) will not run for a specified period and so preserve the status quo while they seek to negotiate an end to their dispute. Agreements of this kind offer the advantage that parties may be spared the need to raise protective proceedings.

5.5 In the Discussion Paper we expressed the view that agreements of this kind could prevent the waste of resources which the use of protective writs sometimes involves. They could serve the valuable purpose of reducing the volume of litigation and enabling settlement negotiations to be concluded without the creditor needing first to raise proceedings to preserve his or her right.

5.6 We also identified two consequential questions. The first was whether it should be possible to enter an agreement of this kind at any time or whether that should be possible

[1] Ch 7.
[2] This is suggested mainly by the fact that the 1973 Act itself spells out the means by which prescription can be interrupted or suspended and says nothing about suspension by agreement.

only after loss or damage had been sustained.[3] The second was whether there should be a maximum period which could be fixed by such an agreement. We noted that experience in other jurisdictions suggests that what is valuable in practice is the ability to extend a short prescriptive period in order to allow investigation or settlement discussions to take place.[4] We asked consultees whether they favoured permitting agreements to lengthen the statutory prescriptive periods and, if so, whether there should be an upper limit on the period which can be fixed by such agreements.[5]

5.7 Again, opinion was divided. Of the seventeen respondents answering this question, nine were in favour of permitting agreements to lengthen the statutory prescriptive periods. In agreeing, the Senators of the College of Justice and Burness Paull (Dispute Resolution) added that the long-stop period should not be capable of extension by agreement. CMS were in favour of standstill agreements, since they would assist in minimising the need for protective writs. Clyde & Co commented that permitting such agreements would remove the need to litigate to prevent a claim from prescribing. Craig Connal observed that standstill agreements can be useful but should only be used where a claim has arisen and investigations are in hand. Charles McGregor thought that there was no need for an upper limit. The Law Society of Scotland observed:

> "The same 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. A compromise could be 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."

Brodies pointed out:

> "Historically Scottish courts have taken a relaxed approach to the progress of court actions raised to prevent the expiry of a prescriptive period. Improved (and more extensive) case management of actions by the courts has meant that parties are less likely to be allowed to let actions languish while they seek to resolve their differences. Once raised, the courts are keen to ensure that actions are processed through the courts as speedily as possible. We tend to think that many clients would like to have the option of entering into a standstill agreement in respect of the 5-year prescriptive period. This may however run contrary to the current prevailing view that stale claims and delay in settlement should be avoided. We consider that, if allowed, such agreements should only be capable of being entered into after the standard 5 year period has already started to run. Any period of standstill should be limited. We would favour a maximum 6-month period. The standstill agreement should not be capable of being renewed or extended. This will help avoid claims becoming stale."

Brodies also raised a question about how the courts would deal with legal expenses if a party had refused to enter into a standstill agreement. Scottish Water (Business Stream) could see the commercial benefit in some industries of entering into a standstill agreement in order to avoid the need for protective court proceedings but had no view on the time limit that should be fixed for such an agreement.

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[3] See Discussion Paper, para 3.4 and the quotation of recommendation 30 of the 1989 Report.
[4] See Discussion Paper, paras 7.11–14.
[5] Question 19, para 7.23.

5.8 On the other hand, seven respondents disagreed. RIAS nonetheless saw merit in allowing standstill agreements in order to facilitate negotiation. In construction disputes this would mean everyone involved would have to enter the agreement. Morton Fraser stated that to allow agreements to lengthen prescriptive periods could cause uncertainty and unfairness. BLM observed that prescription extinguishes obligations by operation of law and as such does not lend itself to contracting out. Contracting out might add unnecessary complexity and scope for further dispute. Zurich and FSCM were of the view that consistency and certainty were required when procuring adequate and cost-appropriate insurance; permitting agreements to vary prescriptive periods could lead to coverage disputes and increased litigation and hence increased cost and delay in the resolution of disputes. The Faculty of Advocates thought that to permit such agreements would be subversive of parliamentarily determined policy. The Faculty considered that it would be preferable to outlaw agreements which would in some degree contract out of, or seek to circumvent, the substantive provisions on prescription. The Faculty was willing to make a limited exception to this general rule for the case of standstill agreements reached after a dispute had arisen. It was suggested that such agreements should be limited to a maximum duration of the order of 6 months or a year. Clear limits on the availability of standstill agreements should be laid down: it should not be possible to enter one before the dispute to which it related had arisen; and such agreements should not be able to extend the long negative prescription. NFU Mutual stated that parties are bound by statute and should not be permitted to vary the terms of the statutory provisions.

5.9 A further respondent, Burness Paull (Construction and Projects), stated that their view on extending the five-year period depended on the test adopted for the start of the prescriptive period. For example, under Option 3,[6] 5 years would be long enough. But if the start date were the date when the creditor knew only of the fact of the loss, 5 years might not be long enough. They pointed out that a fixed upper limit for the short negative period is attractive for substantial claims as it can limit the period for which a contingent liability needs to sit on a company's accounts.

5.10 We do not think there is any objection of principle to permitting agreements to lengthen a prescriptive period. If Parliament enacts provision permitting agreements of that kind, then by definition they are not subversive of the intention of Parliament. The issues therefore appear to be (i) whether agreements of this kind would introduce uncertainty, complexity, or cost; and (ii) if so, whether those disadvantages are outweighed by the advantages that they offer.

5.11 Since there is substantial support for permitting agreements of this kind, and for the reasons we set out below, our view is that such agreements should be permitted. A key consideration is the precise terms on which they should be permitted. Responses disclosed a substantial degree of agreement about this. Provided the applicable limits are appropriate and clear, we think agreements of this kind need not give rise to uncertainty, complexity or cost. The appropriate limitations appear to us to be as follows.

[6] See para 3.4 above.

5.12 First, the long-stop prescriptive period should continue to represent an absolute limit. It should not be possible to extend it by agreement. This is necessary in order for the long stop to serve its purpose of bringing about certainty that, after an obligation has subsisted for a continuous period of 20 years, it is extinguished.[7] In the discussion that follows we are therefore concerned only with agreements that relate to extending the short prescriptions, that is the five-year prescription of section 6 and the two-year prescription of section 8A.[8]

5.13 Second, it should be possible to enter into an agreement of this kind only after a dispute has arisen. In short, it should be possible to enter into a "standstill agreement", an agreement that once a dispute has arisen, and while parties are seeking to settle it, time should not run against the claim in question for an agreed period. While in the Discussion Paper we were open on grounds of freedom of contract to permitting a wider range of agreements lengthening the prescriptive period, we are persuaded by the number of responses which support only standstill agreements that these are the only agreements of this kind that should be permitted. We think that to allow parties in effect to choose their own prescriptive period at the time of entering into a contract might well lead to uncertainty, complexity or cost. On the other hand, once a dispute has arisen, there is much to be said for permitting agreements that may allow differences to be resolved without the need for raising proceedings. It is perhaps self-evident that such agreements must be entered into before the prescriptive period would otherwise have expired.

5.14 Third, parties should be able to extend the prescriptive period by agreement only once. The reasons for this restriction are essentially the same as those set out in the previous paragraph. In short, we do not think it should be open to parties to perpetuate the prescriptive period without restriction, even when they are in agreement.

5.15 Fourth, a standstill agreement should be limited to a short period. We consider that a maximum period of one year is appropriate. We also consider that it should not be possible to renew such agreements: only a single extension of a maximum period of one year should be permitted. It seems to us necessary to keep the derogation from the ordinary statutory rule within reasonable bounds. To allow a much longer period of standstill increases the likelihood of stale claims. Our overall aim in recommending that standstill agreements should be permitted is to reduce the waste of resources that protective writs may involve, but it is not in any way to encourage delay.

5.16 We do not think statutory provision need be any more elaborate than just described. In particular, we do not think it need deal with issues about legal expenses, which are best left to the discretion of the courts.

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[7] See Ch 4.

[8] For the same reasons set out in relation to s 7, it should also not be possible to extend the long stop of s 8. For completeness we note that our proposals do not apply to s 22A. The reason is that the prescriptive provisions set out in that section implement the terms of Directive 85/374/EEC. Art 10(2) of that Directive provides that the obligation "shall be extinguished upon the expiry of a period of ten years". To allow extension of the 10-year period by agreement appears to us to be inconsistent with the terms of the Directive.

5.17 We therefore recommend:

16. Agreements to extend the five-year prescription of section 6, or the two-year prescription of section 8A, of the 1973 Act should be valid provided (i) that they are made after the appropriate prescriptive period has started to run but before it has been completed; (ii) that they extend the prescriptive period by no more than one year; and (iii) that only one such extension may be made in relation to the same obligation.

(Draft Bill, section 13 – substituted section 13 (1), (2) and (3))

Agreements to shorten the prescriptive period

5.18 It is not entirely clear whether agreements to shorten the prescriptive period are prohibited by the current section 13 of the 1973 Act. In the Discussion Paper we said that we saw no objection in principle to permitting such agreements, although we recognised the need to ensure adequate protection of consumers from standard form or other contracts which purported to cut off their rights at an early date. We asked consultees whether they favoured permitting agreements to shorten the statutory prescriptive periods, and, if so, whether there should be a lower limit on the period which can be fixed by such agreements.[9]

5.19 Opinion was divided. Of the sixteen respondents answering this question, six were in agreement with permitting agreements to shorten the statutory prescriptive periods and also saw no need for a lower limit.

5.20 RIAS thought such agreements would be acceptable and could be related to professional indemnity insurance cover. But RIAS thought there should be a lower limit on such agreements. The Law Society of Scotland also agreed in principle, although it did not comment on the need for a lower limit. It did add, however, that it "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." In agreeing, Burness Paull (Construction and Projects) commented that the freedom to limit the five-year period was commercially attractive – a cheaper price for a shorter period of exposure.

5.21 On the other hand, nine respondents disagreed. Morton Fraser considered that to allow agreements to shorten prescriptive periods could cause uncertainty and unfairness, for example in contracts of employment or in commercial contracts where small businesses are dealing with more sophisticated businesses. BLM thought that to allow such agreements might add unnecessary complexity and scope for further dispute, both with attendant cost. NFU Mutual stated that parties are bound by statute and should not be permitted to vary the terms of the statutory provision. Zurich and FSCM observed that defenders prefer certainty where possible: that allows them more easily to procure adequate and cost-appropriate insurance arrangements. Permitting agreements to vary prescriptive periods could lead to coverage disputes and so to increased litigation and costs and delay in the resolution of disputes.

[9] Question 18, para 7.23.

5.22 Craig Connal thought it unnecessary to legislate, since parties regularly conclude arrangements which provide that claims which are not made within a particular time cannot be brought at all; and there is no need to interfere with something which works well. The Faculty of Advocates was of the view that to permit such agreements would be subversive of policy determined by Parliament. The Faculty considered that it would be preferable to outlaw agreements which would in some degree contract out of, or seek to circumvent, the substantive provisions on prescription. This ban might be extended to contractual limitation clauses, which often have much the same effect as clauses altering the prescriptive period. Brodies considered that clarity and uniformity were best served by refusing to allow parties to shorten the prescriptive period and mentioned a concern that small businesses might be forced to accept very short prescriptive periods when working with larger organisations. Scottish Water (Business Stream) added that allowing parties to shorten the prescriptive period could create uncertainty and inconsistency.

5.23 We do not think there is any objection of principle to permitting agreements to shorten the prescriptive period: if, as noted in paragraph 5.10 above, statute permits them, by definition they do not subvert the intention of Parliament. It is, however, clear from the responses to consultation that there is very little support for the proposition that it should be possible to enter into an agreement to shorten the prescriptive period. We recognise the concerns raised that agreements of this kind might contribute to uncertainty with resultant cost, whether at the stage of arranging insurance cover or as a result of litigation. As we mentioned in the Discussion Paper, we think consumer protection legislation is capable of preventing unfair clauses of this kind from being relied upon against consumers.[10] But we accept that that would not assist small or medium-sized enterprises or other non-consumers who have modest bargaining power.

5.24 In light of the responses and for these reasons we therefore do not consider that agreements shortening the prescriptive period should be permitted. Since section 13 as it stands does not clearly prohibit such agreements, we recommend that it be amended to make that clear.

5.25 We therefore recommend:

17. Agreements to disapply or in any way alter the operation of prescription provided by any of sections 6, 7, 8 or 8A of the 1973 Act should (except as set out in the previous recommendation) be of no effect.

(Draft Bill, section 13 – substituted section 13 (4))

Contractual limitation clauses

5.26 So far in this chapter we have been concerned with agreements to lengthen or shorten periods of prescription. The responses from Burness Paull (Construction and Projects), Craig Connal, and the Faculty of Advocates referred to the separate issue of contractual limitation clauses. These differ from agreements to shorten the prescriptive period, since they have no effect on the subsistence of obligations but are simply agreements that after a time-limit agreed in a contract no proceedings should be brought.

[10] At para 7.16.

These are extremely common in practice: for example, missives for the sale of land usually contain a two-year limitation clause. They are also common in commercial practice, a limitation period of 10 or 12 years being common in construction contracts.

5.27 While clauses of this kind may often have much the same practical effect as clauses altering the prescriptive period, we do not propose to take up the suggestion made by the Faculty of Advocates of considering extending the section 13 prohibition to them. Several of the responses to consultation mention the commercial utility of clauses of this kind. The ubiquity of such clauses means that to introduce a prohibition would be a change of far-reaching practical effect. In any case, reform of that kind clearly falls outside the scope of this project.

Chapter 6 The burden of proof

6.1 The 1973 Act says nothing about who bears the burden of proof in the ordinary case of prescription, that is, where there is no issue about discoverability or alleged fraud or error[1] and the issue is simply when an obligation became enforceable.

6.2 In the Discussion Paper we reviewed the different views expressed in the case law and asked whether it would be appropriate for legislation to clarify the matter. We went on to ask, if statutory provision were to be made in relation to the burden of proof, what it should be. In light of comparative material, we advanced three options and we went on to ask two questions:

> "20. Do you favour statutory provision on the incidence of the burden of proof?"
>
> "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?" [2]

6.3 Of the respondents who answered the first question, all but one were in favour of statutory provision about the burden of proof. The Senators of the College of Justice observed that the lack of statutory provision "is a surprising omission from the 1973 Act". The Law Society of Scotland stated that a statutory provision might be helpful, adding however that:

> "…we are not aware of it having been a particular issue in practice. As is stated in the Discussion Paper, the burden of proving that he or she has a case to answer would usually rest on the pursuer and addressing the possibility of prescription is just one facet of that. That said, there will always be cases where it is appropriate on the facts of that case for the burden of proof to shift and we would not be in favour of any rule which prevented the court from ordaining the defender to lead."

Craig Connal considered that the matter should be left to the courts.

6.4 In relation to the statutory provision that should be made, there was considerable support for the proposition that the burden of proof should rest on the pursuer. Ten

[1] It is generally accepted – and this seems correct in principle – that the burden of proof so far as section 11(3) and section 6(4) are concerned rests on the pursuer.
[2] Discussion Paper, para 8.10.

respondents favoured this option, many of them referring to a view that the burden of proof should rest with the party seeking to assert a right.[3] Brodies added:

> "When a pursuer raises a court action he is positively asserting that the rights/obligations underlying his claim are still in existence. … It is implicit in the raising of the action that he considers there is an obligation to enforce. It is logical therefore that the burden of proof must rest with the pursuer. The fact that a plea of prescription is one which it is *pars judicis* to take reinforces that view. We do not see any distinction between the 5 year and 20 year prescriptive periods in this regard. …".

6.5 Burness Paull (Dispute Resolution) favoured either option (i) or (iii); while Craig Connal, although not in favour of making statutory provision, would favour (i) if such provision were to be made. The Law Society of Scotland also favoured (i) but with the option of asking the court to consider ordaining the defender to lead in appropriate cases.

6.6 Morton Fraser supported the view that the burden of proof should rest on the defender.

6.7 The Senators of the College of Justice reviewed the respective merits of the various options but made it clear that they had no strong preference as between them.

6.8 In light of the responses the way forward is clear. We consider that there should be statutory provision on the incidence of the burden of proof. The Law Society of Scotland noted that they "were not aware of it [the incidence of the burden of proof] having been a particular issue in practice". No doubt it is true that most cases are determined without it becoming an issue. Nonetheless, as we noted in the Discussion Paper,[4] in the cases in which the burden of proof has been considered in the Outer House, a wide divergence of opinion has been expressed. This suggests that the matter should be placed beyond doubt by legislative provision, in order (as the Faculty of Advocates put it) "to reduce uncertainty about where the burden of proof lies, and to avoid court time being taken up by argument on the point".

6.9 We recommend that the burden of proof should rest on the pursuer. This seems logical, since by definition in raising proceedings the pursuer is seeking to found on an obligation which still subsists. There does not appear to be any unfairness in requiring a pursuer to satisfy the court on this point.[5] That does not mean that the pursuer will as a matter of course have to plead anything about prescription. It means only that, when faced with a plea by the defender that the obligation in question has prescribed, the pursuer will need to aver and prove that it has not. We do not think there is any need for our recommendation to deal with issues such as when a defender should be ordained to lead: procedural matters of that kind are for the courts to determine.

6.10 The third option on which we invited views, that the burden of proof should rest on the pursuer for the five-year prescription and on the defender for the 20-year prescription, did not excite much interest in responses. It would certainly be simpler, and might well be

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[3] BLM; Brodies; Clyde & Co; Faculty of Advocates; FSCM; Charles McGregor; NFU Mutual; RIAS; Scottish Water (Business Stream); Zurich.
[4] At paras 8.3-5.
[5] *Cf Pelagic Freezing (Scotland) Ltd v Lovie Construction Ltd* [2010] CSOH 145 at para [95].

more conducive to clarity and certainty, to provide that the incidence of the burden of proof should be the same for both the short and the long-stop prescriptive regimes. We consider accordingly that the burden of proof should rest on the pursuer for the purposes of both section 6 and section 7 of the 1973 Act.

6.11 In the interests of clarity and consistency we consider that the same provision should be made in relation to sections 8 (20-year prescription of rights relating to property); 8A (2-year prescription of obligations to make contribution between wrongdoers); and 22A (10-year prescription of obligations under Part I of the Consumer Protection Act 1987).

6.12 The question whether a right or obligation has been extinguished by prescription is a matter of substantive law. The provision giving effect to our recommendation on the burden of proof, like other rules of prescription, should apply regardless of the forum in which the issue is being considered.[6]

6.13 We therefore recommend:

18. Where for the purposes of section 6, 7, 8, 8A or 22A of the 1973 Act a question arises as to whether an obligation or right has been extinguished by prescription, it should be for the creditor to prove that the obligation or right has not been so extinguished.

(Draft Bill, section 14)

[6] In a foreign forum, that will of course depend on the rules of private international law applied in that forum. A presumption of the kind set out in s 13A as inserted by s 14 of the draft Bill appended to this Report is treated as a matter of substantive law for the purposes both of contractual and of non-contractual obligations in the Rome I and Rome II Conventions: Art 18 of Reg (EC) no 553/2008; Art 22 of Reg (EC) no 864/2007.

Chapter 7 Miscellaneous issues

7.1 The Discussion Paper covered several miscellaneous issues on which we invited comment.

Unjustified enrichment

7.2 We reviewed the issue whether a discoverability test should be introduced for obligations arising from unjustified enrichment and expressed the provisional view that it should not. That led us to ask consultees whether they agreed that no discoverability test should be introduced in relation to obligations arising from unjustified enrichment.[1]

7.3 All respondents who answered this question agreed.

7.4 We therefore recommend:

19. No discoverability test should be introduced in relation to obligations arising from unjustified enrichment.

Fraud, concealment and error

7.5 The 1970 Report recommended that on equitable grounds a creditor should have a defence against the five-year prescription if he or she had been deterred from taking action within the prescriptive period by fraud or concealment on the part of the debtor or by error induced by the words or conduct of the debtor.[2] We are in no doubt that on equitable grounds provision of this kind is an important element in the overall scheme of the five-year prescription.

7.6 As we explained in the Discussion Paper,[3] however, the drafting of the relevant provisions has given rise to difficulties. The Act excludes from the five-year prescription "any period during which by reason of (i) fraud on the part of the debtor or any person acting on his behalf, or (ii) error induced by words or conduct of the debtor or any person acting on his behalf, the creditor was induced to refrain from making a relevant claim in relation to the obligation".[4] While the working of the section was clarified by the House of Lords in *BP Exploration Operating Co Ltd v Chevron Shipping Company*,[5] the drafting of the provisions was criticised: "[t]he language of subsec (4) is not entirely happy. The word 'induced' is used twice in the critical passage, first to refer to the error having been induced by the debtor and secondly to refer to the creditor being induced to refrain. The word implies a more vigorous connection than a merely causal one, although that element must be embodied in it."[6]

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[1] Question 22, para 9.23.
[2] 1970 Report, para 93.
[3] Discussion Paper, paras 10.3-8.
[4] 1973 Act, s 6(4) and (5).
[5] 2002 SC (HL) 19, esp at paras [102]-[110]; *cf* also paras [26]-[36] and [60]-[69].
[6] At para [65] (Lord Clyde).

7.7 After reviewing the case law, we suggested that the drafting of section 6(4) should make it clear that it is intended to address failure to raise proceedings as a result of fraud or error induced by a defender; that for these purposes what matters is that the words or conduct of the defender caused the failure; and that in determining that matter the defender's own state of knowledge should be irrelevant. We asked consultees whether they agreed that section 6(4) should be reformulated to the effect that the prescriptive period should not run against a creditor who has been induced by the debtor, innocently or otherwise, not to raise proceedings.[7]

7.8 All but two of the respondents who answered this question agreed. In agreeing, the Faculty commented that the reformulated section 6(4) should continue to include the proviso about reasonable diligence and discoverability. There would also be justification for requiring the creditor to establish that his or her actings in not raising proceedings were reasonable (an objective test). The Law Society of Scotland agreed for the reasons given in paragraph 10.9 of the Discussion Paper (summarised above in paragraph 7.7), and added that "[t]his will require careful drafting and clarity will be required as to, for example, what period of time the clock stops running and how that is triggered at either end."

7.9 On the other hand, BLM considered that reformulating section 6(4) would dilute legal certainty. Scottish Water (Business Stream) commented on the case of *Rowan Timber Supplies (Scotland) Ltd v Scottish Water Business Stream Ltd*[8] and favoured a more restrictive approach than that set out in the Discussion Paper:

> "Consistent with the observations in *BP Exploration Operating Co Ltd v Chevron Shipping Company*, Business Stream considers that the use of the words "induced" and "refrain" lead to the need for "a more vigorous connection" between a defender's conduct and a pursuer's failure to raise proceedings than is found in *Rowan Timber*. … Business Stream considers that its state of mind and the reasonableness of its knowledge should be factors relevant to the assessment of whether there was an induced error. While there need not be a positive intention to mislead, there should be some means of assessing whether the alleged inducing act was reasonable or not, in the same way that the creditor's knowledge is relevant to the reasonableness of having refrained from making a claim."

7.10 We consider that section 6(4) should be reformulated, along the lines of what was proposed in the Discussion Paper. The essence is that it should be clear that the question whether a creditor failed to raise proceedings owing to the fraud of, or error induced by, the defender is an objective question. Fairness seems to us to require suspending the running of prescription when, as a matter of objective fact, the reason why the pursuer failed to raise proceedings was something that the defender did or said. In cases of error it is not obvious why it should matter whether the defender intended to induce (or even knew of) the error or not. The result so far as the pursuer is concerned is the same. To eliminate consideration of the defender's state of mind will make this test more straightforward and easier to apply. But, in order to rely on this provision, the pursuer will still need to establish that the fraud or words

[7] Question 23, para 10.10.
[8] [2011] CSIH 26.

or conduct of the defender caused the failure to make the claim. Recent case law confirms that "conduct" may include a failure to act.[9]

7.11 We do not propose any change to the existing operation of the reasonable diligence aspect of the test. In short: if a pursuer acting with reasonable diligence could have identified the fraud or error, then, from the date on which he or she could have done so, it should no longer be possible to rely on this provision to suspend the running of prescription.

7.12 We do not think it necessary to reframe the section to indicate the date on which prescription is suspended and the date on which it begins to run again: the present wording of the section is clearly explained by Lord Millett in the *BP Exploration* case and, we think, puts the matter beyond doubt.[10]

7.13 In the recommended provision, the removal of the expression "induced to refrain from making" and its replacement with the words "failed to make" a relevant claim address one of the problems identified in the case law, namely that the existing wording seems to imply that the creditor should have formed the intention to make a claim and then been induced by the debtor not to do so. Failure to make a claim carries no such undesirable implications. In relation to the existing wording of section 6(4), the courts had already concluded that Parliament cannot have intended that the statutory relief should be available to a creditor who knew of the claim but had been deflected by the debtor from making it, and yet not be available to a creditor from whom fraud committed or error induced by the debtor had concealed the very existence of the claim. On such a construction, the greater fraud or error would go unchecked, and the lesser fraud or error would attract the statutory dispensation.[11] Although the courts have clarified the unsatisfactory wording of this subsection, it is clearly desirable that the wording should be amended to reflect that clarification.

7.14 The debtor's intentions are immaterial. The policy intention is that this relief should be available when as a matter of fact (rather than intention) the cause of the creditor's failure to make the claim was the fraud, words or conduct of the debtor (or his or her agent).

7.15 We therefore recommend:

20. The five-year prescription should be suspended in terms of section 6(4) of the 1973 Act against a creditor who has been caused by the debtor, innocently or otherwise, not to raise proceedings.

(Draft Bill, section 4)

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[9] *Heather Capital Ltd v Levy & McRae* [2016] CSOH 107 at para [46]; *Heather Capital Ltd v Burness Paull* [2017] CSIH 19 at para [63]: "relevant conduct in the context of prescription may be active or passive. It may involve positive action, but equally, in certain circumstances, it may involve a silence or a lack of action. The conduct need not be deliberate, or blameworthy, or careless, or be carried out with any particular motive such as .

[10] *BP Exploration Operating Co Ltd v Chevron Shipping Company* 2002 SC (HL) 19 at paras [102]-[110].

[11] *Ibid* at para [32] citing earlier authority.

The definition of "relevant claim"

7.16 A prescriptive period may be interrupted by the making of a "relevant claim". The Discussion Paper[12] raised two short points about the definition of "relevant claim" in section 9 of the 1973 Act. The statutory definition is "a claim made by or on behalf of the creditor for implement or part-implement of the obligation." To be relevant, the claim must be made in one of the following ways: (a) in "appropriate proceedings";[13] (b) by presenting or concurring in a petition for sequestration or submitting a claim in a sequestration; (c) by submitting a claim to a trustee under a trust deed; (d) by presenting or concurring in a petition for winding up a company or submitting a claim in a liquidation; or (e) by executing diligence directed at enforcement of the obligation.

7.17 The first point we raised is that no mention is made in the definition of claims which are made in an administration. As we noted in the Discussion Paper, we can see no reason of policy why a claim submitted in an administration should not interrupt prescription. On the contrary: where a creditor has no other means of seeking to prevent the extinction of a claim by prescription, it seems fair that submitting a claim in an administration should have the effect of interrupting prescription. It also seems appropriate that the position should be brought into line with the law as it currently applies to sequestrations, trust deeds, and liquidations.

7.18 The second point we raised was whether similar provision should be made in relation to receiverships. Following the changes introduced by the Enterprise Act 2002,[14] this is no doubt now less important in practice. Nonetheless, since a receiver has extensive powers in relation to the property attached by a floating charge and also owes certain duties even to unsecured creditors,[15] it may be appropriate to provide that a creditor's claim made to a receiver should also fall within the definition of "relevant claim".

7.19 We therefore asked consultees whether they agreed that "relevant claim" should extend to the submission of a claim in an administration and to the submission of a claim in a receivership.[16]

7.20 All respondents who answered this question agreed, although two of the responses mentioned only the case of administration.[17] Since the policy reasons mentioned in the Discussion Paper for making these changes seem clear, and since no contrary views were expressed, we therefore consider that the definition of "relevant claim" should be extended to cover these two points.

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[12] Discussion Paper, paras 10.11-16.
[13] These are defined in s 4(2) of the 1973 Act (in brief) as meaning any proceedings in a court of competent jurisdiction in Scotland or elsewhere and any arbitration in Scotland or in a country other than Scotland provided the award would be enforceable in Scotland.
[14] Insolvency Act 1986, 72A-72H, as inserted by Enterprise Act 2002, s 250.
[15] Insolvency Act 1986, s 55 and sch 2; *Palmer's Company Law,* paras 14.214-215, 219 and 227-238.
[16] Question 24, para 10.16.
[17] Morton Fraser; Craig Connal.

7.21 We therefore recommend:

21. The definition of "relevant claim" should include the submission of a claim in an administration or receivership and the acts that give rise to administration or receivership.

(Draft Bill, section 10)

Three additional points raised in consultation

7.22 In responses to our consultation three points which were not raised in the Discussion Paper were made about the nature of a "relevant claim".

Adjudication

7.23 RIAS raised the question whether the definition of "appropriate proceedings" should address the status of adjudication under the Housing Grants, Construction and Regeneration Act 1996.

7.24 We have considered this suggestion and have come to the conclusion that "relevant claim" should not extend to adjudication. An adjudication under section 108 of the 1996 Act is expressly conceived as a provisional means of dispute resolution. It becomes final only on a final determination in legal proceedings or if the parties accept it as constituting a final settlement. In this respect it seems to us to be different from the other forms of "relevant claim" and there appear to be sound reasons for treating it differently. We do not therefore recommend any amendment of "relevant claim" in this respect.

Declarator

7.25 Brodies raised the question of declarator in the context of a "relevant claim". They referred to the case of *Highlands & Islands Airports Ltd v Shetland Islands Council*[18], in which the Inner House held that a summons containing only declaratory conclusions constituted a "relevant claim" and was therefore sufficient to interrupt prescription. They suggested that it would be useful to consider within the scope of the present project the question whether an action of declarator should interrupt a prescriptive period. The particular concern is whether it should be enough, where a pursuer is not yet in a position to quantify a claim precisely, to seek a declarator that there is an existing obligation of reparation, as opposed to actually proceeding with an action for damages. Brodies noted that, if decree of declarator had been granted, that would have converted the obligation founded on the decree into one which would subsist for a period of 20 years.[19]

7.26 We accept that prior to the *Highlands & Islands Airports* case the law was uncertain.[20] Following the decision in that case it can no longer be said that the law is unclear. It is true that the effect of a decree is that the obligation constituted by the decree prescribes only after 20 years. But, while this means that a pursuer can secure the subsistence of an

[18] 2015 SC 588.
[19] See 1973 Act, sch 1 para 2(a).
[20] See eg the differing approaches in the first and second editions of Johnston, *Prescription and Limitation* paras 5.26 (1st edn) and 5.25 (2nd edn).

obligation for an extended period, he or she can bring this about only by raising proceedings. No question of a stale claim arises. It therefore does not seem to us that a rule that an action of declarator interrupts prescription involves unfairness. Indeed, it is difficult to see why a pursuer would raise declaratory proceedings if not to insist on his or her right. To maintain that an action of declarator does not amount to a "relevant claim" therefore seems to us to involve a degree of artificiality. For these reasons, and in particular because the law has now been clarified by the courts, we do not recommend that this matter be taken forward.

The effect of a relevant claim

7.27 Douglas McGregor pointed out that one issue not raised in the Discussion Paper is the effect of raising court proceedings and suggested that the current project represented an ideal opportunity to clarify the law in this area. He referred to the fact that there are two possible views about this, namely (i) that court proceedings constitute a "relevant claim" which is made for as long as an action is before the court and (ii) that a claim is an instantaneous event which is made on the date the action is raised.[21] He went on to make the point that the difference between these two approaches is perhaps most starkly apparent in cases in which decree of dismissal is sought on the basis of inordinate and inexcusable delay.[22] In such cases the court action is likely to have been dormant for an extended period of time.[23] He recognised, nonetheless, that modern case management procedures and the fact that courts are themselves keen to insist on progress mean that cases where this issue arises are likely to be rare. He also noted:

> "The vast majority of cases are likely to be disposed of in a relatively short timescale. In the circumstances, it might be more straightforward if the raising of an action were sufficient to interrupt and suspend prescription with a fresh prescriptive period commencing only on disposal of proceedings. If the position is clear then all parties to the action (except perhaps party litigants) will be aware of the consequences of failing to make progress. As an alternative, consideration might be given to allowing a limited period after dismissal in which fresh proceedings could be raised."

7.28 This issue is live only where an action has been pending for more than five years. In that event, on the second view mentioned above, the obligation in question would have prescribed before the action came to an end, because more than five years would have passed since the date on which the action was raised and interrupted prescription. On the first view, it would not, since the interruption would subsist until final disposal of the action. While we would agree that this issue is likely to arise infrequently, we can see the attraction in clarifying it. Our view is that the definition of "relevant claim" should be clarified so as to make it clear that, for as long as an action is pending before a court, it constitutes an interruption of prescription. Our main reasons for this view are that we think it would clearly be unsatisfactory for the obligation on which an action is based to prescribe while the claim was before the court. That would be seriously prejudicial to a pursuer. But to allow an action pending before the court to constitute a continuing interruption does not give a pursuer carte blanche to delay. In particular, the prejudice to which a defender might otherwise be exposed by an action being unduly protracted is now much less likely to occur, given the

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[21] For further discussion, see Johnston, *Prescription,* paras 5.33-44.
[22] Rules of the Court of Session rule 21A.1; Sheriff Court Ordinary Cause Rules rule 15.7.
[23] See, eg, *Abram v British International Helicopters* Ltd [2014] CSIH 53; *Sultana v General Accident Fire & Life Assurance Corporation plc* [2016] SC EDIN 40; *Fox v United Biscuits (UK) Ltd* 2014 SC GLA 20.

ability of the courts by means of their powers of case management to ensure that parties make progress with their actions. Furthermore, we consider that this understanding of the effect of a relevant claim should apply not just to claims advanced in litigation but also to claims made by one of the other methods recognised by the 1973 Act, such as a claim in a sequestration or liquidation. The relevant provision[24] of the draft Bill was included in the working draft of the Bill on which we consulted during March 2017. Consultation did not reveal any opposition to it.

7.29 The provision implementing our recommendation will apply only to prescription under sections 6 and 8A of the 1973 Act. As explained earlier,[25] provision is made elsewhere in the draft Bill that the long-stop prescription under sections 7 and 8 should not be amenable to interruption by a relevant claim. Equally, the limited extensions of time recommended, for cases in which a relevant claim has been raised before expiry of the long-stop prescriptive period, are applicable only to the long-stop prescription of section 7 or section 8.[26]

7.30 We therefore recommend:

22. For purposes of sections 6 and 8A of the 1973 Act, a "relevant claim" should be treated as being made continuously until it is finally disposed of.

(Draft Bill, sections 11 and 12)

[24] S 11.
[25] See paras 4.15-25 and 4.34; draft Bill, ss 6 and 7.
[26] See paras 4.26-40; draft Bill, ss 6 and 7.

Chapter 8 List of recommendations

1. The 1973 Act should be amended to make clear that neither the five-year nor 20-year prescriptive periods will apply where an enactment other than the 1973 Act provides for a specific limitation or prescriptive period or that an obligation is imprescriptible or is not subject to any period of limitation.

(Paragraph 2.14; Draft Bill, section 9)

2. The five-year prescription should extend to all statutory obligations to make payment in so far as they are not expressly excluded.

(Paragraph 2.24; Draft Bill, section 3 (1) and (2))

3. The following should be excluded from the five-year prescription:

(i) obligations to pay taxes and duties that are recoverable by the Crown, including any penalty, interest or other sum that is recoverable as if it were an amount of such taxes or duties, and obligations underlying proceedings for forfeiture under the customs and excise Acts or proceedings for forfeiture of a ship;

(ii) any obligation to pay sums recoverable under Part 3 of the Social Security Administration Act 1992; section 127(c) of the Social Security Contributions and Benefits Act 1992; or Part 1 of the Tax Credits Act 2002;

(iii) any obligation to pay child support maintenance arising under the Child Support Act 1991 and regulations made under it; and

(iv) any obligation to pay council tax or non-domestic rates and any surcharge, fees, expenses or other sum recoverable in connection with its enforcement.

(Paragraph 2.31; Draft Bill, section 3(1) and (3)(b))

4. Paragraph 1 of schedule 1 of the 1973 Act should be amended to the effect that the five-year prescription, in addition to applying to any obligation to pay damages (whatever the source of the obligation), should extend to any obligation arising from delict.

(Paragraph 2.39: Draft Bill, section 1)

5. The following should be brought within the scope of the five-year prescription:

(i) Any obligation to reimburse expenditure incurred in reliance on a representation about the existence of a contract; and

(ii) Any obligation relating to the validity of a contract.

(Paragraph 2.61; Draft Bill, section 2)

6. The discoverability formula currently set out in section 11(3) of the 1973 Act should be replaced by a new formula to the effect that, in relation to obligations to pay damages, before the five-year prescriptive period begins to run the creditor must be aware, as a matter of fact, (i) that loss, injury or damage has occurred; (ii) that the loss, injury or damage was caused by a person's act or omission; and (iii) the identity of that person. Whether the creditor is aware that the act or omission that caused the loss, injury or damage is actionable in law should be irrelevant.

(Paragraph 3.21; Draft Bill, section 5(1), (4) and (5))

7. The words "act, neglect or default", currently used in section 11 of the 1973 Act should be replaced by the words "act or omission".

(Paragraph 3.28; Draft Bill, section 5(1), (2) and (3))

8. The discoverability formula should incorporate a proviso to the effect that knowledge that any act or omission is or is not actionable as a matter of law is irrelevant.

(Paragraph 3.33; Draft Bill, section 5(1) and (5))

9. There should be no legislative change by introducing a test of materiality in the context of the discoverability formula.

(Paragraph 3.45)

10. There should be no legislative change to the test of "reasonable diligence".

(Paragraph 3.54)

11. For obligations to pay damages in respect of loss, injury or damage caused by an act or omission, the 20-year prescriptive period should commence on 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 other obligations the date of commencement of the 20-year prescriptive period should remain unchanged.

(Paragraph 4.14; Draft Bill, section 8)

12. The 20-year prescription under section 7 of the 1973 Act should no longer be amenable to interruption either by relevant claim or by relevant acknowledgment, and the 20-year prescription under section 8 of the 1973 Act should no longer be amenable to interruption by relevant claim.

(Paragraph 4.41; Draft Bill, sections 6 and 7)

13. For the purpose of the 20-year prescription under sections 7 and 8 of the 1973 Act, where a relevant claim has been made during the prescriptive period but by the end of that period has not been finally disposed of, and the proceedings in which the claim is made have not come to an end, the prescriptive period should be extended so that it expires when the claim is finally disposed of or the proceedings otherwise come to an end.

(Paragraph 4.41; Draft Bill, sections 6, 7 and 12)

14. Construction contracts should not be subject to any special regime in relation to the running of the long-stop prescriptive period.

(Paragraph 4.47)

15. The length of the long-stop period of prescription should remain 20 years.

(Paragraph 4.55)

16. Agreements to extend the five-year prescription of section 6, or the two-year prescription of section 8A, of the 1973 Act should be valid provided (i) that they are made after the appropriate prescriptive period has started to run but before it has been completed; (ii) that they extend the prescriptive period by no more than one year; and (iii) that only one such extension may be made in relation to the same obligation.

(Paragraph 5.17; Draft Bill, section 13 – substituted section 13 (1), (2) and (3))

17. Agreements to disapply or in any way alter the operation of prescription provided by any of sections 6, 7, 8 or 8A of the 1973 Act should (except as set out in the previous recommendation) be of no effect.

(Paragraph 5.25; Draft Bill, section 13 – substituted section 13 (4))

18. Where for the purposes of section 6, 7, 8, 8A or 22A of the 1973 Act a question arises as to whether an obligation or right has been extinguished by prescription, it should be for the creditor to prove that the obligation or right has not been so extinguished.

(Paragraph 6.13; Draft Bill, section 14)

19. No discoverability test should be introduced in relation to obligations arising from unjustified enrichment.

(Paragraph 7.4)

20. The five-year prescription should be suspended in terms of section 6(4) of the 1973 Act against a creditor who has been caused by the debtor, innocently or otherwise, not to raise proceedings.

(Paragraph 7.15; Draft Bill, section 4)

21. The definition of “relevant claim” should include the submission of a claim in an administration or receivership and the acts that give rise to administration or receivership.

(Paragraph 7.21; Draft Bill, section 10)

22. For purposes of sections 6 and 8A of the 1973 Act, a “relevant claim” should be treated as being made continuously until it is finally disposed of.

(Paragraph 7.30; Draft Bill, sections 11 and 12)

Appendix A

DRAFT BILL

Prescription (Scotland) Bill

[DRAFT]

CONTENTS

Prescription (Scotland) Bill

[DRAFT]

An Act of the Scottish Parliament to amend the law relating to the extinction of rights and obligations by the passage of time.

INTRODUCTORY NOTE

Sections 1 to 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. 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 purposes of a long-stop prescription which is that it should cut off a right of action clearly and absolutely after a defined period. The remaining sections cover miscellaneous and general matters.

5-year negative prescription

1 Obligations to pay damages and delictual obligations

(1) The Prescription and Limitation (Scotland) Act 1973 (referred to in this Act as "the 1973 Act") is amended as follows.

(2) In schedule 1 (obligations affected by prescriptive periods of five years under section 6), in paragraph 1, for sub-paragraph (d) substitute—

"(d) to any obligation to pay damages (whatever the source of the obligation);

(da) to any obligation arising from delict, not being an obligation falling within any other provision of this paragraph;".

(3) In section 11 (obligations to make reparation)—

(a) in subsection (1), for the words from "(whether" to "reparation" substitute "to pay damages (whatever the source of the obligation)",

(b) the section title becomes "Obligations to pay damages".

NOTE

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).

2 Obligations related to contract

(1) Schedule 1 (obligations affected by prescriptive periods of five years under section 6) of the 1973 Act is amended as follows.

(2) In paragraph 1, after sub-paragraph (f) insert—

"(fa) to any obligation relating to the validity of a contract, not being an obligation falling within any other provision of this paragraph;

(fb) to any obligation to reimburse expenditure incurred in reliance on a representation about the existence of a contract;".

NOTE

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.

3 Statutory obligations

(1) Schedule 1 (obligations affected by prescriptive periods of five years under section 6) of the 1973 Act is amended as follows.

(2) In paragraph 1—

(a) the following sub-paragraphs are repealed—

(i) sub-paragraphs (aa) (both),

(ii) sub-paragraphs (aca) to (ae), and

(iii) sub-paragraph (dd),

(b) after sub-paragraph (g) insert—

"(h) to any obligation to make a payment arising under an enactment (whenever passed or made), not being an obligation falling within any other provision of this paragraph.".

(3) In paragraph 2—

(a) for sub-paragraph (e) substitute—

"(e) except as provided in paragraph 1(a), (ab), (ac) and (h) of this Schedule, to any obligation relating to land (including an obligation to recognise a servitude);

(ea) to any obligation of the Keeper of the Registers of Scotland to pay compensation by virtue of section 77 or 94 of the Land Registration etc. (Scotland) Act 2012;",

(b) after sub-paragraph (f) insert—

"(fa) to any obligation to pay taxes or duties that are recoverable by the Crown, or to pay any penalty, interest or other sum that is recoverable as if it were an amount of such taxes or duties;

(fb) to any obligation to pay a sum recoverable under—

(i) Part 3 (overpayments and adjustments of benefit) of the Social Security Administration Act 1992;

(ii) section 127(c) (recovery of income support in certain circumstances) of the Social Security Contributions and Benefits Act 1992; or

(iii) Part 1 (tax credits) of the Tax Credits Act 2002;

(fc) to any obligation to pay child support maintenance under the Child Support Act 1991;

(fd) to any obligation to pay—

(i) council tax under Part 2 of the Local Government Finance Act 1992;

(ii) non-domestic rates levied under section 7B(2) of the Local Government (Scotland) Act 1975; or

(iii) any surcharge, fees, expenses or other sum recoverable in connection with the enforcement of an obligation to pay such council tax or rates;

(fe) so as to prevent the bringing of—

(i) proceedings for forfeiture under the customs and excise Acts (within the meaning of the Customs and Excise Management Act 1979); or

(ii) proceedings in respect of the forfeiture of a ship (that is, any description of vessel used in navigation and not propelled by oars);".

NOTE

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 a 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 which do not involve payment, or may involve something in addition to payment, are unaffected and so 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. For the avoidance of doubt, that part of the current sub-paragraph (e) which relates to any obligation of the Keeper of the Registers of Scotland to pay compensation by virtue of section 77 or 94 of the Land Registration etc. (Scotland) Act 2012 ("the 2012 Act") has been moved into a separate sub-paragraph (ea). Sub-paragraph (ea), unlike sub-paragraph (e), is not qualified by a reference to the new sub-paragraph (h) of paragraph 1 of schedule 1 (statutory obligations to make a payment). The said obligations of the Keeper in terms of the 2012 Act will continue to be governed by the 20-year prescription.

Subsection (3)(b) sets out further exceptions to the application of the five-year prescription. First, 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 interest, penalty or other sum recoverable as if it were an amount of such taxies or duties, are not subject to the five-year prescription. Secondly, an exception is made for obligations to pay sums recoverable under certain social security and tax credit legislation. Thirdly, an exception is made for any obligation to pay child support maintenance under the Child Support Act 1991. Fourthly, an exception is made in relation to obligations to pay council tax or non-domestic rates and sums recoverable in connection with the

enforcement of such obligations. Lastly, an exception is made for obligations underlying proceedings for forfeiture under the customs and excise Acts or for forfeiture of a ship. (The Limitation Act 1980, section 37(2), makes similar provision for England and Wales.). Such obligations (with the possible exception of obligations to pay council tax and non-domestic rates - see the Report, paragraph 2.29) do not fall within schedule 1 paragraph 1, and this exception therefore preserves the status quo.

4 Effect of fraud or error on computation of prescriptive period

(1) Section 6 (extinction of obligations by prescriptive periods of five years) of the 1973 Act is amended as follows.

(2) In subsection (4), for "was induced to refrain from making" substitute "failed to make".

(3) After subsection (4) insert—

"(4A) For the purposes of subsection (4)(a), it does not matter whether the debtor, or the person acting on the debtor's behalf, intended the fraud or the words or conduct to cause the creditor to fail to make a relevant claim.".

NOTE

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 be suspended in terms of section 6(4) of the 1973 Act against a creditor who has been caused by the debtor, innocently or otherwise, not to raise proceedings.

Subsection (2) addresses one of the problems identified in the case law, namely that the wording seems to imply that the creditor should have formed the intention to make a claim and then been induced by the debtor not to do so. "Failure to make a claim" carries no such undesirable implications. Subsection (2) therefore 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 para [46]; [2017] CSIH 19 at para [63].

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. This relief is available when as a matter of fact (rather than intention) the cause of the creditor's failure to make the claim was the fraud, words or conduct of the debtor or his or her agent.

5 Start point of prescriptive period for obligations to pay damages

(1) Section 11 (obligations to make reparation) of the 1973 Act is amended as follows.

(2) In subsection (1), for "act, neglect or default" substitute "act or omission".

(3) In subsection (2), for "act, neglect or default", in each place those words appear substitute "act or omission".

(4) In subsection (3), for the words "that loss, injury or damage caused as aforesaid had occurred" substitute "of each of the facts mentioned in subsection (3A)".

(5) After subsection (3) insert—

"(3A) The facts referred to in subsection (3) are—

(a) that loss, injury or damage has occurred,

(b) that the loss, injury or damage was caused by a person's act or omission, and

(c) the identity of that person.

(3B) It does not matter for the purposes of subsections (3) and (3A) whether the creditor is aware that the act or omission that caused the loss, injury or damage is actionable in law.".

NOTE

This section alters the discoverability formula for determining the knowledge which a pursuer must have before the prescriptive period begins to run where damages are sought for loss or damage which was initially latent. 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 brought forward the start of the five-year prescriptive period under section 11(3), in a manner that has been perceived to be detrimental to 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) that loss, injury or damage has occurred;

(b) that the loss, injury or damage was caused by a person's act or omission; and

(c) the identity of that person.

The policy underlying this provision is that the creditor must be aware (actually or constructively) of these matters of fact. The drafting is intended to omit any reference to, or connotation of, the creditor's awareness or otherwise of the legal significance of these facts.

Under new subsection (3A), in a case where there is more than one debtor in an obligation but the creditor gains knowledge about the identity of one co-debtor earlier than that of another co-debtor, the starting point for the running of the prescriptive period for each of the debtors will be different.

New subsection (3B), 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 debtor's liability in law is of no relevance in relation to the discoverability formula. This latter point is put beyond doubt by new subsection (3B).

20-year negative prescription

6 Obligations: 20-year prescriptive period and extension

(1) The 1973 Act is amended as follows.

(2) In section 7 (extinction of obligations by prescriptive periods of twenty years)—

(a) for subsection (1) substitute—

"(1) An obligation to which this section applies is extinguished on the expiry of the continuous period of 20 years after the date on which the obligation became enforceable.",

(b) after subsection (2) insert—

"(3) Subsection (4) applies if—

(a) a relevant claim is made in relation to an obligation to which this section applies,

(b) the claim is made before the time at which the prescriptive period mentioned in subsection (1) would, but for subsection (4), expire, and

(c) at that time—

(i) the claim has not been finally disposed of, and

(ii) the proceedings in which the claim is made have not otherwise come to an end.

(4) The prescriptive period is extended so that it expires—

(a) when the claim is finally disposed of, or

(b) when the proceedings in which the claim is made come to an end (where the proceedings come to an end without the claim having been finally disposed of).

(5) In subsections (3) and (4), the references to proceedings in which a relevant claim is made include references to any other process in or by which a relevant claim is made.".

(3) In section 10 (relevant acknowledgement for purposes of sections 6 and 7)—

(a) in each of subsections (1), (2)(a) and (3), for "sections 6 7 and 8A" substitute "sections 6 and 8A",

(b) in the section title, for "7" substitute "8A".

NOTE

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, before 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.

Reference to final disposal and the end of proceedings means that the claimant has the benefit of the extension only if the claim has not been finally disposed of and the proceedings in which it is made have not otherwise come to an end. In other words, if the proceedings have ended by the time the prescriptive period expires, it does not matter that there has not been a final disposal of the relevant claim; it is enough that the proceedings have ended. This provision ensures that what is intended to be a narrow exception from the long-stop prescription is kept within tight bounds. The words in brackets in subsection (4)(b) make clear that, where a claim has been finally disposed of, the claimant cannot rely on the fact that proceedings are continuing for other purposes in order to seek an extension of time.

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 (for example a claim in a sequestration or liquidation) 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 also no longer be amenable to interruption by relevant acknowledgement.

7 Property rights: 20-year prescriptive period and extension

(1) Section 8 (extinction of other rights relating to property by prescriptive periods of twenty years) of the 1973 Act is amended as follows.

(2) In subsection (1), the words ", and without any relevant claim in relation to it having been made," are repealed.

(3) After subsection (1) insert—

"(1A) Subsection (1B) applies if—

(a) a relevant claim is made in relation to a right to which this section applies,

(b) the claim is made before the time at which the prescriptive period mentioned in subsection (1) would, but for subsection (1B), expire, and

(c) at that time—

(i) the claim has not been finally disposed of, and

(ii) the proceedings in which the claim is made have not otherwise come to an end.

(1B) The prescriptive period is extended so that it expires—

(a) when the claim is finally disposed of, or

(b) when the proceedings in which the claim is made come to an end (where the proceedings come to an end without the claim having been finally disposed of).".

NOTE

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. (As section 8 contains no reference to relevant acknowledgement, it is necessary only to amend the section by repealing the reference 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, before 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.

8 Start point of prescriptive period for obligations to pay damages

In section 11 (obligations to make reparation) of the 1973 Act, for subsection (4) substitute—

"(4) For the purposes of section 7 of this Act, any obligation referred to in subsection (1) of this section is to be regarded as having become enforceable on—

(a) the date on which the act or omission occurred (or the last such date, where there was more than one act or omission), or

(b) where the act or omission was a continuing one, the date on which it ceased.".

NOTE

By virtue of section 11(4) of the 1973 Act, the 20-year prescriptive period for obligations to pay damages currently runs from the date when loss, injury or damage occurred. 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.

Not all obligations subject to prescription under section 7 are obligations to pay damages, and for them an analysis in terms of act or omission and loss, injury or damage is inappropriate. For these obligations, the starting date for the 20-year prescription remains the date on which the obligation giving rise to the claim became enforceable.

9 Saving for other statutory provisions about prescription or limitation

(1) The 1973 Act is amended as follows.

(2) After section 7 insert—

"**7A Saving for other statutory provisions about prescription or limitation**

(1) Sections 6 and 7 of this Act do not apply to an obligation if, and so far as, an enactment other than this Act makes provision to the effect that—

(a) the obligation is imprescriptible,

(b) the obligation is extinguished after a specified period of time, or

(c) the making of a claim or the bringing of proceedings in respect of the obligation—

(i) is not subject to any period of limitation, or

(ii) may be done only within a specified period of time.

(2) In this section—

"enactment" means any enactment whenever passed or made,

"specified" means specified in, or determined in accordance with, any enactment other than one contained in this Act.".

(3) In section 15(1) (interpretation of Part 1), in the definition of "enactment", after "Act" insert "and includes an enactment contained in, or in an instrument made under, an Act of the Scottish Parliament".

NOTE

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. (It seems appropriate for the section to apply to provisions in other statutes which stipulate that an obligation should be imprescriptible or that proceedings in respect of it should not be subject to any period of limitation, even though it seems unlikely that this will be an issue of significance in practice.)

The reference to making provision in relation to prescription or limitation serves to focus on express provision in the enactment and directs attention to its effect rather than the way in which it is worded.

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.

10 Definition of "relevant claim"

(1) The 1973 Act is amended as follows.

(2) In section 9(1) (definition of "relevant claim")—

(a) the word "or" after each of paragraphs (a), (b) and (c) is repealed,

(b) after paragraph (d) insert—

"(e) by the appointment, or the submission of an application for the appointment, of a receiver under section 51 of the Insolvency Act 1986;

(f) by the submission of an application for an administration order under paragraph 12 of Schedule B1 of the Insolvency Act 1986;

(g) by the appointment of an administrator under paragraph 14 of Schedule B1 of the Insolvency Act 1986; or

(h) by the submission of a claim in an administration under Part 2, or a receivership under Part 3, of the Insolvency Act 1986 in accordance with rules made under section 411 of that Act;".

(3) In section 22A(3), in the definition of "relevant claim"—

(a) the word "or" after each of paragraphs (a) and (b) is repealed,

(b) after paragraph (c) insert—

"(d) by the appointment, or the submission of an application for the appointment, of a receiver under section 51 of the Insolvency Act 1986;

(e) by the submission of an application for an administration order under paragraph 12 of Schedule B1 of the Insolvency Act 1986;

(f) by the appointment of an administrator under paragraph 14 of Schedule B1 of the Insolvency Act 1986; or

(g) by the submission of a claim in an administration under Part 2, or a receivership under Part 3, of the Insolvency Act 1986 in accordance with rules made under section 411 of that Act;".

NOTE

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.

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

(1) Section 9 (definition of "relevant claim" for the purposes of sections 6, 7 and 8) of the 1973 Act is amended as follows.

(2) After subsection (2) insert—

"(2A) Where a relevant claim is made in relation to an obligation to which section 6 or 8A applies, the claim is to be treated for the purposes of that section as being made continuously until the claim is finally disposed of.".

(3) In the section title, for "and 8" substitute ", 8 and 8A".

NOTE

This section stems from a suggestion by a respondent to the 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. In other words, the claim is to be treated as being made continuously until it is finally disposed of. "Relevant claim" for these purposes is not restricted to claims advanced in litigation but includes those made, for example, in a liquidation.

This section applies only to prescription under sections 6 and 8A of the 1973 Act. (Provision is made in sections 6 and 7 of the draft Bill that the long-stop prescription under sections 7 and 8 of the 1973 Act should not be amenable to interruption by a relevant claim. The limited extensions of time provided for cases in which a relevant claim has been raised before expiry of the long-stop prescriptive period are applicable only to the long-stop prescription under section 7 or section 8 of the 1973 Act.)

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.

12 Definition of "final disposal" of relevant claim

After section 9 of the 1973 Act insert—

"**9A Definition of "final disposal" of relevant claim for purposes of sections 7, 8 and 9**

(1) For the purposes of sections 7, 8 and 9, a relevant claim is finally disposed of—

(a) when a decision disposing of the claim is made, if there is no right of appeal against the decision,

(b) if there is a right of appeal with leave or permission against such a decision—

(i) when the time period for seeking leave or permission to appeal has expired without an application for leave or permission having been made, or

(ii) when leave or permission to appeal is refused,

(c) if leave or permission to appeal against such a decision has been granted or is not required, when the time period for making an appeal has expired without an appeal having been made, or

(d) when the claim is withdrawn or abandoned.

(2) In subsection (1)(a), the reference to a decision disposing of the claim includes a reference to a decision made in an appeal against an earlier decision.".

NOTE

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 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. For example, disposal of an appeal in the Inner House of the Court of Session is not necessarily a "final disposal": whether it is depends on whether there is a right of appeal from that decision to the UK Supreme Court.

13 Restrictions on contracting out

For section 13 (prohibition of contracting out) of the 1973 Act substitute—

"**13 Restrictions on contracting out**

(1) The creditor and debtor in an obligation to which a prescriptive period under section 6 or 8A applies may agree to extend the prescriptive period under section 6 or, as the case may be, 8A in relation to the obligation.

(2) A prescriptive period may be extended by agreement under subsection (1) only—

(a) after the period has commenced (and before it would, but for this section, expire),

(b) by a period of no more than one year, and

(c) once in relation to the same obligation.

(3) Where there is an agreement under subsection (1) in relation to an obligation—

(a) the prescriptive period which is the subject of the agreement expires, in relation to the parties to the agreement, on the date specified in or determined in accordance with the agreement, but

(b) that does not otherwise affect the operation of this Act in relation to the obligation or the prescriptive period.

(4) Except as provided for in subsections (1) to (3), a provision in an agreement is of no effect so far as the provision would (apart from this subsection) have the effect, in relation to a right or obligation to which section 6, 7, 8 or 8A (the "section in question") applies, of—

(a) disapplying the section in question in relation to the right or obligation, or

(b) otherwise altering the operation of the section in question in relation to the right or obligation.".

NOTE

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 otherwise alter the operation of any of such periods, 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 (but not expired); 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 obligation. Drafting in terms of the "obligation" rather than the creditor or debtor is intended to prevent any circumvention of the restrictions by assignation of obligations.

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 set out in or determined in accordance with the agreement. It also makes clear that the extension binds only the parties to the agreement: if there are multiple creditors or multiple debtors, the agreement affects them only if they are party to it.

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. Accordingly, the ordinary rules of the 1973 Act about the commencement, interruption and suspension of prescription continue to apply.

Subsection (4) deals with the disapplication of, or alteration in some other way 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, with the sole exception of agreements permitted under subsection (1), no derogation from the statutory periods of prescription should be possible. The subsection refers to the effect which the provision in the agreement would (apart from this section) have on the operation of section 6, 7, 8 or 8A of the 1973 Act. The intention is that it should extend not just to cases where parties have in terms purported to disapply one of those sections, but also where that is in fact the effect of their agreement.

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.

14 Burden of proof

(1) The 1973 Act is amended as follows.

(2) After section 13 insert—

"**13A Burden of proof**

(1) This section applies in relation to—

(a) an obligation to which a prescriptive period under section 6, 7 or 8A applies, and

(b) a right to which the prescriptive period under section 8 applies.

(2) If a question arises as to whether the obligation or right has been extinguished by the expiry of the applicable prescriptive period, it is to be presumed that the obligation or right has been so extinguished unless the contrary is proved by the creditor.".

(3) In section 22A (prescription of obligations under Part 1 of the Consumer Protection Act 1987), after subsection (7) insert—

"(7A) Section 13A of this Act applies in relation to an obligation to which the prescriptive period under this section applies as it applies in relation to the obligations and rights referred to in subsection (1) of that section.".

NOTE

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 to prove that the obligation or right has not been extinguished. The subsection is drafted so as to apply "if a question arises as to whether the obligation or right has been extinguished by prescription". Accordingly, the party seeking to rely on the right or obligation need not address that issue in the pleadings, unless the other party pleads that the obligation has prescribed. The subsection refers to the burden resting on the "creditor" rather than the pursuer, since issues of onus may arise in relation to a counterclaim, in which it would be the defender who bore the burden of proof.

The subsection refers to the "creditor" although, in its application to property rights under section 8, it might be thought that an expression such as "holder of the right" would be appropriate. However, as the 1973 Act already uses "creditor" in relation to the holder of a property right (section 9(2) is an example), in the interests of consistency, the draft Bill refers only to "creditor".

The drafting of subsection (2) in the form of a rebuttable presumption seeks to make it clear that the section is itself concerned with substantive law. Like other rules of prescription, this provision too should apply regardless of the forum in which the issue is being considered

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 of the 1973 Act).

General

15 Ancillary provision

(1) The Scottish Ministers may by regulations make any incidental, supplementary, consequential, transitional, transitory or saving provision they consider appropriate for the purposes of, in connection with or for giving full effect to this Act.

(2) Regulations under this section may—

(a) make different provision for different purposes,

(b) modify any enactment (including this Act).

(3) Regulations under this section containing provision that adds to, replaces or omits any part of the text of an Act are subject to the affirmative procedure.

(4) Otherwise, regulations under this section are subject to the negative procedure.

16 Commencement

(1) This section and sections 15 and 17 come into force on the day after Royal Assent.

(2) The other provisions of this Act come into force on such day as the Scottish Ministers may by regulations appoint.

(3) Regulations under subsection (2) may—

(a) include transitional, transitory or saving provision,

(b) make different provision for different purposes.

17 Short title

The short title of this Act is the Prescription (Scotland) Act 2017.

Appendix B

Extracts from 1973 Act amended as if draft Bill had been implemented

This Appendix contains relevant extracts from the Prescription and Limitation (Scotland) Act 1973 as they might appear if the draft Bill appended to this Report were to be implemented. The Scottish Law Commission is grateful to Westlaw UK for granting permission enabling the extracts to be reproduced and re-used in this way. (Material downloaded from Westlaw on 19 June 2017.)

Prescription and Limitation (Scotland) Act 1973 c. 52

An Act to replace the Prescription Acts of 1469, 1474 and 1617 and make new provision in the law of Scotland with respect to the establishment and definition by positive prescription of title to interests in land and of positive servitudes and public rights of way, and with respect to the extinction of rights and obligations by negative prescription; to repeal certain enactments relating to limitation of proof; to re-enact with modifications certain enactments relating to the time-limits for bringing legal proceedings where damages are claimed which consist of or include damages or solatium in respect of personal injuries or in respect of a person's death and the time-limit for claiming contribution between wrongdoers; and for purposes connected with the matters aforesaid.

[25th July 1973]

[1]

Notes

1 . Act amended by Self-Governing Schools etc. (Scotland) Act 1989 (c.39), s. 39(4)(a)

Part I PRESCRIPTION

Positive prescription

1 Validity of right.

OMITTED

2 Special cases.

OMITTED

3 Positive servitudes and public rights of way.

OMITTED

4.— Judicial interruption of periods of possession for purposes of sections 1, 2 and 3.

(1) In sections 1, 2 and 3 of this Act references to a judicial interruption, in relation to possession, are references to the making in appropriate proceedings, by any person having a proper interest to do so, of a claim which challenges the possession in question.

(2) In this section *"appropriate proceedings"* means—

(a) any proceedings in a court of competent jurisdiction in Scotland or elsewhere, except proceedings in the Court of Session initiated by a summons which is not subsequently called;

(b) any arbitration in Scotland [in respect of which an arbitrator (or panel of arbitrators) has been appointed] [1] ;

(c) any arbitration in a country other than Scotland, being an arbitration an award in which would be enforceable in Scotland.

(3) The date of a judicial interruption shall be taken to be—

(a) where the claim has been made in an arbitration [, the date when the arbitration begins] [2] ;

(b) in any other case, the date when the claim was made.

[(4) An arbitration begins for the purposes of this section—

(a) when the parties to the arbitration agree that it begins, or

(b) in the absence of such agreement, in accordance with rule 1 of the Scottish Arbitration Rules (see section 7 of, and schedule 1 to, the Arbitration (Scotland) Act 2010 (asp 1)).

] [3]

Notes

1 . Words inserted by Arbitration (Scotland) Act 2010 asp 1 (Scottish Act) s.23(2)(a) (June 7, 2010: insertion has effect as SSI 2010/195 on June 7, 2010 except for purposes of statutory arbitration subject to transitional provisions specified in 2010 asp 1 s.36 and SSI 2010/195 art.3(1); not yet in force otherwise)

2 . Words substituted by Arbitration (Scotland) Act 2010 asp 1 (Scottish Act) s.23(2)(b) (June 7, 2010: substitution has effect as SSI 2010/195 on June 7, 2010 except for purposes of statutory arbitration subject to transitional provisions specified in 2010 asp 1 s.36 and SSI 2010/195 art.3(1); not yet in force otherwise)

3 . Substituted by Arbitration (Scotland) Act 2010 asp 1 (Scottish Act) s.23(2)(c) (June 7, 2010: substitution has effect as SSI 2010/195 on June 7, 2010 except for purposes of statutory arbitration subject to transitional provisions specified in 2010 asp 1 s.36 and SSI 2010/195 art.3(1); not yet in force otherwise)

Modifications

Pt I s. 4(4)(b)	Modified by Arbitration (Scotland) Act 2010 (Commencement No. 1 and Transitional Provisions) Order 2010/195 (Scottish SI), art. 5(1)

5 Further provisions supplementary to sections 1, 2 and 3.

OMITTED

Part I PRESCRIPTION

Negative Prescription

6.— Extinction of obligations by prescriptive periods of five years.

(1) If, after the appropriate date, an obligation to which this section applies has subsisted for a continuous period of five years—

(a) without any relevant claim having been made in relation to the obligation, and

(b) without the subsistence of the obligation having been relevantly acknowledged,

then as from the expiration of that period the obligation shall be extinguished:

Provided that in its application to an obligation under a bill of exchange or a promissory note this subsection shall have effect as if paragraph (b) thereof were omitted.

(2) Schedule 1 to this Act shall have effect for defining the obligations to which this section applies.

(3) In subsection (1) above the reference to the appropriate date, in relation to an obligation of any kind specified in Schedule 2 to this Act is a reference to the date specified in that Schedule in relation to obligations of that kind, and in relation to an obligation of any other kind is a reference to the date when the obligation became enforceable.

(4) In the computation of a prescriptive period in relation to any obligation for the purposes of this section—

(a) any period during which by reason of—

(i) fraud on the part of the debtor or any person acting on his behalf, or

(ii) error induced by words or conduct of the debtor or any person acting on his behalf,

the creditor failed to make~~was induced to refrain from making~~ a relevant claim in relation to the obligation, and

(b) any period during which the original creditor (while he is the creditor) was under legal disability,

shall not be reckoned as, or as part of, the prescriptive period:

Provided that any period such as is mentioned in paragraph (a) of this subsection shall not include any time occurring after the creditor could with reasonable diligence have discovered the fraud or error, as the case may be, referred to in that paragraph.

(4A) For the purposes of subsection (4)(a), it does not matter whether the debtor, or the person acting on the debtor's behalf, intended the fraud or the

words or conduct to cause the creditor to fail to make a relevant claim.

(5) Any period such as is mentioned in paragraph (a) or (b) of subsection (4) of this section shall not be regarded as separating the time immediately before it from the time immediately after it.

1 2 3

Notes

1 . Act amended by Self-Governing Schools etc. (Scotland) Act 1989 (c.39), s. 39(4)(a)

2 . S. 6 extended by Local Government, Planning and Land Act 1980 (c. 65), s. 113(11)

3 . S. 6(4) extended by Merchant Shipping (Liner Conferences) Act 1982 (c. 37), s. 8(3)

7.— Extinction of obligations by prescriptive periods of twenty years.

~~(1) If, after the date when any obligation to which this section applies has become enforceable, the obligation has subsisted for a continuous period of twenty years—~~

~~(a) without any relevant claim having been made in relation to the obligation, and~~

~~(b) without the subsistence of the obligation having been relevantly acknowledged,~~

~~then as from the expiration of that period the obligation shall be extinguished:~~

~~Provided that in its application to an obligation under a bill of exchange or a promissory note this subsection shall have effect as if paragraph (b) thereof were omitted.~~

(1) An obligation to which this section applies is extinguished on the expiry of the continuous period of 20 years after the date on which the obligation became enforceable.

(2) This section applies to an obligation of any kind (including an obligation to which section 6 of this Act applies), not being an obligation [to which section 22A of this Act applies or an obligation] [1] specified in Schedule 3 to this Act as an imprescriptible obligation [or an obligation to make reparation in respect of personal injuries within the meaning of Part II of this Act or in respect of the death of any person as a result of such injuries.] [2]

(3) Subsection (4) applies if—

(a) a relevant claim is made in relation to an obligation to which this section applies,

(b) the claim is made before the time at which the prescriptive period mentioned in subsection (1) would, but for subsection (4), expire, and

(c) at that time—

(i) the claim has not been finally disposed of, and

(ii) the proceedings in which the claim is made have not otherwise come to an end.

(4) The prescriptive period is extended so that it expires—

(a) when the claim is finally disposed of, or

(b) when the proceedings in which the claim is made come to an end (where the proceedings come to an end without the claim having been finally disposed of).

(5) In subsections (3) and (4), the references to proceedings in which a relevant claim is made include references to any other process in or by which a relevant claim is made.

7A Saving for other statutory provisions about prescription or limitation

(1)Sections 6 and 7 of this Act do not apply to an obligation if, and so far as, an enactment other than this Act makes provision to the effect that—

(a) the obligation is imprescriptible,

(b) the obligation is extinguished after a specified period of time, or

(c) the making of a claim or the bringing of proceedings in respect of the obligation—

(i) is not subject to any period of limitation, or

(ii) may be done only within a specified period of time.

(2)In this section—

"enactment" means any enactment whenever passed or made,

"specified" means specified in, or determined in accordance with, any enactment other than one contained in this Act.

3

Notes

1 . Words inserted by Consumer Protection Act 1987 (c.43) ss. 6, 41(2), 47(1)(2), Sch. 1 para. 8

2 . Words added by Prescription and Limitation (Scotland) Act 1984 (c. 45), ss. 5(3), 6(1), Sch. 1 para. 2

3 . Act amended by Self-Governing Schools etc. (Scotland) Act 1989 (c.39), s. 39(4)(a)

8.— Extinction of other rights relating to property by prescriptive periods of twenty years.

(1) If, after the date when any right to which this section applies has become exercisable or enforceable, the right has subsisted for a continuous period of twenty years unexercised or unenforced~~, and without any relevant claim in relation to it having been made,~~ then as from the expiration of that period the right shall be extinguished.

(1A) Subsection (1B) applies if—

(a) a relevant claim is made in relation to a right to which this section applies,

(b) the claim is made before the time at which the prescriptive period mentioned in subsection (1) would, but for subsection (1B), expire, and

(c) at that time—

(i) the claim has not been finally disposed of, and

(ii) the proceedings in which the claim is made have not otherwise come to an end.

(1B) The prescriptive period is extended so that it expires—

(a) when the claim is finally disposed of, or

(b) when the proceedings in which the claim is made come to an end (where the proceedings come to an end without the claim having been finally disposed of).

(2) This section applies to any right relating to property, whether heritable or moveable, not being a right specified in Schedule 3 to this Act as an imprescriptible right or falling within section 6 or 7 of this Act as being a right correlative to an obligation to which either of those sections applies.

[1]

Notes

1 . Act amended by Self-Governing Schools etc. (Scotland) Act 1989 (c.39), s. 39(4)(a)

[8A.— Extinction of obligations to make contributions between wrongdoers.

(1) If any obligation to make a contribution by virtue of section 3(2) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 in respect of any damages or expenses has subsisted for a continuous period of 2 years after the date on which the right to recover the contribution became enforceable by the creditor in the obligation—

(a) without any relevant claim having been made in relation to the obligation; and

(b) without the subsistence of the obligation having been relevantly acknowledged;

then as from the expiration of that period the obligation shall be extinguished.

(2) Subsections (4) and (5) of section 6 of this Act shall apply for the purposes of this section as they apply for the purposes of that section.

] [1]

[2]

Notes

1 . S. 8A inserted by Prescription and Limitation (Scotland) Act 1984 (c. 45), s. 1

2 . Act amended by Self-Governing Schools etc. (Scotland) Act 1989 (c.39), s. 39(4)(a)

9.— Definition of "relevant claim" for purposes of sections 6, 7, 8 and 8A ~~and 8~~.

(1) In sections 6 [7 and 8A] [1]

of this Act the expression *"relevant claim"*, in relation to an obligation, means a claim made by or on behalf of the creditor for implement or part-implement of the obligation, being a claim made—

(a) in appropriate proceedings, ~~or~~

[(b) by the presentation of, or the concurring in, a petition for sequestration or by the submission of a claim under [section 46 or 122 of the Bankruptcy (Scotland) Act 2016] [3] [...] [4] ; ~~or~~

(c) by a creditor to the trustee acting under a trust deed as defined in [section 228(1) of the Bankruptcy (Scotland) Act 2016] [5] ; ~~or~~] [2]

[(d) by the presentation of, or the concurring in, a petition for the winding up of a company or by the submission of a claim in a liquidation in accordance with rules made under section 411 of the Insolvency Act 1986;] [6]

(e) by the appointment, or the submission of an application for the appointment, of a receiver under section 51 of the Insolvency Act 1986;

(f) by the submission of an application for an administration order under paragraph 12 of Schedule B1 of the Insolvency Act 1986;

(g) by the appointment of an administrator under paragraph 14 of Schedule B1 of the Insolvency Act 1986; or

(h) by the submission of a claim in an administration under Part 2, or a receivership under Part 3, of the Insolvency Act 1986 in accordance with rules made under section 411 of that Act;

and for the purposes of the said sections 6 [7 and 8A] [7] the execution by or on behalf of the creditor in an obligation of any form of diligence directed to the enforcement of the obligation shall be deemed to be a relevant claim in relation to the obligation.

(2) In section 8 of this Act the expression *"relevant claim"*, in relation to a right, means a claim made in appropriate proceedings by or on behalf of the creditor to establish the right or to contest any claim to a right inconsistent therewith.

(2A) Where a relevant claim is made in relation to an obligation to which section 6 or 8A applies, the claim is to be treated for the purposes of that section as being made continuously until the claim is finally disposed of.

(3) Where a claim which, in accordance with the foregoing provisions of this section, is a relevant claim for the purposes of section 6, 7 [8 or 8A] [8] of this Act is made in an arbitration, [the date when the arbitration begins] [9] shall be taken for those purposes to be the date of the making of the claim.

(4) In this section the expression *"appropriate proceedings"* and, in relation to an arbitration, the expression [*"the date when the arbitration begins"*] [10] have the same meanings as in section 4 of this Act.

Notes

1 . Words substituted by Prescription and Limitation (Scotland) Act 1984 (c. 45), s. 6(1), Sch. 1 para. 3 (a)

2 . Paras. (b) and (c) substituted for para. (b) by Bankruptcy (Scotland) Act 1985 (c. 66), s. 75(1), Sch. 7 para. 11

3 . Words substituted by Bankruptcy (Scotland) Act 2016 asp 21 (Scottish Act) Sch.8 para.6(2)(a) (November 30, 2016: substitution has effect subject to savings and transitional provisions specified in 2016 asp 21 s.234)

4 . Words repealed by Prescription (Scotland) Act 1987 (c.36) s. 1(2)(3)

5 . Words substituted by Bankruptcy (Scotland) Act 2016 asp 21 (Scottish Act) Sch.8 para.6(2)(b) (November 30, 2016: substitution has effect subject to savings and transitional provisions specified in 2016 asp 21 s.234)

6 . S. 9(1)(d) inserted with effect as regards any claim (whenever submitted) in a liquidation in respect of which the winding up commenced on or after 29 December 1986, by Prescription (Scotland) Act 1987 (c.36) s. 1(1)(3)

7 . Words substituted by Prescription and Limitation (Scotland) Act 1984 (c. 45), s. 6(1), Sch. 1 para. 3(a)

8 . Words substituted by Prescription and Limitation (Scotland) Act 1984 (c. 45), s. 6(1), Sch. 1 para. 3(b)

9 . Words substituted by Arbitration (Scotland) Act 2010 asp 1 (Scottish Act) s.23(3)(a) (June 7, 2010: substitution has effect as SSI 2010/195 on June 7, 2010 except for purposes of statutory arbitration subject to transitional provisions specified in 2010 asp 1 s.36 and SSI 2010/195 art.3(1); not yet in force otherwise)

10 . Words substituted by Arbitration (Scotland) Act 2010 asp 1 (Scottish Act) s.23(3)(b) (June 7, 2010: substitution has effect as SSI 2010/195 on June 7, 2010 except for purposes of statutory arbitration subject to transitional provisions specified in 2010 asp 1 s.36 and SSI 2010/195 art.3(1); not yet in force otherwise)

Modifications

Pt I s. 9	Modified for the purposes of 2003 asp 9 s.18(1) and (2) by Title Conditions (Scotland) Act 2003 asp 9 (Scottish Act), Pt 1 s. 18(3)

9A Definition of "final disposal" of relevant claim for purposes of sections 7, 8 and 9

(1) For the purposes of sections 7, 8 and 9, a relevant claim is finally disposed of—

(a) when a decision disposing of the claim is made, if there is no right of appeal against the decision,

(b) if there is a right of appeal with leave or permission against such a decision—

(i) when the time period for seeking leave or permission to appeal has expired without an application for leave or permission having been made, or

(ii) when leave or permission to appeal is refused,

(c) if leave or permission to appeal against such a decision has been granted or is not required, when the time period for making an appeal has expired without an appeal having been made, or

(d) when the claim is withdrawn or abandoned.

(2) In subsection (1)(a), the reference to a decision disposing of the claim includes a reference to a decision made in an appeal against an earlier decision.

10.— Relevant acknowledgment for purposes of sections 6 and 8A~~7~~.

(1) The subsistence of an obligation shall be regarded for the purposes of sections 6 and 8A~~sections 6 [7 and 8A]~~ [1] of this Act as having been relevantly acknowledged if, and only if, either of the following conditions is satisfied, namely—

(a) that there has been such performance by or on behalf of the debtor towards implement of the obligation as clearly indicates that the obligation still subsists;

(b) that there has been made by or on behalf of the debtor to the creditor or his agent an unequivocal written admission clearly acknowledging that the obligation still subsists.

(2) Subject to subsection (3) below, where two or more persons are bound jointly by an obligation so that each is liable for the whole, and the subsistence of the obligation has been relevantly acknowledged by or on behalf of one of those persons then—

(a) if the acknowledgment is made in the manner specified in paragraph (a) of the foregoing subsection it shall have effect for the purposes of the said sections 6 and 8A~~sections 6 [7 and 8A]~~ [1] as respects the liability of each of those persons, and

(b) if it is made in the manner specified in paragraph (b) of that subsection it shall have effect for those purposes only as respects the liability of the person who makes it.

(3) Where the subsistence of an obligation affecting a trust estate has been relevantly acknowledged by or on behalf of one of two or more co-trustees in the manner specified in paragraph (a) or (b) of subsection (1) of this section, the acknowledgment shall have effect for the purposes of the said sections 6 and 8A~~sections 6 [7 and 8A]~~ [1] as respects the liability of the trust estate and any liability of each of the trustees.

(4) In this section references to performance in relation to an obligation include, where the nature of the obligation so requires, references to refraining from doing something and to permitting or suffering something to be done or maintained.

[2]

Notes

1 . Words substituted by Prescription and Limitation (Scotland) Act 1984 (c. 45), s. 6(1), Sch. 1 para. 4

2 . Act amended by Self-Governing Schools etc. (Scotland) Act 1989 (c.39), s. 39(4)(a)

Modifications

Pt I s. 10	Modified for the purposes of 2003 asp 9 s.18(1) and (2) by Title Conditions (Scotland) Act 2003 asp 9 (Scottish Act), Pt 1 s. 18(3)

11.— Obligations to pay damages~~make reparation~~.

(1) Subject to subsections (2) and (3) below; any obligation to pay damages (whatever the source of the obligation)~~(whether arising from any enactment, or from any rule of law or from, or by reason of any breach of, a contract or promise) to make reparation~~ for loss, injury or damage caused by an act or omission~~act, neglect or default~~ shall be regarded for the purposes of section 6 of this Act as having become enforceable on the date when the loss, injury or damage occurred.

(2) Where as a result of a continuing act or omission~~act, neglect or default~~ loss, injury or damage has occurred before the cessation of the act or omission~~act, neglect or default~~ the loss, injury or damage shall be deemed for the purposes of subsection (1) above to have occurred on the date when the act or omission~~act, neglect or default~~ ceased.

(3) In relation to a case where on the date referred to in subsection (1) above (or, as the case may be, that subsection as modified by subsection (2) above) the creditor was not aware, and could not with reasonable diligence have been aware, of each of the facts mentioned in subsection (3A)~~that loss, injury or damage caused as aforesaid had occurred~~, the said subsection (1) shall have effect as if for the reference therein to that date there were substituted a reference to the date when the creditor first became, or could with reasonable diligence have become, so aware.

(3A) The facts referred to in subsection (3) are—

(a) that loss, injury or damage has occurred,

(b) that the loss, injury or damage was caused by a person's act or omission, and

(c) the identity of that person.

(3B) It does not matter for the purposes of subsections (3) and (3A) whether the creditor is aware that the act or omission that caused the loss, injury or damage is actionable in law.

~~(4) Subsections (1) and (2) above (with the omission of any reference therein to subsection (3) above) shall have effect for the purposes of section 7 of this Act as they have effect for the purposes of section 6 of this Act;[...]~~ [1]

(4) For the purposes of section 7 of this Act, any obligation referred to in subsection (1) of this section is to be regarded as having become enforceable on—

(a) the date on which the act or omission occurred (or the last such date, where there was more than one act or omission), or

(b) where the act or omission was a continuing one, the date on which it ceased.

[2]

Notes

1 . Words repealed by Prescription and Limitation (Scotland) Act 1984 (c. 45), s. 6(2), Sch. 2

2 . Act amended by Self-Governing Schools etc. (Scotland) Act 1989 (c.39), s. 39(4)(a)

12.— Savings.

(1) Where by virtue of any enactment passed or made before the passing of this Act a claim to establish a right or enforce implement of an obligation may be made only within a period of limitation specified in or determined under the enactment, and, by the expiration of a prescriptive period determined under section 6, 7 or 8 of this Act the right or obligation would, apart from this subsection, be extinguished before the expiration of the period of limitation, the said section shall have effect as if the relevant prescriptive period were extended so that it expires—

(a) on the date when the period of limitation expires, or

(b) if on that date any such claim made within that period has not been finally disposed of, on the date when the claim is so disposed of.

(2) Nothing in section 6, 7 or 8 of this Act shall be construed so as to exempt any deed from challenge at any time on the ground that it is invalid *ex facie* or was forged.

1

Notes

1 . Act amended by Self-Governing Schools etc. (Scotland) Act 1989 (c.39), s. 39(4)(a)

~~13. Prohibition of contracting out.~~

~~Any provision in any agreement purporting to provide in relation to any right or obligation that section 6, 7 [8 or 8A]~~ [1]

~~of this Act shall not have effect shall be null.~~

~~2~~

13 Restrictions on contracting out

(1) The creditor and debtor in an obligation to which a prescriptive period under section 6 or 8A applies may agree to extend the prescriptive period under section 6 or, as the case may be, 8A in relation to the obligation.

(2) A prescriptive period may be extended by agreement under subsection (1) only—

(a) after the period has commenced (and before it would, but for this section, expire),

(b) by a period of no more than one year, and

(c) once in relation to the same obligation.

(3) Where there is an agreement under subsection (1) in relation to an obligation—

(a) the prescriptive period which is the subject of the agreement expires, in relation to the parties to the agreement, on the date specified in or determined in accordance with the agreement, but

(b) that does not otherwise affect the operation of this Act in relation to the obligation or the prescriptive period.

(4) Except as provided for in subsections (1) to (3), a provision in an agreement is of no effect so far as the provision would (apart from this subsection) have the effect, in relation to a right or obligation to which section 6, 7, 8 or 8A (the "section in question") applies, of—

(a) disapplying the section in question in relation to the right or obligation, or

(b) otherwise altering the operation of the section in question in relation to the right or obligation.

13A Burden of proof

(1) This section applies in relation to—

(a) an obligation to which a prescriptive period under section 6, 7 or 8A applies, and

(b) a right to which the prescriptive period under section 8 applies.

(2) If a question arises as to whether the obligation or right has been extinguished by the expiry of the applicable prescriptive period, it is to be presumed that the obligation or right has been so extinguished unless the contrary is proved by the creditor.

Notes

1 . Words substituted by Prescription and Limitation (Scotland) Act 1984 (c. 45), s. 6(1), Sch. 1 para. 5

2 . Act amended by Self-Governing Schools etc. (Scotland) Act 1989 (c.39), s. 39(4)(a)

14.— Computation of prescriptive periods.

(1) In the computation of a prescriptive period for the purposes of any provision of this Part of this Act—

(a) time occurring before the commencement of this Part of this Act shall be reckonable towards the prescriptive period in like manner as time occurring thereafter, but subject to the restriction that any time reckoned under this paragraph shall be less than the prescriptive period;

(b) any time during which any person against whom the provision is pled was under legal disability shall (except so far as otherwise provided by [subsection (4) of section 6 of this Act including that subsection as applied by section 8A of this Act] [1] of this Act) be reckoned as if the person were free from that disability;

(c) if the commencement of the prescriptive period would, apart from this paragraph, fall at a time in any day other than the beginning of the day, the

period shall be deemed to have commenced at the beginning of the next following day;

(d) if the last day of the prescriptive period would, apart from this paragraph, be a holiday, the period shall, notwithstanding anything in the said provision, be extended to include any immediately succeeding day which is a holiday, any further immediately succeeding days which are holidays, and the next succeeding day which is not a holiday;

(e) save as otherwise provided in this Part of this Act regard shall be had to the like principles as immediately before the commencement of this Part of this Act were applicable to the computation of periods of prescription for the purposes of the Prescription Act 1617.

[(1A) The prescriptive period calculated in relation to a relevant cross-border dispute for the purposes of any provision of this Part of this Act is extended where the last day of the period would, apart from this subsection, fall—

(a) in the 8 weeks after the date that a mediation in relation to the dispute ends;

(b) on the date that a mediation in relation to the dispute ends; or

(c) after the date when all of the parties to the dispute agree to participate in a mediation in relation to the dispute but before the date that such mediation ends.

(1B) Where subsection (1A) applies, the prescriptive period is extended so that it expires on the date falling 8 weeks after the date on which the mediation ends.

(1C) For the purposes of subsections (1A) and (1B), a mediation ends on the date that any of the following occurs—

(a) all of the parties reach an agreement in resolution of the dispute;

(b) all of the parties agree to end the mediation;

(c) a party withdraws from the mediation, which is the date on which—

(i) i)a party informs all of the other parties of that party's withdrawal,

(ii) in the case of a mediation involving 2 parties, 14 days expire after a request made by one party to the other party for confirmation of whether the other party has withdrawn, if the other party does not respond in that period, or

(iii) in the case of a mediation involving more than 2 parties, a party informs all of the remaining parties that the party received no response in the 14 days after a request to another party for confirmation of whether the other party had withdrawn; or

(d) a period of 14 days expires after the date on which the mediator's tenure ends (by reason of death, resignation or otherwise), if a replacement mediator has not been appointed.

] [2]

[(1D) The prescriptive period calculated in relation to a relevant consumer dispute for the purposes of any provision of this Part of this Act is extended

where the last day of the period would, apart from this subsection fall—

(a) after the date when the non-binding ADR procedure starts but before the date that such a procedure ends;

(b) on the date that a non-binding ADR procedure in relation to the dispute ends; or

(c) in the 8 weeks after the date that a non-binding ADR procedure in relation to the dispute ends.

(1E) Where subsection (1D) applies, the prescriptive period is extended so that it expires on the date falling 8 weeks after the date on which the non-binding ADR procedure ends.

(1F) For the purposes of subsections (1D)(a) and (1E), a non-binding ADR procedure starts in relation to a relevant dispute on the date when the dispute is first sent or otherwise communicated to the ADR entity in accordance with the entity's rules regarding the submission of complaints.

(1G) For the purposes of subsections (1D) and (1E), a non-binding ADR procedure ends on the date that any of the following occurs—

(a) all of the parties reach an agreement in resolution of the relevant consumer dispute;

(b) a party completes the notification of the other parties that it has withdrawn from the non-binding ADR procedure;

(c) a party to whom a qualifying request is made fails to give a response reaching the other parties within 14 days of the request;

(d) the ADR entity notifies the party that submitted the relevant dispute to the ADR entity that, in accordance with its policy, the ADR entity refuses to deal with the relevant consumer dispute;

(e) after the parties are notified that the ADR entity can no longer act in relation to the relevant dispute (for whatever reason), the parties fail to agree within 14 days to submit the dispute to an alternative ADR entity;

(f) the non-binding ADR procedure otherwise comes to an end pursuant to the rules of the ADR entity.

] [3]

(2) [In this section—

["*ADR Directive*" means Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC;

"*ADR entity*" has the meaning given by article 4(1)(h) of the ADR Directive;

[...] [6]

"*ADR procedure*" has the meaning given by article 4(1)(g) of the ADR Directive;][5]

"*the Directive*" means Directive 2008/52/EC of the European Parliament and of

the Council of 21st May 2008 on certain aspects of mediation in civil and commercial matters;

"holiday" means a day of any of the following descriptions, namely, a Saturday, a Sunday and a day which, in Scotland, is a bank holiday under the Banking and Financial Dealings Act 1971 [;] [7]

[*"mediation"* and *"mediator"* have the meanings given by Article 3 of the Directive; and

[*"non-binding ADR procedure"* means an ADR procedure the outcome of which is not binding on the parties;

"qualifying request" is a request by a party that another (A) confirm to all parties that A is continuing with the non-binding ADR procedure;

"relevant consumer dispute" means a dispute to which Article 12(1) of the ADR Directive applies (certain cross-border or domestic contractual disputes brought by a consumer against a trader);] [5]

"relevant cross-border dispute" means a cross-border dispute within the meaning given by Article 2 of the Directive—

(a) which is about a right or obligation to which a prescriptive period applies by virtue of this Part of this Act; and

(b) to which the Directive applies.

] [7]

] [4]

Notes

1. Words substituted by Prescription and Limitation (Scotland) Act 1984 (c. 45), s. 6(1), Sch. 1 para. 6
2. Added by Cross-Border Mediation (Scotland) Regulations 2011/234 (Scottish SI) reg.5(2) (April 6, 2011)
3. Added by Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations 2015/1392 Pt 3 reg.3(2)(a) (July 9, 2015: insertion has effect subject to transitional provision specified in SI 2015/1392 reg.1(3))
4. Definition inserted by Cross-Border Mediation (Scotland) Regulations 2011/234 (Scottish SI) reg.5(3)(a) (April 6, 2011)
5. Definitions inserted by Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations 2015/1392 Pt 3 reg.3(2)(b) (July 9, 2015: insertion has effect subject to transitional provision specified in SI 2015/1392 reg.1(3))
6. Definition repealed by Alternative Dispute Resolution for Consumer Disputes (Amendment) (No. 2) Regulations 2015/1972 Pt 2 reg.2(2) (January 9, 2016)
7. Definitions inserted by Cross-Border Mediation (Scotland) Regulations 2011/234 (Scottish SI) reg.5(3)(b) (April 6, 2011)

Modifications

Pt I s. 14	Modified for the purposes of 2003 asp 9 s.18(1) and (2) by Title Conditions (Scotland) Act 2003 asp 9 (Scottish Act), Pt 1 s. 18(4)

15.— Interpretation of Part I.

(1) In this Part of this Act, unless the context otherwise requires, the following expressions have the meanings hereby assigned to them, namely—

"bill of exchange" has the same meaning as it has for the purposes of the Bills of Exchange Act 1882;

"date of execution", in relation to a deed executed on several dates, means the last of those dates;

"enactment" includes an order, regulation, rule or other instrument having effect by virtue of an Act and includes an enactment contained in, or in an instrument made under, an Act of the Scottish Parliament;

"holiday" has the meaning assigned to it by section 14 of this Act;

[...] [1]

"land" includes heritable property of any description;

"lease" includes a sub-lease;

"legal disability" means legal disability by reason of nonage or unsoundness of mind;

"possession" includes civil possession, and *"possessed"* shall be construed accordingly;

"prescriptive period" means a period required for the operation of section 1, 2, 3, 6, 7 [8 or 8A] [2] of this Act;

"promissory note" has the same meaning as it has for the purposes of the Bills of Exchange Act 1882;

"trustee" includes any person holding property in a fiduciary capacity for another and, without prejudice to that generality, includes a trustee within the meaning of the Trusts (Scotland) Act 1921; and *"trust"* shall be construed accordingly;

and references to the recording of a deed are references to the recording thereof in the General Register of Sasines [and to the registering of a deed are to the registering thereof in the Land Register of Scotland] [3] .

(2) In this Part of this Act, unless the context otherwise requires, any reference to an obligation or to a right includes a reference to the right or, as the case may be, to the obligation (if any), correlative thereto.

(3) In this Part of this Act any reference to an enactment shall, unless the context otherwise requires, be construed as a reference to that enactment as amended or extended, and as including a reference thereto as applied, by or under any other enactment.

Notes

1 . Definition repealed by Abolition of Feudal Tenure etc. (Scotland) Act 2000 asp 5 (Scottish Act) Sch.13(1) para.1 (November 28, 2004: as SSI 2003/456)

2 . Words substituted by Prescription and Limitation (Scotland) Act 1984 (c. 45), s. 6(1), Sch. 1 para. 7

3 . Words inserted by Land Registration etc. (Scotland) Act 2012 asp 5 (Scottish Act) Sch.5 para.18(5) (December 8, 2014)

16 Amendments and repeals related to Part I.

OMITTED

16A Part II not to extend to product liability.

OMITTED

Part II LIMITATION OF ACTIONS

OMITTED

Part IIA PRESCRIPTION OF OBLIGATIONS AND LIMITATION OF ACTIONS UNDER PART I OF THE CONSUMER PROTECTION ACT 1987

Prescription of Obligations

[22A.— Ten years' prescription of obligations.

(1) An obligation arising from liability under section 2 of the 1987 Act (to make reparation for damage caused wholly or partly by a defect in a product) shall be extinguished if a period of 10 years has expired from the relevant time, unless a relevant claim was made within that period and has not been finally disposed of, and no such obligation shall come into existence after the expiration of the said period.

(2) If, at the expiration of the period of 10 years mentioned in subsection (1) above, a relevant claim has been made but has not been finally disposed of, the obligation to which the claim relates shall be extinguished when the claim is finally disposed of.

(3) In this section—

a claim is finally disposed of when—

(a) a decision disposing of the claim has been made against which no appeal is competent;

(b) an appeal against such a decision is competent with leave, and the time limit for leave has expired and no application has been made or leave has been refused;

(c) leave to appeal against such a decision is granted or is not required, and no appeal is made within the time limit for appeal; or

(d) the claim is abandoned;

'relevant claim' in relation to an obligation means a claim made by or on behalf of the creditor for implement or part implement of the obligation, being a claim made—

(a) in appropriate proceedings within the meaning of section 4(2) of this Act;

~~or~~

(b) by the presentation of, or the concurring in, a petition for sequestration or by the submission of a claim under [section 46 or 122 of the Bankruptcy (Scotland) Act 2016] [2]; ~~or~~

(c) by the presentation of, or the concurring in, a petition for the winding up of a company or by the submission of a claim in a liquidation in accordance with the rules made under section 411 of the Insolvency Act 1986;

(d) by the appointment, or the submission of an application for the appointment, of a receiver under section 51 of the Insolvency Act 1986;

(e) by the submission of an application for an administration order under paragraph 12 of Schedule B1 of the Insolvency Act 1986;

(f) by the appointment of an administrator under paragraph 14 of Schedule B1 of the Insolvency Act 1986; or

(g) by the submission of a claim in an administration under Part 2, or a receivership under Part 3, of the Insolvency Act 1986 in accordance with rules made under section 411 of that Act;

'relevant time' has the meaning given in section 4(2) of the 1987 Act.

(4) Where a relevant claim is made in an arbitration, [the date when the arbitration begins (within the meaning of section 4(4) of this Act)] [3]

shall be taken for those purposes to be the date of the making of the claim.

[(5) The prescriptive period calculated in relation to a relevant cross-border dispute for the purposes of this section is extended where the last day of the period would, apart from this subsection, fall—

(a) in the eight weeks after the date that a mediation in relation to the dispute ends;

(b) on the date that a mediation in relation to the dispute ends, or

(c) after the date when all of the parties to the dispute agree to participate in a mediation in relation to the dispute but before the date that such mediation ends.

(6) Where subsection (5) applies, the prescriptive period is extended so that it expires on the date falling 8 weeks after the date on which the mediation ends.

(7) For the purposes of subsections (5) and (6), a mediation ends on the date that any of the following occurs—

(a) all of the parties reach an agreement in resolution of the dispute;

(b) all of the parties agree to end the mediation;

(c) a party withdraws from the mediation, which is the date on which—

(i) a party informs all of the other parties of that party's withdrawal,

(ii) in the case of a mediation involving 2 parties, 14 days expire after a request made by one party to the other party seeking confirmation of whether the other party has withdrawn, if the other party does not respond in that period, or

(iii) in the case of a mediation involving more than 2 parties, a party informs all of the remaining parties that the party received no response in the 14 days after that party's request to another party seeking confirmation of whether the other party had withdrawn; or

(d) a period of 14 days expires after the date on which the mediator's tenure ends (whether by reason of death, resignation or otherwise), if a replacement mediator has not been appointed.

(7A) Section 13A of this Act applies in relation to an obligation to which the prescriptive period under this section applies as it applies in relation to the obligations and rights referred to in subsection (1) of that section.

(8) In this section—

"the Directive" means Directive 2008/52/EC of the European Parliament and of the Council of 21st May 2008 on certain aspects of mediation in civil and commercial matters;

"mediation" and *"mediator"* have the meanings given by Article 3 of the Directive; and

"relevant cross-border dispute" means a cross-border dispute within the meaning given by Article 2 of the Directive—

(a) which is about an obligation to which a prescriptive period applies by virtue of this section, and

(b) to which the Directive applies.

] [4]

] [1]

Notes

1 . Part IIA inserted by Consumer Protection Act 1987 (c.43) ss. 6, 41(2), 47(1)(2), Sch. 1 para. 10

2 . Words substituted by Bankruptcy (Scotland) Act 2016 asp 21 (Scottish Act) Sch.8 para.6(3) (November 30, 2016: substitution has effect subject to savings and transitional provisions specified in 2016 asp 21 s.234)

3 . Words substituted by Arbitration (Scotland) Act 2010 asp 1 (Scottish Act) s.23(5) (June 7, 2010: substitution has effect as SSI 2010/195 on June 7, 2010 except for purposes of statutory arbitration subject to transitional provisions specified in 2010 asp 1 s.36 and SSI 2010/195 art.3(1); not yet in force otherwise)

4 . Added by Cross-Border Mediation (EU Directive) Regulations 2011/1133 Pt 3 reg.17 (May 20, 2011)

22B 3 year limitation of actions.

OMITTED

22C Actions under the 1987 Act where death has resulted from personal injuries.

OMITTED

[22D.— Interpretation of this Part.

(1) Expressions used in this Part and in Part I of the 1987 Act shall have the same meanings in this Part as in the said Part I.

(2) For the purposes of section 1(1) of the 1987 Act, this Part shall have effect

and be construed as if it were contained in Part I of that Act.

(3) In this Part, *'the 1987 Act'* means the Consumer Protection Act 1987.

] [1]

[2]

Notes

1 . Part IIA inserted by Consumer Protection Act 1987 (c.43) ss. 6, 41(2), 47(1)(2), Sch. 1 para. 10

2 . Act amended by Self-Governing Schools etc. (Scotland) Act 1989 (c.39), s. 39(4)(a)

23 - *REPEALED*

Part III SUPPLEMENTAL

[23A.— Private international law application.

(1) Where the substantive law of a country other than Scotland falls to be applied by a Scottish court as the law governing an obligation, the court shall apply any relevant rules of law of that country relating to the extinction of the obligation or the limitation of time within which proceedings may be brought to enforce the obligation to the exclusion of any corresponding rule of Scots law.

(2) This section shall not apply where it appears to the court that the application of the relevant foreign rule of law would be incompatible with the principles of public policy applied by the court.

(3) This section shall not apply in any case where the application of the corresponding rule of Scots law has extinguished the obligation, or barred the bringing of proceedings prior to the coming into force of the Prescription and Limitation (Scotland) Act 1984.

[(4) This section shall not apply in any case where the law of a country other than Scotland falls to be applied by virtue of any choice of law rule contained in [the Rome I Regulation or] [3] the Rome II Regulation.

(5) [In subsection (4)

(a) *"the Rome I Regulation"* means Regulation (EC) No. 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I), including that Regulation as applied by regulation 4 of the Law Applicable to Contractual Obligations (Scotland) Regulations 2009 (conflicts falling within Article 22(2) of Regulation (EC) No. 593/2008), and.

(b) *"the Rome II Regulation"* means Regulation (EC) No. 864/2007 of the European Parliament and of the Council on the law applicable to non-contractual obligations (Rome II), including that Regulation as applied by regulation 4 of the Law Applicable to Non-Contractual Obligations (Scotland) Regulations 2008 (conflicts falling within Article 25(2) of Regulation (EC) No. 864/2007).] [4]

] [2]

] [1]

Notes

1 . S. 23A inserted by Prescription and Limitation (Scotland) Act 1984 (c. 45), ss. 4, 5(2)

2 . Added by Law Applicable to Non-Contractual Obligations (Scotland) Regulations 2008/404 (Scottish SI) reg.3 (January 11, 2009)

3 . Words inserted by Law Applicable to Contractual Obligations (Scotland) Regulations 2009/410 (Scottish SI) reg.3(a) (December 17, 2009)

4 . S.23A(5)(a) inserted and existing text renumbered as s.23A(5)(b) by Law Applicable to Contractual Obligations (Scotland) Regulations 2009/410 (Scottish SI) reg.3(b) (December 17, 2009)

24. The Crown.

This Act binds the Crown.

1

Notes

1 . Act amended by Self-Governing Schools etc. (Scotland) Act 1989 (c.39), s. 39(4)(a)

25.— Short title, commencement and extent.

(1) This Act may be cited as the Prescription and Limitation (Scotland) Act 1973.

(2) [...] [1] this Act shall come into operation, as follows:—

(a) Parts II and III of this Act, Part II of Schedule 4 to this Act and Part II of Schedule 5 to this Act shall come into operation on the date on which this Act is passed;

(b) except as aforesaid this Act shall come into operation on the expiration of three years from the said date.

(3) [...] [2]

(4) This Act extends to Scotland only.

3

Notes

1 . Words repealed by Prescription and Limitation (Scotland) Act 1984 (c. 45), s. 6(2), Sch. 2

2 . Repealed by Prescription and Limitation (Scotland) Act 1984 (c. 45), s. 6(2), Sch. 2

3 . Act amended by Self-Governing Schools etc. (Scotland) Act 1989 (c.39), s. 39(4)(a)

Schedule 1 OBLIGATIONS AFFECTED BY PRESCRIPTIVE PERIODS OF FIVE YEARS UNDER SECTION 6

1.

Subject to paragraph 2 below, section 6 of this Act applies—

(a) to any obligation to pay a sum of money due in respect of a particular period—

(i) by way of interest;

(ii) by way of an instalment of an annuity;

(iii) – (iv) [...] [1]

(v) by way of rent or other periodical payment under a lease;

(vi) by way of a periodical payment in respect of the occupancy or use of land, not being an obligation falling within any other provision of this sub-paragraph;

(vii) by way of a periodical payment under a [title condition] [2] , not being an obligation falling within any other provision of this sub-paragraph;

[~~(aa) to any obligation to pay compensation by virtue of section 2 of the Leasehold Casualties (Scotland) Act 2001 (asp 5);~~] [3]

[~~(aa) to any obligation to make a compensatory payment ("compensatory payment" being construed in accordance with section 8(1) of the Abolition of Feudal Tenure etc. (Scotland) Act 2000 (asp 5), including that section as read with section 56 of that Act);~~] [4]

[(ab) to any obligation arising by virtue of a right–

(i) of reversion under the third proviso to section 2 of the School Sites Act 1841 (4 & 5 Vict. c.38) (or of reversion under that proviso as applied by virtue of any other enactment);

[(ii) to petition for a declaration of forfeiture under section 7 of the Entail Sites Act 1840 (3 & 4 Vict. c.48);] [6]

] [5]

[(ac) to any obligation to pay a sum of money by way of costs to which section 12 of the Tenements (Scotland) Act 2004 (asp 11) applies;] [7]

[~~(aca) to any obligation to make a payment under section 46, 53(2) or 54(5) of the Long Leases (Scotland) Act 2012 (asp 9),~~] [8]

[~~(ad) to any obligation of the Keeper of the Registers of Scotland to pay compensation by virtue of section 84 of the Land Registration etc. (Scotland) Act 2012 (asp 5);~~

~~(ae) to any obligation to pay compensation by virtue of section 111 of that Act;~~] [9]

[(af) to any obligation arising by virtue of a right to redress under Part 4A of the Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277);] [10]

(b) to any obligation based on redress of unjustified enrichment, including

without prejudice to that generality any obligation of restitution, repetition or recompense;

(c) to any obligation arising from *negotiorum gestio*;

~~(d) to any obligation arising from liability (whether arising from any enactment or from any rule of law) to make reparation;~~

(d) to any obligation to pay damages (whatever the source of the obligation);

(da) to any obligation arising from delict, not being an obligation falling within any other provision of this paragraph;

[~~(dd) to any obligation arising by virtue of section 7A(1) of the Criminal Injuries Compensation Act 1995 (recovery of compensation from offenders: general);~~] [11]

(e) to any obligation under a bill of exchange or a promissory note;

(f) to any obligation of accounting, other than accounting for trust funds;

(fa) to any obligation relating to the validity of a contract, not being an obligation falling within any other provision of this paragraph;

(fb) to any obligation to reimburse expenditure incurred in reliance on a representation about the existence of a contract;

(g) to any obligation arising from, or by reason of any breach of, a contract or promise, not being an obligation falling within any other provision of this paragraph.

(h) to any obligation to make a payment arising under an enactment (whenever passed or made), not being an obligation falling within any other provision of this paragraph.

Notes

1. Repealed by Abolition of Feudal Tenure etc. (Scotland) Act 2000 asp 5 (Scottish Act) Sch.13(1) para.1 (November 28, 2004: as SSI 2003/456)

2. Words substituted by Title Conditions (Scotland) Act 2003 asp 9 (Scottish Act) Sch.14 para.5(3)(a) (November 28, 2004 being the day appointed by SSI 2003/456 art.2 for the purposes of 2003 asp.9 s.71)

3. Added by Leasehold Casualties (Scotland) Act 2001 asp 5 (Scottish Act) s.4(a) (April 12, 2001)

4. Possible drafting error, para.1(aa) is purportedly inserted but that provision already exists so a second para.1(aa) is inserted by Abolition of Feudal Tenure etc. (Scotland) Act 2000 asp 5 (Scottish Act) Pt 3 s.12(a) (November 28, 2004)

5. Added by Title Conditions (Scotland) Act 2003 asp 9 (Scottish Act) Pt 8 s.88(a) (April 4, 2003: as 2003 asp 9)

6. Added by Title Conditions (Scotland) Act 2003 asp 9 (Scottish Act) Pt 8 s.88(a) (November 28, 2004: as SSI 2003/456)

7. Added by Tenements (Scotland) Act 2004 asp 11 (Scottish Act) s.15(a) (November 28, 2004)

8. Added by Long Leases (Scotland) Act 2012 asp 9 (Scottish Act) Pt 4 s.60(a) (November 28, 2013)

9. Added by Land Registration etc. (Scotland) Act 2012 asp 5 (Scottish Act) Sch.5 para.18 (December 8, 2014)

10. Added by Consumer Protection (Amendment) Regulations 2014/870 reg.7 (October 1, 2014 in relation to contracts entered into, or payments made, on or after October 1, 2014)

11. Added by Management of Offenders etc. (Scotland) Act 2005 asp 14 (Scottish Act) s.20(4) (December 8, 2005)

2.

Notwithstanding anything in the foregoing paragraph, section 6 of this Act does not apply—

(a) to any obligation to recognise or obtemper a decree of court, an arbitration award or an order of a tribunal or authority exercising jurisdiction under any enactment;

(b) to any obligation arising from the issue of a bank note;

(c) [...] [1]

(d) to any obligation under a contract of partnership or of agency, not being an obligation remaining, or becoming, prestable on or after the termination of the relationship between the parties under the contract;

~~(e) except as provided in [paragraph 1(a) to (ae)] [2] of this Schedule, to any obligation relating to land (including an obligation to recognise a servitude [and any obligation of the Keeper of the Registers of Scotland to pay compensation by virtue of section 77 or 94 of the Land Registration etc. (Scotland) Act 2012 (asp 5)] [3]);~~

(e) except as provided in paragraph 1(a), (ab), (ac) and (h) of this Schedule, to any obligation relating to land (including an obligation to recognise a servitude);

(ea) to any obligation of the Keeper of the Registers of Scotland to pay compensation by virtue of section 77 or 94 of the Land Registration etc. (Scotland) Act 2012;

[(ee) so as to extinguish, before the expiry of the continuous period of five years which immediately follows the coming into force of section 88 of the Title Conditions (Scotland) Act 2003 (asp 9) (prescriptive period for obligations arising by virtue of 1841 Act or 1840 Act), an obligation mentioned in sub-paragraph (ab) of paragraph 1 of this Schedule;] [4]

(f) to any obligation to satisfy any claim to [...] [5] legitim, *jus relicti* or *jus relictae*, or to any prior right of a surviving spouse under section 8 or 9 of the Succession (Scotland) Act 1964;

(fa) to any obligation to pay taxes or duties that are recoverable by the Crown, or to pay any penalty, interest or other sum that is recoverable as if it were an amount of such taxes or duties;

(fb) to any obligation to pay a sum recoverable under—

(i) Part 3 (overpayments and adjustments of benefit) of the Social Security Administration Act 1992;

(ii) section 127(c) (recovery of income support in certain circumstances) of the Social Security Contributions and Benefits Act 1992; or

(iii) Part 1 (tax credits) of the Tax Credits Act 2002;

(fc) to any obligation to pay child support maintenance under the Child Support Act 1991;

(fd) to any obligation to pay—

(i) council tax under Part 2 of the Local Government Finance Act 1992;

(ii) non-domestic rates levied under section 7B(2) of the Local Government (Scotland) Act 1975; or

(iii) any surcharge, fees, expenses or other sum recoverable in connection with the enforcement of an obligation to pay such council tax or rates;

(fe) so as to prevent the bringing of—

(i) proceedings for forfeiture under the customs and excise Acts (within the meaning of the Customs and Excise Management Act 1979); or

(ii) proceedings in respect of the forfeiture of a ship (that is, any description of vessel used in navigation and not propelled by oars);

(g) to any obligation to make reparation in respect of personal injuries within the meaning of Part II of this Act or in respect of the death of any person as a result of such injuries;

[(gg) to any obligation to make reparation or otherwise make good in respect of defamation within the meaning of section 18A of this Act;] [6]

[(ggg) to any obligation arising from liability under section 2 of the Consumer Protection Act 1987 (to make reparation for damage caused wholly or partly by a defect in a product);] [7]

(h) to any obligation specified in Schedule 3 to this Act as an imprescriptible obligation.

Notes

1. Repealed subject to savings specified in s.14(3) by Requirements of Writing (Scotland) Act 1995 c. 7 Sch.5 para.1 (August 1, 1995)

2. Words substituted by Land Registration etc. (Scotland) Act 2012 (Incidental, Consequential and Transitional) Order 2014/190 (Scottish SI) art.2(1) (December 8, 2014)

3. Words inserted by Land Registration etc. (Scotland) Act 2012 asp 5 (Scottish Act) Sch.5 para.18(7)(b) (December 8, 2014)

4. Added by Title Conditions (Scotland) Act 2003 asp 9 (Scottish Act) Pt 8 s.88(b)(ii) (April 4, 2003 for the purposes specified in 2003 asp 9 s.129(3); November 28, 2004 being the day appointed by SSI 2003/456 art.2 for the purposes of 2003 asp.9 s.71 otherwise)

5. Words repealed by Abolition of Feudal Tenure etc. (Scotland) Act 2000 asp 5 (Scottish Act) Sch.13(1) para.1 (November 28, 2004: as SSI 2003/456)

6. Para. 2(gg) inserted by Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 (c. 73), s. 12(5)

7. Sch. 1 para. (ggg) inserted by Consumer Protection Act 1987 (c.43) ss. 6, 41(2), 47(1)(2), Sch. 1 para. 11

3 - *REPEALED*

[**4**

In this Schedule, *"title condition"* shall be construed in accordance with section 122(1) of the Title Conditions (Scotland) Act 2003 (asp 9).

] [1]

Notes

1 . Substituted by Title Conditions (Scotland) Act 2003 asp 9 (Scottish Act) Sch.14 para.5(3)(b) (November 28, 2004 being the day appointed by SSI 2003/456 art.2 for the purposes of 2003 asp.9 s.71)

Schedule 2 APPROPRIATE DATES FOR CERTAIN OBLIGATIONS FOR PURPOSES OF SECTION 6

OMITTED

Schedule 3 RIGHTS AND OBLIGATIONS WHICH ARE IMPRESCRIPTIBLE FOR THE PURPOSES OF SECTIONS 7 AND 8 AND SCHEDULE 1

The following are imprescriptible rights and obligations for the purposes of sections 7(2) and 8(2) of, and paragraph 2(h) of Schedule 1 to, this Act, namely—

(a) any real right of ownership in land;

(b) the right in land of the lessee under a recorded lease;

(c) any right exercisable as a *res merae facultatis*;

(d) any right to recover property *extra commercium*;

(e) any obligation of a trustee—

(i) to produce accounts of the trustee's intromissions with any property of the trust;

(ii) to make reparation or restitution in respect of any fraudulent breach of trust to which the trustee was a party or was privy;

(iii) to make furthcoming to any person entitled thereto any trust property, or the proceeds of any such property, in the possession of the trustee, or to make good the value of any such property previously received by the trustee and appropriated to his own use;

(f) any obligation of a third party to make furthcoming to any person entitled thereto any trust property received by the third party otherwise than in good faith and in his possession;

(g) any right to recover stolen property from the person by whom it was stolen or from any person privy to the stealing thereof;

(h) any right to be served as heir to an ancestor or to take any steps

necessary for making up or completing title to any [real right] [1] in land [;] [2]

[(i) any obligation of the Keeper of the Registers of Scotland to rectify an inaccuracy in the Land Register of Scotland.] [2]

Notes

1 . Words substituted by Title Conditions (Scotland) Act 2003 asp 9 (Scottish Act) Sch.14 para.5(4) (November 28, 2004 being the day appointed by SSI 2003/456 art.2 for the purposes of 2003 asp.9 s.71)

2 . Added by Land Registration etc. (Scotland) Act 2012 asp 5 (Scottish Act) Sch.5 para.18(8) (December 8, 2014)

Appendix C

List of respondents to the Discussion Paper

BLM Scotland

Brodies LLP (Response formulated on basis of informal discussions; intended only to reflect the views of those who took part in the discussions.)

Burness Paull LLP Construction and Projects Team

Burness Paull LLP Dispute Resolution Team

Clyde & Co (Scotland) LLP

CMS Cameron McKenna LLP (CMS)

Craig Connal QC (Partner at Pinsent Masons LLP - response submitted in a personal capacity.)

Faculty of Advocates

Forum of Scottish Claims Managers (FSCM)

HM Revenue and Customs (HMRC)

Law Society of Scotland

Charles McGregor (Partner at Clyde & Co (Scotland) LLP - response submitted in a personal capacity.)

Douglas McGregor (Solicitor - response submitted in a personal capacity.)

Morton Fraser LLP

NFU Mutual Insurance Society Ltd

Hugh Paterson

Royal Incorporation of Architects in Scotland (RIAS)

Scottish Water Business Stream Limited

Senators of the College of Justice

Zurich Insurance plc

Appendix D

List of respondents to the consultation on the draft Prescription (Scotland) Bill

Aberdeenshire Council

Brodies LLP

Burness Paull LLP

Karen Cornwell, TLT; Paul McIntosh, Aberdein Considine; and Sarah Wardell, Maclay Murray and Spens

Department for Work and Pensions (DWP)

Faculty of Advocates

Fife Council

Glasgow City Council

HM Revenue and Customs (HMRC)

Insolvency Service

Law Society of Scotland

The Rt Hon Lady Paton

Royal Incorporation of Architects in Scotland (RIAS)

Royal Institution of Chartered Surveyors (RICS)

Scottish Water Business Stream Limited

South Lanarkshire Council

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