Compass Chambers

Speaking Note for Compass Conference:

Stop the Clock: Prescription and Limitation

Acts:

1973 Act: Prescription and Limitation (Scotland) Act 1973

1940 Act: Law Reform (Miscellaneous Provisions) Act 1940

2018 Act: Prescription (Scotland) Act 2018

Back to basics:-

- Prescription and Limitation are two different concepts in law.
- Both governed by the Prescription and Limitation (Scotland) Act 1973 (as amended).
- Prescription is the term for the principle whereby a risk or obligation is created by a lapse of time, or a right or liability is extinguished by a lapse of time.
- Limitation is a different beast. In terms of s17 the 1973 Act, actions for damages for personal injuries must be brought within 3 years of:-

> *(a) the date on which the injuries were sustained or, where the act or omission to which the injuries were attributable was a continuing one, that date or the date on which the act or omission ceased, whichever is the later; or*
>
> *(b) the date (if later than any date mentioned in paragraph (a) above) on which the pursuer in the action became, or on which, in the opinion of the court, it would have been reasonably practicable for him in all the circumstances to become, aware of all the following facts—*
>
> > *(i) that the injuries in question were sufficiently serious to justify his bringing an action of damages on the assumption that the person against whom the action was brought did not dispute liability and was able to satisfy a decree;*
> >
> > *(ii) that the injuries were attributable in whole or in part to an act or omission; and*
> >
> > *(iii) that the defender was a person to whose act or omission the injuries were attributable in whole or in part or the employer or principal of such a person.*

- Aside from the relevant time periods and how they are calculated, there is one main difference between prescription and limitation - once a claim has prescribed there is no going back – your right of action evaporates on the fifth anniversary of the appropriate date.

- Limitation is somewhat kinder – s19A of the 1973 Act allows for an action to proceed out of time where the court considers it equitable to do so.

- On a practical point, attendees will be used to dealing with actions seeking a contribution from another wrongdoer in terms of the Law Reform (Miscellaneous Provisions) Act 1940. The prescriptive period for raising an action under the 1940 Act is 2 years (s8A of the 1973 Act) from when the obligation is created. The single obligation is the obligation to contribute to joint wrongdoing. However, there may be multiple legal grounds to base that obligation on for example negligence and breach of contract. All potential grounds must be raised within the 2-year time limit. Any additional grounds, even if they were unknown during the 2-year period, cannot be added in later. Once the 2-year prescriptive period has passed there is no going back. See *Vipond Fire Protection Limited v SSP Pumps Limited.* 2020 Rep L.R. 103.

- Limitation provides a safeguard against claims being made in perpetuity but allows leeway when fairness requires it. Prescription is harsh – when a right of action has prescribed there is no going back.

Health Warning:-

- Law of prescription is complicated.

- The Prescription and Limitation (Scotland) Act 1973 as it stands prescribes 13 different types of claim which are subject to the quinquennium – seven are listed at s6 of the act and a further six are listed at schedule 1, para 1.

- One would think that if an action doesn't fall within that list that it will not be subject to the five-year short negative prescription, but the matter is clarified or confused depending on your view by Schedule 2 para 2 which lists ten obligations which s6 does not apply to.

- For the purpose of today, I will be focusing on the changes to the calculation of the 5-year time limit with reference to actions stemming from negligence. Other types of action are available upon instruction.

- There are various texts and articles available for review of the law of prescription. Further information about the pending changes, can be found in the Stair Memorial Encyclopaedia which has been helpfully updated to provide commentary on the 2018 Act.

Prescription pre-Prescription (Scotland) Act 2018

- The starting point for the short negative prescription is s6 of the 1973 Act which states:-

  (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:

- Question then becomes, what is the appropriate date. The appropriate date for a reparation action is defined by s11 of the 1973 Act.

- Highlight from s 11 is that the claim becomes actionable on the date the loss, injury or damage occurred. S11(3) allows for a slight variation in that if the creditor was not aware and could not with reasonable diligence have been aware that the loss, injury or damage had occurred, then the time runs from the date the creditor first became or should have become so aware.

- What does that all mean? As Lord Keith of Kinkel put it in his speech in *Dunlop v McGowans* "the right to raise an action accrues when *injuria* concurs with *damnum*."

- The saga, or rather modern line of authority, begins with *David T Morrison & Co Limited (t/a Gael Home Interiors v ICL Plastics Limited;* moved onto *Gordon's Trustees v Campbell Riddle Breeze Paterson LLP;* continued in *Midlothian Council v Raeburn Drilling and Geotechnical Limited;* once we reached *WPH Developments Limited v Young and Gault LLP (in liquidation)* it could have been thought the issues were settled but then *C & L Mair v Mike Dewis Farm Systems Limited* came along to demonstrate that the law remains tricky and fact specific. Because time does not allow for a full analysis of the cases, I have provided links on the app.

- The crux of the line of authority is that to establish the relevant date one has to question (i) when the wrong occurred (*the injuria*); and, (ii) what is the loss incurred (*the damnum*)?

- The result is that the clock starts ticking at different times depending on the facts of the case.

- Where the pursuer's loss is economic, the clock can start ticking before anyone is aware something has gone wrong. Take the example of *WPH Developments Limited* - the case concerned a firm of architects whose purportedly negligent drawings caused a developer to build on land they didn't own. The clock started ticking when the payment for the houses (*damnum*) concurred with the drawings being relied upon to build houses (*injuria*). As Lord Malcolm stated: "*In short, the pursuers knew of the objective facts which amounted to 'loss, injury or damage' in terms of both subsections (1) and (3) as and when they occurred. In particular, it was known that the walls had been built and that houses had been sold. There is no scope for a postponement of the start of the five-year prescriptive period until the pursuers were told of the problem.*"

- The position is, however, different for physical damage caused by negligence. Let's say I had a holiday home in Earlsferry, Fife. I followed the COVID guidelines and stayed at my main home during lockdown. Catherine Calderwood, however, hasn't and in a hurry to get away from prying eyes, strikes and damages the wall of my property with her car. The 5-year time limit starts from when I first became aware of the damage, even if that is 6 months or so later when I was first allowed out to visit the property. In this circumstance, I'm relying on s11(3) – I was not aware of the damage before going back to the property nor could I reasonably have been aware.

- In relation to what constitutes *damnum,* the recent case of *C&L Mair v Mike Dewis Farm Systems Limited* confirmed the opinion that a contingent loss based on a future event does not constitute *damnum*. Lord Braid opined that the modern line of authority did not support the blanket view that where there had been wasted expenditure incurred, loss had ensued, which on one view is hard to reconcile with Lord Hodge's judgement in *Gordon's Trustees* where it was said that the pursuer needn't know of a breach of duty for the 5-year limit to start. It is enough that the pursuer is aware of an expenditure which turns out to be a loss even if there is no way of knowing there was anything amiss.

- It seems therefore that there is a distinction to be drawn between damnum which is (i) purely economic and incurred at the point of an ultimately wasted payment being made; and (ii) damage to property.

Problem with Prescription

- The problem with prescription is therefore the unknown ticking timebomb in cases of economic loss.

- Law Commission of Scotland undertook a review of the position in relation to prescription. The Commission published a discussion paper in February 2016 and prepared a report to the Scottish Ministers in July 2017. From those two papers, the Prescription (Scotland) Act 2018 was born.

- The explanatory notes state that the changes made "are designed to increase clarity, certainty and fairness." So, what are the changes, and will they fix the problem?

Current provisions of s11

- The Prescription (Scotland) Act 2018 is being introduced in stages. The first tranche of amendments, which included the amendment of s11, came into being on 1 June 2022.

- Changes are the amendment of "act, neglect or default" to "act or omission"

- The most significant change is the creation of s3A which prescribes the facts to be established for a case to fall under the umbrella of s3. In cases of latent defects, subsection 3A states that the subsection 3 clock starts ticking when the pursuer is aware of (i) loss, injury, or damage; (ii) that it was caused by an act or omission; and, (iii) the identity of the wrongdoer.

- In addition, the new s3B clarifies that it matters not whether the creditor is aware that the act or omission that caused the loss, injury or damage is actionable in law.

- It is important to note that the new wording of the legislation will not help for some time yet. The old provisions of the 1973 Act apply to cases which prescribed on or before 31 May

2022. The amended provisions of s11 only apply where the appropriate date is on or after 1 June 2022.

Post February 2025 s11:-

- After February 2025, s11 will be renamed. It will no longer refer to an obligation to make reparation but rather refer to obligations to pay damages.
- Subsection 1 has been amended to reflect the same.
- Subsection 4 has been updated to include reference to actions for damages which are subject to the long negative prescription of 20 years referred to in s7 of the 1973 Act.

Other highlights:-

- Changes to schedule 1 to expand the types of claims subject to the short negative prescription.
- Amendment to fraud provisions at s6(4) including a new s6(4A) which clarifies that it doesn't matter that the debtor didn't mean to induce the creditor into failing to make a claim.
- New s9(2A) confirms that a case subject to s6 is to be treated as being made continuously until disposed of.
- Introduction of a new s13 allowing for parties to agree to extend the prescription period for no more than one year.
- Introduction of a new s13A which flips the burden of proof – where prescription is an issue, it will be for the creditor/pursuer to establish that the claim has not prescribed.

Problem solved?

- Do the changes do anything to clarify when the clock starts ticking?
- Good news for lawyers - probably not. Prescription remains very fact specific.
- Addition of subsection 3A arguably doesn't change the law as presently stated. Applying the three strand approach to *WPH Developments Limited:-*

  a) that loss, injury or damage has occurred – it was known that the houses were being built and sold – the wasted expenditure had been incurred - *damnum*;

b) that the loss, injury or damage was caused by a person's act or omission – looking back with hindsight, the wasted expenditure was caused by the negligent drawings - *injuria*;

c) the identity of that person – it was known the defenders were responsible for the drawings.

- Provisions particularly in relation to s11(3) and s11(3A) remain ripe for dispute. Given line of authority relating to economic losses, is the new battleground for latent defects now s6(4)/s6(4A)?

- Can s6(4) and new s6(4A) be prayed in aid of an otherwise prescribed claim? Has the defenders conduct in an economic case that all is well enough to utilise that provision?

- Problems with establishing a negative under new s13A? Pursuers may have to consider their pleadings given there is a positive obligation to prove the appropriate date, rather than just respond to a position being advanced by defenders.

- How will courts react to a party having to establish a negative? Courts have struggled in the recent past with *res ipsa* (for example *Woodhouse v Lochs and Glens)* where burden is on defender to establish standard of driving was not negligent.

Disclaimer: Notes prepared for presentation and discussion at the Compass Chambers Conference 2022. Nothing in these notes should be taken as constituting formal legal advice.

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

Version 1 of 1

25 July 1973 - Present

Subjects
Civil procedure; Prescription

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]
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Notes

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

s. 1 Validity of right

Law In Force With Amendments Pending

Version 3 of 4

8 December 2014 - Present

Subjects
Prescription

Keywords
Positive prescription; Possession claims; Proprietary rights; Scotland; Time
[

1 Validity of right

(1) If land has been possessed by any person, or by any person and his successors, for a continuous period of ten years openly, peaceably and without any judicial interruption and the possession was founded on, and followed–

(a) the recording of a deed which is sufficient in respect of its terms ot constitute in favour of that person a real right in–

(i) that land; or

(ii) land of a description habile to include that land; or

[

(b) the registration of a deed which is sufficient in respect of its terms to constitute in favour of that person a real right in—

(i) that land; or

(ii) land of a description habile to include that land,

][2] then, as from the expiry of that period, the real right so far as relating to that land shall be exempt from challenge.

(2) Subsection (1) above shall not apply where–

(a) possession was founded on the recording of a deed which is invalid ex facie or was forged; or

(b) possession was founded on registration in the Land Register of Scotland proceeding on a forged deed and the person appearing from the Register to have the real right in question was aware of the forgery at the time of registration in his favour.

(3) In subsection (1) above, the reference to a real right is to a real right which is registrable in the Land Register of Scotland or a deed relating to which can competently be recorded; but this section does not apply to [real burdens,][3] servitudes or public rights of way.

(4) In the computation of a prescriptive period for the purposes of this section in a case where the deed in question is a decree of adjudication for debt, any period before the expiry of the legal shall be disregarded.

(5) Where, in any question involving any foreshore or any salmon fishings, this section is pled against the Crown as owner of the regalia, subsection (1) above shall have effect as if for the words "ten years" there were substituted "twenty years".

(6) This section is without prejudice to section 2 of this Act.

][1]

Notes

1 Substituted by Abolition of Feudal Tenure etc. (Scotland) Act 2000 asp 5 (Scottish Act) Sch.12(1) para.33(2) (November 28, 2004)
2 Substituted by Land Registration etc. (Scotland) Act 2012 asp 5 (Scottish Act) Sch.5 para.18(2) (December 8, 2014)
3 Words inserted by Title Conditions (Scotland) Act 2003 asp 9 (Scottish Act) Sch.14 para.5(2) (November 28, 2004 being the day appointed by SSI 2003/456 art.2 for the purposes of 2003 asp.9 s.71)

s. 2 Special cases

Law In Force

Version 3 of 3

8 December 2014 - Present

Subjects
Prescription

Keywords
Positive prescription; Possession claims; Proprietary rights; Scotland
[

2 Special cases

(1) If–

(a) land has been possessed by any person, or by any person and his successors, for a continuous period of twenty years openly, peaceably and without any judicial interruption; and

(b) the possession was founded on, and followed the execution of, a deed (whether [or not registered or recorded] [2]) which is sufficient in respect of its terms to constitute in favour of that person a real right in that land, or in land of a description habile to include that land,

then, as from the expiry of that period, the real right so far as relating to that land shall be exempt from challenge except on the ground that the deed is invalid ex facie or was forged.

(2) This section applies–

(a) to the real right of the lessee under a lease; and

(b) to any other real right in land, being a real right of a kind which, under the law in force immediately before the commencement of this Part of this Act, was sufficient to form a foundation for positive prescription without the deed constituting the title to the real right having been [registered or] [3] recorded,

but does not apply to servitudes or public rights of way.

(3) This section is without prejudice to section 1 of this Act or to [section 20B or 20C of the Registration of Leases (Scotland) Act 1857 (c.26)] [4] .

] [1]

Notes

1 Substituted by Abolition of Feudal Tenure etc. (Scotland) Act 2000 asp 5 (Scottish Act) Sch.12(1) para.33(2) (November 28, 2004)
2 Words substituted by Land Registration etc. (Scotland) Act 2012 asp 5 (Scottish Act) Sch.5 para.18(3)(a) (December 8, 2014)

Notes

3 Words inserted by Land Registration etc. (Scotland) Act 2012 asp 5 (Scottish Act) Sch.5 para.18(3)(b) (December 8, 2014)

4 Words substituted by Land Registration etc. (Scotland) Act 2012 asp 5 (Scottish Act) Sch.5 para.18(3)(c) (December 8, 2014)

s. 3 Positive servitudes and public rights of way.

Law In Force

Version 1 of 1

25 July 1976 - Present

Subjects
Prescription

Keywords
Positive prescription; Possession; Public rights of way; Scotland; Servitudes; Time

3.— Positive servitudes and public rights of way.

(1) If in the case of a positive servitude over land—

(a) the servitude has been possessed for a continuous period of twenty years openly, peaceably and without any judicial interruption, and

(b) the possession was founded on, and followed the execution of, a deed which is sufficient in respect of its terms (whether expressly or by implication) to constitute the servitude,

then, as from the expiration of the said period, the validity of the servitude as so constituted shall be exempt from challenge except on the ground that the deed is invalid ex facie or was forged.

(2) If a positive servitude over land has been possessed for a continuous period of twenty years openly, peaceably and without judicial interruption, then, as from the expiration of that period, the existence of the servitude as so possessed shall be exempt from challenge.

(3) If a public right of way over land has been possessed by the public for a continuous period of twenty years openly, peaceably and without judicial interruption, then, as from the expiration of that period, the existence of the right of way as so possessed shall be exempt from challenge.

(4) References in subsections (1) and (2) of this section to possession of a servitude are references to possession of the servitude by any person in possession of the relative dominant tenement.

(5) This section is without prejudice to the operation of section 7 of this Act.

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Notes

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

Part I PRESCRIPTION > Positive prescription > s. 3 Positive servitudes and public rights of way.

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

Law In Force

Version 2 of 2

7 June 2010 - Present

Subjects
Prescription

Keywords
Interpretation; Notice; Positive prescription; Possession claims; Scotland; Suspension; Time

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)

Part I PRESCRIPTION > Positive prescription > s. 4 Judicial interruption of periods of possession for purposes of sections 1, 2 and 3.

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

Law In Force

Version 4 of 4

8 December 2014 - Present

Subjects
Prescription

Keywords
Deeds; Interpretation; Positive prescription; Scotland

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

(1) In sections 1, 2 and 3 of this Act *"deed"* includes a judicial decree; and for the purposes of the said sections any of the following, namely an instrument of sasine, a notarial instrument and a notice of title, which narrates or declares that a person has a [right in land shall be treated as a deed sufficient to constitute that right] [1] in favour of that person.

[

(1A) Any reference in those sections to a real right's being exempt from challenge as from the expiration of some continuous period is to be construed, if the real right of the possessor was void immediately before that expiration, as including reference to acquisition of the real right by the possessor.

] [2] [...] [3]

Notes

1 Words substituted by Abolition of Feudal Tenure etc. (Scotland) Act 2000 asp 5 (Scottish Act) Sch.12(1) para.33(3) (November 28, 2004)
2 Added by Land Registration etc. (Scotland) Act 2012 asp 5 (Scottish Act) Sch.5 para.18(4) (December 8, 2014: insertion has effect subject to savings specified in 2012 asp 5 s.120(1))
3 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)

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

Law In Force With Amendments Pending

Version 1 of 2

25 July 1976 - 27 February 2025

Subjects
Prescription

Keywords
Extinguishment; Negative prescription; Scotland; Time

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 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.

(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)

Part I PRESCRIPTION > Negative Prescription > s. 6
Extinction of obligations by prescriptive periods of five years.

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

Law In Force With Amendments Pending

Version 2 of 3

28 June 2022 - Present

Subjects
Prescription

Keywords
Extinguishment; Negative prescription; Scotland; Time

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.

(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 [or any obligation to pay damages arising from liability under section 148 or section 149 of the Building Safety Act 2022 (see section 18ZD of this Act).] [3]] [2]

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 Words inserted by Building Safety Act 2022 c. 30 Pt 5 s.151(3) (June 28, 2022)

s. 7A Saving for other statutory provisions about prescription or limitation

Not Yet In Force

Version 1 of 1

28 February 2025 - Date not available

Subjects
Civil procedure; Prescription
[

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.

][1]

Notes

1 Added by Prescription (Scotland) Act 2018 asp 15 (Scottish Act) s.9(2) (February 28, 2025: insertion has effect as SSI 2022/78 reg.2(1) subject to saving and transitional provisions as specified in SSI 2022/78 reg.3(1) and reg.4(1))

Part I PRESCRIPTION > Negative Prescription > s. 7A Saving for other statutory provisions about prescription or limitation

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

Law In Force With Amendments Pending

Version 1 of 2

25 July 1976 - 27 February 2025

Subjects
Prescription

Keywords
Extinguishment; Negative prescription; Property; Scotland; Time

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.

(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.

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Notes

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

Part I PRESCRIPTION > Negative Prescription > s. 8 Extinction of other rights relating to property by prescriptive periods of twenty years.

s. 8A Extinction of obligations to make contributions between wrongdoers.

Law In Force

Version 1 of 1

Date not available - Present

Subjects
Prescription

Keywords
Contribution; Damages; Expenses; Extinguishment; Negative prescription; Scotland; Time
[

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)

Part I PRESCRIPTION > Negative Prescription > s. 8A Extinction of obligations to make contributions between wrongdoers.

s. 9 Definition of “relevant claim” for purposes of sections 6, 7 and 8.

Law In Force With Amendments Pending

Version 3 of 4

30 November 2016 - Present

Subjects
Prescription

Keywords
Claims; Extinguishment; Interpretation; Negative prescription; Scotland; Time

9.— Definition of “relevant claim” for purposes of sections 6, 7 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] 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.

(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)

Part I PRESCRIPTION > Negative Prescription > s. 9 Definition of "relevant claim" for purposes of sections 6, 7 and 8.

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

Not Yet In Force

Version 1 of 1

28 February 2025 - Date not available

Subjects
Civil procedure; Prescription

[

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.

][1]

Notes

1 Added by Prescription (Scotland) Act 2018 asp 15 (Scottish Act) s.12 (February 28, 2025: insertion has effect as SSI 2022/78 reg.2(1) subject to saving and transitional provisions as specified in SSI 2022/78 reg.3(1) and reg.4(1))

s. 10 Relevant acknowledgment for purposes of sections 6 and 7.

Law In Force With Amendments Pending

Version 1 of 2

Date not available - 27 February 2025

Subjects
Prescription

Keywords
Acknowledgment; Extinguishment; Negative prescription; Scotland; Time

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

(1) The subsistence of an obligation shall be regarded for the purposes of 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[7 and 8A] [2] 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[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.

3

Notes

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

Notes

2 Words substituted by Prescription and Limitation (Scotland) Act 1984 (c. 45), s. 6(1), Sch. 1 para. 4
3 Act amended by Self-Governing Schools etc. (Scotland) Act 1989 (c.39), s. 39(4)(a)

Part I PRESCRIPTION > Negative Prescription > s. 10
Relevant acknowledgment for purposes of sections 6 and 7.

s. 11 Obligations to make reparation.

Law In Force With Amendments Pending

Version 2 of 3

1 June 2022 - Present

Subjects
Prescription

Keywords
Damage; Negative prescription; Reparation; Scotland

11.— Obligations to make reparation.

(1) Subject to subsections (2) and (3) below; any 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] [1] 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] [2] loss, injury or damage has occurred before the cessation of the [act or omission] [2] 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] [2] 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)] [3] , 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]

(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;[...] [5]

Notes

1 Words substituted by Prescription (Scotland) Act 2018 asp 15 (Scottish Act) s.5(2) (June 1, 2022: substitution has effect as SSI 2022/78 reg.2(2) subject to saving provisions as specified in SSI 2022/78 reg.3(2))

2 Words substituted by Prescription (Scotland) Act 2018 asp 15 (Scottish Act) s.5(3) (June 1, 2022: substitution has effect as SSI 2022/78 reg.2(2) subject to saving provisions as specified in SSI 2022/78 reg.3(2))

3 Words substituted by Prescription (Scotland) Act 2018 asp 15 (Scottish Act) s.5(4) (June 1, 2022: substitution has effect as SSI 2022/78 reg.2(2) subject to saving provisions as specified in SSI 2022/78 reg.3(2))

4 Added by Prescription (Scotland) Act 2018 asp 15 (Scottish Act) s.5(5) (June 1, 2022: insertion has effect as SSI 2022/78 reg.2(2) subject to saving provisions as specified in SSI 2022/78 reg.3(2))

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

s. 12 Savings.

Law In Force

Version 1 of 1

25 July 1976 - Present

Subjects
Prescription

Keywords
Negative prescription; Savings provisions; Scotland

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)

Part I PRESCRIPTION > Negative Prescription > s. 12 Savings.

s. 13 Restrictions on contracting out

Law In Force

Version 2 of 2

1 June 2022 - Present

Subjects
Prescription

Keywords
Agreements; Negative prescription; Nullity; Scotland
[

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.

][1]

Notes

1 Substituted by Prescription (Scotland) Act 2018 asp 15 (Scottish Act) s.13 (June 1, 2022)

s. 13A Burden of proof

Not Yet In Force

Version 1 of 1

28 February 2025 - Date not available

Subjects
Civil procedure; Prescription
[

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.

][1]

Notes

1 Added by Prescription (Scotland) Act 2018 asp 15 (Scottish Act) s.14(2) (February 28, 2025: insertion has effect as SSI 2022/78 reg.2(1) subject to saving and transitional provisions as specified in SSI 2022/78 reg.3(1) and reg.4(1))

s. 14 Computation of prescriptive periods.

Law In Force

Version 5 of 5

31 December 2020 - Present

Subjects
Prescription

Keywords
Computation; Prescription; Scotland; Time

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.

[...] [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—

[...][5] [

"ADR entity" means a person whose name appears on a list maintained in accordance with regulation 10 of the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015 (S.I. 2015/542)[7] ;

][6] [...][8] [

"ADR procedure" means a procedure for the out-of-court resolution of disputes through the intervention of an ADR entity which proposes or imposes a solution or brings the parties together with the aim of facilitating an amicable solution;

][9] [

"consumer" means an individual acting for purposes which are wholly or mainly outside that individual's trade, business, craft or profession;

][10] [...][11]

"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[;][12]

[...][13] [

"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 that—

(a) concerns obligations under a sales contract or a service contract, and

(b) is between a trader established in the United Kingdom or the European Union and a consumer resident in the United Kingdom,

which the parties attempt to settle by recourse to a non-binding ADR procedure;

][15]][14] [...] [16] [

"sales contract" means a contract under which a trader transfers, or agrees to transfer, the ownership of goods to a consumer and the consumer pays, or agrees to pay, the price, including any contract that has both goods and services as its object;

"service contract" means a contract, other than a sales contract, under which a trader supplies, or agrees to supply, a service to a consumer and the consumer pays, or agrees to pay, the price;

"trader" means a person acting for purposes relating to that person's trade, business, craft or profession, whether acting personally or through another person acting in the trader's name or on the trader's behalf.

][17]

][4]

Notes

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

2 Repealed by Civil and Family Justice (EU Exit) (Scotland) (Amendment etc.) Regulations 2020/441 (Scottish SI) Pt 2 reg.2(2)(a) (December 31, 2020: repeal has effect subject to saving specified in SSI 2020/441 reg.7)

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 Definition repealed by Alternative Dispute Resolution for Consumer Disputes (Extension of Time Limits for Legal Proceedings) (Amendment etc.) (EU Exit) Regulations 2020/1139 Pt 2 reg.2(2)(a) (December 31, 2020: repeal has effect subject to transitional provision specified in SI 2020/1139 reg.7)

6 Definition substituted by Alternative Dispute Resolution for Consumer Disputes (Extension of Time Limits for Legal Proceedings) (Amendment etc.) (EU Exit) Regulations 2020/1139 Pt 2 reg.2(2)(b) (December 31, 2020: substitution has effect subject to transitional provision specified in SI 2020/1139 reg.7)

7 S.I. 2015/542. Regulation 4 was amended by S.I. 2015/1392.

8 Definition repealed by Alternative Dispute Resolution for Consumer Disputes (Amendment) (No. 2) Regulations 2015/1972 Pt 2 reg.2(2) (January 9, 2016)

9 Definition substituted by Alternative Dispute Resolution for Consumer Disputes (Extension of Time Limits for Legal Proceedings) (Amendment etc.) (EU Exit) Regulations 2020/1139 Pt 2 reg.2(2)(c) (December 31, 2020: substitution has effect subject to transitional provision specified in SI 2020/1139 reg.7)

Notes

10 Definition inserted by Alternative Dispute Resolution for Consumer Disputes (Extension of Time Limits for Legal Proceedings) (Amendment etc.) (EU Exit) Regulations 2020/1139 Pt 2 reg.2(2)(d) (December 31, 2020: insertion has effect subject to transitional provision specified in SI 2020/1139 reg.7)

11 Definition repealed by Civil and Family Justice (EU Exit) (Scotland) (Amendment etc.) Regulations 2020/441 (Scottish SI) Pt 2 reg.2(2)(b)(i) (December 31, 2020: repeal has effect subject to saving specified in SSI 2020/441 reg.7)

12 Definitions inserted by Cross-Border Mediation (Scotland) Regulations 2011/234 (Scottish SI) reg.5(3)(b) (April 6, 2011)

13 Definition repealed by Civil and Family Justice (EU Exit) (Scotland) (Amendment etc.) Regulations 2020/441 (Scottish SI) Pt 2 reg.2(2)(b)(ii) (December 31, 2020: repeal has effect subject to saving specified in SSI 2020/441 reg.7)

14 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))

15 Definition substituted by Alternative Dispute Resolution for Consumer Disputes (Extension of Time Limits for Legal Proceedings) (Amendment etc.) (EU Exit) Regulations 2020/1139 Pt 2 reg.2(2)(e) (December 31, 2020: substitution has effect subject to transitional provision specified in SI 2020/1139 reg.7)

16 Definition repealed by Civil and Family Justice (EU Exit) (Scotland) (Amendment etc.) Regulations 2020/441 (Scottish SI) Pt 2 reg.2(2)(b)(iii) (December 31, 2020: repeal has effect subject to saving specified in SSI 2020/441 reg.7)

17 Definitions inserted by Alternative Dispute Resolution for Consumer Disputes (Extension of Time Limits for Legal Proceedings) (Amendment etc.) (EU Exit) Regulations 2020/1139 Pt 2 reg.2(2)(f) (December 31, 2020: insertion has effect subject to transitional provision specified in SI 2020/1139 reg.7)

s. 15 Interpretation of Part I.

Law In Force With Amendments Pending

Version 3 of 4

8 December 2014 - Present

Subjects
Prescription

Keywords
Interpretation; Prescription; Scotland

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;

"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)

s. 16 Amendments and repeals related to Part I.

Law In Force

Version 1 of 1

Date not available - Present

Subjects
Prescription

Keywords
Amendments; Prescription; Repeals; Scotland

16.— Amendments and repeals related to Part I.

[...] [1]

(2) Subject to the next following subsection, the enactments specified in Part I of Schedule 5 to this Act (which includes certain enactments relating to the limitation of proof) are hereby repealed to the extent specified in column 3 of that Schedule.

(3) Where by virtue of any Act repealed by this section the subsistence of an obligation in force at the date of the commencement of this Part of this Act was immediately before that date, by reason of the passage of time, provable only by the writ or oath of the debtor the subsistence of the obligation shall (notwithstanding anything in [sections 16(1) and 17(2)(a) of the Interpretation Act 1978] [2] , which relates to the effect of repeals) as from that date be provable as if the said repealed Act had not passed.

[3]

Notes

1 Provides for amendment of enactment specified in Sch. 4 Pt. I
2 Words substituted by virtue of Interpretation Act 1978 (c. 30), s. 25(2)
3 Act amended by Self-Governing Schools etc. (Scotland) Act 1989 (c.39), s. 39(4)(a)

s. 16A Part II not to extend to product liability.

Law In Force

Version 1 of 1

Date not available - Present

Subjects
Prescription

Keywords
Exemptions; Limitations; Prescription; Product liability; Scotland
[

16A.— Part II not to extend to product liability.

This Part of this Act does not apply to any action to which section 22B or 22C of this Act applies.

][1 2]

Notes

1 S. 16A inserted by Consumer Protection Act 1987 (c.43) ss. 6, 41(2), 47(1)(2), Sch. 1 para. 9
2 Act amended by Self-Governing Schools etc. (Scotland) Act 1989 (c.39), s. 39(4)(a)

Part I PRESCRIPTION > General > s. 16A Part II not to extend to product liability.

s. 17 Actions in respect of personal injuries not resulting in death.

Law In Force

Version 2 of 2

21 April 2021 - Present

Subjects
Civil procedure

Keywords
Damages; Limitation periods; Personal injury; Scotland

[

17.— Actions in respect of personal injuries not resulting in death.

(1) This section applies to an action of damages where the damages claimed consist of or include damages in respect of personal injuries, being an action (other than an action to which section 18 of this Act applies) brought by the person who sustained the injuries or any other person.

[

(1A) This section does not apply to an action of damages in respect of personal injuries to which section 18ZA applies.

][2]

(2) Subject to subsection (3) below and section 19A of this Act, no action to which this section applies shall be brought unless it is commenced within a period of 3 years after—

(a) the date on which the injuries were sustained or, where the act or omission to which the injuries were attributable was a continuing one, that date or the date on which the act or omission ceased, whichever is the later; or

(b) the date (if later than any date mentioned in paragraph (a) above) on which the pursuer in the action became, or on which, in the opinion of the court, it would have been reasonably practicable for him in all the circumstances to become, aware of all the following facts—

(i) that the injuries in question were sufficiently serious to justify his bringing an action of damages on the assumption that the person against whom the action was brought did not dispute liability and was able to satisfy a decree;

(ii) that the injuries were attributable in whole or in part to an act or omission; and

(iii) that the defender was a person to whose act or omission the injuries were attributable in whole or in part or the employer or principal of such a person.

(3) In the computation of the period specified in subsection (2) above there shall be disregarded any time during which the person who sustained the injuries was under legal disability by reason of nonage or unsoundness of mind.

][1]

Notes

1 Ss. 17, 18 substituted for ss. 17–19 by Prescription and Limitation (Scotland) Act 1984 (c. 45), ss. 2, 5(1)
2 Added by Automated and Electric Vehicles Act 2018 c. 18 Sch.1 para.1 (April 21, 2021)

Part II LIMITATION OF ACTIONS > s. 17 Actions in respect of personal injuries not resulting in death.

s. 17A Actions in respect of personal injuries resulting from childhood abuse

Law In Force

Version 1 of 1

4 October 2017 - Present

Subjects
Civil procedure; Prescription

[

17A Actions in respect of personal injuries resulting from childhood abuse

(1) The time limit in section 17 does not apply to an action of damages if—

(a) the damages claimed consist of damages in respect of personal injuries,

(b) the person who sustained the injuries was a child on the date the act or omission to which the injuries were attributable occurred or, where the act or omission was a continuing one, the date the act or omission began,

(c) the act or omission to which the injuries were attributable constitutes abuse of the person who sustained the injuries, and

(d) the action is brought by the person who sustained the injuries.

(2) In this section—

"abuse" includes sexual abuse, physical abuse, emotional abuse and abuse which takes the form of neglect,

"child" means an individual under the age of 18.

][1]

Notes

1 Added by Limitation (Childhood Abuse) (Scotland) Act 2017 asp 3 (Scottish Act) s.1 (October 4, 2017)

Part II LIMITATION OF ACTIONS > s. 17A Actions in respect of personal injuries resulting from childhood abuse

s. 17B Childhood abuse actions: previously accrued rights of action

Law In Force

Version 1 of 1

4 October 2017 - Present

Subjects
Civil procedure; Prescription
[

17B Childhood abuse actions: previously accrued rights of action

Section 17A has effect as regards a right of action accruing before the commencement of section 17A.

][1]

Notes

1 Added by Limitation (Childhood Abuse) (Scotland) Act 2017 asp 3 (Scottish Act) s.1 (October 4, 2017)

Part II LIMITATION OF ACTIONS > s. 17B Childhood abuse actions: previously accrued rights of action

s. 17C Childhood abuse actions: previously litigated rights of action

Law In Force

Version 1 of 1

4 October 2017 - Present

Subjects
Civil procedure; Prescription
[

17C Childhood abuse actions: previously litigated rights of action

(1) This section applies where a right of action in respect of relevant personal injuries has been disposed of in the circumstances described in subsection (2).

(2) The circumstances are that—

(a) prior to the commencement of section 17A, an action of damages was brought in respect of the right of action ("the initial action"), and

(b) the initial action was disposed of by the court—

(i) by reason of section 17, or

(ii) in accordance with a relevant settlement.

(3) A person may bring an action of damages in respect of the right of action despite the initial action previously having been disposed of (including by way of decree of absolvitor).

(4) In this section—

(a) personal injuries are "relevant personal injuries" if they were sustained in the circumstances described in paragraphs (b) and (c) of section 17A(1),

(b) a settlement is a "relevant settlement" if—

(i) it was agreed by the parties to the initial action,

(ii) the pursuer entered into it under the reasonable belief that the initial action was likely to be disposed of by the court by reason of section 17, and

(iii) any sum of money which it required the defender to pay to the pursuer, or to a person nominated by the pursuer, did not exceed the pursuer's expenses in connection with bringing and settling the initial action.

(5) The condition in subsection (4)(b)(iii) is not met if the terms of the settlement indicate that the sum payable under it is or includes something other than reimbursement of the pursuer's expenses in connection with bringing and settling the initial action.

][1]

Notes

1 Added by Limitation (Childhood Abuse) (Scotland) Act 2017 asp 3 (Scottish Act) s.1 (October 4, 2017)

Part II LIMITATION OF ACTIONS > s. 17C Childhood abuse actions: previously litigated rights of action

s. 17D Childhood abuse actions: circumstances in which an action may not proceed

Law In Force

Version 1 of 1

4 October 2017 - Present

Subjects
Civil procedure; Prescription
[

17D Childhood abuse actions: circumstances in which an action may not proceed

(1) The court may not allow an action which is brought by virtue of section 17A(1) to proceed if either of subsections (2) or (3) apply.

(2) This subsection applies where the defender satisfies the court that it is not possible for a fair hearing to take place.

(3) This subsection applies where—

(a) the defender satisfies the court that, as a result of the operation of section 17B or (as the case may be) 17C, the defender would be substantially prejudiced were the action to proceed, and

(b) having had regard to the pursuer's interest in the action proceeding, the court is satisfied that the prejudice is such that the action should not proceed.

][1]

Notes

1 Added by Limitation (Childhood Abuse) (Scotland) Act 2017 asp 3 (Scottish Act) s.1 (October 4, 2017)

Part II LIMITATION OF ACTIONS > s. 17D Childhood abuse actions: circumstances in which an action may not proceed

s. 18 Actions where death has resulted from personal injuries.

Law In Force

Version 3 of 3

21 April 2021 - Present

Subjects
Civil procedure

Keywords
Death; Limitation periods; Personal injury; Scotland
[

18.— Actions where death has resulted from personal injuries.

(1) This section applies to any action in which, following the death of any person from personal injuries, damages are claimed in respect of the injuries or the death.

[

(1A) This section does not apply to an action of damages in respect of personal injuries or death to which section 18ZA applies.

][2]

(2) Subject to subsections (3) and (4) below and section 19A of this Act, no action to which this section applies shall be brought unless it is commenced within a period of 3 years after—

(a) the date of death of the deceased; or

(b) the date (if later than the date of death) on which the pursuer in the action became, or on which, in the opinion of the court, it would have been reasonably practicable for him in all the circumstances to become, aware of both of the following facts—

(i) that the injuries of the deceased were attributable in whole or in part to an act or omission; and

(ii) that the defender was a person to whose act or omission the injuries were attributable in whole or in part or the employer or principal of such a person.

(3) Where the pursuer is a relative of the deceased, there shall be disregarded in the computation of the period specified in subsection (2) above any time during which the relative was under legal disability by reason of nonage or unsoundness of mind.

(4) Subject to section 19A of this Act, where an action of damages has not been brought by or on behalf of a person who has sustained personal injuries within the period specified in section 17(2) of this Act and that person subsequently dies in consequence of those injuries, no action to which this section applies shall be brought in respect of those injuries or the death from those injuries.

(5) In this section *"relative"* has the same meaning as in [the Damages (Scotland) Act 2011][3].

][1]

Notes

1 Ss. 17, 18 substituted for ss. 17–19 by Prescription and Limitation (Scotland) Act 1984 (c. 45), ss. 2, 5(1)
2 Added by Automated and Electric Vehicles Act 2018 c. 18 Sch.1 para.2 (April 21, 2021)
3 Words substituted by Damages (Scotland) Act 2011 asp 7 (Scottish Act) Sch.1 para.2(1) (July 7, 2011)

Part II LIMITATION OF ACTIONS > s. 18 Actions where death has resulted from personal injuries.

s. 18ZA Actions under section 2 of the Automated and Electric Vehicles Act 2018

Law In Force

Version 1 of 1

21 April 2021 - Present

Subjects
Civil procedure; Prescription
[

18ZA Actions under section 2 of the Automated and Electric Vehicles Act 2018

(1) This section applies to an action of damages under section 2 of the 2018 Act (liability of insurers etc where accident caused by automated vehicle).

(2) An action may not be brought after the expiry of the period of 3 years beginning with—

(a) the date of the accident mentioned in subsection (1) or (as the case may be) subsection (2) of that section, or

(b) where subsection (3) applies, the date on which the person who sustained the injuries first became aware of the facts mentioned in subsection (4) (if later).

(3) This subsection applies where the damages claimed consist of or include damages in respect of personal injuries (to the pursuer or any other person).

(4) The facts are—

(a) that the injury in question was significant;

(b) that the injury was attributable in whole or in part to an accident caused by an automated vehicle when driving itself; and

(c) the identity of the insurer of the vehicle (in the case of an action under section 2(1) of the 2018 Act) or the owner of the vehicle (in the case of an action under section 2(2) of that Act).

(5) Expressions used in subsection (4) that are defined for the purposes of Part 1 of the 2018 Act have the same meaning in that subsection as in that Part.

(6) In the computation of the period specified in subsection (2) above any time during which the person who sustained the injuries was under legal disability by reason of nonage or unsoundness of mind is to be disregarded.

(7) If a person injured in the accident dies before the expiry of the period mentioned in subsection (2) above, an action may not be brought after the expiry of the period of 3 years beginning with—

(a) the date of death of the person, or

(b) where subsection (3) applies, the date on which the pursuer first became aware of the facts mentioned in subsection (4) (if later).

(8) Where an action has not been brought before the expiry of the period mentioned in subsection (2) above and the person subsequently dies in consequence of injuries sustained in the accident, an action may not be brought in respect of those injuries or that death.

(9) Subsection (10) applies if a person injured in the accident dies and the person seeking to bring the action is a relative of the deceased.

(10) In the computation of the period specified in subsection (7) any time during which the relative was under legal disability by reason of nonage or unsoundness of mind is to be disregarded.

(11) In this section—

"the 2018 Act" means the Automated and Electric Vehicles Act 2018;

"relative" has the same meaning as in the Damages (Scotland) Act 2011.

]1

Notes

1 Added by Automated and Electric Vehicles Act 2018 c. 18 Sch.1 para.3 (April 21, 2021)

Part II LIMITATION OF ACTIONS > s. 18ZA Actions under section 2 of the Automated and Electric Vehicles Act 2018

s. 18ZB Section 18ZA: extension of limitation periods

Law In Force

Version 1 of 1

21 April 2021 - Present

Subjects
Civil procedure; Prescription
[

18ZB Section 18ZA: extension of limitation periods

(1) Subsection (2) applies where a person would be entitled, but for section 18ZA, to bring an action other than one in which the damages claimed are confined to damages for loss of or damage to property.

(2) The court may, if it seems to it equitable to do so, allow the person to bring the action despite that section.

][1]

Notes

1 Added by Automated and Electric Vehicles Act 2018 c. 18 Sch.1 para.3 (April 21, 2021)

s. 18ZC Actions under section 5 of the Automated and Electric Vehicles Act 2018

Law In Force

Version 1 of 1

21 April 2021 - Present

Subjects
Civil procedure; Prescription
[

18ZC Actions under section 5 of the Automated and Electric Vehicles Act 2018

(1) Subsection (2) applies where, by virtue of section 5 of the Automated and Electric Vehicles Act 2018 (right of insurer etc to claim against person responsible for accident), an insurer or vehicle owner becomes entitled to bring an action against any person.

(2) The action may not be brought after the expiry of the period of 2 years beginning with the date on which the right of action accrued (under subsection (5) of that section).

][1]

Notes

1 Added by Automated and Electric Vehicles Act 2018 c. 18 Sch.1 para.3 (April 21, 2021)

Part II LIMITATION OF ACTIONS > s. 18ZC Actions under section 5 of the Automated and Electric Vehicles Act 2018

s. 18ZD Actions relating to construction products

Law In Force

Version 1 of 1

28 June 2022 - Present

Subjects
Civil procedure; Construction law

Keywords
Buildings; Causes of action; Construction materials; Limitation periods; Product liability; Safety
[

18ZD Actions relating to construction products

(1) An action under section 148 of the Building Safety Act 2022 may not be brought after the expiration of 15 years from the date on which the right of action accrued (see subsection (8) of that section).

(2) An action under section 149 of the Building Safety Act 2022 may not be brought after—

(a) if the right of action accrued before the commencement date, the expiration of the period of 30 years from the date on which it accrued (see subsection (8) of that section), and

(b) if the right of action accrued on or after the commencement date, the expiration of the period of 15 years beginning with the date on which it accrued.

(3) In a case where—

(a) a right of action under section 149 of the Building Safety Act 2022 accrued before the commencement date, and

(b) the expiration of the period of 30 years beginning with the date on which the right of action accrued falls in the year beginning with the commencement date,

subsection (2)(a) has effect as if it referred to the expiration of that year.

(4) In subsections (2) and (3) *"the commencement date"* is the day on which section 149 of the Building Safety Act 2022 came into force.

(5) No other period of limitation specified by this Part of this Act applies in relation to an action referred to in subsection (1) or (2).

(6) In the computation of a period of time specified in subsection (1) or (2), there is to be disregarded any time during which the person seeking to bring the action (P)—

(a) was under a legal disability by reason of nonage or unsoundness of mind, or

(b) failed to bring the action by reason of—

(i) fraud on the part of the person against whom the action is to be brought (D) or the part of any person acting on D's behalf, or

(ii) error induced by words or conduct of D or any person acting on D's behalf, (but not including, for the purposes of paragraph (b), any time occurring after P could with reasonable diligence have discovered the fraud or error mentioned in that paragraph).

(7) For the purposes of subsection (6)(b), it does not matter whether D, or the person acting on D's behalf, intended the fraud or the words or conduct to cause P to fail to bring the action.

][1]

Notes

1 Added by Building Safety Act 2022 c. 30 Pt 5 s.151(2) (June 28, 2022)

s. 18A Limitation of defamation and other actions.

Law In Force

Version 2 of 2

8 August 2022 - Present

Subjects
Civil procedure

Keywords
Defamation; Interpretation; Limitation periods; Scotland
[

18A— Limitation of defamation and other actions.

(1) Subject to subsections (2) and (3) below and section 19A of this Act, no action for defamation [or under section 21, 22 or 23 of the 2021 Act (actionable types of malicious publication)][2] shall be brought unless it is commenced within a period of [one year][3] after the date when the right of action accrued.

[

(1A) Where—

(a) a person publishes a statement to the public or to a section of the public ("the frst publication"), and

(b) the person subsequently publishes (whether or not to the public) the same statement or a statement that is substantially the same ("the subsequent publication"),

any right of action against the person for defamation or under section 21, 22 or 23 of the 2021 Act in respect of the subsequent publication is to be treated as having accrued on the date of the frst publication.

(1B) Subsection (1A) does not apply where the court determines that the manner of the subsequent publication is materially different from the manner of the frst publication.

(1C) In determining whether the manner of the subsequent publication is materially different from the manner of the frst publication, the court may have regard to—

(a) the level of prominence that the statement is given,

(b) the extent of the subsequent publication, and

(c) any other matter that the court considers relevant.

][4]

(2) In the computation of the period specified in subsection (1) above there shall be disregarded any time during which the person alleged to have been defamed [or harmed by a malicious publication in a manner described in section 21, 22 or 23 of the 2021 Act][5] was under legal disability by reason of nonage or unsoundness of mind.

(3) Nothing in this section shall affect any right of action which accrued before the commencement of this section.

[

(3A) This section continues to have effect in relation to a statement which was published before [8 August 2022] [7] as if it had not been amended by section 32 of the 2021 Act.

(3B) In determining whether subsection (1A) applies, no account is to be taken of a statement which was published before [8 August 2022] [7] .

] [6]

(4) In this section—[

(aa) *"the 2021 Act"* means the Defamation and Malicious Publication (Scotland) Act 2021,

] [8]

(b) references to the date when a right of action accrued shall be construed [(subject to subsection (1A))] [9] as references to the date when the [statement] [10] in respect of which the action for defamation [or, as the case may be, under section 21, 22 or 23 of the 2021 Act] [11] is to be brought [was published, and] [12]

[

(c) *"statement"* has the meaning given in section 36 of the 2021 Act (interpretation).

] [13]

] [1]

Notes

1 S. 18A inserted by Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 (c. 73), s. 12(2)
2 Words inserted by Defamation and Malicious Publication (Scotland) Act 2021 asp 10 (Scottish Act) Pt 3 s.32(2)(a) (August 8, 2022)
3 Words substituted by Defamation and Malicious Publication (Scotland) Act 2021 asp 10 (Scottish Act) Pt 3 s.32(2)(b) (August 8, 2022)
4 Added by Defamation and Malicious Publication (Scotland) Act 2021 asp 10 (Scottish Act) Pt 3 s.32(3) (August 8, 2022)
5 Words inserted by Defamation and Malicious Publication (Scotland) Act 2021 asp 10 (Scottish Act) Pt 3 s.32(4) (August 8, 2022)
6 Added by Defamation and Malicious Publication (Scotland) Act 2021 asp 10 (Scottish Act) Pt 3 s.32(5) (August 8, 2022)
7 Words substituted by Defamation and Malicious Publication (Scotland) Act 2021 (Commencement and Transitional Provision) Regulations 2022/154 (Scottish SI) reg.3 (August 8, 2022)
8 S.18A(4)(aa) substituted for s.18A(4)(a) by Defamation and Malicious Publication (Scotland) Act 2021 asp 10 (Scottish Act) Pt 3 s.32(6)(a) (August 8, 2022)
9 Words inserted by Defamation and Malicious Publication (Scotland) Act 2021 asp 10 (Scottish Act) Pt 3 s.32(6)(b)(i) (August 8, 2022)
10 Words substituted by Defamation and Malicious Publication (Scotland) Act 2021 asp 10 (Scottish Act) Pt 3 s.32(6)(b)(ii) (August 8, 2022)
11 Words inserted by Defamation and Malicious Publication (Scotland) Act 2021 asp 10 (Scottish Act) Pt 3 s.32(6)(b)(iii) (August 8, 2022)
12 Words substituted by Defamation and Malicious Publication (Scotland) Act 2021 asp 10 (Scottish Act) Pt 3 s.32(6)(b)(iv) (August 8, 2022)

Notes

13 Added by Defamation and Malicious Publication (Scotland) Act 2021 asp 10 (Scottish Act) Pt 3 s.32(6)(c) (August 8, 2022)

Part II LIMITATION OF ACTIONS > s. 18A Limitation of defamation and other actions.

s. 18B Actions of harassment.

Law In Force

Version 2 of 2

20 July 2011 - Present

Subjects
Civil procedure

Keywords
Harassment; Limitation periods; Scotland
[

18B.— Actions of harassment.

(1) This section applies to actions of harassment (within the meaning of [section 8 or section 8A of the Protection from Harassment Act 1997] [2]) which include a claim for damages.

(2) Subject to subsection (3) below and to section 19A of this Act, no action to which this section applies shall be brought unless it is commenced within a period of 3 years after—

(a) the date on which the alleged harassment ceased; or

(b) the date, (if later than the date mentioned in paragraph (a) above) on which the pursuer in the action became, or on which, in the opinion of the court, it would have been reasonably practicable for him in all the circumstances to have become, aware, that the defender was a person responsible for the alleged harassment or the employer or principal of such a person.

(3) In the computation of the period specified in subsection (2) above there shall be disregarded any time during which the person who is alleged to have suffered the harassment was under legal disability by reason of nonage or unsoundness of mind.

] [1]

Notes

1 Added by Protection from Harassment Act 1997 c. 40 s.10(1) (June 16, 1997)
2 Words inserted by Domestic Abuse (Scotland) Act 2011 asp 13 (Scottish Act) s.1(4) (July 20, 2011)

s. 19A Power of court to override time-limits etc.

Law In Force

Version 3 of 3

30 June 2021 - Present

Subjects
Civil procedure

Keywords
Interpretation; Jurisdiction; Limitations; Scotland

[

19A.— Power of court to override time-limits etc.

(1) Where a person would be entitled, but for any of the provisions of [section 17, 18, 18A or 18B] [2] of this Act, to bring an action, the court may, if it seems to it equitable to do so, allow him to bring the action notwithstanding that provision [(but see section 19AA)] [3] .

(2) The provisions of subsection (1) above shall have effect not only as regards rights of action accruing after the commencement of this section but also as regards those, in respect of which a final judgment has not been pronounced, accruing before such commencement.

(3) In subsection (2) above, the expression *"final judgment"* means an interlocutor of a court of first instance which, by itself, or taken along with previous interlocutors, disposes of the subject matter of a cause notwithstanding that judgment may not have been pronounced on every question raised or that the expenses found due may not have been modified, taxed or decerned for; but the expression does not include an interlocutor dismissing a cause by reason only of a provision mentioned in subsection (1) above.

[

(4) An action which would not be entertained but for this section shall not be tried by jury.

] [4]] [1]

Notes

1 S. 19A inserted by Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 (c. 55), s. 23(a)
2 Words substituted by Protection from Harassment Act 1997 c. 40 s.10(2) (June 16, 1997)
3 Words inserted by Overseas Operations (Service Personnel and Veterans) Act 2021 c. 23 Sch.3(1) para.1(2) (June 30, 2021)
4 S. 19A (4) added by Prescription and Limitation (Scotland) Act 1984 (c. 45), s. 6(1), Sch. 1 para. 8(b)

s. 19AA Restriction of court's power to override time-limits: overseas armed forces actions

Law In Force

Version 1 of 1

30 June 2021 - Present

Subjects
Civil procedure; Prescription
[

19AA Restriction of court's power to override time-limits: overseas armed forces actions

(1) This section applies where the court is considering whether to exercise its power under section 19A to override time-limits in respect of an overseas armed forces action (see subsection (11)).

(2) The court must exercise its power—

(a) in accordance with subsection (3), and

(b) subject to the rules in subsections (5) to (7).

(3) The court must have particular regard to—

(a) the effect of the delay in bringing the action on the cogency of evidence adduced or likely to be adduced by the parties, with particular reference to—

(i) the likely impact of the operational context on the ability of members of Her Majesty's forces to remember relevant events or actions fully or accurately, and

(ii) the extent of dependence on the memories of members of Her Majesty's forces, taking into account the effect of the operational context on their ability to record, or to retain records of, relevant events or actions; and

(b) the likely impact of the action on the mental health of any witness or potential witness who is a member of Her Majesty's forces.

(4) In subsection (3)(a) references to *"the operational context"* are to the fact that the events to which the action relates took place in the context of overseas operations, and include references to the exceptional demands and stresses to which members of Her Majesty's forces are subject.

(5) The first rule referred to in subsection (2)(b) is that an overseas armed forces action for which a limitation period is specified in section 17 must be brought within the period of 6 years beginning with the section 17 relevant date.

(6) The second rule referred to in subsection (2)(b) is that an overseas armed forces action for which a limitation period is specified in section 18(2) must be brought within the period of 6 years beginning with the section 18 relevant date.

(7) The third rule referred to in subsection (2)(b) is that, in respect of an overseas armed forces action to which section 18 applies, the court may exercise its power to override section 18(4) only if the injured person in question died within the period of 6 years beginning with the section 17 relevant date.

(8) In the application of the rule in subsection (5) or (7) to an action in respect of which (in accordance with section 17(3)) any time has been disregarded when computing the limitation period specified in section 17(2)

for the purposes of section 17 or 18(4) (as the case may be), the reference to the period of 6 years is to be treated as a reference to the period of 6 years plus the period that was so disregarded.

(9) In the application of the rule in subsection (6) to an action in respect of which (in accordance with section 18(3)) any time has been disregarded when computing the limitation period specified in section 18(2), the reference to the period of 6 years is to be treated as a reference to the period of 6 years plus the period that was so disregarded.

(10) In the application of the rule in subsection (5) or (7) to an overseas armed forces action in respect of which a limitation period has been suspended in accordance with section 1(1) of the Limitation (Enemies and War Prisoners) Act 1945 (as modified by section 4 of that Act), any reference to the period of 6 years is to be treated as a reference to the period of 6 years plus—

(a) the period during which the limitation period was suspended, and

(b) any extra period after the suspension ended during which the action could have been brought only because of an extension provided for by section 1(1) of that Act.

(11) In this section, an *"overseas armed forces action"* means an action which, or an action which includes a claim which—

(a) is against the Ministry of Defence, the Secretary of State for Defence, or any member of Her Majesty's forces,

(b) is brought in connection with overseas operations (see subsection (13)), and

(c) relates to damage that occurred outside the British Islands.

(12) In subsection (11), *"damage"* means—

(a) in the case of an overseas armed forces action for which a limitation period is specified in section 17, the personal injuries to which the action relates;

(b) in the case of an overseas armed forces action for which a limitation period is specified in section 18(2), the death to which the action relates (and where a person sustains personal injuries outside the British Islands which are a substantial cause of their later death in any of the British Islands, or vice versa, the death is for the purposes of subsection (11)(c) to be treated as occurring where the injuries were sustained).

(13) In this section—

"Her Majesty's forces" has the same meaning as in the Armed Forces Act 2006 (see section 374 of that Act);

"overseas operations" means any operations outside the British Islands, including peacekeeping operations and operations for dealing with terrorism, civil unrest or serious public disorder, in the course of which members of Her Majesty's forces come under attack or face the threat of attack or violent resistance;

"the section 17 relevant date" means the date from which the period of 3 years starts to run in accordance with subsection (2) of section 17;

"the section 18 relevant date" means the date from which the period of 3 years starts to run in accordance with subsection (2) of section 18.

(14) In this section, references—

(a) to the British Islands include the territorial sea adjacent to the United Kingdom and the territorial sea adjacent to any of the Channel Islands or the Isle of Man (and the reference to any of the British Islands is to be read accordingly);

(b) to a member of Her Majesty's forces, in relation to an overseas armed forces action, include an individual who was a member of Her Majesty's forces at the time of the events to which the action relates.

][1]

Notes

1 Added by Overseas Operations (Service Personnel and Veterans) Act 2021 c. 23 Sch.3(1) para.1(3) (June 30, 2021)

Part II LIMITATION OF ACTIONS > s. 19AA Restriction of court's power to override time-limits: overseas armed forces actions

s. 19B Actions for recovery of property obtained through unlawful conduct etc.

Law In Force

Version 4 of 4

31 January 2018 - Present

Subjects
Civil procedure

Keywords
Accrual of cause of action; Civil recovery proceedings; Commencement of proceedings; Limitation periods; Proceeds of crime; Scotland; Scottish Ministers

[

19B Actions for recovery of property obtained through unlawful conduct etc.

(1) None of the time limits given in the preceding provisions of this Act applies to any proceedings under Chapter 2 of Part 5 of the Proceeds of Crime Act 2002 (civil recovery of proceeds of unlawful conduct).

(2) Proceedings under that Chapter for a recovery order in respect of any recoverable property shall not be commenced after the expiration of the period of [20 years][2] from the date on which the Scottish Ministers' right of action accrued.

(3) Proceedings under that Chapter are commenced when—

(a) the proceedings are served, [...][3]

[

(aa) an application is made for a prohibitory property order, or

][3]

(b) an application is made for an interim administration order,

whichever is the [earliest][4] .

(4) The Scottish Ministers' right of action accrues in respect of any recoverable property—

(a) in the case of proceedings for a recovery order in respect of property obtained through unlawful conduct, when the property is so obtained,

(b) in the case of proceedings for a recovery order in respect of any other recoverable property, when the property obtained through unlawful conduct which it represents is so obtained.

[

(4A) Subsection (4) is subject to section 13(5) of the Criminal Finances Act 2017 (which provides that, in the case of property obtained through unlawful conduct relating to a gross human rights abuse or violation, proceedings cannot be brought after the end of the period of 20 years from the date on which the conduct constituting the commission of the abuse or violation occurs).

][5]

(5) Expressions used in this section and Part 5 of that Act have the same meaning in this section as in that Part.

][1]

Notes

1 Added by Proceeds of Crime Act 2002 c. 29 Pt 5 c.2 s.288(2) (February 24, 2003 subject to savings and transitional provisions specified in SI 2003/120 arts 3-7)
2 Words substituted by Policing and Crime Act 2009 c. 26 Pt 5 s.62(1)(b) (January 25, 2010)
3 Added by Serious Organised Crime and Police Act 2005 c. 15 Sch.6 para.1(a) (January 1, 2006)
4 Word substituted by Serious Organised Crime and Police Act 2005 c. 15 Sch.6 para.1(b) (January 1, 2006)
5 Added by Criminal Finances Act 2017 c. 22 Sch.5 para.1 (January 31, 2018: 2017 c.22 Sch.5 para.1 came into force on April 27, 2017 as 2017 c.22 s.58(6)(d) for the limited purpose of enabling the exercise of any power to make provision by subordinate legislation; January 31, 2018 otherwise)

s. 19BA Actions to prohibit dealing with property subject to an external request

Law In Force

Version 1 of 1

11 November 2013 - Present

Subjects
Civil procedure; Prescription

Keywords
Limitation periods; Prescription; Prohibition orders; Scotland; Scottish Ministers
[

19BA.— Actions to prohibit dealing with property subject to an external request

(1) None of the time limits given in the preceding provisions of this Act applies to any proceedings under Part 4B of the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 (giving effect to external requests by means of civil proceedings).

(2) Proceedings under that Part for a prohibition order in respect of relevant property shall not be commenced after the expiration of the period of 20 years from the date on which the Scottish Ministers' right of action accrued.

(3) Proceedings under that Part are commenced when an application is made for a prohibition order.

(4) The Scottish Ministers' right of action accrues in respect of any relevant property when the property is obtained (or when it is believed to have been obtained) as a result of or in connection with criminal conduct.

(5) In this section—

(a) *"criminal conduct"* is to be construed in accordance with section 447(8) of the Proceeds of Crime Act 2002,

(b) expressions used in this section and Part 4B of the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 have the same meaning in this section as in that Part.

][1]

Notes

1 Added by Proceeds of Crime Act 2002 (External Requests and Orders) (Amendment) Order 2013/2604 art.6(2) (November 11, 2013)

s. 19C Actions for recovery of property for the purposes of an external order

Law In Force

Version 3 of 3

11 November 2013 - Present

Subjects
Civil procedure; Prescription

Keywords
External orders; Limitation periods; Prescription; Prohibition orders; Scotland; Scottish Ministers

[

19C Actions for recovery of property for the purposes of an external order

(1) None of the time limits given in the preceding provisions of this Act applies to any proceedings under Chapter 2 of Part 5 of the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005[("the 2005 Order")] [2] (civil proceedings for the realisation of property to give effect to an external order).

(2) Proceedings under that Chapter for a recovery order in respect of any recoverable property shall not be commenced after the expiration of the period of [20 years] [3] from the date on which the Scottish Ministers' right of action accrued.

(3) Proceedings under that Chapter are commenced when—

(a) the proceedings are served,

(b) an application is made for a prohibitory property order, or

(c) an application is made for an interim administration order,

whichever is the earliest.

[

(3A) If, before an event mentioned in subsection (3) occurs, an application is made for a prohibition order under Part 4B of the 2005 Order, proceedings under that Chapter are to be treated as having been commenced when that application is made.

] [4]

(4) The Scottish Ministers' right of action accrues in respect of any recoverable property—

(a) in the case of proceedings for a recovery order in respect of property obtained, or believed to have been obtained, as a result of or in connection with criminal conduct, when the property is so obtained,

(b) in the case of proceedings for a recovery order in respect of any other recoverable property, when the property obtained, or believed to have been obtained, as a result of or in connection with criminal conduct which it represents is so obtained.

(5) In this section—

(a) *"criminal conduct"* is to be construed in accordance with section 447(8) of the Proceeds of Crime Act 2002, and

(b) expressions used in this section which are also used in [Part 5 of the 2005 Order] [5] have the same meaning in this section as in that Part.

] [1]

Notes

1 Added by Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005/3181 Pt 5(2) art.201(2) (January 1, 2006)
2 Words inserted by Proceeds of Crime Act 2002 (External Requests and Orders) (Amendment) Order 2013/2604 art.6(3)(a) (November 11, 2013)
3 Words substituted by Policing and Crime Act 2009 c. 26 Pt 5 s.62(1)(b) (January 25, 2010)
4 Added by Proceeds of Crime Act 2002 (External Requests and Orders) (Amendment) Order 2013/2604 art.6(3)(b) (November 11, 2013)
5 Words substituted by Proceeds of Crime Act 2002 (External Requests and Orders) (Amendment) Order 2013/2604 art.6(3)(c) (November 11, 2013)

Part II LIMITATION OF ACTIONS > s. 19C Actions for recovery of property for the purposes of an external order

s. 19CA Interruption of limitation period: arbitration

Partially In Force

Version 3 of 3

28 June 2022 - Present

Subjects
Civil procedure; Prescription

Keywords
Arbitration; Limitations; Scotland; Statutory definition
[

19CA Interruption of limitation period: arbitration

(1) Any period during which an arbitration is ongoing in relation to a matter is to be disregarded in any computation of the period specified in [section 17(2), 18(2), 18ZA(2) or (7), 18ZC(2), 18ZD(1) or (2), 18A(1) or 18B(2)][2] of this Act in relation to that matter.

(2) In this section, *"arbitration"* means—

(a) any arbitration in Scotland,

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

][1]

Notes

1 Added by Arbitration (Scotland) Act 2010 asp 1 (Scottish Act) s.23(4) (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 inserted by Building Safety Act 2022 c. 30 Pt 5 s.151(4) (June 28, 2022)

s. 19CB Interruption of section 18A(1) limitation period: mediation

Law In Force

Version 1 of 1

8 August 2022 - Present

Subjects
Civil procedure; Prescription
[

19CB Interruption of section 18A(1) limitation period: mediation

(1) In any computation of the period specifed in section 18A(1), any period of mediation in relation to a relevant matter is to be disregarded.

(2) For the purposes of this section, a period of mediation—

(a) begins on the day on which a mediator is appointed by the parties, and

(b) ends on such day as the parties may agree or, otherwise, on the day—

(i) on which a party notifes another party that they are withdrawing from the mediation,

(ii) which falls 14 days after the day on which a party makes a request for confrmation that another party is continuing with the mediation (and no response has been received), or

(iii) which falls 14 days after the day on which the mediator resigns or dies or otherwise becomes incapable of acting (and no replacement has been appointed).

(3) In this section—

"mediation" means a structured process, whereby two or more parties to a dispute attempt, with the assistance of a mediator, to resolve or reduce disagreement between or among them with a view to resolution of the dispute without recourse to court,

"mediator" means an independent person who is appointed by the parties to conduct a mediation, whether or not for remuneration, in an effective, impartial, and competent way,

"party" means a party to the mediation, and

"relevant matter" means a matter to which a limitation period applies by virtue of section 18A(1).

][1]

Notes

1 Added by Defamation and Malicious Publication (Scotland) Act 2021 asp 10 (Scottish Act) Pt 3 s.33 (August 8, 2022: insertion has effect subject to transitional provision specified in SSI 2022/154 reg.4(2))

Part II LIMITATION OF ACTIONS > s. 19CB
Interruption of section 18A(1) limitation period: mediation

s. 19CC Interruption of section 18A(1) limitation period: media complaints and expert determination

Law In Force

Version 1 of 1

8 August 2022 - Present

Subjects
Civil procedure; Prescription
[

19CC Interruption of section 18A(1) limitation period: media complaints and expert determination

(1) In any computation of the period specified in section 18A(1), any relevant period in relation to a relevant matter is to be disregarded.

(2) For the purposes of this section, a relevant period—

(a) begins on the day on which the parties agree, in writing, to attempt to resolve the dispute by way of a complaints process or expert determination ("the process"), and

(b) ends on such day as the parties may agree or, otherwise, on the day—

(i) on which a party notifies another party that they are withdrawing from the process,

(ii) which falls 14 days after the day on which a party makes a request for confirmation that another party is continuing with the process (and no response has been received),

(iii) which falls 14 days after the day on which any person (other than a party) who was conducting or facilitating the process resigns or dies or otherwise becomes incapable of acting (and no replacement has been appointed).

(3) This section does not apply where the process is one to which section 19CA or 19CB applies.

(4) In this section—

"complaints process" means a process whereby two or more parties to a dispute attempt to resolve the dispute between them by referring the relevant matter to an independent person that handles complaints relating to the publication of material in the medium in question to make a determination on the merits of the relevant matter,

"expert determination" means a process whereby two or more parties to a dispute attempt to resolve the dispute between them by appointing a single independent and suitable individual who holds appropriate professional qualifications and is a member of a suitable professional body to act as an expert and decide the dispute, such person to be agreed by the parties or, failing which, to be determined in a manner agreed by the parties,

"party" means a party to the complaints process or expert determination,

"relevant matter" means a matter to which a limitation period applies by virtue of section 18A(1).

(5) The Scottish Ministers may by regulations amend the definitions in subsection (4).

(6) Regulations under subsection (5) are subject to the affirmative procedure.

][1]

Notes

1 Added by Defamation and Malicious Publication (Scotland) Act 2021 asp 10 (Scottish Act) Pt 3 s.34 (August 8, 2022: insertion has effect subject to transitional provision specified in SSI 2022/154 reg.4(2))

Part II LIMITATION OF ACTIONS > s. 19CC Interruption of section 18A(1) limitation period: media complaints and expert determination

s. 19D Actions for exploitation proceeds orders

Law In Force

Version 1 of 1

6 April 2010 - Present

Subjects
Civil procedure; Prescription

Keywords
Exploitation proceeds orders; Limitations; Scotland
[

19D Actions for exploitation proceeds orders

(1) None of the time limits given in the preceding provisions of this Act applies to proceedings under Part 7 of the Coroners and Justice Act 2009 (criminal memoirs etc) for an exploitation proceeds order.

(2) Proceedings under that Part for such an order are not to be brought after the expiration of 5 years from the date on which the enforcement authority's right of action accrued.

(3) Proceedings under that Part for such an order are brought when an application is made for the order.

(4) Where exploitation proceeds have been obtained by a person from a relevant offence, an enforcement authority's right of action under that Part in respect of those proceeds accrues when the enforcement authority has actual knowledge that the proceeds have been obtained.

(5) Expressions used in this section and that Part have the same meaning in this section as in that Part.

][1]

Notes

1 Added by Coroners and Justice Act 2009 c. 25 Pt 7 s.171(3) (April 6, 2010)

s. 19F Extension of limitation periods: cross-border mediation

Repealed

Version 2 of 2

31 December 2020 - Present

Subjects
Civil procedure; Prescription
[...] [1]

Notes

1 Repealed by Civil and Family Justice (EU Exit) (Scotland) (Amendment etc.) Regulations 2020/441 (Scottish SI) Pt 2 reg.2(3) (December 31, 2020: repeal has effect subject to saving specified in SSI 2020/441 reg.7)

s. 20

Repealed

Version 1 of 1

Date not available - Present

Subjects
Civil procedure; Prescription
[...][1][2]

Notes

1 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)

s. 21

Repealed

Version 1 of 1

Date not available - Present

Subjects
Civil procedure; Prescription
[...][1][2]

Notes

1 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)

s. 22 Interpretation of Part II and supplementary provisions.

Law In Force

Version 2 of 2

21 April 2021 - Present

Subjects
Civil procedure

Keywords
Interpretation; Limitations; Scotland; Supplemental provisions
[

22.— Interpretation of Part II and supplementary provisions.

(1) In this Part of this Act—

"the court" means the Court of Session or the sheriff court; and

"personal injuries" includes any disease and any impairment of a person's physical or mental condition.

(2) Where the pursuer in an action to which section 17[, [18, 18A or 18ZA][3]][2] of this Act applies is pursuing the action by virtue of the assignation of a right of action, the reference in subsection (2)(b) of the said section 17 or[of the said section 18 or, as the case may be, subsection (4)(b) of the said section 18A][2] [or subsection (3) or (7)(b) of the said section 18ZA][4] to the pursuer in the action shall be construed as a reference to the assignor of the right of action.

(3) For the purposes of the said subsection (2)(b) knowledge that any act or omission was or was not, as a matter of law, actionable, is irrelevant.

(4) An action which would not be entertained but for the said subsection (2)(b) shall not be tried by jury.

][1]

Notes

1 S. 22 substituted by Prescription and Limitation (Scotland) Act 1984 (c. 45), s. 3
2 Words substituted by Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 (c. 73), s. 12(4)
3 Words substituted by Automated and Electric Vehicles Act 2018 c. 18 Sch.1 para.6(a) (April 21, 2021)
4 Words inserted by Automated and Electric Vehicles Act 2018 c. 18 Sch.1 para.6(b) (April 21, 2021)

Part II LIMITATION OF ACTIONS > s. 22 Interpretation of Part II and supplementary provisions.

s. 22A Ten years' prescription of obligations.

Law In Force With Amendments Pending

Version 5 of 6

31 December 2020 - Present

Subjects
Consumer law; Prescription

Keywords
Extinguishment; Negative prescription; Product liability; Reparation; Scotland
[

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;

'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.

[...] [4] [...] [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 Repealed by Cross-Border Mediation (EU Directive) (EU Exit) Regulations 2019/469 Sch.1(1) para.4(2) (December 31, 2020: repeal has effect subject to savings and transitional provisions specified in SI 2019/469 reg.5 and Sch.2)

Part IIA PRESCRIPTION OF OBLIGATIONS AND LIMITATION OF ACTIONS UNDER PART I OF THE CONSUMER PROTECTION ACT 1987 > Prescription of Obligations > s. 22A Ten years' prescription of obligations.

s. 22B 3 year limitation of actions.

Law In Force

Version 1 of 1

Date not available - Present

Subjects
Civil procedure; Consumer law

Keywords
Actions; Limitation periods; Product liability; Scotland
[

22B— 3 year limitation of actions.

(1) This section shall apply to an action to enforce 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), except where section 22C of this Act applies.

(2) Subject to subsection (4) below, an action to which this section applies shall not be competent unless it is commenced within the period of 3 years after the earliest date on which the person seeking to bring (or a person who could at an earlier date have brought) the action was aware, or on which, in the opinion of the court, it was reasonably practicable for him in all the circumstances to become aware, of all the facts mentioned in subsection (3) below.

(3) The facts referred to in subsection (2) above are—

(a) that there was a defect in a product;

(b) that the damage was caused or partly caused by the defect;

(c) that the damage was sufficiently serious to justify the pursuer (or other person referred to in subsection (2) above) in bringing an action to which this section applies on the assumption that the defender did not dispute liability and was able to satisfy a decree;

(d) that the defender was a person liable for the damage under the said section 2.

(4) In the computation of the period of 3 years mentioned in subsection (2) above, there shall be disregarded any period during which the person seeking to bring the action was under legal disability by reason of nonage or unsoundness of mind.

(5) The facts mentioned in subsection (3) above do not include knowledge of whether particular facts and circumstances would or would not, as a matter of law, result in liability for damage under the said section 2.

(6) Where a person would be entitled, but for this section, to bring an action for reparation other than one in which the damages claimed are confined to damages for loss of or damage to property, the court may, if it seems to it equitable to do so, allow him to bring the action notwithstanding this section.

][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)

Part IIA PRESCRIPTION OF OBLIGATIONS AND LIMITATION OF ACTIONS UNDER PART I OF THE CONSUMER PROTECTION ACT 1987 > Limitation of actions > s. 22B 3 year limitation of actions.

s. 22C Actions under the 1987 Act where death has resulted from personal injuries.

Law In Force

Version 2 of 2

7 July 2011 - Present

Subjects
Civil procedure; Consumer law

Keywords
Death; Limitation periods; Personal injury; Product liability; Scotland
[

22C.— Actions under the 1987 Act where death has resulted from personal injuries.

(1) This section shall apply to an action to enforce 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) where a person has died from personal injuries and the damages claimed include damages for those personal injuries or that death.

(2) Subject to subsection (4) below, an action to which this section applies shall not be competent unless it is commenced within the period of 3 years after the later of—

(a) the date of death of the injured person;

(b) the earliest date on which the person seeking to make (or a person who could at an earlier date have made) the claim was aware, or on which, in the opinion of the court, it was reasonably practicable for him in all the circumstances to become aware—

(i) that there was a defect in the product;

(ii) that the injuries of the deceased were caused (or partly caused) by the defect; and

(iii) that the defender was a person liable for the damage under the said section 2.

(3) Where the person seeking to make the claim is a relative of the deceased, there shall be disregarded in the computation of the period mentioned in subsection (2) above any period during which that relative was under legal disability by reason of nonage or unsoundness of mind.

(4) Where an action to which section 22B of this Act applies has not been brought within the period mentioned in subsection (2) of that section and the person subsequently dies in consequence of his injuries, an action to which this section applies shall not be competent in respect of those injuries or that death.

(5) Where a person would be entitled, but for this section, to bring an action for reparation other than one in which the damages claimed are confined to damages for loss of or damage to property, the court may, if it seems to it equitable to do so, allow him to bring the action notwithstanding this section.

(6) In this section *'relative'* has the same meaning as in the [Damages (Scotland) Act 2011][2] .

(7) For the purposes of subsection (2)(b) above there shall be disregarded knowledge of whether particular facts and circumstances would or would not, as a matter of law, result in liability for damage under the said section 2.

][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 Damages (Scotland) Act 2011 asp 7 (Scottish Act) Sch.1 para.2(2) (July 7, 2011)

Part IIA PRESCRIPTION OF OBLIGATIONS AND LIMITATION OF ACTIONS UNDER PART I OF THE CONSUMER PROTECTION ACT 1987 > Limitation of actions > s. 22C Actions under the 1987 Act where death has resulted from personal injuries.

s. 22CA Interruption of limitation period for 1987 Act actions: arbitration

Partially In Force

Version 1 of 1

7 June 2010 - Date not available

Subjects
Civil procedure; Consumer law

Keywords
Arbitration; Limitation periods; Product liability; Scotland

[

22CA Interruption of limitation period for 1987 Act actions: arbitration

(1) Any period during which an arbitration is ongoing in relation to a matter is to be disregarded in any computation of the period specified in section 22B(2) or 22C(2) of this Act in relation to that matter.

(2) In this section, *"arbitration"* means—

(a) any arbitration in Scotland,

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

][1]

Notes

1 Added by Arbitration (Scotland) Act 2010 asp 1 (Scottish Act) s.23(6) (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)

s. 22CB Extension of limitation periods for 1987 Act actions: mediation

Repealed

Version 2 of 2

31 December 2020 - Present

Subjects
Civil procedure; Prescription
[...] [1]

Notes

1 Repealed by Cross-Border Mediation (EU Directive) (EU Exit) Regulations 2019/469 Sch.1(1) para.4(3) (December 31, 2020: repeal has effect subject to savings and transitional provisions specified in SI 2019/469 reg.5 and Sch.2)

Part IIA PRESCRIPTION OF OBLIGATIONS AND LIMITATION OF ACTIONS UNDER PART I OF THE CONSUMER PROTECTION ACT 1987 > Limitation of actions > s. 22CB Extension of limitation periods for 1987 Act actions: mediation

s. 22D Interpretation of this Part.

Law In Force

Version 1 of 1

Date not available - Present

Subjects
Civil procedure; Consumer law; Prescription

Keywords
Consumer protection; Interpretation; Limitations; Prescription; Scotland

[

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)

Part IIA PRESCRIPTION OF OBLIGATIONS AND LIMITATION OF ACTIONS UNDER PART I OF THE CONSUMER PROTECTION ACT 1987 > Supplementary > s. 22D Interpretation of this Part.

s. 23

Repealed

Version 1 of 1

Date not available - Present

Subjects
Civil procedure; Prescription
[...][1][2]

Notes

1 Repealed (with saving) by Consumer Protection Act 1987 (c.43) ss. 6, 41(2), 47(1)(2), 48(3), Sch. 1 para. 11, Sch. 5
2 Act amended by Self-Governing Schools etc. (Scotland) Act 1989 (c.39), s. 39(4)(a)

s. 23A Private international law application.

Law In Force

Version 5 of 5

30 June 2021 - Present

Subjects
Civil procedure; Conflict of laws; Prescription

Keywords
Conflict of laws; Limitations; Prescription
[

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 [, subject to section 23B,] [2] 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 [and section 23B] [4] 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] [5] 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) as that Regulation has effect as retained direct EU legislation (including that Regulation as applied by regulation 4 of the Law Applicable to Contractual Obligations (Scotland) Regulations 2009), unless the proceedings are ones in respect of which Regulation (EC) No. 593/2008 has effect by virtue of Article 66 of the EU withdrawal agreement, in which case it means that Regulation as it has effect by virtue of that Article; 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) as that Regulation has effect as retained direct EU legislation (including that Regulation as applied by regulation 4 of the Law Applicable to Non-Contractual Obligations (Scotland) Regulations 2008), unless the proceedings are ones in respect of which Regulation (EC) No. 864/2007 has effect by virtue of Article 66 of the EU withdrawal agreement, in which case it means that Regulation as it has effect by virtue of that Article.

] [6]] [3]] [1]

Notes

1 S. 23A inserted by Prescription and Limitation (Scotland) Act 1984 (c. 45), ss. 4, 5(2)
2 Words inserted by Overseas Operations (Service Personnel and Veterans) Act 2021 c. 23 Sch.3(2) para.2(2)(a) (June 30, 2021)
3 Added by Law Applicable to Non-Contractual Obligations (Scotland) Regulations 2008/404 (Scottish SI) reg.3 (January 11, 2009)
4 Words inserted by Overseas Operations (Service Personnel and Veterans) Act 2021 c. 23 Sch.3(2) para.2(2)(b) (June 30, 2021)
5 Words inserted by Law Applicable to Contractual Obligations (Scotland) Regulations 2009/410 (Scottish SI) reg.3(a) (December 17, 2009)
6 Substituted by Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019/834 Pt 2 reg.2 (December 31, 2020: commenced by an amendment)

Part III SUPPLEMENTAL > s. 23A Private international law application.

s. 23B Overseas armed forces actions: restriction of foreign prescription and limitation law

Law In Force

Version 1 of 1

30 June 2021 - Present

Subjects
Civil procedure; Prescription
[

23B Overseas armed forces actions: restriction of foreign prescription and limitation law

(1) Subsection (3) applies where—

(a) the law of a country other than Scotland relating to the extinction of an obligation or the limitation of time within which an action may be brought to enforce an obligation is to be applied by virtue of section 23A(1) in an overseas armed forces personal injuries action, and

(b) the commencement condition applies in relation to that action,

and in this section the law mentioned in paragraph (a) that is to be applied in that action is referred to as *"the relevant foreign limitation law"* .

(2) The commencement condition applies in relation to an overseas armed forces personal injuries action if the action commenced on a date which is after the end of the period of 6 years beginning with—

(a) the date on which any limitation period specified in the relevant foreign limitation law began to run, or

(b) where the relevant foreign limitation law has the effect that the action may be commenced within an indefinite period, the first date on which the action could have been commenced,

and in this section *"limitation period"* includes a prescriptive period (however expressed in the relevant foreign limitation law).

(3) The relevant foreign limitation law is to be treated as providing the defender with a complete defence to the action so far as relating to the obligation (where that would not otherwise be the case).

(4) An *"overseas armed forces personal injuries action"* means an action—

(a) which is an overseas armed forces action as defined in section 19AA(11), and

(b) which (under the substantive law of the other country that falls to be applied) corresponds to an action to which section 17 or 18 applies (actions in respect of personal injuries or death).

(5) In the application of subsection (2) to an action in respect of which—

(a) in accordance with the relevant foreign limitation law, a limitation period specified in that law has been suspended or interrupted for a period by reason of a person's lacking legal capacity or being under a disability, or

(b) in accordance with the relevant foreign limitation law, a period during which a person lacks legal capacity or is under a disability has been disregarded in computing a limitation period specified in that law,

the reference to the period of 6 years is to be treated as a reference to the period of 6 years plus the period of suspension or interruption or (as the case may be) the period that was so disregarded.

][1]

Notes

1 Added by Overseas Operations (Service Personnel and Veterans) Act 2021 c. 23 Sch.3(2) para.2(3) (June 30, 2021)

Part III SUPPLEMENTAL > s. 23B Overseas armed forces actions: restriction of foreign prescription and limitation law

s. 23C Actions relating to the Northern Ireland Troubles

Proposed Draft Insertion

View proposed draft amended version

Subjects
Civil procedure; Prescription

This provision has not been enacted

Part III SUPPLEMENTAL > s. 23C Actions relating to the Northern Ireland Troubles

s. 24 The Crown.

Law In Force

Version 1 of 1

25 July 1973 - Present

Subjects
Civil procedure; Prescription

Keywords
Crown; Limitations; Prescription

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)

Part III SUPPLEMENTAL > s. 24 The Crown.

s. 25 Short title, commencement and extent.

Law In Force

Version 1 of 1

Date not available - Present

Subjects
Civil procedure; Prescription

Keywords
Commencement; Extent; Limitations; Prescription; Scotland; Short titles

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.

[...][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
para. 1


Law In Force With Amendments Pending

Version 9 of 10

22 October 2018 - Present

Subjects
Prescription

Keywords
Negative prescription; Payments; Powers rights and duties; Scotland; Time

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;

[...] [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;

[

(ba) to any obligation to make payment to the Scottish Ministers arising from section 63 of the Social Security (Scotland) Act 2018.

][11]

(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;

[

(dd) to any obligation arising by virtue of section 7A(1) of the Criminal Injuries Compensation Act 1995 (recovery of compensation from offenders: general);

][12]

(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;

(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.

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 Social Security (Scotland) Act 2018 asp 9 (Scottish Act) Pt 2 c.5 s.66(2) (October 22, 2018 subject to saving provision specified in SSI 2018/298 reg.3(3))
12 Added by Management of Offenders etc. (Scotland) Act 2005 asp 14 (Scottish Act) s.20(4) (December 8, 2005)

Schedule 1 OBLIGATIONS AFFECTED BY PRESCRIPTIVE PERIODS OF FIVE YEARS UNDER SECTION 6 > para. 1

Schedule 1 OBLIGATIONS AFFECTED BY PRESCRIPTIVE PERIODS OF FIVE YEARS UNDER SECTION 6
para. 2


Law In Force With Amendments Pending

Version 9 of 10

28 June 2022 - Present

Subjects
Prescription

Keywords
Exemptions; Negative prescription; Powers rights and duties; Scotland

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;

[...] [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]);

[

(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;

(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;

[

(ga) to any obligation to make reparation arising from liability under section 2 of the Automated and Electric Vehicles Act 2018 (liability of insurer etc. where accident caused by automated vehicle);

][6][

(gb) to any obligation to pay damages arising from liability under section 148 or 149 of the Building Safety Act 2022;

][7][

(gg) to any obligation to make reparation or otherwise make good in respect of defamation within the meaning of section 18A of this Act;

][8][

(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);

][9]

(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 Added by Automated and Electric Vehicles Act 2018 c. 18 Sch.1 para.7 (April 21, 2021)
7 Added by Building Safety Act 2022 c. 30 Pt 5 s.151(5) (June 28, 2022)
8 Para. 2(gg) inserted by Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 (c. 73), s. 12(5)
9 Sch. 1 para. (ggg) inserted by Consumer Protection Act 1987 (c.43) ss. 6, 41(2), 47(1)(2), Sch. 1 para. 11

Schedule 1 OBLIGATIONS AFFECTED BY PRESCRIPTIVE PERIODS OF FIVE YEARS UNDER SECTION 6 > para. 2

Schedule 1 OBLIGATIONS AFFECTED BY PRESCRIPTIVE PERIODS OF FIVE YEARS UNDER SECTION 6
para. 3

Repealed

Version 2 of 2

1 August 1995 - Present

Subjects
Civil procedure; Prescription
[...] [1]

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)

Schedule 1 OBLIGATIONS AFFECTED BY PRESCRIPTIVE PERIODS OF FIVE YEARS UNDER SECTION 6 > para. 3

Schedule 1 OBLIGATIONS AFFECTED BY PRESCRIPTIVE PERIODS OF FIVE YEARS UNDER SECTION 6
para. 4

Law In Force

Version 3 of 3

28 November 2004 - Present

Subjects
Prescription

Keywords
Conditions; Heritable property; Interpretation; Negative prescription; Scotland; Time

[

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 1 OBLIGATIONS AFFECTED BY PRESCRIPTIVE PERIODS OF FIVE YEARS UNDER SECTION 6 > para. 4

Schedule 2 APPROPRIATE DATES FOR CERTAIN OBLIGATIONS FOR PURPOSES OF SECTION 6 para. 1

Law In Force

Version 1 of 1

25 July 1976 - Present

Subjects
Prescription

Keywords
Dates; Negative prescription; Payments; Scotland; Transactions

1.—

(1) This paragraph applies to any obligation, not being part of a banking transaction, to pay money in respect of—

(a) goods supplied on sale or hire, or

(b) services rendered,

in a series of transactions between the same parties (whether under a single contract or under several contracts) and charged on continuing account.

(2) In the foregoing sub-paragraph—

(a) any reference to the supply of goods on sale includes a reference to the supply of goods under a hire-purchase agreement, a credit-sale agreement or a conditional sale agreement as defined (in each case) by section 1 of the Hire-Purchase (Scotland) Act 1965; and

(b) any reference to services rendered does not include the work of keeping the account in question.

(3) Where there is a series of transactions between a partnership and another party, the series shall be regarded for the purposes of this paragraph as terminated (without prejudice to any other mode of termination) if the partnership or any partner therein becomes bankrupt; but, subject to that, if the partnership (in the further provisions of this sub-paragraph referred to as *"the old partnership"*) is dissolved and is replaced by a single new partnership having among its partners any person who was a partner in the old partnership, then, for the purposes of this paragraph, the new partnership shall be regarded as if it were identical with the old partnership.

(4) The appropriate date in relation to an obligation to which this paragraph applies is the date on which payment for the goods last supplied, or, as the case may be, the services last rendered, became due.

1 2

Notes

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

Notes

2 Sch. 2 para. 1(2)(a): Hire-Purchase (Scotland) Act 1965 (c. 67) repealed by Consumer Credit Act 1974 (c. 39), s. 192(3), Sch. 5 and Interpretation Act 1978 (c. 30), s. 17(2)(a) applies

Schedule 2 APPROPRIATE DATES FOR CERTAIN OBLIGATIONS FOR PURPOSES OF SECTION 6 > para. 1

Schedule 2 APPROPRIATE DATES FOR CERTAIN OBLIGATIONS FOR PURPOSES OF SECTION 6 para. 2

Law In Force

Version 1 of 1

25 July 1976 - Present

Subjects
Prescription

Keywords
Dates; Loans; Negative prescription; Repayments; Scotland

2.—

(1) This paragraph applies to any obligation to repay the whole, or any part of, a sum of money lent to, or deposited with, the debtor under a contract of loan or, as the case may be, deposit.

(2) The appropriate date in relation to an obligation to which this paragraph applies is—

(a) if the contract contains a stipulation which makes provision with respect to the date on or before which repayment of the sum or, as the case may be, the part thereof is to be made, the date on or before which, in terms of that stipulation, the sum or part thereof is to be repaid; and

(b) if the contract contains no such stipulation, but a written demand for repayment of the sum, or, as the case may be, the part thereof, is made by or on behalf of the creditor to the debtor, the date when such demand is made or first made.

1

Notes

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

Schedule 2 APPROPRIATE DATES FOR CERTAIN OBLIGATIONS FOR PURPOSES OF SECTION 6 > para. 2

Schedule 2 APPROPRIATE DATES FOR CERTAIN OBLIGATIONS FOR PURPOSES OF SECTION 6 para. 3

Law In Force

Version 1 of 1

25 July 1976 - Present

Subjects
Prescription

Keywords
Contracts of agency; Dates; Negative prescription; Partnerships; Scotland

3.—

(1) This paragraph applies to any obligation under a contract of partnership or of agency, being an obligation remaining, or becoming, prestable on or after the termination of the relationship between the parties under the contract.

(2) The appropriate date in relation to an obligation to which this paragraph applies is—

(a) if the contract contains a stipulation which makes provision with respect to the date on or before which performance of the obligation is to be due, the date on or before which, in terms of that stipulation, the obligation is to be performed; and

(b) in any other case the date when the said relationship terminated.

1

Notes

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

Schedule 2 APPROPRIATE DATES FOR CERTAIN OBLIGATIONS FOR PURPOSES OF SECTION 6 > para. 3

Schedule 2 APPROPRIATE DATES FOR CERTAIN OBLIGATIONS FOR PURPOSES OF SECTION 6 para. 4

Law In Force

Version 1 of 1

25 July 1976 - Present

Subjects
Prescription

Keywords
Dates; Instalments; Negative prescription; Payments; Scotland

4.—

(1) This paragraph applies to any obligation—

(a) to pay an instalment of a sum of money payable by instalments, or

(b) to execute any instalment of work due to be executed by instalments,

not being an obligation to which any of the foregoing paragraphs applies.

(2) The appropriate date in relation to an obligation to which this paragraph applies is the date on which the last of the instalments is due to be paid or, as the case may be, to be executed.

1

Notes

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

Schedule 2 APPROPRIATE DATES FOR CERTAIN OBLIGATIONS FOR PURPOSES OF SECTION 6 > para. 4

Schedule 3 RIGHTS AND OBLIGATIONS WHICH ARE IMPRESCRIPTIBLE FOR THE PURPOSES OF SECTIONS 7 AND 8 AND SCHEDULE 1 para. 1

Law In Force

Version 3 of 3

8 December 2014 - Present

Subjects
Prescription

Keywords
Negative prescription; Powers rights and duties; Proprietary rights; Scotland

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.

] [3]

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)
3 Added by Land Registration etc. (Scotland) Act 2012 asp 5 (Scottish Act) Sch.5 para.18(8) (December 8, 2014)

Schedule 3 RIGHTS AND OBLIGATIONS WHICH ARE IMPRESCRIPTIBLE FOR THE PURPOSES OF SECTIONS 7 AND 8 AND SCHEDULE 1 > para. 1

Prescription (Scotland) Act 2018 asp 15 (Scottish Act)
Preamble

Version 1 of 1

18 December 2018 - Present

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

The Bill for this Act of the Scottish Parliament was passed by the Parliament on 8th November 2018 and received Royal Assent on 18th December 2018

Key Legal Concepts Library

Statutory Annotations

Introductory Note

The Scottish Government's Revised Explanatory Notes to the Bill for this Act (for discussion of the nature and status of the Notes see Key Legal Concept: **Explanatory Notes**) say as follows (the Notes as re-issued after Royal Assent are shown at the end of the Act on Westlaw UK):

> "4. The Bill makes changes to the law of negative prescription to address certain issues which have caused or may cause difficulty in practice. These changes are designed to increase clarity, certainty and fairness as well as promote a more efficient use of resources. The Bill makes amendments to the Prescription and Limitation (Scotland) Act 1973 ('the 1973 Act').
>
> **"The structure of the Bill**
>
> "5. Sections 1 to 5 of the Bill make provision in relation to the five-year prescription provided for in section 6 of 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 rights) after a period of five years has elapsed, provided that various conditions are met. Sections 6 to 8 of the 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 (obligations that cannot be extinguished by the law of prescription, such as a real right of ownership in land), in terms of schedule 3 of the 1973 Act, and those relating to reparation for personal injury/death and damage caused by defective products). The remaining sections cover miscellaneous and general matters."

Background Note (Scottish Law Commission):

This Act was based on the Scottish Law Commission's Report on Prescription (SCOT LAW COM No 247) laid before the Scottish Parliament by the Scottish Ministers under section 3(2) of the Law Commissions Act 1965 in July 2017.

Legislative Intention Note (this note assists purposive construction of this Act by reference to its Parliamentary history; it may also assist in cases of ambiguity — see Key Legal Concept: **Pepper v Hart**): the Stage 1 Report of the Delegated Powers and Law Reform Committee on the Bill for this Act says as follows:

"

- The Committee notes that stakeholders are generally content that the Bill is a welcome reform to the law relating to negative prescription.
- The Committee welcomes the greater certainty this Bill provides for the users of the law.
- The Committee recognises that the Bill aims to achieve an overall balance between the rights and obligations of creditors and debtors. In particular, the Committee considered this overall balance when deliberating the effects of sections 3, 5, and 8 as discussed later in this report." (SP Committee Report, 14 June 2018.)

Legislative Intention Note (this note assists purposive construction of this Act by reference to its Parliamentary history; it may also assist in cases of ambiguity — see Key Legal Concept: **Pepper v Hart**): the Stage 1 Report of the Delegated Powers and Law Reform Committee on the Bill for this Act says as follows:

"

- The Committee notes that welfare rights organisations appeared on the list of consultees to the Scottish Law Commission's February 2016 discussion paper.
- The Committee notes the response from the Justice Committee on the Scottish Law Commission consultation process.
- The Committee notes that its Stage 1 scrutiny process for this Bill had reached a different audience to that of the Scottish Law Commission and Scottish Government consultations, particularly in relation to the welfare rights sector. The issues unpacked by the Committee's Stage 1 enquiry relating to the welfare rights sector are discussed in this report.
- Accordingly, the Committee recommends that the Scottish Law Commission review its consultation processes with a view to giving policy considerations a greater level of attention when deliberating on law reforms." (SP Committee Report, 14 June 2018.)

Legislative Intention Note (this note assists purposive construction of this Act by reference to its Parliamentary history; it may also assist in cases of ambiguity — see Key Legal Concept: **Pepper v Hart**): At the Stage 1 Debate on the Bill for this Act the Minister said as follows:

"The bill began as part of the Scottish Law Commission's ninth programme of law reform, and its aim is to increase clarity, legal certainty and fairness in the law of negative prescription. In civil law, that doctrine serves a vital function: it sets time limits for when obligations and correlative rights are extinguished. That serves the interests of individuals where, after a certain lapse of time, it is fairer to deprive one of a right rather than allow it to trouble the other; it also serves the public interest, because litigation begun promptly encourages legal certainty.

"It is probably worth briefly revisiting the bill's intentions, which are to resolve issues with the law of negative prescription that have caused practical difficulty. Those are deemed to be worthy and welcome reforms to this aspect of the law. We should perhaps bear that in mind when we debate the bill's principles this afternoon.

"What does the bill do? By extending the five-year negative prescription period to cover all statutory obligations to make payment, the bill will significantly simplify the law in that area. Currently, the Prescription and Limitation (Scotland) Act 1973 lists specific categories of obligation that are subject to the five-year prescriptive period. Consequently, that list needs to be constantly updated if new obligations are to come under the five-year prescription. At the same time, there are statutory obligations that do not come under the five-year prescription but where there are no policy grounds to explain or justify that. There are exceptions to the new rule, such as taxes, council tax and Department for Work and Pensions overpayments—in other words, generally those statutory obligations of a public law nature.

"Negative prescription is about the extinction of obligations after they become enforceable but it is difficult to say that there is an enforceable obligation unless we know whom to enforce against. In the case of seeking damages, it is, after all, only fair that, if a person does not know who was responsible for their loss, injury or damage, time should not run against them until they know, or can reasonably be expected to know, who was responsible. Section 5 will do just that. It makes little sense to postpone the start of prescription when the creditor becomes aware of the cause of their loss yet unaware of the identity of those responsible. The Scottish Government welcomes the committee's recognition that the new test proposed in the bill will achieve a fair balance between the interests of the creditor and those of the debtor.

"While it seems fair to creditors to allow them some time to discover the identity of the person responsible for their loss or damage, it is also fair to defenders that time does not carry on indefinitely against them. An unusual feature of Scots law is that both the five and 20-year prescription for obligations to pay damages run from the same date—that is, the date of the loss. Another unusual feature is that the 20-year prescription can be interrupted, with the effect that the 20-year period starts again, so it is possible for a long time to pass before an obligation finally prescribes.

"The bill will make the 20-year prescription, in relation to obligations to pay damages, commence on the date of the act or omission giving rise to the loss. It will also make the 20-year prescription a true long stop by preventing the period from being restarted. The committee, along with a number of those who gave evidence at stage 1, agree with the Scottish Government that such provision will increase legal certainty and clarity. The committee also recognises the logic in allowing the prescription period to continue until proceedings finish, where that happens after the end of the 20-year period.

"A good deal of time has been spent on what the bill does not do, as opposed to what it does. It simply maintains the exceptions that exist under Scots law. With respect to council tax and non-domestic rates, the bill does not seek to change the position as it

is generally understood. Local taxes are vital sources of income for local authorities in the same way that other taxes are vital sources of income for the Scottish and United Kingdom Governments, and the Scottish Government does not want, as the SLC has indicated, to differentiate the treatment of local taxation payments from all other tax payments." (SP Official Report, 27 June 2018.)

Legislative Intention Note (this note assists purposive construction of this Act by reference to its Parliamentary history; it may also assist in cases of ambiguity — see Key Legal Concept: **Pepper v Hart**): At the Stage 1 Debate on the Bill for this Act the Minister said as follows:

"The Convention of Scottish Local Authorities told the committee that it is rare for action to be taken to recover a debt that is more than five years old, but that any move to a five-year negative prescription period would—just like with the DWP—hurt the debtor most. Payments would either have to be recovered over a shorter period—and we must always remember that local taxes are recurring obligations that are due every year, so failure to make payment one year is likely to be compounded the following year—or councils would have to change the way they try to pursue and enforce payment, leading to substantially increased costs for councils, for the Scottish Courts and Tribunals Service and, more important, for the debtors themselves. The Scottish Government notes from the committee's report that the committee has agreed to write to all 32 local authorities for more information about such debts.

"Reserved social security spending in Scotland is still decided on the basis of rules that are set by the DWP, and that includes how it decides to recover any overpaid benefits. The DWP has made it clear to the committee that, if there was no exception from the five-year prescription for obligations to repay reserved benefit overpayments, debtors would be placed in a worse position than they are in now, as the DWP would have to recover the money over a shorter period, meaning that larger amounts would require to be deducted from a debtor's benefits over a shorter period.

"The Scottish Government does not have any jurisdiction over policy decisions concerning the operation of reserved benefits, and the committee is keen not to increase the financial hardship on vulnerable people in our society. The DWP is in control of the matter, and the Scottish Government hopes that the committee will join it in recognising the impact that making reserved benefit overpayments subject to the five-year prescription would have." (SP Official Report, 27 June 2018.)

Legislative Intention Note (this note assists purposive construction of this Act by reference to its Parliamentary history; it may also assist in cases of ambiguity — see Key Legal Concept: **Pepper v Hart**): At the Stage 1 Debate on the Bill for this Act the Minister said as follows:

"As well as the provisions that I have mentioned, the bill makes some miscellaneous provisions, which I want to mention briefly before time runs out. First, the bill allows for agreements to extend the five-year prescription by no more than one year in order to allow parties time to negotiate an end to their dispute without the need for protective proceedings. The committee recognises the merit in those agreements. Secondly, the bill adds to the definition of 'relevant claim' in order to take account of claims that are made

in sequestrations and company administration receiverships." (SP Official Report, 27 June 2018.)

s. 1 Obligations to pay damages and delictual obligations

Not Yet In Force

Version 1 of 1

28 February 2025 - Date to be appointed

Subjects
Prescription

1 Obligations to pay damages and delictual obligations

(1) The Prescription and Limitation (Scotland) Act 1973 ("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".

5-year negative prescription > s. 1 Obligations to pay damages and delictual obligations

Key Legal Concepts Library

Statutory Annotations

Section 1

Introduction

The Scottish Government's Revised Explanatory Notes to this Act (for the status and nature of the Notes see Key Legal Concept: **Explanatory Notes**) say as follows (the Notes as re-issued after Royal Assent are shown at the end of the Act on Westlaw UK):

> "6. 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.
>
> "7. Section 1 amends paragraph 1 of schedule 1 of the 1973 Act. Subsection (2) inserts a new sub-paragraph (d). This 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.
>
> "8. Subsection (2) also inserts a new sub-paragraph (da) into 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 sub-paragraph of paragraph 1.
>
> "9. Subsection (3) makes textual changes to section 11 of the 1973 Act to reflect new sub-paragraph (d) of paragraph 1 of schedule 1 of the 1973 Act."

Navigation Note (General):

For power to make ancillary provision see s.15; for consequential modifications see s.16; for commencement see s.17.

Background Note:

For information about the background to this Act (including Ministerial Statements) see the annotations to the Long Title / Preamble.

Background Note (Scottish Law Commission): This Act was based on the Scottish Law Commission's Report on Prescription (SCOT LAW COM No 247) laid before the Scottish Parliament by the Scottish Ministers under section 3(2) of the Law Commissions Act 1965 in July 2017; the Notes to the equivalent section in the Scottish Law Commission draft Bill said as follows:

> "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).” (Scottish Law Commission Report on Prescription (No. 247).)

Case Note:

“Once it comes into force the provisions of the Prescription (Scotland) Act 2018 will supersede those of the 1973 Act. In the meantime the proper approach to section 11(3) has been authoritatively determined by the decisions in Morrison and Gordon’s Trs. In short, the pursuers knew of the objective facts which amounted to ‘loss, injury or damage’ in terms of both subsections (1) and (3) as and when they occurred. In particular it was known that the walls had been built and that houses had been sold. There is no scope for a postponement of the start of the five year prescriptive period until the pursuers were told of the problem. The decision in Morrison was by a narrow majority, and after it there remained doubt as to whether its reasoning should be applied to economic loss. The concern was that while known physical damage would generally be easily recognisable as harmful, the same may not apply to financial matters. Such doubts were addressed and resolved in Gordon’s Trs.” (*WPH Developments Ltd v Young & Gault LLP (In Liquidation) [2021] CSIH 39*.)

s. 2 Obligations related to contract

Not Yet In Force

Version 1 of 1

28 February 2025 - Date to be appointed

Subjects
Prescription

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;".

5-year negative prescription > s. 2 Obligations related to contract

Key Legal Concepts Library

Statutory Annotations

Section 2

Introduction

The Scottish Government's Revised Explanatory Notes to this Act (for the status and nature of the Notes see Key Legal Concept: **Explanatory Notes**) say as follows (the Notes as re-issued after Royal Assent are shown at the end of the Act on Westlaw UK):

"10. 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.

"11. Subsection (2) inserts a new sub-paragraph (fa) dealing with the first type of obligation: any obligation relating to the validity of a contract. Where a contract has been induced by error or innocent misrepresentation (caused by the debtor innocently or otherwise), the contract is voidable. In other words, the contract is valid until it is set aside

by the party entitled to avoid it. For example, A is induced to purchase a painting from B by B's innocent misrepresentation that the painting is by artist C. When A discovers the painting is not in fact by C, A can seek to have the contract set aside on the ground of misrepresentation and recover from B the sum paid. 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 effect of the provision 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 are subject to the five-year prescription. 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. Subsection (2) also inserts a new sub-paragraph (fb) dealing with the second type of obligation to be brought within the five-year prescription by this section: 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. Perhaps the most famous example of this concerned the Melville Monument in Edinburgh. Development of an estate in Edinburgh owned by W was to include a monument paid for by subscribers led by M. The subscribers, with W's consent, carried out preparatory work on the estate with a view to having the monument erected there. This disrupted W's other plans for the estate. Subsequently, the subscribers had the monument erected in a different place — in St Andrew's Square. W sued M. The court decided that W was entitled to recover from M any wasted expenditure incurred as a result of the monument not having been erected at the agreed location on his estate."

Navigation Note (General):

For power to make ancillary provision see s.15; for consequential modifications see s.16; for commencement see s.17.

Background Note:

For information about the background to this Act (including Ministerial Statements) see the annotations to the Long Title / Preamble.

Background Note (Scottish Law Commission): This Act was based on the Scottish Law Commission's Report on Prescription (SCOT LAW COM No 247) laid before the Scottish Parliament by the Scottish Ministers under section 3(2) of the Law Commissions Act 1965 in July 2017; the Notes to the equivalent section in the Scottish Law Commission draft Bill said as follows:

"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." (Scottish Law Commission Report on Prescription (No. 247).)

Case Note:

"Once it comes into force the provisions of the Prescription (Scotland) Act 2018 will supersede those of the 1973 Act. In the meantime the proper approach to section 11(3) has been authoritatively determined by the decisions in Morrison and Gordon's Trs. In short, the pursuers knew of the objective facts which amounted to 'loss, injury or damage' in terms of both subsections (1) and (3) as and when they occurred. In particular it was known that the walls had been built and that houses had been sold. There is no scope for a postponement of the start of the five year prescriptive period until the pursuers were told of the problem. The decision in Morrison was by a narrow majority, and after it there remained doubt as to whether its reasoning should be applied to economic loss. The concern was that while known physical damage would generally be easily recognisable as harmful, the same may not apply to financial matters. Such doubts were addressed and resolved in Gordon's Trs." (*WPH Developments Ltd v Young & Gault LLP (In Liquidation) [2021] CSIH 39*.)

s. 3 Statutory obligations

Not Yet In Force

Version 1 of 1

28 February 2025 - Date to be appointed

Subjects
Prescription

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;".

5-year negative prescription > s. 3 Statutory obligations

Key Legal Concepts Library

Statutory Annotations

Section 3

Introduction

The Scottish Government's Revised Explanatory Notes to this Act (for the status and nature of the Notes see Key Legal Concept: **Explanatory Notes**) say as follows (the Notes as re-issued after Royal Assent are shown at the end of the Act on Westlaw UK):

> "12. 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 of schedule 1 of the 1973 Act, 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.

"13. Subsection (2)(a) provides for the repeal of provisions of paragraph 1 of schedule 1 of the 1973 Act 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.

"14. Subsection (2)(b) inserts a new sub-paragraph (h) into paragraph 1 of schedule 1 of the 1973 Act. Subject to exceptions set out in subsection (3) (on which see below), new 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 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. For example, the one-year limitation period, in terms of the Carriage of Goods by Sea Act 1971, for claims for loss of or damage to goods carried at sea.

"15. 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) of paragraph 2 to reflect the addition to 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 new sub-paragraph (ea), in order to make it clear that such obligations of the Keeper in terms of the 2012 Act will continue to be governed by the 20-year prescription.

"16. Subsection (3)(b) sets out further exceptions to the application of the five-year prescription to statutory obligations to make a payment. First, notwithstanding sub-paragraph (h) of paragraph 1 of schedule 1 of the 1973 Act (statutory obligations to make a payment), obligations to pay taxes and duties recoverable by the Crown (i.e. HM Revenue and Customs and Revenue Scotland which, as part of the Scottish Administration, is a Crown body), and any interest, penalty or other sum recoverable as if it were an amount of such taxes or duties, are not subject to the five-year prescription (new sub-paragraph (fa)). Secondly, an exception is made for obligations to pay sums recoverable under certain social security and tax credit legislation (new sub-paragraph (fb)). Thirdly, an exception is made for any obligation to pay child support maintenance under the Child Support Act 1991 (new sub-paragraph (fc)). 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 (new sub-paragraph (fd))."

Navigation Note (General):

For power to make ancillary provision see s.15; for consequential modifications see s.16; for commencement see s.17.

Background Note:

For information about the background to this Act (including Ministerial Statements) see the annotations to the Long Title / Preamble.

Background Note (Scottish Law Commission): This Act was based on the Scottish Law Commission's Report on Prescription (SCOT LAW COM No 247) laid before the Scottish Parliament by the Scottish Ministers under section 3(2) of the Law Commissions Act 1965 in July 2017; the Notes to the equivalent section in the Scottish Law Commission draft Bill said as follows:

> "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 subparagraph (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 (subparagraph (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." (Scottish Law Commission Report on Prescription (No. 247).)

Legislative Intention Note (this note assists purposive construction of this Act by reference to its Parliamentary history; it may also assist in cases of ambiguity — see Key Legal Concept: **Pepper v Hart**): the Stage 1 Report of the Delegated Powers and Law Reform Committee on the Bill for this Act says as follows:

"

- The Committee notes that the Scottish Government regards the exception for council tax as reflecting the status quo.
- The Committee also notes the response from SOLAR reiterating the preference of local authorities for the proposed exception in the Bill.
- The Committee notes the response from COSLA and welcomes the clear explanation of the public policy landscape in relation to the collection of council tax. The Committee notes COSLA's support for the exception from the five year prescription rule but also notes that this response was not politically endorsed.
- The Committee also notes the points raised by the Law Society of Scotland, Govan Law Centre, and Citizens Advice Scotland in regard to the recovery of council tax debts.
- The Committee is mindful that there are public policy arguments for the exception. The Committee is also mindful of the arguments made that applying a twenty year prescription period to council tax is perceived by some witnesses to be unfair.
- The Committee did not reach agreement as to whether the exception for council tax and business rates was appropriate. The Committee therefore recommends that the Scottish Government provides further rationale for excepting council tax and business rates from the five year rule in advance of Stage 2.
- The Committee nevertheless agreed, in advance of Stage 2, to write to all 32 local authorities to ask how many council tax and business rates debts are still outstanding after five years and how many times local authorities have had to make use of the twenty year prescription period to seek payment of such debts.
- The Committee also agreed in advance of Stage 2, to write to the Scottish Law Commission seeking an explanation for its decision to include council tax and business rates as an exception in section 3 when the draft bill at consultation stage had not included that exception." (SP Committee Report, 14 June 2018.)

Legislative Intention Note (this note assists purposive construction of this Act by reference to its Parliamentary history; it may also assist in cases of ambiguity — see Key Legal Concept: **Pepper v Hart**): the Stage 1 Report of the Delegated Powers and Law Reform Committee on the Bill for this Act says as follows:

"

- The Committee notes the Equalities and Human Rights Committee's response.
- The Committee is grateful for the evidence provided to it on the impact this divergence in approach [between reserved and devolved social security benefits] may have. In particular, the Committee is grateful for the evidence provided by the welfare rights sector, which highlighted some issues that had not been in the foreground during the previous consultation periods.
- The Committee welcomes the explanation provided by the Minister for Social Security on the Scottish Government's approach to recovering overpayments of social security benefits.
- The Committee also welcomes the explanation provided by the Department for Work and Pensions in regard to its debt recovery policies and its recognition that there is a need to balance recovering money owed to the public purse and the impact on vulnerable people.
- The Committee is keen to ensure that it does not increase the financial hardship for vulnerable people and, in doing so, notes that the debt recovery policies of the Department of Work and Pensions take into account the need to recover debt over a long period of time to mitigate any such financial hardship.
- The Committee acknowledges that the devolution of certain aspects of social security benefits has brought them under the jurisdiction of Scots law and this, therefore, creates a divergence of approach.
- The Committee did not reach agreement as to the different prescriptive periods that would apply to devolved and reserved benefits." (SP Committee Report, 14 June 2018.)

Legislative Intention Note (this note assists purposive construction of this Act by reference to its Parliamentary history; it may also assist in cases of ambiguity — see Key Legal Concept: **Pepper v Hart**): At the Stage 2 Debate on the Bill for this Act in the Delegated Powers and Law Reform Committee the Minister said as follows:

"Section 3 of the bill provides that all statutory obligations to make payment will prescribe after five years, with a few exceptions. One of those exceptions relates to obligations to repay overpayments of certain reserved benefits, including social security and tax credit overpayments. That exception preserves the status quo for those reserved benefits.

"In its response to the SLC consultation, the DWP made the point that recovery of social security overpayments often takes place over a long period of time and that it would be concerned if the five-year prescription period were to apply rather than the 20-year prescription period. That point was also made to the committee at stage 1. The DWP's view is that having a 20-year prescription period for the recovery of reserved benefit

overpayments allows it to protect the most disadvantaged in our society from harsh recovery methods." (SP Official Report, 25 September 2018.)

Legislative Intention Note (this note assists purposive construction of this Act by reference to its Parliamentary history; it may also assist in cases of ambiguity — see Key Legal Concept: **Pepper v Hart**): At the Stage 2 Debate on the Bill for this Act in the Delegated Powers and Law Reform Committee the Minister said as follows:

"In its evidence to the committee, the DWP made it clear that making recovery of reserved benefit overpayments subject to five-year prescription would impose greater hardship on the most vulnerable members of society. It informed the committee that it had a public duty to protect public funds and collect arrears. It seems clear that changing the prescription period by reducing it would result in the DWP taking more money more quickly from those who would be least likely to be able to afford it. Any move to a five-year prescription period would impact on the DWP's ability to recover debts in circumstances in which recovery rates have been reduced on account of hardship or in which the customer has a number of debts and recovery of later debts is on hold while the earlier debt is recovered.

"Ultimately, the DWP's policy in respect of reserved social security payments is a matter for it, and the bill is about prescription generally. It is not the place to make any substantial policy changes in other specific areas." (SP Official Report, 25 September 2018.)

Legislative Intention Note (this note assists purposive construction of this Act by reference to its Parliamentary history; it may also assist in cases of ambiguity — see Key Legal Concept: **Pepper v Hart**): At the Stage 2 Debate on the Bill for this Act in the Delegated Powers and Law Reform Committee the Minister said as follows:

"The Scottish Government's position is that we have accepted the Scottish Law Commission's view on the matter. We believe that it is a matter for the DWP and that, more widely, the bill is about prescription to improve clarity. Therefore, it is not the place for such a change, which would be more far reaching. I have much sympathy with the intention behind the amendments, but it would not be appropriate at this stage to change things in that way without appropriate consultation, as that change would be far reaching.

"On Scottish social security, the benefit of devolution is that the Scottish ministers can decide to make changes or to make a system that is completely different from the United Kingdom system and fits the Scottish context. That is why the systems are different." (SP Official Report, 25 September 2018.)

Legislative Intention Note (this note assists purposive construction of this Act by reference to its Parliamentary history; it may also assist in cases of ambiguity — see Key Legal Concept: **Pepper v Hart**): At the Stage 2 Debate on the Bill for this Act in the Delegated Powers and Law Reform Committee the Minister said as follows:

"The bill does not seek to change the position of council tax. Its aim is simply to maintain the status quo as we understand it. Local taxes form a substantial source of income for local authorities, and they pay for essential services such as education, housing and roads.

The Scottish Government accepts the considered view of the Scottish Law Commission on this matter.

"At stage 1, COSLA told the committee how a 20-year prescription period for recovering arrears allows local authorities to quickly begin the recovery process at minimal cost to taxpayers, all the while protecting those who owe arrears by entering into long-term arrangements. All of that would be jeopardised by changing and shortening the prescription period.

"I note that the committee has written to all 32 local authorities seeking further information on that point and has received responses from 26 of them. It is important to note that not one of those agreed that changing the prescription period was appropriate. Instead, they were all adamant that no change to the status quo should be made.

"Among the points that the local authorities made was the fact that the policy reasons that justify the exception of taxes payable to the Crown from the five-year prescription apply equally to taxes that are payable to local authorities. That is, there should be no distinction between taxes that are owed to central Government and those that are owed to local authorities. Highland Council said:

> 'It would … place local authorities at a disadvantage to HMRC and ordinary creditors … It is inconceivable to believe that this is actually what is at stake.'

"Local authorities continue to recover a significant amount of arrears each year. More than £2 billion-worth of council tax debt is currently owed across Scotland, and £1.2 billion of that relates to debts that are more than five years old. Obviously, that is money that would be spent on local services. Making the prescription period for those debts five years would likely force a change in the way that councils recover that debt, to the detriment of not only the debtor but all those who use our local services. Local authorities have told the committee that they would have to depart from the summary warrant process, meaning more costs for the debtor and a diversion of local authority resources to the collection of arrears.

"The 26 local authorities that have responded to the committee are all deeply concerned about the impact that shortening the prescription period from 20 years to five years would have on their funding. They are concerned not only about the ability to recover arrears that are already owed to them, but also about the fact that reducing the prescription period might create an incentive for those who wish to avoid paying their taxes in the first place to do so.

"If council tax is subject to the five-year prescription period, all taxpayers will suffer as they will have to pay an increased amount of council tax just in order to maintain the current level of services.

"Finally, as I said in relation to the earlier amendment, this bill is about prescription generally and, therefore, is not the place to make any substantial policy changes in specific areas. Any change to the current position would need wider consultation, particularly in light of the views that have been expressed by many local authorities and

COSLA, not to mention the issues in relation to Scottish Water that have been raised with the committee." (SP Official Report, 25 September 2018.)

Legislative Intention Note (this note assists purposive construction of this Act by reference to its Parliamentary history; it may also assist in cases of ambiguity — see Key Legal Concept: **Pepper v Hart**): At the Stage 2 Debate on the Bill for this Act in the Delegated Powers and Law Reform Committee the Minister said as follows:

"On amendment 2, recent changes to the devolution settlement have given the Scottish Parliament legislative competence over a range of benefits payments. The recent Social Security (Scotland) Act 2018 created a legislative framework that underpins a system of devolved benefits, creating a process in which people are given the assistance to which they are entitled. At the same time, the 2018 act makes it clear that those receiving devolved benefits are under an obligation to repay overpayments of those benefits in certain circumstances. That obligation is subject to the five-year prescription period, and that is achieved by section 66 of the 2018 act, which amends schedule 1 to the 1973 act.

"The bill inserts a general rule into schedule 1 to the 1973 act that all statutory obligations to make payments will be subject to the five-year prescription period, and that will cover the obligation that is contained in the 2018 act that I have just described. One of the main purposes of the bill is to increase clarity and legal certainty, and having two provisions that achieve the same outcome in an already crowded schedule 1 to the 1973 act does not achieve that aim." (SP Official Report, 25 September 2018.)

Legislative Intention Note (this note assists purposive construction of this Act by reference to its Parliamentary history; it may also assist in cases of ambiguity — see Key Legal Concept: **Pepper v Hart**): At the Stage 3 Debate on the Bill for this Act the Minister said as follows:

"Any reduction to the prescription period would likely force a change in the way in which councils recover the debt, potentially making it more expensive to recover the moneys owed. That would be all to the detriment of those who use and rely on our local services. In addition, local authorities are concerned that reducing the prescription period will create an incentive for those who wish to avoid paying their taxes in the first place.

"Local authorities continue to recover a significant amount of arrears each year. More than £2 billion of council tax debt is currently owed across Scotland and more than £1 billion of that relates to debts that are more than five years old. Although we are told that we are reaching the end of austerity, that money is vital not just for the debtor, but for local services." (SP Official Report, 8 November 2018.)

Legislative Intention Note (this note assists purposive construction of this Act by reference to its Parliamentary history; it may also assist in cases of ambiguity — see Key Legal Concept: **Pepper v Hart**): At the Stage 3 Debate on the Bill for this Act the Minister said as follows:

"In terms of the potential impact, the value of debt owed to the DWP that is more than five years old stands at just over £1.2 billion, and it belongs to 413,000 debtors. For those

> who can pay off their debts, but only in periods of time over the five-year mark—for example, in six, seven, eight or more years—Mark Griffin's amendment would have an enormous impact. It would make a large number of families face even more hardship. That is especially so given that the rate of deductions taken from benefits is set out in legislation and other debts can take priority." (SP Official Report, 8 November 2018.)

Legislative Intention Note (this note assists purposive construction of this Act by reference to its Parliamentary history; it may also assist in cases of ambiguity — see Key Legal Concept: **Pepper v Hart**): At the Stage 3 Debate on the Bill for this Act the Minister said as follows:

> "Mark Griffin has suggested that it is unfair to have a debt hanging over someone's head for 18 years before the DWP takes action. Does he not realise that Scots common law recognises the doctrine of delay? That law sits alongside negative prescription but is separate from it, and the bill does not affect it. That means that, if a pursuer were to wait 18 years before raising an action, as he suggested, the debtor would be able to rely on that defence to bar a pursuer from enforcing their rights." (SP Official Report, 8 November 2018.)

Case Note:

> "Once it comes into force the provisions of the Prescription (Scotland) Act 2018 will supersede those of the 1973 Act. In the meantime the proper approach to section 11(3) has been authoritatively determined by the decisions in Morrison and Gordon's Trs. In short, the pursuers knew of the objective facts which amounted to 'loss, injury or damage' in terms of both subsections (1) and (3) as and when they occurred. In particular it was known that the walls had been built and that houses had been sold. There is no scope for a postponement of the start of the five year prescriptive period until the pursuers were told of the problem. The decision in Morrison was by a narrow majority, and after it there remained doubt as to whether its reasoning should be applied to economic loss. The concern was that while known physical damage would generally be easily recognisable as harmful, the same may not apply to financial matters. Such doubts were addressed and resolved in Gordon's Trs." (*WPH Developments Ltd v Young & Gault LLP (In Liquidation) [2021] CSIH 39*.)

s. 4 Effect of fraud or error on computation of prescriptive period

Not Yet In Force

Version 1 of 1

28 February 2025 - Date to be appointed

Subjects
Prescription

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.".

5-year negative prescription > s. 4 Effect of fraud or error on computation of prescriptive period

Key Legal Concepts Library

Statutory Annotations

Section 4

Introduction

The Scottish Government's Revised Explanatory Notes to this Act (for the status and nature of the Notes see Key Legal Concept: **Explanatory Notes**) say as follows (the Notes as re-issued after Royal Assent are shown at the end of the Act on Westlaw UK):

> "17. 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.
>
> "18. 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 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.
>
> "19. Subsection (3), which inserts new subsection (4A) into section 6 of the 1973 Act, 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."

Navigation Note (General):

For power to make ancillary provision see s.15; for consequential modifications see s.16; for commencement see s.17.

Background Note:

For information about the background to this Act (including Ministerial Statements) see the annotations to the Long Title / Preamble.

Background Note (Scottish Law Commission): This Act was based on the Scottish Law Commission's Report on Prescription (SCOT LAW COM No 247) laid before the Scottish Parliament by the Scottish Ministers under section 3(2) of the Law Commissions Act 1965 in July 2017; the Notes to the equivalent section in the Scottish Law Commission draft Bill said as follows:

> "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." (Scottish Law Commission Report on Prescription (No. 247).)

Case Note:

"Once it comes into force the provisions of the Prescription (Scotland) Act 2018 will supersede those of the 1973 Act. In the meantime the proper approach to section 11(3) has been authoritatively determined by the decisions in Morrison and Gordon's Trs. In short, the pursuers knew of the objective facts which amounted to 'loss, injury or damage' in terms of both subsections (1) and (3) as and when they occurred. In particular it was known that the walls had been built and that houses had been sold. There is no scope for a postponement of the start of the five year prescriptive period until the pursuers were told of the problem. The decision in Morrison was by a narrow majority, and after it there remained doubt as to whether its reasoning should be applied to economic loss. The concern was that while known physical damage would generally be easily recognisable as harmful, the same may not apply to financial matters. Such doubts were addressed and resolved in Gordon's Trs." (*WPH Developments Ltd v Young & Gault LLP (In Liquidation) [2021] CSIH 39*.)

s. 5 Start point of prescriptive period for obligations to pay damages

Law In Force

Version 1 of 1

1 June 2022 - Present

Subjects
Prescription

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.".

5-year negative prescription > s. 5 Start point of prescriptive period for obligations to pay damages

Key Legal Concepts Library

Statutory Annotations

Section 5

Introduction

The Scottish Government's Revised Explanatory Notes to this Act (for the status and nature of the Notes see Key Legal Concept: **Explanatory Notes**) say as follows (the Notes as re-issued after Royal Assent are shown at the end of the Act on Westlaw UK):

> "20. Subsections (2) and (3) provide for the replacement of the words 'act, neglect or default' with the words 'act or omission' in section 11(1) and (2) of the 1973 Act respectively. 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).
>
> "21. Subsections (4) and (5) replace the existing 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. 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) of section 11 of the 1973 Act:
>
> (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.
>
> "22. 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.
>
> "23. 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."

Navigation Note (General):

For power to make ancillary provision see s.15; for consequential modifications see s.16; for commencement see s.17.

Background Note:

For information about the background to this Act (including Ministerial Statements) see the annotations to the Long Title / Preamble.

Background Note (Scottish Law Commission): This Act was based on the Scottish Law Commission's Report on Prescription (SCOT LAW COM No 247) laid before the Scottish Parliament by the Scottish Ministers under section 3(2) of the Law Commissions Act 1965 in July 2017; the Notes to the equivalent section in the Scottish Law Commission draft Bill said as follows:

"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)." (Scottish Law Commission Report on Prescription (No. 247).)

Legislative Intention Note (this note assists purposive construction of this Act by reference to its Parliamentary history; it may also assist in cases of ambiguity — see Key Legal Concept: **Pepper v Hart**): the Stage 1 Report of the Delegated Powers and Law Reform Committee on the Bill for this Act says as follows:

"

- The Committee notes the impact the Supreme Court's decision in regard to the Morrison case [*David T Morrison v ICL Plastics (2014)*] had on the law relating to prescription.
- The Committee therefore agrees that section 5 contributes to the overall objective of the Bill to provide legal certainty.
- The Committee also notes that the new discoverability test tips the balance in favour of the pursuer and that, whilst it makes the law a little more complex, this complexity is offset by fairness.
- The Committee notes that the additional strand to the discoverability test requiring identity lengthens the period before prescription begins to run and that this would mean that the wrongdoer would be exposed to the risk of liability for longer. However, the legal certainty it provides could help the insurance industry and practitioners.
- The Committee nevertheless recommends that the Scottish Government provides further clarification, ahead of Stage 2, on how the test would operate in situations of joint and several liability. In particular, that the Scottish Government provides further clarification on how the third strand of the test will operate in relation to the knowledge of the identity of a particular defender." (SP Committee Report, 14 June 2018.)

Case Note:

"Once it comes into force the provisions of the Prescription (Scotland) Act 2018 will supersede those of the 1973 Act. In the meantime the proper approach to section 11(3) has been authoritatively determined by the decisions in Morrison and Gordon's Trs. In short, the pursuers knew of the objective facts which amounted to 'loss, injury or damage' in terms of both subsections (1) and (3) as and when they occurred. In particular it was known that the walls had been built and that houses had been sold. There is no scope for a postponement of the start of the five year prescriptive period until the pursuers were told of the problem. The decision in Morrison was by a narrow majority, and after it there remained doubt as to whether its reasoning should be applied to economic loss. The concern was that while known physical damage would generally be easily recognisable as harmful, the same may not apply to financial matters. Such doubts were addressed and resolved in Gordon's Trs." (*WPH Developments Ltd v Young & Gault LLP (In Liquidation) [2021] CSIH 39*.)

s. 6 Obligations: 20-year prescriptive period and extension

Not Yet In Force

Version 1 of 1

28 February 2025 - Date to be appointed

Subjects
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".

20-year negative prescription > s. 6 Obligations: 20-year prescriptive period and extension

Key Legal Concepts Library

Statutory Annotations

Section 6

Introduction

The Scottish Government's Revised Explanatory Notes to this Act (for the status and nature of the Notes see Key Legal Concept: **Explanatory Notes**) say as follows (the Notes as re-issued after Royal Assent are shown at the end of the Act on Westlaw UK):

"24. 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. Subsection (2)(a) substitutes a new subsection (1) into section 7. The 20-year prescriptive period will no longer be amenable to interruption by a relevant claim or by relevant acknowledgement which has the effect of a full 20-year period starting again. The amendment is achieved through omitting any reference to such a claim or acknowledgement.

"25. To complement this amendment, subsection (2)(b) provides for the insertion of new subsections (3) to (5) into section 7 of the 1973 Act. 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.

"26. 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 new

subsection (4)(b) of section 7 of the 1973 Act 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 (for example in relation to the enforcement of a separate obligation under the same contract) in order to seek an extension of time.

"27. New subsection (5) of section 7 of the 1973 Act 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 Bill.

"28. Subsection (3) of section 6 of the 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."

Navigation Note (General):

For power to make ancillary provision see s.15; for consequential modifications see s.16; for commencement see s.17.

Background Note:

For information about the background to this Act (including Ministerial Statements) see the annotations to the Long Title / Preamble.

Background Note (Scottish Law Commission): This Act was based on the Scottish Law Commission's Report on Prescription (SCOT LAW COM No 247) laid before the Scottish Parliament by the Scottish Ministers under section 3(2) of the Law Commissions Act 1965 in July 2017; the Notes to the equivalent section in the Scottish Law Commission draft Bill said as follows:

"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." (Scottish Law Commission Report on Prescription (No. 247).)

Legislative Intention Note (this note assists purposive construction of this Act by reference to its Parliamentary history; it may also assist in cases of ambiguity — see Key Legal Concept: **Pepper v Hart**): the Stage 1 Report of the Delegated Powers and Law Reform Committee on the Bill for this Act says as follows:

"

- The Committee notes the views on the extension of the twenty year period to allow legal proceedings to finish and recognises the logic to the view." (SP Committee Report, 14 June 2018.)

Case Note:

"Once it comes into force the provisions of the Prescription (Scotland) Act 2018 will supersede those of the 1973 Act. In the meantime the proper approach to section 11(3) has been authoritatively determined by the decisions in Morrison and Gordon's Trs. In short, the pursuers knew of the objective facts which amounted to 'loss, injury or damage' in terms of both subsections (1) and (3) as and when they occurred. In particular it was known that the walls had been built and that houses had been sold. There is no scope for a postponement of the start of the five year prescriptive period until the pursuers were told of the problem. The decision in Morrison was by a narrow majority, and after it there remained doubt as to whether its reasoning should be applied to economic loss. The concern was that while known physical damage would generally be easily recognisable as harmful, the same may not apply to financial matters. Such doubts were addressed and resolved in Gordon's Trs." (*WPH Developments Ltd v Young & Gault LLP (In Liquidation) [2021] CSIH 39*.)

s. 7 Property rights: 20-year prescriptive period and extension

Not Yet In Force

Version 1 of 1

28 February 2025 - Date to be appointed

Subjects
Prescription

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).

(1C) If the relevant claim (as finally disposed of) is successful, the right is to be treated for the purposes of subsection (1) as having been exercised or enforced by the creditor at the time when the claim was made.".

Statutory Annotations

Section 7

Introduction

The Scottish Government's Revised Explanatory Notes to this Act (for the status and nature of the Notes see Key Legal Concept: **Explanatory Notes**) say as follows (the Notes as re-issued after Royal Assent are shown at the end of the Act on Westlaw UK):

> "29. In the same way as section 6 of the 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.
>
> "30. Section 8 of the 1973 Act deals with the extinction of certain rights relating to property by a 20-year prescriptive period. Subsection (2) of section 7 of the 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.)
>
> "31. Subsection (3) replicates the provision made by section 6 of the 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 Bill. Where the 20-year prescriptive period is extended to the end of proceedings raised before the expiry of that period, then at the end of those proceedings where the relevant claim has been successful, the right is deemed to have been exercised or enforced at the time when the claim was made. The result is that a new 20-year prescriptive period starts to run at that time. This deeming provision applies only where the 20-year prescriptive period is extended by the amendments made by subsection (3) and only where the claim, as finally disposed of, is successful."

Navigation Note (General):

For power to make ancillary provision see s.15; for consequential modifications see s.16; for commencement see s.17.

Background Note:

For information about the background to this Act (including Ministerial Statements) see the annotations to the Long Title / Preamble.

Background Note (Scottish Law Commission): This Act was based on the Scottish Law Commission's Report on Prescription (SCOT LAW COM No 247) laid before the Scottish Parliament by the Scottish Ministers under section 3(2) of the Law Commissions Act 1965 in July 2017; the Notes to the equivalent section in the Scottish Law Commission draft Bill said as follows:

"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." (Scottish Law Commission Report on Prescription (No. 247).)

Legislative Intention Note (this note assists purposive construction of this Act by reference to its Parliamentary history; it may also assist in cases of ambiguity — see Key Legal Concept: **Pepper v Hart**): the Stage 1 Report of the Delegated Powers and Law Reform Committee on the Bill for this Act says as follows:

"

- The Committee notes the views on the extension of the twenty year period to allow legal proceedings to finish and recognises the logic to the view." (SP Committee Report, 14 June 2018.)

Legislative Intention Note (this note assists purposive construction of this Act by reference to its Parliamentary history; it may also assist in cases of ambiguity — see Key Legal Concept: **Pepper v Hart**): the Stage 1 Report of the Delegated Powers and Law Reform Committee on the Bill for this Act says as follows:

"

- The Committee welcomes the Government's intention to consider the concerns raised and calls on it to respond to the issue ahead of Stage 2.

"Interruptions and extensions Section 12: final disposal

- The Committee welcomes the Government's intention to consider the concerns raised and calls on it to respond to the issue ahead of Stage 2." (SP Committee Report, 14 June 2018.)

Legislative Intention Note (this note assists purposive construction of this Act by reference to its Parliamentary history; it may also assist in cases of ambiguity — see Key Legal Concept: **Pepper v Hart**): At the Stage 2 Debate on the Bill for this Act in the Delegated Powers and Law Reform Committee the Minister said as follows:

"Amendment 1 addresses a point that was raised by the Faculty of Advocates. The faculty and others raised concerns about the section 7 extension of the 20-year prescription period for some property rights, in particular servitude rights, as the committee highlighted in its stage 1 report. The faculty made the point that the drafting of section 7 suggests that, when a creditor raises court proceedings in relation to a property right before the expiry of the 20-year period and the proceedings extend beyond the 20-year period, the period in relation to that right ends when the proceedings end, with the consequence that the property right is extinguished.

"Amendment 1 ensures that, where the creditor is successful in the court proceedings —for example, by obtaining a declarator of the existence of the right—they should not be denied the property right by the 20-year prescription coming to an end at the end of the court proceedings. Instead, the amendment ensures that, where the creditor's claim is successful, the property right is deemed to have been exercised or enforced. The outcome is that a new 20-year prescription period will start to run. (SP Official Report, 25 September 2018.)

Case Note:

"Once it comes into force the provisions of the Prescription (Scotland) Act 2018 will supersede those of the 1973 Act. In the meantime the proper approach to section 11(3) has been authoritatively determined by the decisions in Morrison and Gordon's Trs. In short, the pursuers knew of the objective facts which amounted to 'loss, injury or damage' in terms of both subsections (1) and (3) as and when they occurred. In particular it was known that the walls had been built and that houses had been sold. There is no scope for a postponement of the start of the five year prescriptive period until the pursuers were told of the problem. The decision in Morrison was by a narrow majority, and after it there remained doubt as to whether its reasoning should be applied to economic loss. The concern was that while known physical damage would generally be easily recognisable as harmful, the same may not apply to financial matters. Such doubts were addressed and resolved in Gordon's Trs." (*WPH Developments Ltd v Young & Gault LLP (In Liquidation) [2021] CSIH 39*.)

s. 8 Start point of prescriptive period for obligations to pay damages

Not Yet In Force

Version 1 of 1

28 February 2025 - Date to be appointed

Subjects
Prescription

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.".

20-year negative prescription > s. 8 Start point of prescriptive period for obligations to pay damages

Key Legal Concepts Library

Statutory Annotations

Section 8

Introduction

The Scottish Government's Revised Explanatory Notes to this Act (for the status and nature of the Notes see Key Legal Concept: **Explanatory Notes**) say as follows (the Notes as re-issued after Royal Assent are shown at the end of the Act on Westlaw UK):

> "32. 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 debtor should be able to arrange his or her affairs on the assumption that any risk of litigation has passed.

"33. 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.

"34. 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."

Legislative Intention Note (this note assists purposive construction of this Act by reference to its Parliamentary history; it may also assist in cases of ambiguity — see Key Legal Concept: **Pepper v Hart**): the Stage 1 Report of the Delegated Powers and Law Reform Committee on the Bill for this Act says as follows:

"

- The Committee recognises that the new start date for twenty year prescription, like any hard deadline, will result in some harsh cases at the margins.
- However, the Committee is persuaded by the argument that evidence deteriorated considerably after twenty years and may be irretrievable, thus resulting in difficulties for the pursuer in compiling a case where many years have elapsed.
- Furthermore, the Committee agrees that legal certainty provided comfort to defenders who would have greater clarity on when their legal obligation would be extinguished and allow them to arrange their affairs accordingly.
- The Committee also takes into account that the judiciary would have difficulty doing justice to parties concerned where there was limited good quality evidence.
- The Committee acknowledges that it is for the Law Society of Scotland to introduce a system of strict liability for solicitors in conveyancing cases.
- However, in view of the evidence the Committee heard in relation to the operation of prescription and conveyancing, the Committee calls on the Scottish Government to consider what alternative courses of action there are to remedy conveyancing cases that are harshly affected by prescription.
- The Committee recommends that the Public Audit and Post-Legislative Scrutiny Committee consider the use of land registration procedures in relation to conveyancing issues as part of any scrutiny of the Land Registration etc. (Scotland) Act 2012." (SP Committee Report, 14 June 2018.)

Legislative Intention Note (this note assists purposive construction of this Act by reference to its Parliamentary history; it may also assist in cases of ambiguity — see Key Legal Concept: **Pepper v Hart**): the Stage 1 Report of the Delegated Powers and Law Reform Committee on the Bill for this Act says as follows:

> "
>
> - The Committee agrees that the language used in relation to omissions and ongoing breaches would be familiar to courts and those who used the law." (SP Committee Report, 14 June 2018.)

Background Note (Scottish Law Commission): This Act was based on the Scottish Law Commission's Report on Prescription (SCOT LAW COM No 247) laid before the Scottish Parliament by the Scottish Ministers under section 3(2) of the Law Commissions Act 1965 in July 2017; the Notes to the equivalent section in the Scottish Law Commission draft Bill said as follows:

> "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." (Scottish Law Commission Report on Prescription (No. 247).)

Case Note:

> "Once it comes into force the provisions of the Prescription (Scotland) Act 2018 will supersede those of the 1973 Act. In the meantime the proper approach to section 11(3) has been authoritatively determined by the decisions in Morrison and Gordon's Trs. In short, the pursuers knew of the objective facts which amounted to 'loss, injury or damage' in terms of both subsections (1) and (3) as and when they occurred. In particular it was known that the walls had been built and that houses had been sold. There is no scope for a postponement of the start of the five year prescriptive period until the pursuers were

told of the problem. The decision in Morrison was by a narrow majority, and after it there remained doubt as to whether its reasoning should be applied to economic loss. The concern was that while known physical damage would generally be easily recognisable as harmful, the same may not apply to financial matters. Such doubts were addressed and resolved in Gordon's Trs." (*WPH Developments Ltd v Young & Gault LLP (In Liquidation) [2021] CSIH 39*.)

s. 9 Saving for other statutory provisions about prescription or limitation

Not Yet In Force

Version 1 of 1

28 February 2025 - Date to be appointed

Subjects
Prescription

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".

Miscellaneous > s. 9 Saving for other statutory provisions about prescription or limitation

Key Legal Concepts Library

Statutory Annotations

Section 9

Introduction

The Scottish Government's Revised Explanatory Notes to this Act (for the status and nature of the Notes see Key Legal Concept: **Explanatory Notes**) say as follows (the Notes as re-issued after Royal Assent are shown at the end of the Act on Westlaw UK):

> "35. 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.
>
> "36. 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 is 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 may be unlikely that this will be an issue of significance in practice.)
>
> "37. 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."

Navigation Note (General):

For power to make ancillary provision see s.15; for consequential modifications see s.16; for commencement see s.17.

Background Note:

For information about the background to this Act (including Ministerial Statements) see the annotations to the Long Title / Preamble.

Background Note (Scottish Law Commission): This Act was based on the Scottish Law Commission's Report on Prescription (SCOT LAW COM No 247) laid before the Scottish Parliament by the Scottish Ministers under section 3(2) of the Law Commissions Act 1965 in July 2017; the Notes to the equivalent section in the Scottish Law Commission draft Bill said as follows:

> "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." (Scottish Law Commission Report on Prescription (No. 247).)

Case Note:

"Once it comes into force the provisions of the Prescription (Scotland) Act 2018 will supersede those of the 1973 Act. In the meantime the proper approach to section 11(3) has been authoritatively determined by the decisions in Morrison and Gordon's Trs. In short, the pursuers knew of the objective facts which amounted to 'loss, injury or damage' in terms of both subsections (1) and (3) as and when they occurred. In particular it was known that the walls had been built and that houses had been sold. There is no scope for a postponement of the start of the five year prescriptive period until the pursuers were told of the problem. The decision in Morrison was by a narrow majority, and after it there remained doubt as to whether its reasoning should be applied to economic loss. The concern was that while known physical damage would generally be easily recognisable as harmful, the same may not apply to financial matters. Such doubts were addressed and resolved in Gordon's Trs." (*WPH Developments Ltd v Young & Gault LLP (In Liquidation) [2021] CSIH 39*.)

s. 10 Definition of "relevant claim"

Not Yet In Force

Version 1 of 1

28 February 2025 - Date to be appointed

Subjects
Prescription

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;".

Miscellaneous > s. 10 Definition of "relevant claim"

Key Legal Concepts Library

Statutory Annotations

Section 10

Introduction

The Scottish Government's Revised Explanatory Notes to this Act (for the status and nature of the Notes see Key Legal Concept: **Explanatory Notes**) say as follows (note section numbering may not match final section numbering; the Notes as re-issued after Royal Assent are shown at the end of the Act on Westlaw UK):

> "38. Section 9 of the 1973 Act defines 'relevant claim' for the 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 (process for a company in debt that cannot pay the money it owes) nor receivership (a receiver is appointed by a party holding a floating charge over some or all of the company's assets) is.
>
> "39. 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.
>
> "40. 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."

Navigation Note (General):

For power to make ancillary provision see s.15; for consequential modifications see s.16; for commencement see s.17.

Background Note:

For information about the background to this Act (including Ministerial Statements) see the annotations to the Long Title / Preamble.

Background Note (Scottish Law Commission): This Act was based on the Scottish Law Commission's Report on Prescription (SCOT LAW COM No 247) laid before the Scottish Parliament by the Scottish Ministers under section 3(2) of the Law Commissions Act 1965 in July 2017; the Notes to the equivalent section in the Scottish Law Commission draft Bill said as follows:

> "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." (Scottish Law Commission Report on Prescription (No. 247).)

Case Note:

> "Once it comes into force the provisions of the Prescription (Scotland) Act 2018 will supersede those of the 1973 Act. In the meantime the proper approach to section 11(3) has been authoritatively determined by the decisions in Morrison and Gordon's Trs. In short, the pursuers knew of the objective facts which amounted to 'loss, injury or damage' in terms of both subsections (1) and (3) as and when they occurred. In particular it was known that the walls had been built and that houses had been sold. There is no scope for a postponement of the start of the five year prescriptive period until the pursuers were told of the problem. The decision in Morrison was by a narrow majority, and after it there remained doubt as to whether its reasoning should be applied to economic loss. The concern was that while known physical damage would generally be easily recognisable as harmful, the same may not apply to financial matters. Such doubts were addressed and resolved in Gordon's Trs." (*WPH Developments Ltd v Young & Gault LLP (In Liquidation) [2021] CSIH 39*.)

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

Not Yet In Force

Version 1 of 1

28 February 2025 - Date to be appointed

Subjects
Prescription

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".

Miscellaneous > s. 11 Prescriptive periods under sections 6 and 8A: interruption by relevant claim

Key Legal Concepts Library

Statutory Annotations

Section 11

Introduction

The Scottish Government's Revised Explanatory Notes to this Act (for the status and nature of the Notes see Key Legal Concept: **Explanatory Notes**) say as follows (note section numbering may not match final section numbering; the Notes as re-issued after Royal Assent are shown at the end of the Act on Westlaw UK):

> "41. 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.

"42. 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 two-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.

"43. 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 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.)

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

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

Navigation Note (General):

For power to make ancillary provision see s.15; for consequential modifications see s.16; for commencement see s.17.

Background Note:

For information about the background to this Act (including Ministerial Statements) see the annotations to the Long Title / Preamble.

Background Note (Scottish Law Commission): This Act was based on the Scottish Law Commission's Report on Prescription (SCOT LAW COM No 247) laid before the Scottish Parliament by the Scottish Ministers under section 3(2) of the Law Commissions Act 1965 in July 2017; the Notes to the equivalent section in the Scottish Law Commission draft Bill said as follows:

"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." (Scottish Law Commission Report on Prescription (No. 247).)

Case Note:

"Once it comes into force the provisions of the Prescription (Scotland) Act 2018 will supersede those of the 1973 Act. In the meantime the proper approach to section 11(3) has been authoritatively determined by the decisions in Morrison and Gordon's Trs. In short, the pursuers knew of the objective facts which amounted to 'loss, injury or damage' in terms of both subsections (1) and (3) as and when they occurred. In particular it was known that the walls had been built and that houses had been sold. There is no scope for a postponement of the start of the five year prescriptive period until the pursuers were told of the problem. The decision in Morrison was by a narrow majority, and after it there remained doubt as to whether its reasoning should be applied to economic loss. The concern was that while known physical damage would generally be easily recognisable as harmful, the same may not apply to financial matters. Such doubts were addressed and resolved in Gordon's Trs." (*WPH Developments Ltd v Young & Gault LLP (In Liquidation) [2021] CSIH 39*.)

s. 12 Definition of "final disposal" of relevant claim

Not Yet In Force

Version 1 of 1

28 February 2025 - Date to be appointed

Subjects
Prescription

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.".

Miscellaneous > s. 12 Definition of "final disposal" of relevant claim

Key Legal Concepts Library

Statutory Annotations

Section 12

Introduction

The Scottish Government's Revised Explanatory Notes to this Act (for the status and nature of the Notes see Key Legal Concept: **Explanatory Notes**) say as follows (note section numbering may not match final section numbering; the Notes as re-issued after Royal Assent are shown at the end of the Act on Westlaw UK):

> "46. 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 — see new section 9A(1).
>
> "47. 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."

Navigation Note (General):

For power to make ancillary provision see s.15; for consequential modifications see s.16; for commencement see s.17.

Background Note:

For information about the background to this Act (including Ministerial Statements) see the annotations to the Long Title / Preamble.

Legislative Intention Note (this note assists purposive construction of this Act by reference to its Parliamentary history; it may also assist in cases of ambiguity — see Key Legal Concept: **Pepper v Hart**): the Stage 1 Report of the Delegated Powers and Law Reform Committee on the Bill for this Act says as follows:

> "
>
> - The Committee notes the views on the extension of the twenty year period to allow legal proceedings to finish and recognises the logic to the view." (SP Committee Report, 14 June 2018.)

Background Note (Scottish Law Commission): This Act was based on the Scottish Law Commission's Report on Prescription (SCOT LAW COM No 247) laid before the Scottish Parliament by the Scottish Ministers under section 3(2) of the Law Commissions Act 1965 in July 2017; the Notes to the equivalent section in the Scottish Law Commission draft Bill said as follows:

> "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." (Scottish Law Commission Report on Prescription (No. 247).)

Case Note:

"Once it comes into force the provisions of the Prescription (Scotland) Act 2018 will supersede those of the 1973 Act. In the meantime the proper approach to section 11(3) has been authoritatively determined by the decisions in Morrison and Gordon's Trs. In short, the pursuers knew of the objective facts which amounted to 'loss, injury or damage' in terms of both subsections (1) and (3) as and when they occurred. In particular it was known that the walls had been built and that houses had been sold. There is no scope for a postponement of the start of the five year prescriptive period until the pursuers were told of the problem. The decision in Morrison was by a narrow majority, and after it there remained doubt as to whether its reasoning should be applied to economic loss. The concern was that while known physical damage would generally be easily recognisable as harmful, the same may not apply to financial matters. Such doubts were addressed and resolved in Gordon's Trs." (*WPH Developments Ltd v Young & Gault LLP (In Liquidation) [2021] CSIH 39*.)

s. 13 Restrictions on contracting out

Law In Force

Version 1 of 1

1 June 2022 - Present

Subjects
Prescription

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.".

Statutory Annotations

Section 13

Introduction

The Scottish Government's Revised Explanatory Notes to this Act (for the status and nature of the Notes see Key Legal Concept: **Explanatory Notes**) say as follows (note section numbering may not match final section numbering; the Notes as re-issued after Royal Assent are shown at the end of the Act on Westlaw UK):

> "48. 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.
>
> "49. 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. The provision refers to 'the same obligation' rather than the particular creditor or debtor in the obligation. This means that it is not possible to get round the restriction which prevents more than one extension of the prescriptive period by assigning the obligation to a new creditor or debtor. That is because, even if there is an assignation, it remains 'the same obligation'.
>
> "50. 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.
>
> "51. 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.
>
> "52. 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 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.

"53. 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."

Navigation Note (General):

For power to make ancillary provision see s.15; for consequential modifications see s.16; for commencement see s.17.

Background Note:

For information about the background to this Act (including Ministerial Statements) see the annotations to the Long Title / Preamble.

Legislative Intention Note (this note assists purposive construction of this Act by reference to its Parliamentary history; it may also assist in cases of ambiguity — see Key Legal Concept: **Pepper v Hart**): the Stage 1 Report of the Delegated Powers and Law Reform Committee on the Bill for this Act says as follows:

"

- The Committee is persuaded that the proposed standstill agreements in the new section 13 have merit.
- However, the Committee also recognises the argument that standstill agreements may be abused by the economically stronger party.
- The Committee acknowledges that the additional safeguard that parties should be required to consult a solicitor or accredited money adviser before entering into such a contract might create further issues, such as cost. Therefore, the Committee welcomes the Minister's commitment to reflect further on the issue." (SP Committee Report, 14 June 2018.)

Background Note (Scottish Law Commission): This Act was based on the Scottish Law Commission's Report on Prescription (SCOT LAW COM No 247) laid before the Scottish Parliament by the Scottish Ministers under section 3(2) of the Law Commissions Act 1965 in July 2017; the Notes to the equivalent section in the Scottish Law Commission draft Bill said as follows:

"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." (Scottish Law Commission Report on Prescription (No. 247).)

Case Note:

"Once it comes into force the provisions of the Prescription (Scotland) Act 2018 will supersede those of the 1973 Act. In the meantime the proper approach to section 11(3) has been authoritatively determined by the decisions in Morrison and Gordon's Trs. In short, the pursuers knew of the objective facts which amounted to 'loss, injury or damage' in terms of both subsections (1) and (3) as and when they occurred. In particular it was known that the walls had been built and that houses had been sold. There is no scope for a postponement of the start of the five year prescriptive period until the pursuers were told of the problem. The decision in Morrison was by a narrow majority, and after it there remained doubt as to whether its reasoning should be applied to economic loss. The concern was that while known physical damage would generally be easily recognisable as harmful, the same may not apply to financial matters. Such doubts were addressed

and resolved in Gordon's Trs." (*WPH Developments Ltd v Young & Gault LLP (In Liquidation) [2021] CSIH 39*.)

s. 14 Burden of proof

Not Yet In Force

Version 1 of 1

28 February 2025 - Date to be appointed

Subjects
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.".

Miscellaneous > s. 14 Burden of proof

Key Legal Concepts Library

Statutory Annotations

Section 14

Introduction

The Scottish Government's Revised Explanatory Notes to this Act (for the status and nature of the Notes see Key Legal Concept: **Explanatory Notes**) say as follows (note section numbering may not match final section numbering; the Notes as re-issued after Royal Assent are shown at the end of the Act on Westlaw UK):

> "54. For clarity, section 14 inserts a new section 13A, dealing with the onus of proof, into the 1973 Act.
>
> "55. Subsection (1) of new 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.
>
> "56. 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 intended 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.
>
> "57. The subsection refers to the 'creditor' in its application to property rights under section 8, as the 1973 Act already uses 'creditor' in relation to the holder of a property right (section 9(2) is an example).
>
> "58. 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)."

Navigation Note (General):

For power to make ancillary provision see s.15; for consequential modifications see s.16; for commencement see s.17.

Background Note:

For information about the background to this Act (including Ministerial Statements) see the annotations to the Long Title / Preamble.

Background Note (Scottish Law Commission): This Act was based on the Scottish Law Commission's Report on Prescription (SCOT LAW COM No 247) laid before the Scottish Parliament by the Scottish Ministers under section 3(2) of the Law Commissions Act 1965 in July 2017; the Notes to the equivalent section in the Scottish Law Commission draft Bill said as follows:

"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)." (Scottish Law Commission Report on Prescription (No. 247).)

Case Note:

"Once it comes into force the provisions of the Prescription (Scotland) Act 2018 will supersede those of the 1973 Act. In the meantime the proper approach to section 11(3) has been authoritatively determined by the decisions in Morrison and Gordon's Trs. In short, the pursuers knew of the objective facts which amounted to 'loss, injury or damage' in terms of both subsections (1) and (3) as and when they occurred. In particular it was known that the walls had been built and that houses had been sold. There is no scope for a postponement of the start of the five year prescriptive period until the pursuers were told of the problem. The decision in Morrison was by a narrow majority, and after it there remained doubt as to whether its reasoning should be applied to economic loss. The concern was that while known physical damage would generally be easily recognisable as harmful, the same may not apply to financial matters. Such doubts were addressed

and resolved in Gordon's Trs." (*WPH Developments Ltd v Young & Gault LLP (In Liquidation) [2021] CSIH 39*.)

s. 15 Ancillary provision

Law In Force

Version 1 of 1

19 December 2018 - Present

Subjects
Prescription

Keywords
Negative prescription; Regulations; Scotland

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.

General > s. 15 Ancillary provision

Key Legal Concepts Library

Statutory Annotations

Section 15

Introduction

The Scottish Government's Revised Explanatory Notes to this Act (for the status and nature of the Notes see Key Legal Concept: **Explanatory Notes**) say as follows (note section numbering may not match final section numbering; the Notes as re-issued after Royal Assent are shown at the end of the Act on Westlaw UK):

> "59. This section allows the Scottish Ministers to make ancillary provision by regulations. Generally, such regulations are subject to negative procedure but any

regulations which add to, replace or omit any part of the text of an Act are subject to the affirmative procedure."

Navigation Note (General):

For power to make ancillary provision see s.15; for consequential modifications see s.16; for commencement see s.17.

Background Note:

For information about the background to this Act (including Ministerial Statements) see the annotations to the Long Title / Preamble.

Analysis Note:

See Key Legal Concept: **Statutory Instruments: Ancillary Provision**.

Analysis Note:

Subsection (1) — see Key Legal Concept: **Consequential Amendments**.

Analysis Note:

Subsection (1) — see Key Legal Concept: **Transitional Provision**.

Analysis Note:

Subsection (1) — "consider" — see Key Legal Concept: **Levels of Certainty**.

Analysis Note:

Subsection (2) — see Key Legal Concept: **Statutory Instruments: Different Provision for Different Purposes**.

Analysis Note:

Subsection (2) — "may… modify any enactment" — see Key Legal Concept: **Henry VIII Provision**.

Analysis Note:

Subsection (3) — see Key Legal Concept: **Statutory Instruments: Draft Affirmative Procedure**.

Analysis Note:

Subsection (4) — see Key Legal Concept: **Statutory Instruments: Negative Resolution**.

Other Key Legal Concepts:

Scottish Ministers.

Necessary or Appropriate.

Enactment.

Case Note:

"Once it comes into force the provisions of the Prescription (Scotland) Act 2018 will supersede those of the 1973 Act. In the meantime the proper approach to section 11(3) has been authoritatively determined by the decisions in Morrison and Gordon's Trs. In short, the pursuers knew of the objective facts which amounted to 'loss, injury or damage' in terms of both subsections (1) and (3) as and when they occurred. In particular it was known that the walls had been built and that houses had been sold. There is no scope for a postponement of the start of the five year prescriptive period until the pursuers were told of the problem. The decision in Morrison was by a narrow majority, and after it there remained doubt as to whether its reasoning should be applied to economic loss. The concern was that while known physical damage would generally be easily recognisable as harmful, the same may not apply to financial matters. Such doubts were addressed and resolved in Gordon's Trs." (*WPH Developments Ltd v Young & Gault LLP (In Liquidation) [2021] CSIH 39*.)

s. 16 Consequential modifications

Not Yet In Force

Version 1 of 1

28 February 2025 - Date to be appointed

Subjects
Prescription

16 Consequential modifications

(1) In the 1973 Act, in schedule 1 (obligations affected by prescriptive periods of five years), paragraph 1(ba) is repealed.

(2) In the Social Security (Scotland) Act 2018, section 66 (which inserts paragraph 1(ba) into schedule 1 of the 1973 Act) is repealed.

General > s. 16 Consequential modifications

Key Legal Concepts Library

Statutory Annotations

Section 16

Introduction

The Scottish Government's Revised Explanatory Notes to this Act (for the status and nature of the Notes see Key Legal Concept: **Explanatory Notes**) say as follows (note section numbering may not match final section numbering; the Notes as re-issued after Royal Assent are shown at the end of the Act on Westlaw UK):

> "60. This section removes an amendment to the Prescription and Limitation (Scotland) Act 1973 Act ('the 1973 Act') made in the recent Social Security (Scotland) Act 2018 ('the 2018 Act') and the provision in the 2018 Act making that amendment. The amendment inserted a new provision into schedule 1 of the 1973 Act making recovery of devolved social security overpayments subject to a five-year prescription period. Such recovery will fall under the general rule contained at section 3."

Navigation Note (General):

For power to make ancillary provision see s.15; for consequential modifications see s.16; for commencement see s.17.

Background Note:

For information about the background to this Act (including Ministerial Statements) see the annotations to the Long Title / Preamble.

Case Note:

> "Once it comes into force the provisions of the Prescription (Scotland) Act 2018 will supersede those of the 1973 Act. In the meantime the proper approach to section 11(3) has been authoritatively determined by the decisions in Morrison and Gordon's Trs. In short, the pursuers knew of the objective facts which amounted to 'loss, injury or damage' in terms of both subsections (1) and (3) as and when they occurred. In particular it was known that the walls had been built and that houses had been sold. There is no scope for a postponement of the start of the five year prescriptive period until the pursuers were told of the problem. The decision in Morrison was by a narrow majority, and after it there remained doubt as to whether its reasoning should be applied to economic loss. The concern was that while known physical damage would generally be easily recognisable as harmful, the same may not apply to financial matters. Such doubts were addressed and resolved in Gordon's Trs." (*WPH Developments Ltd v Young & Gault LLP (In Liquidation) [2021] CSIH 39*.)

s. 17 Commencement

Not Yet In Force

Version 1 of 1

28 February 2025 - Date to be appointed

Subjects
Prescription

Keywords
Commencement; Negative prescription; Scotland

17 Commencement

(1) This section and sections 15 and 18 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.

General > s. 17 Commencement

Key Legal Concepts Library

Statutory Annotations

Section 17

Introduction

See Key Legal Concept: **Commencement**.

Navigation Note (General):

For power to make ancillary provision see s.15; for consequential modifications see s.16; for commencement see s.17.

Background Note:

For information about the background to this Act (including Ministerial Statements) see the annotations to the Long Title / Preamble.

Analysis Note:

See Key Legal Concept: **Commencement**.

Analysis Note:

Subsection (1) — "Royal Assent" — 18 December 2018; see also Key Legal Concept: **Royal Assent**.

Analysis Note:

Subsection (2) — see Key Legal Concept: **Appointed Day Orders**.

Analysis Note:

Subsection (3) — see Key Legal Concept: **Transitional Provision**.

Analysis Note:

Subsection (3) — see Key Legal Concept: **Statutory Instruments: Different Provision for Different Purposes**.

Other Key Legal Concept:

Scottish Ministers.

Case Note:

> "Once it comes into force the provisions of the Prescription (Scotland) Act 2018 will supersede those of the 1973 Act. In the meantime the proper approach to section 11(3) has been authoritatively determined by the decisions in Morrison and Gordon's Trs. In short, the pursuers knew of the objective facts which amounted to 'loss, injury or damage' in terms of both subsections (1) and (3) as and when they occurred. In particular it was known that the walls had been built and that houses had been sold. There is no scope for a postponement of the start of the five year prescriptive period until the pursuers were told of the problem. The decision in Morrison was by a narrow majority, and after it there remained doubt as to whether its reasoning should be applied to economic loss. The concern was that while known physical damage would generally be easily recognisable as harmful, the same may not apply to financial matters. Such doubts were addressed and resolved in Gordon's Trs." (*WPH Developments Ltd v Young & Gault LLP (In Liquidation) [2021] CSIH 39*.)

s. 18 Short title

Law In Force

Version 1 of 1

19 December 2018 - Present

Subjects
Prescription

Keywords
Negative prescription; Scotland; Short titles

18 Short title

The short title of this Act is the Prescription (Scotland) Act 2018.

General > s. 18 Short title

Key Legal Concepts Library

Statutory Annotations

Section 18

Introduction

See Key Legal Concept: **Short Title**.

Navigation Note (General):

For power to make ancillary provision see s.15; for consequential modifications see s.16; for commencement see s.17.

Background Note:

For information about the background to this Act (including Ministerial Statements) see the annotations to the Long Title / Preamble.

Case Note:

> "Once it comes into force the provisions of the Prescription (Scotland) Act 2018 will supersede those of the 1973 Act. In the meantime the proper approach to section 11(3) has been authoritatively determined by the decisions in Morrison and Gordon's Trs. In short, the pursuers knew of the objective facts which amounted to 'loss, injury or damage' in terms of both subsections (1) and (3) as and when they occurred. In particular it was known that the walls had been built and that houses had been sold. There is no scope for a postponement of the start of the five year prescriptive period until the pursuers were told of the problem. The decision in Morrison was by a narrow majority, and after it

there remained doubt as to whether its reasoning should be applied to economic loss. The concern was that while known physical damage would generally be easily recognisable as harmful, the same may not apply to financial matters. Such doubts were addressed and resolved in Gordon's Trs." (*WPH Developments Ltd v Young & Gault LLP (In Liquidation) [2021] CSIH 39*.)

para. 1

Version 1 of 1

28 February 2025 - Present

Subjects
Prescription

INTRODUCTION

1. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Prescription (Scotland) Act 2018. They do not form part of the Act and have not been endorsed by the Parliament.

2. The Notes should be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section, or a part of a section, does not seem to require any explanation or comment, none is given.

THE ACT – COMMENTARY ON SECTIONS

3. The Prescription (Scotland) Act 2018 makes changes to the law of negative prescription to address certain issues which have caused or may cause difficulty in practice. These changes are designed to increase clarity, certainty and fairness as well as promote a more efficient use of resources. The Act makes amendments to the Prescription and Limitation (Scotland) Act 1973 ("the 1973 Act").

The structure of the Act

4. Sections 1 to 5 of the Act make provision in relation to the five-year prescription provided for in section 6 of 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 rights) after a period of five years has elapsed, provided that various conditions are met. Sections 6 to 8 of the Act 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 (obligations that cannot be extinguished by the law of prescription, such as a real right of ownership in land), in terms of schedule 3 of the 1973 Act, and those relating to reparation for personal injury/death and damage caused by defective products). The remaining sections cover miscellaneous and general matters.

Section 1- Obligations to pay damages and delictual obligations

5. 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.

6. Section 1 amends paragraph 1 of schedule 1 of the 1973 Act. Subsection (2) inserts a new sub-paragraph (d). This 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.

7. Subsection (2) also inserts a new sub-paragraph (da) into 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 sub-paragraph of paragraph 1.

8. Subsection (3) makes textual changes to section 11 of the 1973 Act to reflect new sub-paragraph (d) of paragraph 1 of schedule 1 of the 1973 Act.

Section 2 - Obligations related to contract

9. 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.

10. Subsection (2) inserts a new sub-paragraph (fa) dealing with the first type of obligation: any obligation relating to the validity of a contract. Where a contract has been induced by error or innocent misrepresentation (caused by the debtor innocently or otherwise), the contract is voidable. In other words, the contract is valid until it is set aside by the party entitled to avoid it. For example, A is induced to purchase a painting from B by B's innocent misrepresentation that the painting is by artist C. When A discovers the painting is not in fact by C, A can seek to have the contract set aside on the ground of misrepresentation and recover from B the sum paid. 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 effect of the provision 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 are subject to the five-year prescription. 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. Subsection (2) also inserts a new sub-paragraph (fb) dealing with the second type of obligation to be brought within the five-year prescription by this section: 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. Perhaps the most famous example of this concerned the Melville Monument in Edinburgh. Development of an estate in Edinburgh owned by W was to include a monument paid for by subscribers led by M. The subscribers, with W's consent, carried out preparatory work on the estate with a view to having the monument erected there. This disrupted W's other plans for the estate. Subsequently, the subscribers had the monument erected in a different place – in St Andrew's Square. W sued M. The court decided that W was entitled to recover from M any wasted expenditure incurred as a result of the monument not having been erected at the agreed location on his estate.

Section 3**- Statutory obligations**

11. 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 of schedule 1 of the 1973 Act, 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.

12. Subsection (2)(a) provides for the repeal of provisions of paragraph 1 of schedule 1 of the 1973 Act 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.

13. Subsection (2)(b) inserts a new sub-paragraph (h) into paragraph 1 of schedule 1 of the 1973 Act. Subject to exceptions set out in subsection (3) (on which see below), new 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 Act, 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. For example, the one-year limitation period, in terms of the Carriage of Goods by Sea Act 1971, for claims for loss of or damage to goods carried at sea.

14. 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) of paragraph 2 to reflect the addition to 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 new sub-paragraph (ea), in order to make it clear that such obligations of the Keeper in terms of the 2012 Act will continue to be governed by the 20-year prescription.

15. Subsection (3)(b) sets out further exceptions to the application of the five-year prescription to statutory obligations to make a payment. First, notwithstanding sub-paragraph (h) of paragraph 1 of schedule 1 of the 1973 Act (statutory obligations to make a payment), obligations to pay taxes and duties recoverable by the Crown (i.e. HM Revenue and Customs and Revenue Scotland which, as part of the Scottish Administration, is a Crown body), and any interest, penalty or other sum recoverable as if it were an amount of such taxes or duties, are not subject to the five-year prescription (new sub-paragraph (fa)). Secondly, an exception is made for obligations to pay sums recoverable under certain social security and tax credit legislation (new sub-paragraph (fb)). Thirdly, an exception is made for any obligation to pay child support maintenance under the Child Support Act 1991 (new sub-paragraph (fc)). 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 (new sub-paragraph (fd)).

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

16. 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.

17. 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 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.

18. Subsection (3), which inserts new subsection (4A) into section 6 of the 1973 Act, 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.

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

19. Subsections (2) and (3) provide for the replacement of the words "act, neglect or default" with the words "act or omission" in section 11(1) and (2) of the 1973 Act respectively. 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. Subsections (4) and (5) replace the existing 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. 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) of section 11 of the 1973 Act:

(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.

21. 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.

22. 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.

Section 6**- Obligations: 20-year prescriptive period and extension**

23. 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. Subsection (2)(a) substitutes a new subsection (1) into section 7. The 20-year prescriptive period will no longer be amenable to interruption by a relevant claim or by relevant acknowledgement which has the effect of a full 20-year period starting again. The amendment is achieved through omitting any reference to such a claim or acknowledgement.

24. To complement this amendment, subsection (2)(b) provides for the insertion of new subsections (3) to (5) into section 7 of the 1973 Act. 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.

25. 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 new subsection (4)(b) of section 7 of the 1973 Act 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 (for example in relation to the enforcement of a separate obligation under the same contract) in order to seek an extension of time.

26. New subsection (5) of section 7 of the 1973 Act 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 Act.

27. Subsection (3) of section 6 of the Act 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.

Section 7**- Property rights: 20-year prescriptive period and extension**

28. In the same way as section 6 of the Act 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.

29. Section 8 of the 1973 Act deals with the extinction of certain rights relating to property by a 20-year prescriptive period. Subsection (2) of section 7 of the Act 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.)

30. Subsection (3) replicates the provision made by section 6 of the Act 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 Act. Where the 20-year prescriptive period is extended to the end of proceedings raised before the expiry of that period, then at the end of those proceedings where the relevant claim has been successful, the right is deemed to

have been exercised or enforced at the time when the claim was made. The result is that a new 20-year prescriptive period starts to run at that time. This deeming provision applies only where the 20-year prescriptive period is extended by the amendments made by subsection (3) and only where the claim, as finally disposed of, is successful.

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

31. 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 debtor should be able to arrange his or her affairs on the assumption that any risk of litigation has passed.

32. 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.

33. 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.

Section 9**- Saving for other statutory provisions about prescription or limitation**

34. 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.

35. 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 is 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 may be unlikely that this will be an issue of significance in practice.)

36. 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.

Section 10 - Definition of *"relevant claim"*

37. Section 9 of the 1973 Act defines *"relevant claim"* for the 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 (process for a company in debt that cannot pay the money it owes) nor receivership (a receiver is appointed by a party holding a floating charge over some or all of the company's assets) is.

38. 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.

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

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

40. 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.

41. 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 two-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.

42. 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 Act 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.)

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

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

Section 12 - Definition of *"final disposal"* of relevant claim

45. 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 – see new section 9A(1).

46. 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.

Section 13**- Restrictions on contracting out**

47. 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.

48. 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. The provision refers to "the same obligation" rather than the particular creditor or debtor in the obligation. This means that it is not possible to get round the restriction which prevents more than one extension of the prescriptive period by assigning the obligation to a new creditor or debtor. That is because, even if there is an assignation, it remains "the same obligation".

49. 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.

50. 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.

51. 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 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.

52. This will not impact on the current practice in fields such as conveyancing where the parties enter into contractual limitation provisions. Such provisions do not extinguish obligations and, accordingly, are not provisions relating to prescription.

Section 14**– Burden of proof**

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

54. Subsection (1) of new 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.

55. 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 intended 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.

56. The subsection refers to the *"creditor"* in its application to property rights under section 8, as the 1973 Act already uses *"creditor"* in relation to the holder of a property right (section 9(2) is an example).

57. 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).

Section 15**– Ancillary provision**

58. This section allows the Scottish Ministers to make ancillary provision by regulations. Generally, such regulations are subject to negative procedure but any regulations which add to, replace or omit any part of the text of an Act are subject to the affirmative procedure.

Section 16**– Consequential modifications**

59. This section removes an amendment to the Prescription and Limitation (Scotland) Act 1973 Act ("the 1973 Act") made in the recent Social Security (Scotland) Act 2018 ("the 2018 Act") and the provision in the 2018 Act making that amendment. The amendment inserted a new provision into schedule 1 of the 1973 Act making recovery of devolved social security overpayments subject to a five-year prescription period. Such recovery will fall under the general rule contained at section 3.

Section 18– **Short title**

60. The short title of the Act (i.e. the Prescription (Scotland) Act 2018) is provided for by this section.

PARLIAMENTARY HISTORY

61. The following is a list of the proceedings in the Scottish Parliament on the Bill for the Act and significant documents connected to the Bill published by the Parliament during the Bill's parliamentary passage.

Proceedings and reports	***References***
Introduction	
Bill as introduced (09 February 2018)	SP Bill 26 (Session 5 (2018))
Policy Memorandum (09 February 2018)	SP Bill 26-PM (Session 5 (2018))
Explanatory Notes (09 February 2018)	SP Bill 26-EN (Session 5 (2018))
Financial Memorandum (09 February 2018)	SP Bill 26-FM (Session 5 (2018))
Statements on Legislative Competence (09 February 2018)	SP Bill 26-LC (Session 5 (2018))
Delegated Powers Memorandum (09 February 2018)	SP Bill 26-DPM (Session 5 (2018))
SPICe briefing (15 March 2018)	Sb 18-22
Stage 1	
Delegated Powers and Law Reform (lead committee)	
Consideration in private (27 February 2018)	Minutes of proceedings (DPLR/S5/18/6/M)
Consideration in private (06 March 2018)	Minutes of proceedings (DPLR/S5/18/7/M)
Evidence session (20 March 2018)	Official Report (cols. 2 to 15)
Evidence session (27 March 2018)	Official Report (cols. 2 to 32)
Evidence session (17 April 2018)	Official Report (cols. 2 to 20)
Evidence session (24 April 2018)	Official Report (cols. 3 to 18)
Evidence session (01 May 2018)	Official Report (cols. 2 to 24)
Consideration in private (08 May 2018)	Minutes of proceedings (DPLR/S5/18/16/M)
Consideration in private (05 June 2018)	Minutes of proceedings (DPLR/S5/18/20/M)
Consideration in private (12 June 2018)	Minutes of proceedings (DPLR/S5/18/21/M)
Stage 1 Report (14 June 2018)	32 nd Report, 2018 (Session 5) (SP Paper 354)
Whole Parliament	
Stage 1 debate (27 June 2018)	Official Report (cols. 45 to 69)
Stage 2	
Consideration in private (11 September 2018)	Minutes of proceedings (DPLR/S5/18/26/M)
Consideration of amendments (Delegated Powers and Law Reform Committee, 25 September 2018)	Official Report (cols. 2 to 14)
Bill as amended at Stage 2 (26 September 2018)	SP Bill 26A (Session 5 (2018))
Revised Explanatory Notes (04 October 2018)	SP Bill 26A-EN (Session 5 (2018))
Stage 3	
Stage 3 debate (08 November 2018)	Official Report (cols. 68 to 98)
After Passing	
Royal Assent (18 December 2018)	Prescription (Scotland) Act 2018 (asp 15)

Explanatory Note > para. 1

Vipond Fire Protection Ltd v SPP Pumps Ltd

LIVINGSTON SHERIFF COURT

SHERIFF DOUGLAS A KINLOCH

6 MARCH 2020

[2020] SC LIV 20

Prescription and limitation — Practice — Amendment — Competency — Statute providing for action for contribution to damages to be raised within two-year time limit — Action brought within two years but pursuers seeking to add a new case outwith the time limit — Whether competent — Law Reform (Miscellaneous Provisions) (Scotland) Act 1940, ss. 3 and 8A.

Section 3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 provides that any person who has paid damages is entitled to recover a contribution towards those damages from any other person "who, if sued, might also have been held liable".

A service engineer was injured in an accident at work which took place on 17 January 2013 when he was servicing a pump machine. He subsequently sued his employers for damages on the basis of their alleged negligence. His action settled out of court, and on 8 February 2016 an interlocutor was pronounced in terms of which the employers were found liable to pay him agreed damages. His employers then sued the manufacturers of the pump seeking a contribution from them towards the sum which they had paid in damages. The employers' action was based on s.3 of the 1940 Act. Section 8A of the 1940 Act provides that any such action is subject to a prescriptive period of two years. It was accepted by the employers that they had to show that the defenders had been negligent before the defenders could be ordered to make payment of a contribution to the damages. The employers' action was raised in November 2017, being within the two-year prescriptive period, which commenced on 8 February 2016. In March 2019, more than two years after the commencement of the prescriptive period, the employers sought to amend their pleadings by introducing a new case of negligence based on faulty design of the pump machinery.

The defenders took the case to debate in order to argue that: (i) the case sought to be introduced by amendment was time barred; (ii) that even if it was not time barred, it was not sufficiently specific to be allowed to proceed; and (iii) that, in any event, the whole case was lacking in specification and should not be allowed to proceed to probation. The pursuers argued that: (i) in relation to actions based on s.3 of the 1940 Act, the question of whether it was time barred was to be tested at the date that the action was raised, and not at the date when the amendment was proposed, as the action was based on a single

obligation — namely the obligation to make a contribution to damages under s.3; and (ii) that if this was not correct, then the proposed amendment did not introduce a new case, only a development of the existing case, and was not therefore time barred.

HELD

1. That while it might be correct that the employers founded on a single obligation, namely to contribute to the damages which they had paid, and while this might give rise to a single starting point for the two-year prescriptive period, it did not follow that the employers were relieved of the need to put forward within two years from raising their action all the separate grounds on which they said that the defenders had been negligent. To take this view would put the employers in a preferential position compared to other pursuers faced with a time bar period, and would go against the purpose of the rules on prescription which seek to prevent stale claims. It would create a special category of case where the pursuer in a claim for contribution would be allowed to present a new case at any time, and the proposed amendment was accordingly time barred and should be refused [para.25];

2. That the case based on faulty design was a new case and not merely a development of the existing case, and the proposed amendment should also be refused as time barred on that ground [para.29];

3. That the proposed amendment was, in any event, lacking in specification and ought not to be allowed [para.32]; and

4. That the original action as a whole was sufficiently specific, and should be allowed to proceed to probation [para.37].

ACTION OF DAMAGES

Vipond Fire Protection Ltd raised an action of damages against SPP Pumps Ltd. The action called for debate before the Sheriff (Douglas A Kinloch) at Livingston Sheriff Court.

STATUTORY PROVISIONS

The relevant statutory provisions appear sufficiently in the judgment.

TEXTBOOKS REFERRED TO

D. Johnston, *Prescription and Limitation*, 2nd edn, (W. Green, 2012).

Macphail, *Sheriff Court Practice*, 3rd edn, (W. Green, 2006).

E. J. Russell, "Contribution causes confusion" 2010 S.L.T. (News) 169.

The Laws of Scotland: Stair Memorial Encyclopaedia, (LexisNexis), Vol. 16.

Walker, *The Law of Delict in Scotland*, 2nd edn, (W. Green, 1981).

CASES REFERRED TO

Dormer v Melville Dundas & Whitson Ltd, 1989 S.C. 288; 1990 S.L.T. 186; 1989 S.C.L.R. 587.

Farstad Supply AS v Enviroco Ltd, [2010] UKSC 18; [2010] Bus. L.R. 1087; [2010] 2 Lloyd's Rep. 387; 2010 S.C. (U.K.S.C.) 87; 2010 S.L.T. 994.

Glasgow City Council v First Glasgow (No.1) Ltd, [2019] CSOH 101; 2020 S.L.T. 75; 2020 Rep. L.R. 12.

THE SHERIFF (DOUGLAS A KINLOCH).—

Note

[1] This case called before me at Livingston Sheriff Court on 10 January and 5 February 2020 for debate on the defenders' preliminary plea and on their second plea in law which relates to prescription. The pursuers were represented by Mr Pugh, Advocate, as instructed by Clyde & Co, Solicitors, Edinburgh, and the defenders by Mr Manson, Advocate, as instructed by BTO, Solicitors, Glasgow. The action had originally been raised in the Court of Session but was remitted to Livingston Sheriff Court by interlocutor dated 25 January 2018 after the pursuers amended the sum for which they sued so that it came below the privative jurisdiction of the Sheriff Court.

[2] The first issue with which I wish to deal is whether part of the pursuers' case as introduced by amendment is a new case which is excluded by the operation of prescription. This issue is said to involve a novel point regarding the operation of prescription under the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 which has not been considered by the Scottish courts before. In order to understand the arguments, it is necessary to set out the background circumstances which led to the action being raised.

Background circumstances

[3] The background to the action is that on 17 January 2013 a Mr Alan Derwin was injured in an accident which occurred during the course of his employment as a service engineer with the pursuers (Vipond). He was servicing a pump which a company called WL Gore & Associates, based in Livingston, had installed in their premises as part of their fire sprinkler system. WL Gore had purchased the pump from the present defenders, SPP Pumps Ltd, and the pump was installed in WL Gore's premises in 2007 by another company called SPIE Matthew Hall. That company (SPIE Matthew Hall) placed the pump machinery in the correct position in the premises and connected it to the pipework for the sprinkler system. Having been installed the pump machinery was "commissioned", that is brought into service, by two employees of the defenders, a Mr Lennon and a Mr Cunningham.

[4] The pump was in fact quite a large piece of machinery, and it is shown in a number of photographs lodged by the present pursuers in their second inventory of productions. The pump machinery consisted of a diesel engine which was attached to a pump by a coupling system, and the pump was then attached to the fire sprinkler system.

[5] After the machinery was installed it was serviced by the defenders in November 2009 and May 2010. Another company called MB Firepumps Ltd then took over servicing of the pump and carried out periodic inspections for a period after May 2010. At some point after that the pursuers were taken on to carry out the servicing of the pump machinery. Mr Derwin, the original pursuer who was injured in the accident in 2013, worked for the pursuers as a service

engineer, and was carrying out a service of the pump machinery on the day when he was injured.

[6] The accident happened, according to the present pursuers' averments in Article 3 of Condescendence, when Mr Derwin was carrying out pressure testing of the pump machinery and one of the "coupling assemblies on one of the pumps failed causing the assembly itself to be ejected from the coupling guard. Shrapnel struck Mr Derwin causing him to sustain physical and psychological injuries".

[7] After the accident Mr Derwin raised an action for damages in the Court of Session against Vipond in their capacity as his employers and also against WL Gore as occupiers of the premises. He sued for the sum of £500,000, and that action settled by Mr Derwin accepting a joint offer made by Vipond and WL Gore. That settlement resulted in the Lord Ordinary pronouncing an interlocutor on 8 February 2016 which decerned against the present pursuers and WL Gore for payment to Mr Derwin of the agreed extra judicial settlement sum together with expenses.

The present action

[8] In this action Vipond now seek a contribution under s.3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 from the manufacturers and suppliers of the pump machinery, SPP Pumps Ltd, towards the sum Vipond paid to Mr Derwin in order to settle his action against them. Section 3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 is in the following terms:

> "3. — Contribution among joint wrongdoers
>
> (1) …
>
> (2) Where any person has paid any damages or expenses in which he has been found liable in any such action as aforesaid, he shall be entitled to recover from any other person who, if sued, might also have been held liable in respect of the loss or damage on which the action was founded, such contribution, if any, as the court may deem just."

[9] It was common ground between the parties that any claim for contribution under s.3 was subject to a prescriptive period of two years. This prescriptive period comes from s.8A of the 1940 Act which is as follows:

> "8A Extinction of obligations to make contributions between wrongdoers.
>
> 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 two 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 obligations shall be extinguished."

[10] It was, again, common ground that the commencement date of the prescriptive period was to be taken as the date on which the Lord Ordinary pronounced the decree in favour of Mr Derwin, that is 8 February 2016. It was further agreed that the two-year prescriptive period had been interrupted when the present action was raised in the Court of Session in November 2017.

Prescription

[11] The question of prescription arises in this action because the pursuers amended their pleadings by way of a Minute of Amendment which was intimated to the defenders on 13 March 2019, which was more than two years after the commencement date of the prescriptive period on 8 February 2016. The defenders contend that the amendments made by the pursuers seek to introduce a new case based on faulty design of part of the machinery by the defenders (the design case). They say that the original pleadings in the present action contained no averments to the effect that the defenders had been negligent in their design of the pump machinery, and that this design case is therefore a new case which cannot be introduced after the expiry of the prescriptive period. Although the defenders' pleadings have actually been amended the pursuers seek to prevent the pleadings relating to the design case to proceed to probation.

Defenders' submissions

[12] In his submissions the defenders' Counsel stated that it was common ground that, although Vipond had paid damages to Mr Derwin, for the present pursuers to succeed with their claim against the defenders for a contribution to those damages they had to show that the defenders had also been negligent, and that their negligence had caused or contributed to the accident sustained by Mr Derwin. There is no doubt, it seems to me, and as confirmed by the recent case of *Glasgow City Council v First Glasgow* that this is correct.

[13] In relation to demonstrating negligence on the part of the defenders, Counsel for the defenders' position was that originally Vipond had averred in the present action that the defenders were vicariously liable for negligence by the defenders' employees when servicing the machinery. He argued, however, that a second ground of alleged liability was introduced after the expiry of the two-year prescriptive period. At that point Vipond amended their pleadings to introduce a case based on faulty design of a part of the pump machinery. That second ground of alleged liability was therefore said to be a new case against the defenders which was introduced after the expiry of the two-year prescriptive period, and was accordingly time-barred.

[14] The defenders' Counsel referred me to well established rules as to when averments which are sought to be introduced by amendment will be seen as being time-barred and accordingly ruled to be inadmissible. These rules are summarised in, for instance, the textbook *Prescription and Limitation* by David Johnston, at p.415. There it is said as follows:

> "There is an important preliminary point. At the stage of amendment the court has a discretion to allow or to refuse receipt of a minute of amendment … It is now settled that the question of whether to allow amendment is a matter of discretion rather than competency. In the case of prescription, whether a right or obligation still exists is the substantive question … In many cases what will be at issue is whether the minute of amendment

> actually does introduce … a new claim which is alleged to have prescribed or whether it is simply an elaboration of a claim which was raised in time … if the minute of amendment merely adds to or substitutes grounds for making a claim in relation to the original obligation or is a reformulation of that claim but does not proceed on a fundamentally different basis, it will raise no issue about prescription."

[15] Lord Macphail, in *Sheriff Court Practice*, also deals with the question of the extent to which amendment may be permitted after the expiry of the prescriptive period at paras 10.33 onwards. It is said at 10.34 as follows:

> "General principles as to the making of amendments by a pursuer after the expiry of a time limit were stated by Lord Justice Clerk Cooper in a dictum in *Pompa's Trustees v Edinburgh Magistrates* which has been very frequently cited. It may be paraphrased thus: after the expiry of a time limit which would have prevented him from raising proceedings afresh, a pursuer will not in general be allowed by amendment: … (iii) to change the basis of his case … In the absence of a statutory provision making it incompetent to amend in an action which has itself been brought within the time limit, the allowance of an amendment is a pure question for the discretion of the court in all the circumstances of the particular case …"

At 10.37 it is said as follows:

> "There is also room for debate over whether a proposed amendment "changes the basis of" the pursuer's case. In *McPhail v Lanarkshire County Council* it was said that a permissible amendment is one which changes "not the basis of the action so much as the method of formulating the ground of action" … There is, however, no clear-cut dividing line of really practical application for determining whether amendment should be allowed, and the question in any particular case is inevitably one of degree."

[16] Volume 16 of the Stair Memorial Encyclopaedia has a short section which deals with amendment of the pursuer's case after the expiry of the time-bar period. It is at section 2157 onwards, and in those sections the cases of Pompa's Trustees and McPhail are also referred to.

[17] Leaving aside for the moment the separate question as to whether the design case is simply a development of the original case against the defenders, to which question I will return, the defenders' counsel in accordance with the principles set out above accordingly submitted that the design case, being a new ground of liability, could not be added by way of amendment after the expiry of the two-year prescriptive period. It ought to be deleted and should not be allowed to proceed to probation.

Pursuers' submissions

[18] The pursuers' Counsel offered two responses to this argument. The first was that the design case was not a new case, but rather was just an elaboration of the case that was there before. I will return to this argument. The second response is more complicated, and therefore more difficult, and it was said to involve an argument that has not been considered before by the Scottish courts. I will deal with this argument first.

[19] The argument advanced on behalf of the pursuers, as I understood it, was that in relation to actions based on s.3 of the 1940 Act, the competency or relevancy of the present pursuers' case was to be tested at the date that the present action based on a right of contribution was raised. The reason for this, Counsel for the pursuers argued (as I understood him), was that the action for relief was based on a single obligation, namely the obligation which arose under s.8A of the 1940 Act "to make a contribution by virtue of s.3(2)" of the 1940 Act. As the action was based on a single obligation, then, he argued, there was only a single date which applied to determine time bar issues. According to the argument, once the two year prescriptive period had been interrupted by raising a court action, the pursuer was at liberty to add and to plead as many different grounds of action as he wished because the competency of all of the grounds of action was to be tested as if they had been put before the court when the action by the present pursuers was raised. This was to be contrasted with other situations where a party might be able to sue on a variety of different obligations which all arose out of one transaction, and all of which might therefore have their own different starting points for the time bar period. Here there was only one obligation being founded upon, which gave rise to one prescriptive period, and once that was interrupted questions of time bar no longer arose.

[20] In support of his argument, if I understood it properly, Counsel for the pursuers referred me to the case of *Farstad Supply AS v Enviroco*. This was a decision of the Supreme Court, and in his judgment Lord Hope considered the situation which arises in the present action where a party has been sued and has been found liable in damages, and that party then seeks a contribution from another party who was not sued. Lord Hope commented that the defender who was found liable in damages is not prevented from seeking a contribution from the other party simply because the original pursuer would no longer be able to sue the other party because of time bar. Provided the original action against the original defender was competently brought, then the original defender can seek a right of relief and contribution against any other party who might have sued, even although the original pursuer's claim against the other party would be time-barred by the time the action for contribution and relief is brought. This is my understanding of the following passage at p.99 by Lord Hope:

> "Secondly, the defender is not disabled from seeking relief against the third party by reason of the fact that the pursuer's claim against him has been held to have been, or would be time-barred … This is because the words 'if sued' assume that the third party has been 'relevantly, competently and timeously sued' by the pursuer … The question whether the third-party has been sued 'relevantly, competently and timelessly' falls to be tested at the date when the pursuer sued the person who is seeking relief. It is enough that he could have sued the third-party at that date" [my emphasis].

The pursuers' Counsel argued that the reasoning in

Farstad applied also to the present case, and meant that all questions as to time bar had to be considered and tested as at the date Vipond's action was raised. He argued that as the present action had been relevantly, competently and timeously brought against the defenders in November 2017, the question of time bar, and whether a new case was time-barred, could not now be looked at in relation to any different date.

Decision on prescription

[21] I can deal with the case of *Farstad* quite briefly because all that it decided, as I understand it, is that although it would not have been open to Mr Derwin to sue the present defenders in 2017 (when Vipond raised the present action) as his case would have been time-barred by then, that did not prevent Vipond from suing them. The reason for this, as I understand it, is that it has to be assumed that if Mr Derwin had also sued the present defenders as well as the present pursuers in 2017, then his action would have been within the limitation period, and it would have been a good case, that is, relevantly pled, and would not have been dismissed.

[22] Thus it is said in an article on s.3 by Eleanor J Russell, to be found in 2010 S.L.T. (News) 169 as follows:

> "The phrase 'any other person who, if sued, might also have been held liable' was subject to detailed consideration in *Farstad* … Further consideration was given to the expression 'if sued' in *Dormer v Melville Dundas & Whitson Ltd* 1989 S.C. 288, 1990 S.L.T. 186. A personal injuries action was raised against the defenders about a month before the expiry of the three-year limitation period. The defenders brought a third party into the proceedings and the pursuer thereafter amended his conclusion to seek decree against the third party. The pursuer's action as against the third-party was dismissed as time-barred but the Inner House held that the fact that the pursuer sued the third-party out of time did not have the effect of destroying the defenders' right of relief against the third party. This was because the words 'if sued' assume that the third-party has been 'relevantly, competently and timeously sued' by the pursuer — in other words, that all the essential preliminaries to a determination of the other party's liability have been satisfied … It is clear from *Dormer* that the question of whether the third-party has been sued 'relevantly, competently and timeously' falls to be determined at the date when the pursuer sued the person who is seeking relief. If, at that date, the pursuer could have sued the other wrongdoer, then the party sued can seek a contribution from that other wrongdoer, whether or not the pursuer's claim against that other wrongdoer became time-barred thereafter."

[23] So even although the present defenders were not sued by the original pursuer, and even although the original pursuer's claim against the present defenders would now be time barred, the present action is competent. And even if the original pursuer had sued the present defenders but his action against them had been hopelessly irrelevant (in terms of the case pled) and would have been dismissed, that does not matter. The right of relief against the third party still exists. That is the extent of *Farstad* and I cannot see that the reasoning goes beyond that in a way which might assist the defenders.

[24] Leaving aside *Farstad*, none of the textbooks referred to above suggest that there is any special category of claim which has its own special rules in relation to amendment of pleadings after the expiry of a time-barred period, whether that is a limitation period or a prescriptive period. The inference from this, to my mind, is that the rules regarding the introduction of a new case by amendment after the expiry of a prescriptive period apply to all cases.

[25] This inference supports the conclusion to which I have come, which is that the argument advanced by the pursuers' Counsel cannot be correct. I think that the fallacy of it, in my very respectful view, is that while it may well be correct that the present pursuers found on a single obligation (to contribute to the damages paid by Vipond), and while it must therefore follow that it is also correct that this single obligation gives rise to a single starting point for the two-year prescriptive period, it ignores the fact that there may be a variety of different grounds on which it is said that the defenders were negligent. The argument, in my respectful view, ignores the need to put forward all the separate grounds of action, even if based on a single obligation, within the prescriptive period. While the present pursuers had two years from the date that the obligation was created (namely the date of the Lord Ordinary's interlocutor) to raise a court action, that does not then mean that as the action was raised within that period they are free for ever more from time bar considerations. In my view the correct position is that the present pursuers had two years from the date of the Lord Ordinary's interlocutor to advance all the grounds of action they considered to be competent, but once the two-year period had expired it was not open to them to advance any new, separate, ground of action. To take any other view would, in my view, put the present pursuers in a preferential position in comparison with virtually every other, or possibly every other, pursuer faced with a time bar period. It would go against the purpose of the rules on prescription which seek to prevent stale claims. It would create a special category of case where, unlike, as far as I am aware, every other case, the pursuer in a claim for contribution would be allowed to present any new case at any time, even after the expiry of the relevant prescriptive period.

[26] I accordingly reject the argument put forward on behalf of the pursuers. The design case is not saved, in my view, from being time-barred by virtue of an approach which requires the question of time bar to be looked at once only, as at the date the present pursuers' action was raised.

[27] I will accordingly delete the averments introduced by amendment and as relating to the design case and refuse to remit them to probation.

Is the design case a new case?

[28] In case I am wrong in the conclusion to which I have come, I must now return to deal with the other argument put forward by Counsel for the pursuers. He also argued that the design case was not a new case, but only an elaboration or reformulation of the original claim which was raised in time. In support of that

argument he referred me to Walker, *The Law of Delict in Scotland* pp.608–621. There, under the heading "Dangerous Goods" Prof. Walker explorers various grounds of fault which may give rise to a liability in delict on the part of the manufacturer, such as a defect in design, a failure in the course of the manufacturing process, the inadequacy of the container, in the assembly or repair of goods, and so on. The relevance of that seemed to be the idea that all these grounds of liability were linked. The argument, as I understood it, was that the original case referred to and founded upon the failure of the present defenders to fit a guard to the pump which would retain the parts which escaped and injured Mr Derwin. It was said that every piece of machinery has to be designed, and therefore Vipond had always effectively been founding upon what was said to be the faulty design of the guard.

[29] This argument does not really give me any difficulty. The original pleadings did not contain any explicit reference to the defenders being negligent in their design of any part of the pump machinery prior to the Minute of Amendment. The case was based on errors said to have been made by the defenders' employees when servicing the machinery. The design case in my view is plainly a new ground of liability, and therefore a new case. It is a case based more than simply the fact that the guard, according to Vipond's averments, did not work and did not do what it was supposed to do. The design case is based on the negligent design of the guard by the defenders. I do not therefore see it as being in any way an elaboration or reformulation of the original case. On that basis it is also my view that the averments introduced by way of minute of amendment are time-barred.

Is the design case lacking in specification?

[30] I need also to deal with the defenders' further, and separate, subsidiary argument that the design case as contained in the averments added by amendment is lacking in specification, and is therefore irrelevant.

[31] The pursuers' averments regarding the design case are largely contained in condescendence 10. There it is said, in a few sentences, that: "the defenders were under a duty to take reasonable care to design and fit a guard over the coupling that retained the rotating parts in the event of an accident". The defenders criticise these averments as being lacking in specification. I think there is merit in that criticism. There is no explanation as to whether the admirable goal advanced is actually achievable or is just a bald assertion. It is also averred that the defenders had "a duty to take account of relevant guidance, as condescended upon above". Even when that averment is read together with previous averments it is not clear to me what relevant guidance is being referred to, which the pursuers say the defenders should have taken into account.

[32] In my view, the defenders need to know, as a matter of fair notice, in what way they are said to have been negligent in their design of the guard. They need to know, for example, whether it is said that other manufacturers had designed guards in different and more effective ways, and that the defenders should have known about this. Or that there was a body of knowledge which they should have taken into account in designing the guard, but did not. I accept that having averments of this nature is not an absolute requirement in every case as there must be cases where circumstances are unusual and where consequently no standard practice exists. In that kind of case it may be that the pursuer can succeed by showing that the defender failed to take care that was patently and self-evidently necessary. There is however no suggestion by the present pursuers, as I read their pleadings, that any failure in the design of the guard fell into that category. So in my view the defenders need to know in what respects it is said that in designing the guard they were careless and therefore negligent. It is not enough, in my respectful view, for the present pursuers to state simply that the guard failed to contain the parts which escaped. That does not necessarily mean that the design was faulty. Some pieces of equipment can fail to work for reasons which cannot be predicted, and the simple fact that equipment fails is not necessarily indicative of negligence. Nor is it sufficient for there to be a somewhat vague reference to a duty on the defenders to take into account "relevant guidance". In my view the design case is also lacking in specification, and I would have excluded it from probation on that ground also.

[33] I have therefore been persuaded by the defenders' subsidiary argument that the design case is lacking in specification, and for that reason also, even if it is not time barred, and even if it is not a new case, I will delete the averments.

Is the action as a whole irrelevant?

[34] The next question is whether, as the defenders argue, the action as a whole should be dismissed as being irrelevant. Logically, this question should perhaps have come first, but it was convenient to deal with the prescription point, being a novel one, at the outset.

[35] The present pursuers' averments do not contain very much detail as to how the accident happened. It is said in art.3 of condescendence that Mr Derwin was carrying out pressure testing of the pump machinery and the accident is described as follows: "During the pressure tests, one of the coupling assemblies on one of the pumps failed causing the assembly itself to be ejected from the coupling guard. Shrapnel struck Mr Derwin causing him to sustain physical and psychological injuries." Vipond aver that the reason for this happening was that a "coupling" on the driveshaft which connected the diesel engine with the pump had become prone to movement as a result of incorrect tightening of "grub screws" which held the coupling to the driveshaft. It appears to be averred, although I find the averments somewhat difficult to follow, that the grub screws were not tightened properly at the time the pump machinery was supplied by the defenders to WL Gore. It is also averred that one of the defenders' service engineers noted in November 2009 during a service of the pump machinery that the coupling had moved. It is averred that this employee should have tightened the grub screws to the "relevant level of torque", and had that been done the coupling would not have moved. It is averred that the failure to ensure that the grub screws were at the correct torque amounted to negligence of

both the defenders and their service engineer, for whose negligence the defenders are vicariously liable.

[36] The defenders' Counsel argued that the present pursuers' averments do not properly explain the nature of the accident and what actually caused it. He contrasted the averments in condescendence 3 which refer to the "assembly itself" being ejected from the coupling guard, which in turn caused "shrapnel" to hit Mr Derwin, with the averments in condescendence 9 which refer to "rotating parts" being ejected. He argued that it was not clear on the averments why inadequately tightened the grub screws would have resulted in the ejection of any parts.

[37] In my view the present pursuers' averments, although, I think, somewhat sparse, and somewhat difficult to follow, are sufficient to allow the action to proceed to proof. In my view it is reasonably clear, just what case of negligence the present pursuers are averring. As I read the pleadings they are based on the fundamental premise, which must surely be a matter of common sense, that if a moving part is not properly tightened then it may come loose, and that could eventually cause danger by virtue of the moving part being ejected. The case being made out, as I understand it, is that the defenders failed to take reasonable care to ensure that certain "grub screws" were tightened properly when the pump was supplied by them. There is an additional case that the defenders are vicariously liable for failure of their employees to tighten the screws during servicing which took place in 2009. There is a further case that the guard fitted by the defenders was not sufficient to retain the parts which were ejected, and that the defenders should have known about this. There is also further amplification of the reasons for movement which are contained in the present pursuers' averments in condescendence 7 which help explain the circumstances of the accident and why the defenders are said to be to blame.

[38] All of these averments are in my view sufficient to give the defenders fair notice of the case being made out against them, and why they or their employees are said to have been negligent, and I will allow the action to proceed to a proof before answer, under deletion of the averments regarding the design case. I would mention that I have not deleted the averments in Article 9 starting with: "Explained and averred …" and which continue down to "… flywheel adaptor" as they do not relate solely, in my view, to the design case.

[39] I have put the case out for a hearing to determine further procedure, and to deal with the question of expenses.

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Counsel for the Pursuers, Pugh; Solicitors, Clyde & Co — Counsel for the Defenders, Manson; Solicitors, BTO, Glasgow.

drawal and the tactics to be employed, are entirely within the discretion of the officers of the fire service, and entirely outside the control of the occupier. It would therefore be quite unreasonable to expect the occupier to foresee the course of events, and in particular the probability that a particular means of egress will be used.

For all these reasons I am of opinion that the respondents, as occupier of those premises, owed no duty to firemen such as the appellant's deceased husband who entered the premises for the purpose of fighting a fire there, to provide them with a means of access and egress which would remain safe during the fire.

I would dismiss this appeal, and find the appellant liable for the respondents' costs in this House.

LORD KEITH OF KINKEL.—My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Fraser of Tullybelton. I agree that for the reasons given by him this appeal should be dismissed.

APPEAL dismissed.

Robin Thompson & Partners for Courtney, Crawford & Co.—Davies Arnold & Cooper for Simpson & Marwick, W.S., and Mackintosh & Co., Glasgow.

DUNLOP v. M'GOWANS

No. 4.
Mar. 6, 1980.

Viscount Dilhorne, Lords Edmund-Davies, Fraser of Tullybelton, Russell of Killowen, Keith of Kinkel.

JAMES ROBERT WIGHT DUNLOP, Pursuer (Appellant).—*Morison, Q.C.—Gill.*
M'GOWANS AND OTHERS, Defenders (Respondents).—*Cullen, Q.C.—Johnston.*

Prescription—Quinquennial prescription—Period—"Appropriate date" as terminus a quo—Date on which obligation to make reparation became enforceable—"Date when the loss, injury or damage occurred"—Prescription and Limitation (Scotland) Act 1973 (*cap.* 52), *secs.* 6*, 11,† 14 (1),§ *Sch.* 1, *para.* 1 (*d*), (*g*).¶

Prescription—Period—Transitional provision—Introduction of new extinctive quinquennial prescription—Limited retrospective effect—"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"—Prescription and Limitation (Scotland) Act 1973 (*cap.* 52), *sec.* 14 (1).§

A firm of solicitors failed to serve a notice to quit on a tenant timeously, *i.e.*, 40 days before Whitsunday 1971. As a result their client was

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* Sec. 6 of the Prescription and Limitation (Scotland) Act 1973 provides *inter alia*: "(1) If, after the appropriate date, an obligation to which this section applies has subsisted for a continuous period of five years—(*a*)

unable to obtain vacant possession until Whitsunday 1972. On 3rd November 1976 the client raised an action against the agents, based on negligence and breach of contract. It was argued in their defence that any obligation to make reparation had been extinguished by the quinquennial prescription in terms of sec. 6 of the Prescription and Limitation (Scotland) Act 1973, the *terminus a quo* of the prescriptive period being at latest Whitsunday 1971, when the client suffered loss, injury or damage. For the client it was maintained that (*a*) the prescriptive period started to run only when loss actually occurred; thus each item of loss arising after 3rd November 1971 was unaffected by prescription; (*b*) in any event the terms of sec. 14 (1) (*a*) meant that the period from Whitsunday 1971 to the commencement of Part I of the Act on 25th July 1976 could not be taken into account in computing the prescriptive period.

Held (*aff.* judgment of Second Division) (1) that the prescriptive period began when the obligation to make reparation became enforceable, *i.e.*, when there was a concurrence of *injuria* and *damnum*. (2) That sec. 11 (1) of the Act of 1973 afforded no warrant for splitting up the loss, injury or damage caused by an act, neglect or default. (3) That an obligation to make reparation for such loss, injury and damage was a single and indivisible obligation, and only one action could be prosecuted for enforcing it. (4) That the right to raise such an action accrued when *injuria* concurred with *damnum*. (5) That the date at which the prescriptive period had begun to run was Whitsunday 1971 when the appellant, but for the respondents' negligent omission, would have obtained vacant possession of the premises. (6) That the purpose of sec. 14 (1) (*a*) of the Act of 1973 was to allow potential pursuers, whose claims would become subject to the five-year prescriptive period on the commencement of Part I of the Act of 1973, to have the three-year period between the passing of the Act and the commencement of Part I available for the purpose of considering their position and taking timeous proceedings.

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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) 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 . . . is a reference to the date when the obligation became enforceable."

† Sec. 11 (1) of the 1973 Act provides, *inter alia*:—". . . any 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, 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."

§ Sec. 14 (1) provides *inter alia*:—"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 . . ."

¶ Sch. 1, para. 1, provides *inter alia*:—". . . section 6 of this Act applies— . . . (*d*) to any obligation arising from liability (whether arising from any enactment or from any rule of law) to make reparation; . . . (*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."

(In the Court of Session—1979 S.C. 22.)

JAMES ROBERT WIGHT DUNLOP raised an action in the Court of Session against M'Gowans, Solicitors, Dumfries, and James Bertram M'Gowan, David Crawford Kellar and K. A. Ross, the partners therof, claiming damages in respect of their failure to give tenants of subjects owned by the pursuer the notice required to terminate the lease at Whitsunday 1971. The facts of the case are set out in the speech of Lord Keith of Kinkel.

The Lord Ordinary (Stott) allowed a proof before answer, but the Second Division recalled his interlocutor and dismissed the action.

The pursuer appealed to the House of Lords and the appeal was heard on 11th February 1980.

Argued for the appellant;—The question is whether the words "on the date when the loss, injury or damage occurred" in the Prescription and Limitation (Scotland) Act 1973, section 11 (1) applied to Whitsunday 1971 or whether there was a series of appropriate dates (see section 6) each relating to the pecuniary loss which could be shown to have been suffered on or before that date. It was never enacted in the law of Scotland that the prescriptive period ran from the date of the loss as distinct from the injury or damage. An obligation arises at the start as to the making of reparation, but the nature of it may vary from time to time. Part I of the Act lays down prescriptions. Part II lays down limitations of actions in respect of proved injuries. By section 6 (1), if after the "appropriate date" a relevant obligation has subsisted for five years without a claim having been made or the obligation being acknowledged, it shall be extinguished as from the expiration of that period. The matter would have been clear if left there, but further provisions were enacted by section 11. In section 11 "injury" includes personal injuries and must mean more than the invasion of legal rights. The respondents' case depends on "the loss" meaning the whole loss resulting from the breach of duty. Minor damage might occur within five years of the breach of duty and major damage might occur 10 years later. Admittedly successive actions are not possible, but one cause of action may give rise to different rights. As each loss occurs the right to sue is extinguished after five years; but, if one has not sued for the previous loss, one can still sue in respect of the subsequent loss, subject to the five-year limitation after it occurs. The obligation relates to the whole loss, present and future, *e.g.*, if, owing to bad foundations laid in building a house, some slates fall off and the owner does not sue the builder, he can still sue later if the whole house falls down. There are only two possible interpretations of "loss, injury or damage" in section 11. One is that this occurred on the date when the pursuer was disabled from dealing with the property as he intended, or else "loss" must have been taken to have occurred in relation to the loss of rent when it would have been due, loss meaning pecuniary loss. The section is susceptible of the appellant's interpretation. If the section is ambiguous, this interpretation should be preferred as being the least restrictive construction. In the context of section 11, dealing with reparation, it is more appropriate to take the expression as describing pecuniary loss than the initial loss which results from the pursuer's inability to deal with the property as intended. Account must be taken of other subsequent items of damage: see *Pilkington* v. *Wood*, [1953] Ch. 720. What is covered by the expression in the Act is the loss, injury or damage for which the pursuer is suing in the action of reparation. The appellant's construction of section 11 (1) gives a context to its provisions, which other interpretations do not. There is no such context if the date referred to as the *terminus a quo* is the date when the obligation became enforceable, the date when the loss was only potential. The obligation in section 11 (1) is an obligation to make reparation. The obligations in section 6 (3) are wider. Unless the appellant's construction of section 11 (1) is adopted, it would only be enacting what was already enacted by section 6. The provisions of the Act show that when it is intended that the limitation period shall run from the date when the

cause of action accrues that expression is used: see section 17 (1) (*b*). The appellant's interpretation leads to a more equitable result, when the damage is continuous, than the respondents' construction, even though it might lead to a claim being made long after the act or default occurred. Reliance is placed on section 14 (1) (*a*) which directed that the time occurring before the commencement of Part I of the Act (25th July 1976) reckonable in the computation of the prescriptive period should be less than the prescriptive period of five years. Here the time occurring before the date was more than five years, and so it was not reckonable towards that period. No other provision made it reckonable and so the prescriptive period must be reckoned from that date. The appellant's construction fits section 11 (1). It is not to be assumed that the rule whereby only a single action may be raised for a single breach of duty requires that all the items of damage should be sued for. There is a simple obligation to make reparation for such loss as is claimed. Note the use of the expression "any obligation." The words "loss, injury or damage" are not appropriate words in ordinary language to indicate the loss of a legal right, the infringement of one's legal capacity. The claim here is in respect of loss of rent, not on the capital diminution of the subjects. Each element in the loss of rents would prescribe five years after it occurred, *i.e.*, fell due. One must distinguish between the situation where a person is disabled from dealing with his property which may or may not entail pecuniary loss and the case where pecuniary loss is inflicted. Reliance is placed on *West Leigh Colliery Co. Ltd.* v. *Tunnicliffe & Hepson Ltd.*, [1908] A.C. 21, 34. Compare section 1 (1) of the Public Authorities Protection Act 1893 where the expression "injury or damage" is used as in section 11 (1) of the Act of 1973. Developing damage falls within the sections. See *Huyton and Roby Gas Co.* v. *Liverpool Corporation*, [1926] 1 K.B. 146, 156-7. The words of the subsections are capable of the construction put on them by the appellants. If they are ambiguous, the construction causing least restriction to common law rights should be adopted: see section 21 (1) of the Limitation Act 1939 and section 17 (1) (*a*) of the Prescription and Limitation (Scotland) Act 1973. See also Gloag on Contract (2nd ed.) p. 726. Though prescription and limitation are separate concepts, their general nature and intention are similar. The interrelationship of the two Parts of the Act of 1973 dealing with them is witnessed by section 4. The result achieved by the appellant's construction is more convenient than any other in that slight damage which is difficult to prove may occur early. In that connection section 11 (3) does not help. The difficulty and inconvenience in quantification is illustrated by Atkin L.J. in the *Huyton* case (*supra.*). There is no ambiguity in section 14 (1) (*a*) which should be applied.

[The respondents were not called on to reply.]

At delivering judgment on 6th March 1980,—

VISCOUNT DILHORNE.—My Lords, I cannot usefully add anything to the speech of my noble and learned friend, Lord Keith of Kinkel. I agree with him that for the reasons he gives this appeal should be dismissed.

LORD EDMUND-DAVIES.—My Lords, were it not for the fact that it found acceptance by the Lord Ordinary, I would have regarded as unarguable the construction of section 11 (1) of the Prescription and Limitation (Scotland) Act 1973 urged before your Lordships by the appellant's counsel. And, despite his strenuous efforts, I respectfully remain of that view.

My reasons for so thinking are the same as those advanced in the speech of my noble and learned friend, Lord Keith of Kinkel, which I have been

privileged to read in draft. No advantage would be gained by repeating them in different (and, doubtless, less felicitous) language of my own, and I restrict myself to saying that I concur in dismissing this appeal.

LORD FRASER OF TULLYBELTON.—My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Keith of Kinkel, and I agree with it.

In addition to the reasons of principle stated in his speech for dismissing this appeal, I would add the following practical consideration. If the appellants were right in saying that each item of pecuniary loss ought to be treated as a separate loss for the purposes of section 11 (1) of the Prescription and Limitation (Scotland) Act 1973, the result would be that each item would prescribe on its own appropriate date, five years after it occurred. But there would be great uncertainty about the date on which the prescriptive period in respect of each item began. Thus the items of loss specified in the appellant's condescendence include the following:

"3. Increase in contract sum for developing upper storeys of 2/8 Queensberry Street as residential flats.		£8,142·37
4. Loss of rents on residential flats at 2/8 Queensberry Street	£6,864	
less maintenance for the appropriate period	100	
		£6,764·00"

On the appellant's argument, as I understand it, each element of the increase in the costs of development, and each element in the loss of rents would prescribe five years after it "occurred," by which is meant after it fell due. I asked counsel for the appellant how to ascertain the date or dates in which the loss due to the increase mentioned in paragraph 3 above occurred. I asked also how to ascertain the date or dates on which the loss of rents in paragraph 4 occurred, having regard to the fact that *ex hypothesi* there was no lease in operation during the period covered by the claim. Was it to be assumed that the rent would have been payable annually or monthly, or weekly, or that it accrued from day to day, and that an item of loss occurred on the date when each instalment fell due? I received no answer that satisfied me on any of these questions and I am left in complete uncertainty about the *terminus a quo* for each of these items. Apart therefore from the inconvenience, not to say absurdity, of having a multiplicity of dates, on each of which different items of loss would prescribe, there would be a great difficulty in ascertaining exactly what the dates were. Yet if the dates on which prescription starts to run cannot be ascertained with reasonable certainty, the result can only be confusion. I decline to construe the Act in a way that would, I think, produce such confusion unless I am compelled to do so by clear words. In this case, happily, I feel no such compulsion.

I would dismiss the appeal.

LORD RUSSELL OF KILLOWEN.—My Lords, the appellant attacks the decision appealed from on two grounds, the first being based upon an alleged

construction of sections 6 and 11 of the Prescription and Limitation (Scotland) Act 1973, the second and alternative (first taken before the Inner House) being based upon an alleged construction of section 14 (1) (*a*) of that Act.

Prior to the coming into force of Part I of the Act on the 25th July 1976 the period for negative prescription was 20 years.

The appellant had become the owner of a block of flats etc. which he was minded to redevelop, for which he required vacant possession. One tenancy could only be terminated on Whitsun 1971 by notice given not less than 40 days before that date. The appellant's solicitors (the respondents) in breach of their duty to the appellant failed to give such notice timeously, with the result that vacant possession could not be obtained earlier than Whitsunday 1972. The appellant took no proceedings and made no claim in respect of that breach of duty until November 1976, more than five years after the breach had resulted in inability on the part of the appellant then to obtain vacant possession and get on with his proposed redevelopment.

Section 6 provides that, if after the appropriate date an obligation to which the section applies has subsisted (without a claim being made in relation to that obligation and without acknowledgement of its subsistence) for a continuous period of five years, after the expiration of that period the obligation is extinguished. Schedule 1 covered the instant case as concerning an obligation to which section 6 applied, being under paragraph 1 (*d*) an "obligation arising from liability (whether arising from any enactment or from any rule of law) to make reparation": and under paragraph 1 (*g*) "an obligation arising from, or by reason of any breach of, a contract . . ." Section 6 (3) provided in the instant case that "the appropriate date" was "the date when the obligation became enforceable."

It was accepted for the appellant that section 6 by itself was fatal to his appeal (apart from the point under section 14 (1) (*a*)), since manifestly over five years had elapsed since Whitsun 1971. But he relied upon section 11 (1) of which the terms are as follows: ". . . any obligation (whether arising from any enactment, or from any rule of law or from, or by reason of any breach of, a contract . . .) to make reparation for loss, injury or damage caused by an 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." I observe that this echoes Schedule 1 paragraph 1 (*d*) and (*g*), while applying the word "reparation," found only in (*d*), to the whole.

For the appellant it was contended that the operation of section 11 was to produce in the case of this one breach of duty a series of "appropriate dates" for the purpose of section 6, each one relating only to what was referred to in argument as the "pecuniary loss" which could be demonstrated to have been suffered on or before that date. This was to be contrasted with what was described as only "potential loss," which would not serve to produce a *terminus a quo* as an appropriate date, albeit it could be made the subject of proceedings and a claim, if the pursuer thought fit, before it ripened into a "pecuniary loss." Therefore, claimed the appellant, although the relevant time could elapse as to some part of the loss or damage suffered, it did not follow that it would have elapsed

as to other parts: and in this it is right to say that he was not contending that more than one action could be brought for the same breach of duty.

I cannot, my Lords, accept this argument. I do not find in the Act any justification for this distinction between "pecuniary loss" and "potential loss." All is a question of quantification of the harm done by the breach of duty. The loss damage and injury suffered by the pursuer was that arising from the fact that he was unable to obtain vacant possession at Whitsun 1971 and pursue his plans for development, and it occurred then.

I am assisted in this conclusion by the fact that the argument at least in theory may postpone the application of negative prescription indefinitely. In certain circumstances section 7 retains the former period of 20 years but section 11 applies also to such cases. For the appellant it was accepted that the present argument was not available when applying the 20-year period before the 1973 Act: so that if the argument were sound the 1973 Act would in certain circumstances have lessened the protection previously afforded by negative prescription, which would be an unlikely aim of the statute.

I mention without developing in detail a point made on the use in section 17 (1) (*b*) of a reference to a right of action accruing. Why, it was said, was not that phrase used if that was all that was meant? Section 17 is in a different Part of the Act, and the phrase is only used as part of the definition of a person bringing an action and in no sense as part of the description of a *terminus a quo* for limitation purposes. It can afford no guidance.

Section 14 (1) of the Act provides that in the computation of a prescriptive period: "(*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." The argument is that since the *full* period of five years had expired before that commencement (25th July 1976) none of it was reckonable towards the five-year period, and the proceedings were commenced in November 1976 well within five years of 25th July 1976. If this were right and four years 364 days had elapsed before 25th July 1976 negative prescription would operate under the Act on 26th July 1976, but if five years or more had elapsed by 25th July 1976 it could not operate until 1981. Counsel for the appellant admitted that this would be absurd and could offer no suggestion why it should have been intended. The draftsmanship is inept but in my opinion it is possible to deduce from it the intention *a fortiori* that if time occurring before the commencement of this Part and overrunning that commencement is more than the prescriptive period it shall count.

For these reasons I am of opinion that this appeal fails.

LORD KEITH OF KINKEL.—My Lords, this appeal from the Second Division of the Inner House raises questions as to the proper construction of certain provisions of the Prescription and Limitation (Scotland) Act 1973.

The admitted facts are as follows. In 1970 the pursuer purchased for purposes of redevelopment certain heritable property in Dumfries. The defenders, a firm of solicitors, acted for him in carrying through the purchase. Part of the subjects was occupied as a shop by the Dumfries and Maxwelltown

Co-operative Society Limited under a lease the terms of which provided for its termination at Whitsunday in any year upon 40 days' prior notice in writing. The pursuer instructed the defenders to take steps to terminate the lease at Whitsunday 1971. The defenders failed to give the requisite 40 days' notice, with the result that the Co-operative Society was entitled to, and did, remain in possession of the premises until the lease was duly terminated at Whitsunday 1972.

On 3rd November 1976 the pursuer raised the present action against the defenders claiming damages upon the ground of negligence or alternatively breach of contract in respect of their failure to give the Co-operative Society the notice required to terminate the lease at Whitsunday 1971. The damages claimed include sums by way of pecuniary loss some of which are said to have been incurred before and some after 3rd November 1971.

The defenders pleaded that any obligation incumbent upon them to pay damages to the pursuer had been extinguished by the operation of quinquennial negative prescription under Part I of the Act of 1973. The case came before the Lord Ordinary (Lord Stott) on Procedure Roll, and he allowed a proof before answer, holding that prescription did not operate to extinguish the defenders' liability to pay damages for losses arising after 3rd November 1971. The defenders reclaimed, and on 14th July 1978 the Second Division (the Lord Justice-Clerk, Lord Wheatley, Lords Kissen and Thomson) recalled the Lord Ordinary's interlocutor and dismissed the action. The pursuer now appeals to this House.

By section 6 (1) of the 1973 Act it is enacted: "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."

By virtue of subsection (2) and Schedule 1 to the Act, the obligations to which section 6 applies include "any obligation arising from liability (whether arising from any enactment or from any rule of law) to make reparation."

By virtue of subsection (3) the expression "appropriate date" in subsection (1) means, in relation to an obligation arising from a liability to make reparation, "the date when the obligation became enforceable."

Section 11 (1) of the Act provides: "Subject to subsections (2) and (3) below, any 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, 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."

Subsections (2) and (3) are not relevant for present purposes.

It was argued by counsel for the appellant that, on a proper construction of section 11 (1), section 6 (1) did not operate to extinguish the respondents' obligation to make reparation for those items of loss resulting from their negligence which the appellant had suffered less than five years before the raising of the action, *i.e.*, after 3rd November 1971. It was accepted that the right to recover in respect of items of loss suffered before that date

was cut off, and it was not suggested that more than one action could consistently with principle be founded on the same act, neglect or default, but it was maintained that each item of pecuniary loss was properly to be regarded separately as rendering enforceable, in respect of that particular item, the obligation to make reparation.

My Lords, I am unable to accept this argument. The language of section 11 (1) affords no warrant for splitting up, in the manner and to the effect contended for, the loss, injury or damage caused by an act, neglect or default. An obligation to make reparation for such loss, injury and damage is a single and indivisible obligation, and one action only may be prosecuted for enforcing it. The right to raise such an action accrues when *injuria* concurs with *damnum*. Some interval of time may elapse between the two, and it appears to me that section 11 (1) does no more than to recognise this possibility and make it clear that in such circumstances time is to run from the date when *damnum* results, not from the earlier date of *injuria*. The words "loss, injury and damage" in the last line of the subsection refer back to the same words in the earlier part and indicate nothing more than the subject-matter of the single and indivisible obligation to make reparation. In the present case the loss, injury and damage flowing from the respondents' negligent omission occurred at Whitsunday 1971 when the appellant, but for that omission, would have obtained vacant possession of the premises. A quantification of the loss was capable of being made at that date, notwithstanding that it would then necessarily have had to be made on the basis of estimation, and that greater accuracy might have been capable of being achieved, in the light of supervening events, at a later date. Whitsunday 1971 is therefore the date at which the prescriptive period began to run.

Support for the appellant's argument was sought to be gathered from the reference in section 17 (1) (*b*) of the Act to the accrual of a right of action, it being suggested that if section 11 (1) intended to do no more than indicate the moment of concurrence of *injuria* and *damnum* as the point from which time was to run, a similar reference would have been appropriate there. But section 17 appears in the part of the Act dealing with limitation of actions of damages for personal injuries, a topic having historically an entirely different legislative background from negative prescription. Further, the accrual of a right of action is not in section 17 (1) (*b*) laid down as the *terminus a quo* any limitation period is to run. In the circumstances no inference favourable to the appellant's argument can properly be drawn.

Counsel for the appellant submitted a further and quite separate argument founded on the provisions of section 14 (1) (*a*) of the Act, which are: "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."

The Act was passed on 25th July 1973, and Part I came into force three years later. The argument was that since more than five years had elapsed between Whitsunday 1971 and the commencement of Part I on 25th July 1976, no part of that time was to be reckoned towards the prescriptive period,

so that only the short time between 25th July 1976 and the raising of the action on 3rd November 1976 fell to be so reckoned.

This argument also must be rejected. The effect of the last part of paragraph (*a*) is that, in reckoning the prescriptive period, that part of any time occurring before the commencement of Part I which is allowed to be taken into account must be less than five years. So, for example, if ten years had elapsed before the commencement of the Act, only four years and 364 days of that time would be reckoned towards the prescriptive period, which would thus expire one day after the commencement of Part I of the Act. The evident purpose of the provision, which is a transitional one, is to allow potential pursuers whose claims will become subject to the five-year prescriptive period on the commencement of Part I, to have the three-year period between the passing of the Act and the commencement of Part I available for the purpose of considering their position and taking timeous proceedings.

My Lords, for these reasons I am of opinion that the decision of the Second Division was correct and should be affirmed. I would dismiss the appeal.

APPEAL dismissed.

Allen & Overy for J. & R. A. Robertson, W.S.—Radcliffes & Co. for Tods, Murray & Jamieson, W.S.

DAVID T MORRISON & CO LTD T/A GAEL HOME INTERIORS v ICL PLASTICS LTD

No 13
30 July 2014
[2014] UKSC 48

Lord Neuberger of Abbotsbury PSC,
Lord Sumption, Lord Reed,
Lord Toulson and Lord Hodge

David T Morrison & co ltd t/a Gael Home Interiors, Pursuers and Respondent—*Howie QC, PR O'Brien*
ICL Plastics ltd, First defenders and Appellants—*Keen QC, Springham*
ICL Tech ltd, Second defenders and Appellants—*Keen QC, Springham*
Stockline Plastics ltd, Third defenders and Appellants—*Keen QC, Springham*

Prescription – Quinquennial prescription – Appropriate date for commencement of five-year period – Pursuers aware of loss, injury or damage but not aware of whether caused by negligence – Whether prescriptive period commenced – Prescription and Limitation (Scotland) Act 1973 (cap 52), sec 11(3)

Words and phrases – ''loss, injury or damage caused as aforesaid'' – Prescription and Limitation (Scotland) Act 1973 (cap 52), sec 11(3)

Section 6 of the Prescription and Limitation (Scotland) Act 1973 ('the 1973 Act') provides, *inter alia*, ''(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 … (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.'' Section 11 provides, *inter alia*, ''(1) Subject to subsections (2) and (3) below; any 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, 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, neglect or default loss, injury or damage has occurred before the cessation of the 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, 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, 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.'' Schedule 1 provides, *inter alia*, ''1. … section 6 of this Act applies– … (d) to any obligation arising from liability (whether arising from any enactment or from any rule of law) to make reparation''.

On 11 May 2004 there was an explosion at ICL's factory in Glasgow. Nine people were killed and many others were injured. Extensive damage was caused to neighbouring properties, including a shop owned by Morrison. On 13 August 2009 Morrison began proceedings, seeking damages against ICL on the basis that the damage to its shop was caused by ICL's negligence, nuisance and breach of statutory duty. ICL defended the proceedings on the basis that any obligation owed by it had prescribed. Morrison argued that the prescriptive period did not begin to run until long after the explosion occurred, since it

was not aware, and could not with reasonable diligence have been aware that the damage had been caused by negligence, nuisance or breach of statutory duty until a much later date. In the Outer and Inner Houses the case proceeded on the footing that sec 11(3) of the 1973 Act was to be interpreted as meaning that the commencement of the prescriptive period was postponed where the creditor was not aware, and could not with reasonable diligence have been aware, that (1) loss, injury or damage had occurred and (2) it had been caused by the breach of a duty owed to him, in accordance with a number of authorities. Morrison knew that damage had occurred on the date of the explosion. In order to establish that it also knew or could with reasonable diligence have known at that date, or soon after, that the explosion had been caused by a breach of duty ICL relied on the principle *res ipsa loquitur*. The Lord Ordinary held that the principle applied and dismissed the action. An Extra Division held that it did not and allowed the reclaiming motion. ICL appealed to the Supreme Court, and raised the issue of the correct interpretation of sec 11(3) of the 1973 Act. ICL's primary case was that all Morrison needed to know was that it had suffered loss, and it needed no awareness of what had caused that loss and whether anyone had any legal liability for it. As a fall back, ICL submitted that Morrison had constructive knowledge that it had a *prima facie* case because of the doctrine of *res ipsa loquitur*. Morrison's primary case was that time did not run until it had actual or constructive knowledge that it had suffered loss caused by some actionable wrong. As a fall back it submitted that the requisite knowledge was factual, namely that it had suffered loss, that there had been an act or omission and that there was a causal link between that act or omission and that loss.

Held (*diss* Lord Hodge and Lord Toulson) that sec 11(3) of the 1973 Act requires that the creditor has to be aware only of the occurrence of the loss and not also that it had been caused by an act, neglect or default; the reasons for this interpretation are that it is the more natural reading as a matter of ordinary English; had the draftsman intended to require awareness of the cause of the loss, injury or damage before the prescriptive period would begin to run, that would have been a matter of such importance that he would have been likely to make that intention clearer; the subsection addresses the problem which could otherwise arise where there is latent damage; the postponing of prescription according to the creditor's knowledge that an act or omission was actionable would result in a number of unlikely consequences; and it was difficult to see in what sense the creditor can be ''aware'' that there has been a breach of duty in advance of a judicial determination of the issue (paras 16–34, 39, 47–57); and appeal *allowed*.

Observed that: (1) the doctrine of *res ipsa loquitur* was not relevant to ascertaining the starting point of the prescriptive period, but even if it were it could not be invoked against Morrison until there was evidence that the facts indeed spoke for themselves against ICL (paras 37, 98, 99); (2) the recommendations made by the Scottish Law Commission in its report on *Prescription and Limitation of Actions (Latent Damage and other Related Issues)* (no 122) might be recommended for adoption as a matter of law reform (paras 31, 101).

Dissenting (per Lord Hodge and Lord Toulson) that the pursuer must have actual or constructive knowledge (i) that he has suffered more than minimal loss and (ii) of the acts or omissions which caused that loss (paras 77–95).

Greater Glasgow Health Board v Baxter, Clark and Paul 1990 SC 237, *Glasper v Rodger* 1996 SLT 144, *Kirk Care Housing Association Ltd v Crerar & Partners* 1996 SLT 150, *ANM Group Ltd v Gilcomston North Ltd* 2008 SLT 835, *Pelagic Freezing Ltd v Lovie Construction Ltd* [2010] CSOH 145 *dicta disapproved*, *Smith v Fordyce* [2013] EWCA Civ 320 *dictum approved* and *Watson v Fram Reinforced Concrete Co (Scotland) Ltd* 1960 SC (HL) 92 and *Dunlop v McGowans* 1980 SC (HL) 73 *followed*.

DAVID T MORRISON & CO LTD, trading as Gael Home Interiors, raised an action of reparation in the Court of Session against ICL Plastics Ltd, ICL Tech Ltd and Stockline Plastics Ltd. The cause called for a debate on the procedure roll in respect

of the defenders' plea of prescription before the Lord Ordinary (Woolman), on 27 October 2011. At advising, on 9 March 2012, the Lord Ordinary dismissed the action ([2012] CSOH 44).

The pursuers reclaimed. The cause called before an Extra Division (Lady Paton, Lord Mackay of Drumadoon and Lady Smith) for a hearing on the summar roll, on 6 December 2012. At advising, on 14 March 2013, the court allowed the reclaiming motion ([2013] CSIH 19; 2013 SC 391).

The defenders appealed to the Supreme Court.

Cases referred to:
Adams v Thorntons WS (No 3) 2005 1 SC 30; 2005 SLT 594; 2004 SCLR 1016
Agnew v Scott Lithgow Ltd (No 2) 2003 SC 448; 2003 SCLR 426; 2003 GWD 13-443
ANM Group Ltd v Gilcomston North Ltd [2008] CSOH 90; 2008 SLT 835; 2009 SCLR 1; [2008] BLR 481; 2008 Rep LR 130
Beveridge and Kellas WS v Abercromby (No 1) 1997 SC 88; 1997 SLT 1086
Borella v Borden Co 145 F 2d 63 (1945)
Brisbane South Regional Health Authority v Taylor [1996] HCA 25; (1996) 186 CLR 541; 139 ALR 1; 70 ALJR 866
Britannia Building Society v Clarke 2001 SLT 1355
Comer v James Scott & Co (Electrical Engineers) Ltd 1978 SLT 235
Dunfermline District Council v Blyth and Blyth Associates 1985 SLT 345
Dunlop v McGowans 1980 SC (HL) 73; 1980 SLT 129
Ghaidan v Godin-Mendoza sub nom Ghaidan v Mendoza [2004] UKHL 30; [2004] 2 AC 557; [2004] 3 WLR 113; [2004] 3 All ER 411; [2004] 2 FLR 600; [2004] 2 FCR 481; [2004] HRLR 31; [2004] UKHRR 827; 16 BHRC 671; [2004] HLR 46; [2005] 1 P & CR 18; [2005] L & TR 3; [2004] 2 EGLR 132; [2004] Fam Law 641
Ghani v Peter T McCann & Co 2002 SLT (Sh Ct) 135
Glasper v Rodger 1996 SLT 44
Greater Glasgow Health Board v Baxter, Clark and Paul 1990 SC 237; 1992 SLT 35
Halford v Brookes (No 1) [1991] 1 WLR 428; [1991] 3 All ER 559
Kirk Care Housing Association Ltd v Crerar & Partners 1996 SLT 150
McIntyre v Armitage Shanks Ltd 1980 SC (HL) 46; 1980 SLT 112
Nicol v British Steel Corp (General Steels) Ltd 1992 SLT 141
Pelagic Freezing Ltd v Lovie Construction Ltd [2010] CSOH 145; 2010 GWD 37-763
Smith v Fordyce [2013] EWCA Civ 320
Watson v Fram Reinforced Concrete Co (Scotland) Ltd 1960 SC (HL) 92; 1960 SLT 321

Textbooks etc referred to:
Gill (Lord), *The ICL Inquiry Report: Explosion at Grovepark Mills, Maryhill, Glasgow 11 May 2004* (SG/2009/129) (TSO, Edinburgh, 2009) (Online: http://www.theiclinquiry.org/documents/documents/HC838ICL_Inquiry_Report.pdf (22 September 2014))
Johnston, D, *Prescription and Limitation of Actions* (1st ed, W Green, Edinburgh, 1999), para 6.97
Johnston, D, *Prescription and Limitation of Actions* (2nd ed, W Green, Edinburgh, 2012), para 6.96
Law Reform Committee, *24th Report: Latent Damage* (Cmnd 9390, 1984), para 4.7
Scottish Law Commission, *Personal Injury Actions: Limitation and Prescribed Claims* (Scot Law Com no 207, December 2007)
Scottish Law Commission, *Prescription and Limitation of Actions (Latent Damage)* (Scot Law Com Consultative Memorandum no 74, September 1987), paras 2.9, 4.6
Scottish Law Commission, *Prescription and Limitation of Actions (Latent Damage and other Related Issues)* (Scot Law Com no 122, October 1989), paras 2.36, 2.55
Scottish Law Commission, *Reform of the Law Relating to Prescription and Limitation of Actions* (Scot Law Com no 15, August 1970), para 97

The appeal was heard in the Supreme Court before Lord Neuberger of Abbotsbury PSC, Lord Sumption, Lord Reed, Lord Toulson and Lord Hodge, on 7 April 2014.

At delivering judgment, on 30 July 2014—

LORD REED (WITH WHOM LORD NEUBERGER AND LORD SUMPTION AGREE)— [1] On 11 May 2004 there was an explosion at ICL's factory in Glasgow. Nine people were killed and many others were injured. Extensive damage was caused to neighbouring properties, including a shop owned by Morrison. On 13 August 2009 Morrison began the present proceedings, in which it seeks damages against ICL on the basis that the damage to its shop was caused by ICL's negligence, nuisance and breach of statutory duty.

[2] The proceedings are defended on the basis that any obligation owed by ICL to make reparation to Morrison had prescribed before the proceedings began. The relevant prescriptive period is five years, by virtue of sec 6(1) of the Prescription and Limitation (Scotland) Act 1973 (cap 52) ('the 1973 Act'). Morrison argues, however, that the prescriptive period did not begin to run until long after the explosion occurred, since it was not aware, and could not with reasonable diligence have been aware, that the damage had been caused by negligence, nuisance or breach of statutory duty until a much later date. In that regard, Morrison relies upon sec 11(3) of the 1973 Act.

[3] In the courts below, the case proceeded on the footing that sec 11(3) was to be interpreted as meaning that the commencement of the prescriptive period was postponed where the creditor in the obligation was not aware, and could not with reasonable diligence have been aware, (1) that loss, injury or damage had occurred, and (2) that it had been caused by the breach of a duty owed to him. That interpretation was in accordance with a number of authorities. There was no doubt that Morrison knew that damage had occurred on the date of the explosion. In order to establish that it also knew or could with reasonable diligence have known at that date, or soon after, that the explosion had been caused by a breach of duty, ICL relied on the principle expressed in the maxim *res ipsa loquitur*.

[4] The rationale of that approach is not immediately obvious, since the principle *res ipsa loquitur* is not concerned with the establishment of knowledge on the part of a pursuer, whether actual or constructive. The principle belongs to the law of evidence, and refers to circumstances from the establishment of which an inference of negligence can be drawn, so as to shift the evidential burden of proof to a defender. It appears to have been considered relevant in the present context because of a gloss placed in some recent decisions upon the earlier interpretation of sec 11(3) as postponing the commencement of the prescriptive period until the creditor is aware, actually or constructively, that the damage has been caused by the breach of a duty owed to him. In reality, a creditor often cannot be aware of that until the circumstances and their legal consequences have been established after proof. The earlier interpretation of sec 11(3) has therefore been refined in some recent decisions, as I shall explain, so as to postpone the commencement of the prescriptive period until the creditor has sufficient knowledge, actually or constructively, to enable a stateable *prima facie* claim properly to be advanced. On that approach, the law of evidence would have a bearing on the matter.

[5] ICL succeeded before the Lord Ordinary, Lord Woolman, on the basis that the principle *res ipsa loquitur* applied in the circumstances of the explosion ([2012] CSOH 44). Morrison succeeded before the Inner House, on the basis that it did not ([2013] CSIH 19). ICL then appealed to this court, where it has been permitted to raise the more fundamental issue of the correct interpretation of sec 11(3).

Statutory provisions governing prescription

[6] Section 6(1) of the 1973 Act provides:

> '(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'.

[7] The obligations to which sec 6 applies include any obligation arising from liability to make reparation (sch 1, para 1(d)), subject to specified exceptions. The 'appropriate date', when the five year period begins to run, is defined by sec 6(3) as meaning the date when the obligation became enforceable, subject to specified exceptions, none of which is relevant to the present case.

[8] In relation to the date when the obligation became enforceable, sec 11 of the Act provides:

> '(1) Subject to subsections (2) and (3) below, any 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, 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, neglect or default loss, injury or damage has occurred before the cessation of the 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, 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, 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.'

Section 11(3): The problem

[9] The interpretation of sec 11 of the 1973 Act has to begin with the text itself. The opening words of sec 11(1) ('Subject to subsections (2) and (3) below') make it clear that that subsection sets out the general rule, which applies without modification in all circumstances other than those covered by subsecs (2) and (3). The general rule applies to 'any obligation ... to make reparation for loss, injury or damage caused by an act, neglect or default'. The general rule is that the obligation is to be regarded as having become enforceable on the date when loss, injury or damage occurred.

[10] The phrase 'act, neglect or default' has appeared in statutory provisions concerned with limitation periods since the Public Authorities Protection Act 1893 (56 & 57 Vict cap 61). It appeared, in particular, in sec 6(1)(a) of the Law Reform (Limitation of Actions etc) Act 1954 (2 & 3 Eliz 2 cap 36), which was the predecessor of sec 17(1) of the 1973 Act. The meaning of the phrase in that context was considered by the House of Lords in *Watson v Fram Reinforced Concrete Co (Scotland) Ltd*. Lord Reid construed 'default' as meaning 'breach of duty' (p 109). Lord Keith of

Avonholm was of the opinion that the phrase did not refer to a historical event, as the Inner House had considered in that case, but referred to negligence or a failure of duty (p 111). Lord Denning, echoing the *Book of Common Prayer*, stated (p 115):

> 'The words ''act, neglect or default'' are perhaps a little tautologous: for ''act'' in legal terminology often includes an omission as well as an act of commission: and ''default'' certainly includes ''neglect''. But tautologous as they may be, the words are apt to cover all breaches of legal duty, no matter whether it be by leaving undone those things which we ought to have done, or by doing those things which we ought not to have done.'

[11] Given that the phrase had been authoritatively determined to have that meaning in legislation which was repealed and replaced by the 1973 Act, Parliament can be presumed to have intended it to bear the same meaning in sec 11(1). So understood, sec 11(1) establishes a general rule that an obligation to make reparation is to be regarded for the purposes of prescription as having become enforceable on the date when loss, injury or damage has occurred (traditionally denoted by the Latin term *damnum*) which has been caused by an act, neglect or default (*injuria*): in other words, when the relevant right of action arises. This was explained by Lord Keith of Kinkel in *Dunlop v McGowans* (p 81):

> 'The language of section 11(1) affords no warrant for splitting up ... the loss, injury or damage caused by an act, neglect or default. An obligation to make reparation for such loss, injury and damage is a single and indivisible obligation, and one action only may be prosecuted for enforcing it. The right to raise such an action accrues when *injuria* concurs with *damnum*. Some interval of time may elapse between the two, and it appears to me that section 11(1) does no more than to recognise this possibility and make it clear that in such circumstances time is to run from the date when *damnum* results, not from the earlier date of *injuria*. The words ''loss, injury and damage'' in the last line of the subsection refer back to the same words in the earlier part and indicate nothing more than the subject-matter of the single and indivisible obligation to make reparation.'

[12] Section 11(2) then sets out a special rule which applies where 'as a result of a continuing act, neglect or default loss, injury or damage has occurred before the cessation of the act, neglect or default'. Loss, injury or damage must therefore have been caused by an act, neglect or default, as in sec 11(1). What is special is that the act, neglect or default is of a continuing nature, and that loss, injury or damage has occurred before the cessation of the act, neglect or default. In that situation, the right of action arises as soon as any material loss is suffered as a result of the default. The prescriptive period does not however begin to run on that date: the loss, injury or damage is deemed, for the purposes of sec 11(1), to have occurred on the date when the default ceased. For the purposes of prescription, therefore, the loss is deemed to have occurred on a later date than (some of) it actually did.

[13] Section 11(3) sets out another special rule, which applies where, on the date when loss, injury or damage occurred (or, in the case of loss, injury or damage resulting from a continuing act, neglect or default, the date of the latter's cessation), the creditor was not aware, and could not with reasonable diligence have been aware, 'that loss, injury or damage caused as aforesaid had occurred'. In that situation, sec 11(1) is to have effect as if for the reference to the date when loss, injury or damage occurred there were substituted a reference to the date when the creditor 'first became, or could with reasonable diligence have become, so aware.'

[14] As Lady Paton observed, in delivering the opinion of the Inner House, sec 11(3) might *prima facie* be thought to refer solely to latent damage (para 29). Just as sec 11(2) reflects the view that continuing damage requires some adaptation of the general approach laid down in sec 11(1), on the basis that the date when a right of action arises is not in that situation the appropriate date for the commencement of the prescriptive period, so the same is also true of latent damage. In that situation, the right of action arises, and may subsist for more than five years, before the creditor is aware that he has suffered damage. It therefore makes sense to postpone the commencement of the prescriptive period.

[15] Section 11(3) does not however say merely that it applies where the creditor was not aware that loss, injury or damage had occurred: it applies where the creditor was not aware 'that loss, injury or damage *caused as aforesaid* had occurred' (emphasis added). The words 'caused as aforesaid' refer back to the words 'caused by an act, neglect or default' in sec 11(1). Does that therefore mean that sec 11(3) applies not merely in cases of latent damage, but in every case where the creditor was not aware, at the time when the loss occurred, that it had been caused by an act, neglect or default?

Competing interpretations

[16] Section 11(3) of the 1973 Act is capable of being read in two different ways. One possibility is to read the word 'aware' as referring to the loss, injury or damage, and to treat the phrase 'caused as aforesaid' as adjectival. The subsection is then read as if it said: 'the creditor was not aware ... that loss, injury or damage, *which had been* caused as aforesaid, had occurred' (emphasis added). The creditor has then to be aware only of the occurrence of loss, while the words 'caused as aforesaid' connect the loss to the cause of action.

[17] The other possibility is to read the word 'aware' as referring not only to the loss, injury or damage but also to the fact that it has been 'caused as aforesaid'. The subsection is then read as if it said: 'the creditor was not aware ... that loss, injury or damage had occurred, *and that it had been* caused as aforesaid' (emphasis added). Since the words 'caused as aforesaid' refer back to sec 11(1) and mean 'caused by an act, neglect or default', the creditor then has to be aware of a composite of fact and law, comprising the occurrence of loss and the act, neglect or default which caused it, actionability being an element of the concept of an act, neglect or default.

[18] Lord Clyde adopted the latter reading of sec 11(3) in *Greater Glasgow Health Board v Baxter, Clark and Paul* and *Kirk Care Housing Association Ltd v Crerar & Partners*, both decisions in the Outer House. The Inner House expressed their agreement with that approach in *Glasper v Rodger*, in a judgment delivered by Lord President Hope, although that case did not raise any question as to the effect of the words 'caused as aforesaid'. Later cases have followed the same approach without further reassessment at the appellate level. The views of such distinguished judges as Lord Clyde and Lord Hope deserve great weight and respect. Nevertheless, I have reached a different conclusion as to the proper interpretation of sec 11(3), for a number of reasons.

[19] First, I am inclined to think that the first of the interpretations suggested in paras 16 and 17 is the more natural reading as a matter of ordinary English. I recognise however that others may take a different view. More significantly, I am inclined to think that, if the draftsman had intended to require awareness of the cause of the loss, injury or damage before the prescriptive period would begin to

run, that would have been a matter of such importance that he would have been likely to make that intention clearer.

[20] In that regard, sec 11(3) can be contrasted with sec 18(3) of the 1973 Act as originally enacted, which postponed the commencement of the limitation period applicable in cases of personal injury where 'the material facts relating to that right of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the pursuer'. Such facts were defined by sec 22(2) as being:

> ' (a) the fact that personal injuries resulted from a wrongful act or omission;
> (b) the nature or extent of the personal injuries so resulting;
> (c) the fact that the personal injuries so resulting were attributable to that wrongful act or omission, or the extent to which any of those personal injuries were so attributable.'

[21] Although there are significant differences between prescription and limitation, the point can nevertheless be made that secs 18(3) and 22(2) illustrate that where it was intended that the limitation period was not to run so long as there was a lack of awareness of particular matters, the draftsman made it clear, by express language, what those matters were. If it had been Parliament's intention, in relation to sec 11(3), that the prescriptive period was not to run so long as there was a lack of awareness of matters other than the occurrence of loss, injury and damage, one could reasonably expect that that would have been made equally clear.

[22] The contrast is equally striking if sec 11(3) is compared with sec 17(2)(b) of the 1973 Act, as amended by the Prescription and Limitation (Scotland) Act 1984 (cap 52). The latter provision postpones the commencement of the limitation period until the pursuer was actually or constructively aware of a number of specified facts, including '(ii) that the injuries were attributable in whole or in part to an act or omission'. The effect of Lord Clyde's interpretation of sec 11(3) is to postpone the commencement of the prescriptive period until the creditor was actually or constructively aware of a more complex matter relating to causation (namely that the loss was caused by an actionable breach of duty) without there being comparably specific statutory language.

[23] The principal counter-argument is that the words 'caused as aforesaid' are unnecessary, on the reading which I prefer, and that statutes should be construed so as to avoid tautology. That is not in my opinion a persuasive argument. In the first place, as Lord Rodger of Earlsferry remarked, 'cautious tautologous drafting ... used to be typical of much of the statute book.' (*Ghaidan v Godin-Mendoza*, para 107.) Secondly, the words in question are not in my opinion truly tautologous, if sec 11(3) is interpreted as I have suggested. They connect the loss to the cause of action, like the corresponding words in sec 11(1) and (2). As Lord Keith explained in *Dunlop v McGowans*, there is a legal nexus between the loss which is the subject matter of the obligation to make reparation and the default causing the loss. The words 'caused as aforesaid' make it clear that it is only knowledge of loss caused by the default relied upon by the creditor (as distinct from loss arising from any other cause) which is relevant in determining whether the obligation has prescribed.

[24] Two other counter-arguments were accepted by Lord Clyde in *Greater Glasgow Health Board v Baxter, Clark and Paul*. One was that the logic of the scheme points to a requirement of knowledge that the right of action exists before the obligation is deemed to be enforceable. Lord Clyde did not however explain what he considered the logic of the scheme to be, or the basis on which he

arrived at that view. The second counter-argument was that it was difficult to give much content to the reference to reasonable diligence, if it applied only to knowledge that loss had occurred. It is true that the greater the range of matters of which the creditor must be aware, the greater the scope for diligent inquiry. That does not however entail that sec 11(3) must be given an expansive interpretation. Reasonable diligence is an appropriate standard by which to attribute constructive knowledge of the fact that loss, injury or damage has occurred.

[25] The interpretation of sec 11(3) which I prefer is also consistent with my initial impression that the subsection is intended to deal with latent damage. So understood, sec 11(3) follows the same approach as sec 11(1) and (2). The general rule laid down by sec 11(1) focuses on the occurrence of loss: the timing of its occurrence determines the date on which the prescriptive period begins. Section 11(2) addresses the problem which could otherwise arise where loss results from a continuing default, by providing a deemed date for the occurrence of loss, which is to be used instead of the actual date for the purposes of sec 11(1). Section 11(3) addresses the problem which could otherwise arise where there is latent damage, namely that the creditor is unaware of its occurrence, by requiring the date of actual or constructive knowledge of its occurrence to be used instead for the purposes of sec 11(1). If sec 11(3) is so interpreted, all three subsections share a common focus upon the occurrence and timing of loss.

[26] There are two further, and in my opinion compelling, reasons for rejecting the interpretation of sec 11(3) favoured by Lord Clyde. The first is the sheer oddity of postponing prescription according to the creditor's knowledge that an act or omission is actionable. If he has to be aware that the loss was caused by an act, neglect or default, then it follows from *Watson v Fram Reinforced Concrete Co (Scotland) Ltd* that he has to be aware that there has been a breach of a legal duty owed to him, as was accepted in *Greater Glasgow Health Board v Baxter, Clark and Paul* and the other authorities I have mentioned. As it was put in *Glasper v Rodger* (p 47), the lack of awareness which requires to be established for the purposes of sec 11(3) is a lack of awareness that a loss has occurred caused by an act, neglect or default 'which gives rise to an obligation to make reparation for it.' That however results in a number of unlikely consequences.

[27] It means, in the first place, that prescription will run more or less quickly according to the creditor's awareness of the law. If he receives accurate advice from his solicitor, it will begin on one date; if the advice is inaccurate, it will begin on another. If there are a number of creditors who suffer loss as a result of the same event, their claims may prescribe on different dates, depending on the legal advice which they receive. That runs contrary to the legal certainty which is the objective of prescription, and seems unlikely to have been the intention of Parliament.

[28] More fundamentally, in what sense can the creditor be 'aware' that there has been a breach of duty, in advance of a judicial determination of the issue? Does being 'aware' require certainty of success in a claim, or probability, or something less? In practice, even if the creditor has received legal advice, he is likely, at best, to be aware only that he has good prospects of success. If the advice has been less optimistic, he may be aware that he has reasonable prospects of success, or that he has an arguable case.

[29] Some recent decisions in the Outer House have sought to address this difficulty by glossing the phrase 'aware … that loss, injury or damage caused as aforesaid had occurred' as meaning 'aware … that a stateable *prima facie* claim … could properly be advanced against someone.' (*ANM Group Ltd v Gilcomston North Ltd*,

para 58; *Pelagic Freezing Ltd v Lovie Construction Ltd*, para 111.) This test is however much less precise than one would expect in a context in which certainty is important, relying as it does on such uncertain standards as what may be regarded as 'stateable' and what 'could *properly* be advanced'. The gloss also seems to me to be reading more into the statutory language than it will bear. On the other hand, without some such gloss, it is difficult to see how the problem raised in para 28 can be addressed. An approach to the interpretation of sec 11(3) which leads to impalement on one branch or other of Morton's Fork is not an attractive starting point.

[30] Lord Hodge and Lord Toulson, while agreeing with Lord Clyde that sec 11(3) requires the creditor to be aware that loss was 'caused as aforesaid', depart from Lord Clyde's approach by not relating those words back to the words 'caused by an act, neglect or default' in sec 11(1). Instead, they interpret the words 'caused as aforesaid' as meaning 'caused by an act or omission', without any implication that the act or omission is actionable. They suggest that this approach is consistent with the policy of the provision.

[31] This approach seems to me to be one which might be recommended for adoption as a matter of law reform: indeed, recommendations to that effect were included among those made by the Scottish Law Commission in its report on *Prescription and Limitation of Actions (Latent Damage and Other Related Issues)* (no 122) (paras 2.36, 2.55). Those recommendations have not however been implemented by Parliament. It is not possible in my opinion for this court to reach the same result by interpretation of the words used in sec 11(3).

[32] In the first place, Lord Clyde and Lord Hope were in my opinion correct to construe the words 'caused as aforesaid' as referring back to the phrase 'caused by an act, neglect or default' in sec 11(1). That is to my mind the only possible meaning of the words 'as aforesaid', since sec 11(1) contains the only prior reference in the section to causation. If Parliament had intended 'caused as aforesaid' to mean 'caused by an act or omission', it could not have said 'as aforesaid', since there are no words with that meaning elsewhere in sec 11.

[33] It also seems to me that it would make little sense to postpone the commencement of the prescriptive period until the creditor was aware of one fact which was critical to his bringing proceedings in respect of his loss, namely that it had been caused by an act or omission, but unaware of another, namely the identity of the person responsible. Such an arbitrary result would in my view serve no discernible policy. While Lord Hodge and Lord Toulson consider that it would be strange if the prescriptive period were to run before the creditor had sufficient awareness of the facts about what had caused him to suffer loss to be able reasonably to raise an action, it would seem to me to be stranger still to postpone the running of time until he knew what had caused him to suffer loss, but not who.

[34] In so far as Lord Hodge and Lord Toulson suggest that their interpretation is consistent with the policy which they attribute to the provision, I would also comment that I cannot see any basis for inferring such a policy other than their interpretation of sec 11(3) itself. Such a policy cannot in particular be inferred from the report of the Scottish Law Commission which preceded the 1973 Act (see its report on *Reform of the Law Relating to Prescription and Limitation of Actions in Scotland* (no 15), para 97, and its later memorandum, *Prescription and Limitation of Actions (Latent Damage)* (no 74), paras 2.9, 4.6).

Legal certainty

[35] Although all the members of this court agree that the interpretation hitherto placed on sec 11(3) of the 1973 Act does not correctly reflect the intention of Parliament, careful consideration nevertheless has to be given to the overturning, with immediate effect, of an interpretation of a statutory provision relating to prescription which has been followed for many years. That is because of the potential impact on persons who may have conducted their affairs on the basis of the existing interpretation and might be prejudiced by the change.

[36] In the present context, however, counsel were agreed that parties with claims falling within the scope of sec 11(3) were unlikely to have been advised to delay in initiating proceedings in reliance upon the existing authorities. It is also fair to observe that, although the approach adopted in the authorities I have mentioned has been followed for many years, it rests on slender foundations for a matter of such importance (as I have explained, para 18), and its correctness has not gone unquestioned (see, eg *Ghani v Peter T McCann & Co*; *Adams v Thorntons WS (No 3)*; and particularly Johnston, *Prescription and Limitation of Actions* ((1999), para 6.97; (2012), para 6.96): '[T]his interpretation has been adopted in the face of cogent argument to the contrary'). Like Lord Hodge, I would not regard it as settled law.

Res ipsa loquitur

[37] It follows that, on a correct interpretation of sec 11(3) of the 1973 Act, the principle expressed by the maxim *res ipsa loquitur* is of no relevance to the application of the subsection. I am however in agreement with Lord Hodge's observations on that subject.

Conclusion

[38] In these circumstances I would allow the appeal.

Lord Neuberger PSC— [39] I agree with the judgment of Lord Reed and would accordingly allow this appeal. However, in the light of the fact that a different conclusion has been reached by Lord Hodge and Lord Toulson as to the interpretation of sec 11(3) of the Prescription and Limitation (Scotland) Act 1973, I will express my reasons on that issue in my own words.

[40] The history of this case is set out by Lord Hodge in paras 59 to 63, but the basic facts are these. A serious explosion at ICL's premises occurred on 11 May 2004, and extensively damaged adjacent premises owned by Morrison. Morrison got access to its premises in June 2004, and contends that it could not have obtained a reliable expert report on the cause of the explosion until after mid-August 2004. In August 2007 ICL pleaded guilty to breaches of the health and safety legislation, and in July 2009 a report was published identifying the explosion as 'an avoidable tragedy' resulting from a number of failures by ICL (Lord Gill, *The ICL Inquiry Report*). Morrison issued the current proceedings for reparation for the damage to its property and for lost profits against ICL on 13 August 2009.

[41] ICL admit that, but for one point, it would be liable to pay Morrison such reparation (although the question of quantum is not agreed). That one point is that Morrison's claim was extinguished as it was raised more than five years after the date when it could have raised its claim. That argument raises a short issue, namely the meaning of sec 11, and in particular the meaning of the expression 'loss, injury or damage caused as aforesaid' in sec 11(3).

[42] Section 6(1) of the 1973 Act by virtue of sec 6(2) and para 1(d) of sch 1, applies to 'any obligation arising from liability … to make reparation'. It provides that (subject to certain irrelevant exceptions) where such an obligation 'has subsisted for a continuous period of five years' without a claim being brought or a relevant acknowledgment having been made, 'then as from the expiration of that period the obligation shall be extinguished'.

[43] Section 11 is set out in para 66 of Lord Hodge's judgment and in para 8 of Lord Reed's judgment. Section 11(1) provides that, '[s]ubject to subsections (2) and (3)', for the purposes of sec 6 'any obligation … to make reparation for loss, injury or damage' should be regarded 'as having become enforceable on the date when the loss, injury or damage occurred.' Section 11(2) provides that where 'as a result of a continuing act, neglect or default loss, injury or damage' occurs, 'the loss, injury or damage' should be deemed to have occurred 'when the act, neglect or default ceased.' Section 11(3) applies to a case where 'on the date referred to in subsection (1) … the creditor was not aware, and could not with reasonable diligence have been aware, that loss, injury or damage caused as aforesaid had occurred'. In such a case, sec 11(3), provides that sec 11(1) has effect as if the date there referred to was when the creditor 'first became, or could with reasonable diligence have become, so aware.'

[44] It is, rightly, common ground that, subject to subsecs (2) and (3), under sec 11(1), ICL's 'obligation … to make reparation for loss, injury or damage' arose on 11 May 2004, the date of the explosion, as that was the date on which the loss, injury or damage 'occurred'. It is also, again rightly, common ground that sec 11(2) has no application: the explosion was by no stretch of the imagination a 'continuing act'. Accordingly, subject to it being able to rely on sec 11(3), Morrison's claim became extinguished on 11 May 2009, and hence it started its claim three months too late.

[45] The issue therefore turns on sec 11(3). ICL contends that Morrison must have been 'aware … that loss, injury or damage' 'had occurred' on the very day that the explosion took place (or possibly a day later), and, if for some reason it had not been so aware, it seems clear that it 'could with reasonable diligence have [been] so aware'), and accordingly sec 11(3) is of no assistance to Morrison. Morrison, on the other hand, lays stress on the words 'caused as aforesaid' after the words 'loss, injury or damage', and contends that those words carry with them a requirement that that the creditor knows the cause of the loss, injury or damage, and that this could not have happened until late August 2004 at the earliest, when a promptly instructed expert would have reported.

[46] The issue therefore is whether the words 'caused as aforesaid' have the effect contended for by Morrison. On ICL's case, the three words merely describe or identify the 'loss, injury or damage' of which the creditor has to be 'aware'. On Morrison's case, the three words extend the scope of the creditor's required awareness from the 'loss, injury or damage' to the 'cause' of that loss, injury or damage.

[47] As a matter of ordinary language, the three words simply amount to an adjectival phrase, which serves to describe the words which precede them, rather than being words which add a requirement of causation to the scope of the creditor's required awareness. The words 'aware … that loss … caused as aforesaid had occurred' simply do not naturally mean 'aware that loss had occurred and that it had been caused as aforesaid'. They mean 'aware that loss, which had been caused as aforesaid, had occurred'. That reading is reinforced by the point that, if

the drafter had intended a creditor to be aware of the cause of the injury before time began running, one would have expected that intention to have been spelled out clearly.

[48] That is not, of course, necessarily the end of the matter, as interpretation of statutes is not merely an exercise in linguistics. While the natural meaning of an expression or a provision is as good a place as any (and very often the best place) to start, it is seldom, if ever, the only factor to take into account. I would accept that if there were other good reasons to do so, it may well be appropriate to depart from the natural meaning of sec 11(3), and in particular the words 'caused as aforesaid', and to give those words the less natural meaning for which Morrison contends.

[49] I turn to consider the various reasons put forward by Morrison. First, there is the point that the words 'caused as aforesaid' are surplusage on ICL's case. I am unimpressed with that point. A cautious drafter of the 1973 Act could easily have thought it appropriate to emphasise that in sec 11(3) he was referring only to loss, injury or damage which had been caused as described in sec 11(1). Cautious drafters of statutes and contracts often include protective or qualifying words which are not strictly necessary, and it would hinder clarity and certainty in the law, and seriously risk subverting the parliamentary or contractual intention, if judges started giving such expressions unnatural meanings simply to avoid them being surplusage.

[50] A second and similar point is that, if the drafter intended the words to have the effect contended for by ICL, he would have simply said 'the aforesaid loss, injury or damage' rather than the more cumbersome and specific 'loss, injury or damage caused as aforesaid'. I consider that that argument suffers from the same sort of problem as the first point. In addition, the drafter may well have thought that the more simple formulation (which anyway only has one less word) could lead to an ambiguity, as it might be argued that it referred to the immediately preceding reference to 'loss, injury or damage', namely that in sec 11(2). By using the phrase that he did, including the word 'caused', which is not found in subsec (2), the drafter made it clear that he was referring to the loss, injury or damage mentioned in subsec (1).

[51] A third point is the contrast between sec 11(2), which simply refers to 'loss, injury or damage' and sec 11(3), which refers to 'loss, injury or damage caused as aforesaid'. I am not impressed with that point either. It is a big jump to conclude that the distinction justifies a significant and non-natural meaning being given to the words 'caused as aforesaid'. But, quite apart from that, the very different ways in which subsecs (2) and (3) are structured satisfies me that it is unsafe to draw any conclusions from the inclusion of the three words in the latter subsection when they are not in the former. In particular the words 'as a result of' in subsec (2) tie the 'loss, injury or damage' to the 'continuing act, neglect or default', and so, even a cautious draftsman would have regarded it as unnecessary to include the words 'caused as aforesaid' in subsec (2).

[52] Fourthly, there is sec 17 of the 1973 Act, whose provisions are set out and explained by Lord Hodge in para 67. Morrison contends that its interpretation of sec 11(3) has the merit of consistency of approach with sec 17. I see no reason why the same principles should apply to prescription under sec 11 and sec 17: they relate to different types of claim and have different primary prescription periods. Indeed, in my view, far from supporting Morrison's case, sec 17 assists ICL's case. Where the legislature wishes to provide that time does not start running for limitation or prescriptive purposes until an injured party knows or should know that an injury was caused by a defender's act or omission, it is spelled out in clear terms.

[53] Fifthly, there is the argument as to what, on Morrison's case, a creditor has to be aware of before time starts to run. In that connection, the clear provisions of sec 17 highlight a problem with Morrison's interpretation: the words 'caused as aforesaid' are ambiguous on its case, as they could mean 'caused by some actionable wrong' or they could mean 'caused by some act or omission', which may or may not turn out to be an actionable wrong. This sort of uncertainty is reflected in the discussion in paras 81 to 94 of Lord Hodge's judgment, as well as in paras 27 to 29 of Lord Reed's judgment.

[54] Sixthly, there are policy issues. Both parties advanced arguments based on policy, and I am unimpressed with those arguments in this case. The imposition of prescription and limitation periods inevitably involve balancing competing public and individual interests. In particular, it involves balancing the public interest in valid claims being litigated and legal wrongs being righted with the public interest in claims not lingering over the heads of potential defenders and claims not being difficult to dispose of justly due to their antiquity. Similarly, it is an area which throws up another, familiar, tension: on the one hand, it is desirable to have general and clear rules about limitation, even if they occasionally appear to produce a harsh result; on the other hand, it is sometimes appropriate to have specific exceptions to avoid too many unfairnesses. I see no particular policy reasons for adopting either interpretation in the present case, as each of them seems to me to result in a defensible and appropriate outcome.

[55] Seventhly, and connected with the sixth point, there is the alleged unfairness on a potential pursuer if time runs against him from the date he knows of the injury, even though he may not know of the identity of the person who caused the injury or what the cause of the injury was. In my view, the legislature could perfectly reasonably have assumed that in almost every case, five years from the date of discovery of loss, injury or damage would represent plenty of time for the injured party to discover all he needs to know to bring proceedings. The fact that there may be a very rare case where five years may not be enough is simply an example of the inevitable consequence of the compromise which limitation law involves. After all, even under the interpretation favoured by Lord Hodge there could be potential unfairnesses in individual and unusual cases, sometimes to pursuers and sometimes to defenders.

[56] Finally, there is the fact that there is a number of cases where Scottish judges have held that the interpretation advanced in these proceedings by Morrison is correct. Those decisions are discussed by Lord Hodge in paras 69 and 70. There are occasions when it is right for a court to accept that a statute should be accorded a meaning which would not otherwise appear to the court to be right, because that meaning has been generally accepted. However, in the present case, there is simply the fact that, since 1985, Scottish courts have held that sec 11(3) has a certain meaning. This is not a case, for instance, where it can be said that Parliament has impliedly approved that interpretation, or assumed that it is correct. I do not consider that the mere fact that, over some decades, successive judges, however eminent, have come to, or assumed, a conclusion which a superior court thinks is wrong, justifies that court holding that that meaning is correct. Indeed, in the present case, as Lord Hodge explains in para 68, the leading textbook on the topic of prescription and limitation makes it clear, and would have made it clear to practitioners, that the interpretation of sec 11(3) is a live issue. I also note that as long ago as 1987, the Scottish Law Commission suggested that the interpretation being adopted by the Scottish

courts was not in accordance with the Commission's views (*Prescription and Limitation of Actions (Latent Damage)* (no 74)).

[57] For these reasons, which are little more than a summary of Lord Reed's reasons, and differing with diffidence from Lord Hodge and the other distinguished Scottish judges who have consistently taken the opposite view, I would allow this appeal.

Lord Hodge (dissenting, with whom Lord Toulson agrees)— [58] This appeal raises two questions concerning the Scots law of prescription, which extinguishes obligations through the passage of time. First, what is the nature of the actual or constructive awareness required of a pursuer in order to start the running of the prescriptive period? Secondly, of what is the pursuer to be aware? A third and subordinate question concerns the doctrine of *res ipsa loquitur*.

Background facts

[59] On 11 May 2004 a serious explosion occurred at the factory premises of the appellants ('ICL') at Grovepark Mills, Maryhill, Glasgow, causing the substantial collapse of the building. Nine people were killed and others were seriously injured. The shop owned by the respondent ('Morrison'), which was adjacent to ICL's premises, suffered extensive damage.

[60] After the accident the police sealed off the area around ICL's premises, including Morrison's shop. Morrison was not allowed access to its premises until June 2004 and had then to deal with its damaged stock and the risk of asbestos contamination. ICL's premises remained under the control of the Crown Office. On about 21 June 2004 ICL petitioned the Court of Session for judicial review of the procurator fiscal's decision to refuse it access to its premises to investigate the cause of and legal responsibility for the explosion. The Crown Office released ICL's premises from its control on 12 July 2004. Morrison avers that it was unlikely that, having ascertained that the premises had been released, it could have arranged for experts to inspect the fire-damaged premises and have obtained an expert report on the cause of the explosion so as to be able to commence legal proceedings before 13 August 2004.

[61] Morrison avers that speculation about a number of possible causes of the explosion continued and that in late 2005 the media were still reporting that the cause of the accident had not been established. In February 2006 the Crown Office announced its intention to bring criminal proceedings against two of the appellants (ICL Plastics Ltd and ICL Tech Ltd), and on 17 August 2007 those companies pleaded guilty to breaches of the Health and Safety at Work etc Act 1974 (cap 37).

[62] On 1 October 2007 the Lord Advocate announced that a public inquiry would be held into the explosion. That inquiry, which Lord Gill chaired, reported in July 2009. It pointed to a number of failures, including by ICL companies, which led to what was 'an avoidable tragedy'.

[63] On 13 August 2009 Morrison raised this action, in which it seeks reparation for the damage to its property, and for lost profits and other costs. ICL admitted that it had had a liability to make reasonable reparation to Morrison but pleaded that its obligation to do so had prescribed. According to ICL, Morrison had sufficient knowledge to raise an action against it on the day of the explosion, more than five years earlier.

Legislation

[64] The Prescription and Limitation (Scotland) Act 1973, as its title shows, covers both prescription and limitation. The rules of negative prescription (both the five-year short negative prescription and the 20-year long negative prescription) are rules of substantive law and involve the extinction of rights through the passage of time. Limitation on the other hand is a procedural rule relating to personal injury claims. It has to be pleaded as a defence and a defender can waive it. If the plea is successful, it bars an action from proceeding in court after the lapse of the statutorily specified time. Negative prescription and limitation are thus conceptually different. But the sections of the 1973 Act on the short negative prescription, with which we are concerned in this appeal, and the provisions in that Act on limitation both address the circumstances in which a pursuer's lack of actual or constructive knowledge postpones the starting of a clock.

[65] The basic relevant rule of the short negative prescription, in sec 6 of the 1973 Act, is that if an obligation has subsisted for five years after the date when it became enforceable, without a relevant claim having been made or the subsistence of the obligation having been relevantly acknowledged, that obligation is extinguished as from the end of that period. That rule applies to 'any obligation arising from liability (whether arising from any enactment or from any rule of law) to make reparation' (1973 Act, sch 1, para 1(d)).

[66] Section 11 of the 1973 Act sets out the relevant rules in relation to such obligations to make reparation. It provides so far as relevant:

> '(1) Subject to subsections (2) and (3) below, any 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, 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, neglect or default loss, injury or damage has occurred before the cessation of the 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, 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, 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.' (Emphasis added.)

Thus subsec (3) postpones the start of the five-year prescriptive period where the pursuer does not have the specified actual or constructive awareness.

[67] Section 17 of the Act, which deals with the limitation of personal injury actions, establishes as a general rule that the action must be commenced within a period of three years after the date when the injuries were sustained or, if later, the date when the act or omission, to which the injuries were attributable, ceased (sec 17(2)(a)). This general rule is again qualified by a provision which postpones the start of the period of limitation when the pursuer does not have the specified actual or constructive knowledge. While sec 17(2)(b), like sec 11(3), uses the concept of 'awareness', it is much more explicit as to what the pursuer must be aware of. It provides that no action shall be brought unless it is commenced within a period of three years after:

> '[T]he date (if later than any date mentioned in paragraph (a) . . .) on which the pursuer in the action became, or on which, in the opinion of the court, it would have been reasonably practicable for him in all the circumstances to become, aware of all the following facts–
>
> (i) that the injuries in question were sufficiently serious to justify his bringing an action of damages on the assumption that the person against whom the action was brought did not dispute liability and was able to satisfy a decree;
> (ii) that the injuries were attributable in whole or in part to an act or omission; and
> (iii) that the defender was a person to whose act or omission the injuries were attributable in whole or in part or the employer or principal of such a person.'

Unlike sec 11(3), this provision makes it clear that the pursuer's awareness is of specified factual matters. Section 22(3) confirms the irrelevance of legal knowledge of the actionability of the act or omission (see para 80).

[68] The English Law Reform Committee in its 24th report, *Latent Damage* (Cmnd 9390) (para 4.7) recognised the possibility that sec 11(3) might not cover such matters. It decided to model what became sec 14A of the Limitation Act 1980 (cap 58) on sec 14 of that Act rather than sec 11(3) of the Scottish Act because it was arguable that sec 11(3) did not cover lack of knowledge of the causation of the damage or the identity of the persons responsible. Similarly, in its report on *Prescription and Limitation of Actions (Latent Damage and other Related Issues)* (no 122), the Scottish Law Commission recorded in 1989 that, notwithstanding the first case that I mention below, there was doubt whether the discoverability formula in sec 11(3) required knowledge of the cause of the damage. It recommended that the law be clarified by amending the legislation to state expressly that the discoverability formula included knowledge (a) that the loss, injury and damage was attributable in whole or in part to an act or omission and (b) of the identity of the defender. There has been no legislation to implement that report. Johnston in his impressive book, *Prescription and Limitation of Actions* ((2012), para 6.96), also recognises that there are several ways in which sec 11(3) can be read: he suggests that it might require awareness of (a) the facts of the loss, its cause and the identity of the defender, or (b) only the fact of the loss, or (c) the facts of the loss and of its being caused by negligence. The resolution of this uncertainty is the main issue in this appeal.

[69] Nonetheless, there has for almost 30 years been a consistent line of Scottish case law which has treated the words 'caused as aforesaid' not as merely adjectival but as imposing a requirement of knowledge of causation. The first case was *Dunfermline District Council v Blyth and Blyth Associates* in which Lord McDonald said, *obiter*, that the creditor had to know that the loss which he had suffered occurred in circumstances giving rise to an obligation upon someone to make reparation to him. Lord Clyde adopted the same approach in *Greater Glasgow Health Board v Baxter, Clark and Paul* ('*GGHB*'), again in an *obiter* discussion. He held that the ordinary and natural meaning of the phrase 'caused as aforesaid' included the distinct ingredient of causation by negligence (p 251). This was consistent with the logic of the statutory scheme, which was that a right of action was enforceable only once the pursuer could know that it existed (p 252). He also expressed the view that if the section required only knowledge of loss, there would be little content to the reference to reasonable diligence in the discoverability formula. But he was not persuaded that that formula required knowledge of the person on whom the

obligation lay (also p 252). Lord President Hope, delivering the opinion of the First Division in *Glasper v Rodger* (p 47G), approved Lord Clyde's decision in *GGHB* and suggested that sec 11(3) looked for 'an awareness, not only of the fact of loss having occurred, but of the fact that it is a loss caused by negligence'.

[70] In *Kirk Care Housing Association Ltd v Crerar & Partners* Lord Clyde reiterated his view, rejecting a challenge by counsel for the defenders that sec 11(3) was concerned only with awareness of loss, a matter of fact, and not with matters of legal liability. The courts have applied an interpretation consistent with the approach in *GGHB* and *Glasper v Rodger* in several other cases, including an Extra Division of the Inner House of the Court of Session in *Beveridge and Kellas WS v Abercromby (No 1)*, Lord MacFadyen in *Britannia Building Society v Clarke* and Lord Menzies in *Pelagic Freezing Ltd v Lovie Construction Ltd*. In *Ghani v Peter T McCann & Co* Sheriff Principal Bowen expressed doubts about the soundness of the discussion in *GGHB* because he considered that knowledge that the loss was caused by negligence was not knowledge of fact and suggested that knowledge of loss was sufficient for time to run. Nevertheless, he followed *GGHB* and *Glasper v Rodger*. More recently, in *ANM Group Ltd v Gilcomston North Ltd* (para 32), Lord Emslie, addressing an argument that sec 11(3) did not require knowledge that the causal act or omission was actionable, held that 'a construction of the statutory phraseology importing actionability has now been settled law … for nearly a quarter of a century'.

[71] The Scottish courts have thus required knowledge, actual or constructive, of more than the occurrence of loss. But there are doubts at the margins. First, there is a question whether awareness of causation extends beyond factual causation to the actionability of the causative act or omission (as in *Ghani v Peter T McCann & Co*). Secondly, concerns have been expressed whether it is correct that the pursuer need not know of the identity of the defender before time starts to run. In *Adams v Thorntons WS (No 3)* two of the three members of an Extra Division (Lord Marnoch and Sir David Edward) reserved their opinion on whether in sec 11(3) the pursuer had to have actual or constructive knowledge not only of his loss and its causation but also of the identity of the wrongdoer. Johnston (*Prescription and Limitation of Actions* (2012), para 6.96), commenting on the first instance decision in this case (see para 72), suggested that the approach that time runs against a pursuer who does not know the identity of the defender produced what might be thought to be unsatisfactory results.

Proceedings in this action

[72] On 9 March 2012 the Lord Ordinary (Woolman) upheld ICL's plea of prescription after a legal debate in which Morrison's averments were taken *pro veritate*. He accepted as correct the approach of the Scottish courts, which I have discussed, as did ICL's counsel at that stage. In particular, Lord Woolman held that in sec 11(3) of the 1973 Act it was for the pursuer to show that it did not have actual or constructive awareness that loss caused by negligence had occurred. He held (para 24) that the question was whether Morrison knew, or could using reasonable diligence have found out, that it had a stateable *prima facie* claim arising out of the explosion. The identity of the obligant, the prospects of success and the precise extent of the damage were not relevant. Taking that approach, he concluded that the explosion within ICL's factory gave rise to a presumption of negligence in accordance with the principle of *res ipsa loquitur*. In the absence of any explanation for the explosion, Morrison was entitled to infer that the owner and occupier was responsible for the explosion. He took a similar approach to Morrison's alternative case of

nuisance. Thus he held that, from the moment of the explosion, Morrison had the requisite knowledge and the prescriptive period began to run immediately.

[73] An Extra Division (Lady Paton, Lord Mackay of Drumadoon and Lady Smith) on 14 March 2013 recalled his interlocutor and allowed a proof before answer on prescription and the effect of sec 11(3). They followed the approach in *GGHB* and *Glasper v Rodger* but rejected the submission that the fact that there had been an explosion in a building meant that it had been caused by negligence. Because the maxim of *res ipsa loquitur* applied where the cause of the accident was not known, an action based on the maxim was the antithesis of the requirement in *Glasper v Rodger*, namely 'awareness, not only of the fact of loss having occurred, but of the fact that it is loss caused by negligence.'

This appeal

[74] ICL seeks to challenge the established approach of the Scottish courts. Its case is that the period of the short negative prescription began to run on the date of the explosion. Its primary case is that all the pursuer needs to know, or constructively know, is that he has suffered loss. He needs no awareness of what had caused that loss and whether anyone has any legal liability to him for it. As a fallback, senior counsel for ICL submits that if the Scottish case law were correct, Morrison had constructive knowledge that it had a *prima facie* case of negligence against the factory owners or someone because of the operation of the doctrine of *res ipsa loquitur*.

[75] Morrison's primary case, which adopts the approach of existing case law, is that time did not run against it until it had actual or constructive knowledge that it had suffered loss caused by some actionable wrong. As a fallback, senior counsel for Morrison submits that the requisite knowledge was factual, namely that Morrison had suffered loss, that there had been an act or omission and that there was a causal link between that act or omission and that loss.

[76] This appeal therefore raises sharply the question of which if any of the three possible interpretations of sec 11(3) of the 1973 Act (see para 68) is correct.

Discussion

(i) Discoverability test

[77] ICL submits in its written case that when interpreting sec 11 of the 1973 Act it is important to consider the purpose of prescription. I agree. The law seeks to prevent stale claims both as a question of public interest and also as a matter of balancing the interests of the parties. Delay can diminish the quality of justice through both the loss of evidence and the diminution in the quality of the extant evidence. There is a public interest in dealing with disputes promptly. There is also a need for legal certainty. Thus the 20-year long negative prescription runs against a person whatever the state of his actual or constructive knowledge and despite any legal disability (1973 Act, secs 7, 11(4)). In balancing the interests of the parties the law seeks to avoid keeping a defender in suspense as to his liability long after the events which might have given rise to such liability. It also allows people, including insurers, to organise their affairs and use their financial resources on the basis that after a certain period a claim relating to a past event will not be made. The importance of those policy justifications is underlined by the present case. They

apply equally to the law of limitation in relation to personal injuries (*Brisbane South Regional Health Authority v Taylor*, McHugh J, pp 552, 553).

[78] The law, by introducing discoverability tests in sec 11(3) and sec 17(2)(b) of the 1973 Act, has also recognised the injustice of cutting off a claim before the pursuer had or could with reasonable diligence have had sufficient information for a sufficient period to allow him to obtain legal advice and instruct the necessary investigations to raise legal proceedings to assert his right.

[79] The Scottish law of limitation in relation to actions for damages for personal injury and claims arising out of death through personal injury is a relatively modern innovation. Perhaps because claims for personal injury have generated greater political interest than claims for damage to property or financial loss, the Scottish law of limitation has had a different and more extensive history of legislative amendment. It was first enacted in sec 6 of the Law Reform (Limitation of Actions etc) Act 1954. A discoverability test was introduced by the Limitation Act 1963 (cap 47) and was retained and expanded in the 1973 Act. In 1980 sec 19A was introduced into the 1973 Act, giving the court an equitable discretion to override the limitation period. The Prescription and Limitation (Scotland) Act 1984 amended the discoverability test and abolished the longstop of the 20-year long negative prescription in relation to claims for personal injuries. While since 1954 the limitation period has been three years, in 2007 the Scottish Law Commission in its report on *Personal Injury Actions: Limitation and Prescribed Claims* (no 207) recommended assimilating the limitation period with the five-year prescriptive period. That recommendation has not been implemented. Notwithstanding the different legislative histories, there is in my view no obvious policy reason for the legislature to adopt radically different approaches to the substance of a pursuer's knowledge in the discoverability tests applicable to claims for damage to property on the one hand and personal injury claims on the other (in secs 11(3) and 17(2)(b) respectively).

[80] Before 1984 the test for postponing the start of the limitation period was contained in sec 18(3) of the 1973 Act. It was that 'the material facts relating to [the] right of action [which] were or included facts of a decisive character' were 'outside the knowledge (actual or constructive) of the pursuer'. In sec 22(2) of the Act material facts were defined to include among others 'the fact that personal injuries resulted from a wrongful act or omission' and the fact that they were 'attributable to that wrongful act or omission'. Like sec 11(3) this provision could be construed as referring to both factual and legal matters. This gave rise to conflicting judicial opinions. But in *McIntyre v Armitage Shanks Ltd* the House of Lords determined that the legal consequences of a defenders' act or omission were not a material fact of decisive character. In other words, the relevant facts did not include the existence of a right of action arising from the defender's act or omission. The provision was concerned with matters of fact, namely: (i) the existence of injuries, (ii) their nature and extent, and (iii) their cause. This exclusion of legal knowledge from the test was confirmed in the Prescription and Limitation (Scotland) Act 1984, which reworded sec 17 of the 1973 Act (para 67 above) and also amended sec 22(3) of that Act to provide that 'knowledge that any act or omission was or was not, as a matter of law, actionable, is irrelevant.'

(a) Meaning of 'awareness'

[81] Both sec 11(3) and sec 17(2)(b) of the 1973 Act speak of the pursuer being actually or constructively 'aware' of certain things. While the earlier tests in relation

to limitation spoke of the pursuer's 'knowledge', there does not seen to be any substantive difference between that and 'awareness'. The word, 'awareness' is a term of colloquial speech and its meaning is to be understood by reference to its context and to the policy of the legislature. In *Borella v Borden Co* (p 64) Justice Learned Hand spoke of words of colloquial speech

> 'having ''fringes'' of connotation, and unlike the terminology of science, deliberately fabricated for its definite outlines, it is to be expected that interpretation will vary. . . .
>
> [L]egislators, like others concerned with ordinary affairs, do not deal in rigid symbols, so far as possible stripped of suggestion, and do not expect their words to be made the starting point for a dialectical progression. We can best reach the meaning here, as always, by recourse to the underlying purpose, and, with that as a guide, by trying to project upon the specific occasion how we think persons, actuated by such a purpose, would have dealt with it, if it had been presented to them at the time.'

Such an approach is appropriate here.

[82] The policy is to fix the time when the pursuer is aware, or could have been aware if he exercised reasonable diligence, of sufficient information to take steps to pursue his claim. In *ANM Group Ltd v Gilcomston North Ltd* Lord Emslie (para 73) said that awareness went beyond surmising the relevant facts as a mere possibility. In *Pelagic Freezing Ltd v Lovie Construction Ltd* (paras 110, 111), a case which concerned defects in a building, Lord Menzies, in applying the approach set out in *GGHB*, spoke of knowledge of material damage and knowledge that the relevant loss was actionable. In relation to the latter he stated that:

> 'It is not necessary for the [expert] report to link defaults to specific defects any more than it is necessary for the report to explain or identify in minute detail the mechanism of [the] defects.'

[83] Similarly, in the case law on limitation, the courts have drawn a distinction between an awareness of a possibility (which is not sufficient to cause time to run) and awareness of the relevant facts (which is). In *Comer v James Scott & Co (Electrical Engineers) Ltd* (p 240) (a case which concerned the wording of the test before it was altered in 1984) Lord Maxwell stated:

> '[W]hether a person ''knows'' a fact seems to me to involve a question of degree. I do not consider it advisable to attempt to define it, but at least I think it involves something approximating more to certainty than mere suspicion or guess. Moreover, in my opinion, . . . some information, suspicion or belief falling short of knowledge is not transformed into knowledge if it happens to be correct. I accept that a person cannot be said to ''know'' a fact if the thing which he believes with whatever conviction is not in accordance with the truth. But I do not think that the converse is correct. I do not think that any information or belief, however uncertain, necessarily amounts to knowledge . . . merely because it happens to coincide with the truth.'

In *Nicol v British Steel Corp (General Steels) Ltd*, a case under the current sec 17(2)(b) of the 1973 Act, Lord Coulsfield adopted a similar approach in relation to a pursuer's awareness of the cause of his injuries. He held that a pursuer's awareness that an accident might be attributable to an act or omission of one of a group of persons, as only one of a number of possibilities where there was no reason to choose between them, was not sufficient to start time running against him. He also warned against too prescriptive an approach, stating (p 144):

> 'Beyond that, it does not seem to me to be possible to generalise and the question whether the pursuer was aware, or whether it was reasonably practicable for him to become aware, of sufficient facts and circumstances to start the triennium running must depend on the particular facts and circumstances.'

In *Agnew v Scott Lithgow Ltd (No 2)* an Extra Division held that a pursuer, who had vibration white finger, ought to have made enquiry about his condition once he heard former colleagues talking about making claims arising out of having contracted that condition and time started to run then. In the provisions relating to limitation, therefore, a modest level of awareness of the causal link between the act or omission and the injury suffices.

[84] In my view, 'awareness' in both sec 11(3) and sec 17(2)(b) does not require certainty but it needs more than mere knowledge of possibilities. The pursuer must know the specified facts with sufficient confidence for him to be able to take the necessary steps to prepare a legal claim based on them, by obtaining appropriate legal and other advice and collecting evidence of those facts to present to a court or other tribunal.

[85] It is not appropriate to draw too much on the English law of limitation, which is a different statutory regime. But I think that the approach to the nature of 'awareness' or 'knowledge' as a starting point when time begins to run is similar in both jurisdictions (see *Halford v Brookes (No 1)*, Lord Donaldson MR, p 443E–G).

[86] The question then is: what are the specified facts?

(b) Awareness of what?

[87] I have come to the view that the correct interpretation of sec 11(3) of the 1973 Act is that there needs to be actual or constructive awareness of both (i) loss and (ii) its factual cause through an act or omission. I consider that there are three reasons to support this view which is essentially senior counsel for the Morrison's fallback case.

[88] First, like Lord Clyde in *GGHB*, I think that the statutory language of sec 11 points towards giving content to the words, 'caused as aforesaid'. In para 66 above I have underlined the words used in subsecs (1) and (2) which refer back to 'the loss, injury or damage caused by an act, neglect or default'. All that was required for that reference back was the use of the definite article. The words, 'caused as aforesaid' are not needed for that purpose and Parliament must have intended them to have a meaning. I also think that sec 11(3)'s reference to the awareness which the pursuer could acquire through exercising reasonable diligence points to knowledge of more than the fact of loss, injury or damage.

[89] Secondly, the purpose of the discoverability test in sec 11(3) is to ascertain the point at which the pursuer is, or should have been, justified in preparing or instructing the preparation of his legal case. It seems to me that this points towards the pursuer's knowledge of facts rather than legal rules. The starting point should not depend on the competence of the legal advice which he receives. Were it otherwise, the pursuer could defeat a plea of prescription on the basis that he had received incompetent legal advice. Section 11(1) establishes the general rule that the obligation to make reparation becomes enforceable when the pursuer's right of action arises (see *Watson v Fram Reinforced Concrete Co (Scotland) Ltd*, Lord Reid, p 109, Lord Keith of Avonholm, p 111, Lord Denning, p 115; *Dunlop v McGowans*, Lord Keith of Kinkel, p 81). It uses the words 'act, neglect or default' in the context of its description of the obligation to make reparation. Those words characterise the

acts or omissions that give rise to the obligation to make reparation because they are a breach of statutory duty, a delict or a breach of contract. I do not see that characterisation as relevant to the pursuer's knowledge in sec 11(3). It seems to me that in sec 11(3) the phrase, 'loss ... caused as aforesaid', refers to actual or constructive knowledge of loss caused by an act or a failure to act and not the legal characterisation of the act or omission.

[90] Thirdly, the object of sec 11 is to identify the date when the defender's obligation to make reparation became enforceable. It would be strange if prescription were to run before the pursuer had sufficient awareness of the facts (actually or constructively) about what had caused him to suffer loss to be able reasonably to raise an action.

[91] I do not go so far as Mr Johnston (*Prescription and Limitation of Actions*) in his first interpretation of the subsection (see para 68): while there is, as he has said, much to be said for such a policy, on reflection, I do not think that the statutory words extend to require the pursuer to have knowledge of the identity of the defender before the clock starts. Clearly, when the pursuer instructs the raising of an action, his legal advisers will have to identify a person or someone within an identified class of persons (such as the employees of an employer) as the person who has caused him loss. This should not be difficult if there is awareness of the act or omission. If the claim is for breach of contract or breach of promise, there should be little difficulty in identifying the defender. In cases of negligence if there is knowledge of the act or omission, the pursuer can readily use sec 1 or 1(1A) of the Administration of Justice (Scotland) Act 1972 (cap 59) to apply to recover documents or for the disclosure of information as to the identity of persons who might be the defenders.

[92] I am comforted by the thought that the interpretation which I favour is not likely significantly to bring forward or postpone the starting point of the prescriptive period from that set by the established line of case law to which I have referred and thereby upset the expectations of litigants. The prescriptive period will usually start to run at about the same time as it does on the established line of case law as the pursuer will usually seek legal advice once he has the requisite factual knowledge. In any event, the pursuer's constructive knowledge is measured objectively.

[93] By contrast, the start of the prescriptive period would be brought forward significantly in most cases if all that a pursuer needed to know was that he had suffered loss. While counsel debated whether the discussion by the Inner House in *Glasper v Rodger* was *obiter*, a point which we need not decide, many in the legal profession have acted on the understanding that sec 11(3) required more than knowledge of loss. I would not go so far as Lord Emslie in *ANM Group Ltd v Gilcomston North Ltd* by saying that it was settled law, but I can foresee that some pursuers might suffer loss as a result of this court's acceptance of senior counsel for the ICL's attractively presented primary submission.

[94] In reaching my view on this matter I have not attached weight to the recommendations of the Scottish Law Commission in their report in 1970 (*Reform of the Law Relating to Prescription and Limitation of Actions in Scotland* (no 15)). I recognise that the Commission addressed the mischief of latent damage, but they did not prepare a Bill with their report to give effect to their recommendations. The court's task is to construe the words which Parliament used unaided by those recommendations.

(c) Summary

[95] In summary, the pursuer must have actual or constructive knowledge (in the sense set out in para 84) (i) that he has suffered more than minimal loss, and (ii) of the acts or omissions which caused that loss. With that awareness he would be justified in preparing or instructing a solicitor to prepare legal proceedings, and the law gives him five years to commence those proceedings. In most cases that knowledge would be combined with or readily lead to knowledge of the identity of the defender and, as I have said, there are procedures under the Administration of Justice (Scotland) Act 1972 to assist him to acquire that further knowledge.

[96] I think that the Inner House was correct to require a proof before answer on the issue of prescription and the pursuer's knowledge under sec 11(3) of the 1973 Act as Morrison's averments (see paras 60–63) raise issues of fact about both the state of its actual knowledge and the background against which the court may assess what it could have known in the exercise of reasonable diligence.

(ii) Res ipsa loquitur

[97] On this approach, the applicability of the doctrine of *res ipsa loquitur* to the facts of the case does not arise. But as it was the principal matter that engaged both the Lord Ordinary and the Inner House, I comment on it briefly.

[98] Section 11(3) of the 1973 Act is concerned with the factual knowledge of the pursuer which justifies his preparation of the legal action: an awareness that an identified person's act or omission caused him loss. *Res ipsa loquitur* is an evidential rule for finding facts. Where the facts give rise to an inference of negligence by the defender, the evidential burden shifts onto the defender to establish facts to negative that inference. But it is of no relevance if one does not know who the defender is. Toulson LJ summarised the doctrine in *Smith v Fordyce* (para 61) in which he stated:

> 'The doctrine expressed in the maxim *res ipsa loquitur* is a rule of evidence based on fairness and common sense. It should not be applied mechanistically but in a way which reflects its underlying purpose. The maxim encapsulates the principle that in order for a claimant to show that an event was caused by the negligence of the defendant, he need not necessarily be able to show precisely how it happened. He may be able to point to a combination of facts which are sufficient, without more, to give rise to a proper inference that the defendant was negligent. A car going off the road is an obvious example. A driver owes a duty to keep his vehicle under proper control. Unexplained failure to do so will justify the inference that the incident was the driver's fault. In the words of the Latin tag, the matter speaks for itself. In such circumstances the burden rests on the defendant to establish facts from which it is no longer proper for the court to draw the initial inference. To show merely that the car skidded is not sufficient, because a car should not go into a skid without a good explanation. In *Barkway v South Wales Transport Co Ltd* [[1949] 1 KB 54] the court took the same view about a tyre burst. A properly maintained vehicle ought not to suffer a tyre burst. It is therefore not surprising that the court held that in such circumstances:
>
> > ''... the defendants must go further and prove (or it must emerge from the evidence as a whole) either (a) that the burst itself was due to specific cause which does not connote negligence on their part but points to its absence as more probable, or (b) if they can point to no such specific cause, that they used all reasonable care in and about the management of their tyres.'' '

I agree.

[99] On the pleadings it appears that, when the explosion occurred, the source of the flammable material which caused it was not known. In an urban environment there might have been several possible causes involving the responsibility of different people or bodies. The fact of the explosion might cause a reasonable pursuer to suspect that something done or omitted to be done by the owners or occupiers of the factory where it occurred had caused it. But, for the reasons I set out when discussing the nature of the needed awareness, suspicion is not enough. If, contrary to my view, the doctrine were relevant to ascertaining the starting point of the prescriptive period, I do not think that it could be invoked against Morrison until there was evidence that the facts indeed spoke for themselves against ICL. Morrison's case is that the cause of the explosion was capable of being ascertained but that it was not able to carry out the necessary enquiries before 13 August 2004. For the same reason I do not accept ICL's argument that Morrison could infer fault on its part to support its case of nuisance.

Conclusion

[100] I would therefore dismiss the appeal.

[101] My view is a minority view. It is 25 years since the Scottish Law Commission produced its 1989 report (no 122) on prescription and limitation to which I referred in para 68. If the Commission's recommendations had been acted upon, Morrison would have been able to pursue its present claim. In the light of the decision in this case, which has changed the law as it was previously understood, I would urge that those recommendations should be given fresh consideration.

THE COURT allowed the appeal.

MacRoberts LLP – HBM Sayers – HBM Sayers – HBM Sayers

REPORTS

GORDON'S TRUSTEES v CAMPBELL RIDDELL BREEZE PATERSON LLP

SUPREME COURT

Lord Neuberger of Abbotsbury (President), Lord Mance, Lord Sumption, Lord Reed, Lord Hodge: 15 November 2017

[2017] UKSC 75; 2017 S.L.T. 1287

Prescription—Negative prescription—Commencement date of prescriptive period—State of pursuer's knowledge—Applications in land court for removal of tenant refused because of defects in notices drafted by solicitors—Landlords raising action against solicitors—Point at which pursuer becoming aware that loss and damage caused by negligence—Whether prescriptive period beginning to run on payment of legal fees—Prescription and Limitation (Scotland) Act 1973 (c.52), s.11(3).

Statute—Interpretation—Negative prescription—Commencement date of prescriptive period—State of pursuer's knowledge—Whether prescriptive period beginning to run on payment of legal fees—Prescription and Limitation (Scotland) Act 1973 (c.52), s.11(3).

Trustees of an *inter vivos* trust, the owners of three fields, instructed their solicitors to serve notices to quit on their tenant, to take effect on 10 November 2005. The tenant failed to comply therewith and in February 2006, the trustees lodged applications with the Land Court seeking his removal, which were refused in July 2008 in respect of two of the fields because of defects in the notices. On 17 May 2012, the applicants raised an action against the solicitors on account of their alleged breach of contract by drafting ineffective notices to quit, with the heads of loss including legal fees paid in respect of the Land Court proceedings. The Lord Ordinary upheld the defenders' plea of prescription and granted decree of absolvitor, holding that the prescriptive period began when the trustees knowingly became liable for the legal fees and outlays in pursuit of vacant possession of the fields. The pursuers reclaimed. The Inner House held that s.11(3) of the Prescription and Limitation (Scotland) Act 1973 postponed the start of the prescriptive period only when the damage was latent by requiring that the creditor should have actual or constructive knowledge of the occurrence of damage or expenditure, which was viewed as an objective fact, and the prescriptive period ran from the time when the trustees incurred liability for legal fees, notwithstanding that they had not then known that their application to the Land Court would fail. The reclaimers appealed to the Supreme Court.

Held, (1) that *David T Morrison & Co Ltd (t/a Gael Home Interiors) v ICL Plastics Ltd* [2014] UKSC 48; 2014 S.C. (UKSC) 222, 2014 S.L.T. 791 held that s.11(3) of the 1973 Act applied in the case of latent damage by postponing the start of the prescriptive period until the creditor was aware of physical damage to his property but it did not have to address whether the creditor had to be able to recognise that he had suffered some form of detriment before the prescriptive period began; the present appeal raised the question whether s.11(3) started the prescriptive clock when the creditor of the obligation was aware of incurring expenditure but did not know that it would be ineffective (paras 17 and 18); (2) that "loss, injury or damage" in s.11(1) was a reference to the existence of physical damage or financial loss as an objective fact, those words had to have the same meaning in each of the subsections of s.11, therefore, there was no scope for reading any additional meaning into them in subs.(3), and it followed that the creditor did not have to know that he or she had a head of loss, it sufficed that the creditor was aware of not obtaining something sought or that expenditure had been incurred (paras 19–21); (3) that the aforementioned approach was harsh on the creditor of the obligation but it offered certainty; a requirement that there be an awareness of a head of loss would involve knowledge of the factual cause of the loss, an interpretation rejected in *David T Morrison* (para.22); (4) that any understanding on the part of the appellants that the expenditure incurred in pursuing the claim in the Land Court would ultimately be recovered from the tenant when their claim was successful was irrelevant, on an objective assessment, they suffered loss on 10 November

2005, on which date they were aware that they had not obtained vacant possession of the fields, and in any event, were actually or constructively aware by 17 February 2006 that they had incurred expense in legal proceedings to obtain such possession; they had not commenced legal proceedings against the respondents until 17 May 2012, thus the respondents' obligation to make reparation to them had prescribed (para.24); and appeal *dismissed*.

David T Morrison & Co Ltd (t/a Gael Home Interiors) v ICL Plastics Ltd [2014] UKSC 48; 2014 S.C. (UKSC) 222, 2014 S.L.T. 791, *applied*.

Observed, that in so far as the conclusion in the present case might suggest that hard cases might be more common than previously thought, a Scottish Law Commission report had recommended amendment to s.11(3) in relation to the obligation to pay damages and the First Minister had announced that the Scottish Government intended to bring forward a Bill to reform the law of prescription as part of its legislative programme (para.25).

Action of damages

Linda Anne Gordon and others raised an action of damages against Campbell Riddell Breeze Paterson LLP for alleged breach of contract by drafting ineffective notices to quit.

The Lord Ordinary upheld the plea of prescription and granted decree of absolvitor.

The pursuers reclaimed.

Reclaiming motion

(Reported at 2016 S.L.T. 580.)

The reclaiming motion was heard before an Extra Division.

On 8 March 2016 the court refused the reclaiming motion (reported at 2016 S.L.T. 580).

The reclaimers appealed to the Supreme Court.

Statutory provisions

The Prescription and Limitation Scotland Act 1973 provides:

> "11. (1) Subject to subsections (2) and (3) below, any obligation (whether arising from any enactment, or from any rule of law or from, or by reason of any breach of, contract or promise) to make reparation for loss, injury or damage caused by an 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, neglect or default loss, injury or damage has occurred before the cessation of the 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, 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, 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." (Emphasis added)"

Cases referred to

David T Morrison & Co Ltd (t/a Gael Home Interiors) v ICL Plastics Ltd [2014] UKSC 48; 2014 S.C. (U.K.S.C.) 222; 2014 S.L.T. 791.

Dunlop v McGowans, 1980 S.C. (H.L.) 73; 1980 S.L.T. 129.

Gordon's Trustees v Campbell Riddle Breeze Paterson LLP [2015] CSOH 31.

Gordon's Trustees v Campbell Riddell Breeze Paterson LLP [2016] CSIH 16; 2016 S.C. 548; 2016 S.L.T. 580.

Appeal

The appeal was heard by the Supreme Court.

On 15 November 2017 the court *dismissed* the appeal.

LORD HODGE (WITH WHOM LORD NEUBERGER OF ABBOTSBURY (PRESIDENT), LORD MANCE, LORD SUMPTION AND LORD REED AGREE).—

[1] When the law extinguishes obligations as a result of the effluxion of time it is important that there is certainty as to when the clock is started. Yet many within the legal profession in Scotland have been unsure about this important matter. This is another appeal about the meaning of the

provisions of the Prescription and Limitation (Scotland) Act 1973 ("the 1973 Act") concerning the short negative prescription. Counsel for the appellants informed the court that several cases have been sisted in the Court of Session to await the outcome of this appeal.

[2] This appeal proceeds on facts which the parties have agreed solely for the purpose of determining the question of prescription and which may be summarised briefly. The appellants ("the trustees") are the trustees of the *inter vivos* trust of the late William Strathdee Gordon ("the trust"). The trust owns farmland, comprising three fields near the village of Killearn, which the trustees acquired because of its long term potential for residential development. The three fields are a grazing field, a field of about 40 acres and a field of about 50 acres.

[3] The grazing field was originally let out by the trust by a series of seasonal grazing lets to a farming partnership of Messrs A & J C Craig ("the farming partnership") which had two partners. This lease continued by tacit relocation from about 1983. The 40 acre and 50 acre fields were let out to the farming partnership under separate leases in 1981 and 1983 respectively. After the expiry of the original terms of let of those fields the trust entered into various minutes of agreement, which were prepared by their solicitors, who were the predecessor firm to the respondents in this appeal. Those minutes of agreement purported to continue the original leases of those fields. In about August 1992 the solicitors became aware that Mr Andrew Craig, one of the two partners, had retired from the farming partnership. Notwithstanding that knowledge, the minutes of agreement in 1992 and 1998 described the tenant as the farming partnership and John Campbell Craig the sole proprietor and trustee for the firm. Under the 1998 agreements the ish (expiry date) of the lease of each of the two fields was 10 November 2003.

[4] It is a matter of agreement that by 2003 the leases for all three fields were agricultural holdings for the purposes of the Agricultural Holdings (Scotland) Act 1991 ("the 1991 Act").

[5] In 2003 the trustees instructed Mr McGill, who was both a trustee of the trust and a partner in the firm of solicitors, to serve on the tenant notices to quit the three fields at the term of 10 November 2003. The tenant served counter notices under the 1991 Act. After receiving advice from counsel that the notices to quit the 40 acre field and 50 acre field were ineffective as they did not give the period of notice which the 1991 Act required, the solicitors served further notices to quit in respect of the three fields dated 8 November 2004 requiring the tenant to remove on 10 November 2005. In each of those notices to quit the tenant was identified as "the firm of Messrs A & J C Craig and John C Craig, sole proprietor of and trustee for said firm". The notice to quit the 40 acre field described it as being subject to a lease dated 22 September and 7 and 8 October 1981 as amended by subsequent agreements. Similarly the notice to quit the 50 acre field described it as being subject to a lease dated 5 January and 14 February 1983 as so amended.

[6] On 1 December 2004 Mr Richard Leggett, a partner of the solicitors, wrote a long letter to Mr William Gordon, one of the trustees, in which he explained that the solicitors had to withdraw from acting for the trust because of a conflict of interest caused by difficulties which might result from a failure to terminate the leases of the fields before their expiry dates which had allowed the tenant to continue to occupy the fields by tacit relocation. The solicitors suggested that those difficulties might require the payment of money to Mr John Craig to get him to cede possession of the fields. In response, the trustees did not require the solicitors to cease acting for them and continued to instruct them. But, after the tenant did not cede possession of the fields on 10 November 2005, the solicitors wrote to the trustees on the same day to withdraw from acting for the trust in relation to the leases at Killearn, again citing the difficulties which they foresaw would arise from their earlier failure to prevent tacit relocation. Thereafter Mr McGill resigned as a trustee.

[7] The trustees then instructed Anderson Strathern LLP, who on 9 February 2006 applied to the Scottish Land Court seeking the removal of the tenant from each of the three fields. It is an agreed fact that by 17 February 2006, at the latest, the trustees had incurred material expense in instructing Anderson Strathern to pursue those applications. The tenant defended the applications. In a decision dated 24 July 2008 the Scottish Land Court gave effect to the notice to quit in relation to the grazing field but refused to give effect to the notices to quit relating to the other two fields, because the notices were inaccurate in their description of both the

tenant and the relevant lease. As a result, the 40 acre field and the 50 acre field remain subject to leases that are agricultural holdings, thus preventing the trustees from developing them.

The legislation

[8] As is well known, s.6 of the 1973 Act, when read with ss.9 and 10 of that Act, creates the short negative prescription by providing that if an obligation has subsisted for a continuous period of five years after "the appropriate date" without the creditor or someone on his behalf having made a relevant claim or the debtor or someone on his behalf having relevantly acknowledged the subsistence of the obligation, the obligation is extinguished at the expiration of that period. Section 6(3) provides that the appropriate date in relation to an obligation arising from a breach of contract is a reference to the date when the obligation became enforceable.

[9] This appeal is concerned with s.11 of the 1973 Act, which defines when an obligation to make reparation becomes enforceable. It provides: [his Lordship quoted its terms set out supra and continued:]

The court proceedings

[10] On 17 May 2012 the trustees commenced a legal action against the respondents by serving on them a summons seeking damages for breach of an implied term of the contract between the trustees and the solicitors, that the latter would exercise the degree of knowledge, skill and care expected of a reasonably competent solicitor. The breach which the trustees allege is that the solicitors failed to identify correctly both the tenant and the applicable lease in the notices to quit dated 8 November 2004 relating to the 40 acre field and the 50 acre field. Among the sums claimed by the trustees in this action are the fees and outlays paid to the solicitors and to Anderson Strathern relating to the attempt to obtain vacant possession of the two fields and damages for the enhanced value of the land and the opportunity for the trust to exploit the fields' potential for development both of which were lost through the failure to recover possession of them.

[11] The respondents pleaded that any obligation on them to make reparation had prescribed because the trustees had not raised the action within five years of the date when they had suffered loss, which, the respondents submitted, was when the solicitors served the defective notice to quit in November 2004 or in any event when the tenant failed to remove from the fields on 10 November 2005. They submitted that the trustees had had knowledge of having suffered loss when they learned that the tenant would not voluntarily cede possession of the fields. After hearing evidence in a preliminary proof on prescription at which the parties had agreed that the averments of breach of contract and loss were to be treated as proven, Lord Jones upheld the plea of prescription in an opinion dated 25 March 2015. In so doing, he rejected the trustees' argument that the prescriptive period did not begin until the Scottish Land Court issued its decision (i.e. 24 July 2008), which, according to the trustees, was the date on which they first knew that they had suffered loss. He held that the prescriptive period began when the trustees knowingly became liable for legal fees and outlays in pursuit of vacant possession of the fields. As it was agreed that the trustees had incurred material expense in relation to the Scottish Land Court application by 17 February 2006, the five year prescriptive period had run its course before they commenced the legal proceedings against the respondents (on 17 May 2012). Lord Jones therefore absolved the respondents from the trustees' claims.

[12] On 8 March 2016 an Extra Division of the Inner House (Lady Paton, Lord Bracadale and Lord Malcolm) refused the trustees' appeal. Lord Malcolm wrote the leading opinion and the other judges wrote concurring opinions. In his opinion, Lord Malcolm analysed the judgment of the Supreme Court in *David T Morrison & Co Ltd (t/a Gael Home Interiors) v ICL Plastics Ltd* (*"Morrison v ICL"*) which I discuss below. He concluded that s.11(3) of the 1973 Act postponed the start of the prescriptive period only when the damage was latent by requiring that the creditor should have actual or constructive knowledge of the occurrence of damage or expenditure, which was viewed as an objective fact. He held that the prescriptive period ran from the time the trustees incurred liability for legal fees notwithstanding that they did not then know that their application to the Scottish Land Court would fail. In a short judgment with which Lord Bracadale agreed, Lady Paton added that the trustees had gained sufficient knowledge that they had suffered loss when they received the solicitors' letter of 10 November 2005.

[13] The trustees appeal to this court with the permission of the Inner House, which it granted on 1 June 2016.

Discussion

(i) The legislation

[14] It is clear from the opening phrase of s.11(1) — ("Subject to subsections (2) and (3) below") — that that subsection sets out the general rule that an obligation to make reparation becomes enforceable when the loss, injury or damage occurred. Subsections (2) and (3) modify the general rule in the circumstances in which they apply. It is also clear that in each of the subsections Parliament has chosen to use the same words — "loss, injury or damage" — to describe the detriment suffered by the creditor.

[15] The House of Lords and this court have considered those words in their statutory context in ascertaining the appropriate date for the commencement of the five year prescription in two cases.

[16] First, in *Dunlop v McGowans*, which concerned the failure by solicitors timeously to serve a notice to quit on a tenant, Lord Keith of Kinkel in the leading speech (1980 S.C. (H.L.), p.81; 1980 S.L.T., p.132) explained that the obligation to make reparation for loss, injury or damage is a single and indivisible obligation and that that obligation arose as soon as there was the concurrence of a legal wrong and loss resulting from that wrong. In that case the obligation to make reparation became enforceable on the date when, but for the solicitor's omission, the client landlord would have obtained vacant possession of his premises. The prescriptive period under s.11(1) of the 1973 Act began to run then although the landlord's losses, which resulted from the failure to get vacant possession, could only be estimated at that date.

[17] Secondly, in *Morrison v ICL*, which concerned observable physical damage to Morrison's shop caused by an explosion in the neighbouring business premises of ICL, this court held that, for the prescriptive period to begin under s.11(3) of the 1973 Act, the creditor needed to be aware (actually or constructively, if the creditor could with reasonable diligence have been aware) only of the occurrence of the loss or damage and not of its cause. In other words, s.11(3) applies in the case of latent damage, by postponing the start of the prescriptive period until the creditor is aware of the physical damage to his property. The focus of the court's judgment in that case was on the words "caused as aforesaid" in subs.(3). They are a reference back to subs.(1) which speaks of loss, injury or damage "caused by an act, neglect or default". The phrase "caused as aforesaid" thus connects the loss to the cause of action. But the phrase is adjectival; it does not require additional knowledge on the part of the creditor. The subsection falls to be read as if it said: "the creditor was not aware … that loss, injury and damage, which had been caused as aforesaid, had occurred"; thus it, like subss.(1) and (2), focuses on the occurrence and timing of loss (*viz.* Lord Reed at 2014 S.C. (U.K.S.C.), pp.228 and 230; 2014 S.L.T., pp.794 and 796, paras 16 and 25, Lord Neuberger at p.233 (p.798), para.47).

[18] In *Morrison v ICL* this court did not have to address the question which this appeal raises, namely whether in s.11(3) the creditor must be able to recognise that he has suffered some form of detriment before the prescriptive period begins. In *Morrison v ICL* the property damage was manifest on the date of the explosion. But where a client of a professional adviser suffers financial loss by incurring expenditure in reliance on negligent professional advice, the client, when spending the money, will often be unaware that that expenditure amounts to loss or damage because of circumstances, existing at the date he or she spends the money, of which the client has no knowledge. A question which the current appeal raises is whether s.11(3) starts the prescriptive clock when the creditor of the obligation is aware that he or she has spent money but does not know that that expenditure will be ineffective.

[19] The answer to that question lies in interpreting the words "loss, injury or damage" in subs.(3) in the context of s.11 as a whole. In s.11(1) the phrase "loss, injury or damage", which I have emphasised in para.9 above, is a reference to the existence of physical damage or financial loss as an objective fact. Thus if a person's building is damaged in an explosion, or a garden wall is damaged as a result of subsidence, there is physical damage which is enough to start the clock under that subsection, unless either or both of subss.(2) or (3) apply. No question arises under subs.(1) as

to the creditor's knowledge of that objective fact. As Lord Keith stated in *Dunlop v McGowans* (p.81 (p.133)): "The words 'loss, injury or damage' in the last line of the subsection refer back to the same words in the earlier part and indicate nothing more than the subject-matter of the single and indivisible obligation to make reparation."

Thus if, as a result of a breach of contract, a person purchases defective goods, incurs expenditure or fails to regain possession of his property when he or she wished to do so, the s.11(1) clock starts when the person acquires the goods, the expenditure is incurred or when the person fails to obtain vacant possession of the property.

[20] Section 11(3), which postpones the start of the prescriptive period, is concerned with the awareness of the creditor. But that which the creditor must actually or constructively be aware of before the prescriptive period begins is the same "loss, injury or damage" of which s.11(1) speaks, because subs.(3) uses the same language and also refers back to subs.(1) when it speaks of "loss, injury or damage caused as aforesaid". The phrase "loss, injury or damage" must have the same meaning in each of the subsections of s.11. There is therefore no scope for reading any additional meaning into those words in subs.(3).

[21] It follows that s.11(3) does not postpone the start of the prescriptive period until a creditor of an obligation is aware actually or constructively that he or she has suffered a detriment in the sense that something has gone awry rendering the creditor poorer or otherwise at a disadvantage. The creditor does not have to know that he or she has a head of loss. It is sufficient that a creditor is aware that he or she has not obtained something which the creditor had sought or that he or she has incurred expenditure.

[22] This approach is harsh on the creditor of the obligation, where the creditor has incurred expenditure which turns out to be wasted or fails to achieve its purpose, because the circumstances when the prescriptive period begins may not prompt an enquiry into the existence or likelihood of such loss. Thus a person may begin a legal action and incur expenditure on legal fees on the basis of negligent legal advice or he or she may purchase a house at an over value as a result of the negligent advice of a surveyor. In each case the person may be aware of the expenditure but not that it entails the loss. But it offers certainty, at least with the benefit of hindsight. The trustees' formulation by contrast would create uncertainty. If it were necessary in order for the prescriptive period to begin that the creditor be aware that something had gone awry and that he or she has suffered a detriment in the form of wasted expenditure, would an adverse judgment at first instance be sufficient to establish such an awareness of detriment if there were strong grounds for an appeal? The result might be prolonged uncertainty. Further, a requirement that there be an awareness of a head of loss would involve knowledge of the factual cause of the loss, which is an interpretation that this court has rejected in *Morrison v ICL*.

[23] It is not clear that the interpretation set out in para.21 above is what the Scottish Law Commission envisaged in its Report on the Reform of the Law Relating to Prescription and Limitation of Actions (1970) (Scot Law Com No.15), which led to the 1973 Act and in which it recommended (para.97) that: "the [prescriptive] period should commence … (c) if the fact that pecuniary loss or damage to property has been caused by the delict or quasi-delict is not immediately ascertainable, from the date when the fact that the aggrieved party has suffered pecuniary loss or damage is, or could with reasonable diligence have been, ascertained by him. "

In its Report on Prescription and Limitation of Actions (Latent Damage and Other Related Issues) (1989) (Scot Law Com No.122) the commission at para.2.7 described its policy in the 1970 report as being that "the starting point for the running of prescription should be the date when that damage is or could with reasonable diligence have been discovered by the claimant". This court's decision in *Morrison v ICL* is consistent with that policy because the physical damage to property was manifest but it is questionable whether s.11(3) is so consistent in circumstances where the claimant suffers financial loss rather than observable damage to his physical property. As I state in para.25 below, the commission has revisited the topic since this court decided *Morrison v ICL* and has made further recommendations for reform.

(ii) Application to the facts

[24] I am not able to accept the submission of counsel, who appears for the trustees, that time did not begin to run against the trustees until they

received the decision of the Scottish Land Court which demonstrated both that the sums which they had spent on pursuing the application to gain vacant possession of the 40 acre field and the 50 acre field could not be recovered from the tenant and that they had lost the opportunity to develop those fields. Before they received that decision, the trustees may have regarded the tenant's refusal to remove from those fields on 10 November 2005 as unjustified and may have pursued the application to the Scottish Land Court to remove him in the belief that it was likely to succeed. They may, as a result, have believed that the expenditure on legal fees and outlays, which they incurred in so doing, would ultimately be recovered from the tenant in large measure when their application succeeded. But any such understanding on their part is irrelevant. On an objective assessment, the trustees suffered loss on 10 November 2005 when they did not obtain vacant possession of those fields and therefore could not realise their development value. It does not matter whether the loss resulted from the tenant's intransigence, as the trustees may have believed, or from someone else's acts or omissions. It was also possible that the defects in the notices to quit would not have caused loss if the tenant had later waived his right to challenge them or had otherwise surrendered possession of the fields. But he did neither, and with the benefit of hindsight the failure to obtain vacant possession on 10 November 2005 can be seen as having caused loss to the trustees. At that moment, as in *Dunlop v McGowans*, the prescriptive period began to run under s.11(1), unless it was postponed by subs.(3). But there was no postponement under the latter subsection: the trustees were aware on 10 November 2005 that they had not obtained vacant possession of those fields. That was a detriment. They were in any event actually or constructively aware by 17 February 2006 that they had incurred expense in legal proceedings to obtain such possession. As the trustees did not commence legal proceedings against the respondents until 17 May 2012, it follows that the respondents' obligation to make reparation to them has prescribed.

(iii) The future

[25] This conclusion, as Lord Malcolm recognised in the concluding paragraph of his opinion, may suggest that hard cases may be more common than it was previously thought. But there are live proposals for law reform. The Scottish Law Commission has published its Report on Prescription (Scot Law Com No.247) in July 2017, following its Discussion Paper (No.160) in which it invited views on, among other things, the discoverability test in s.11(3) of the 1973 Act in the light of *Morrison v ICL* decision. In its report the commission recommends (para.3.21) that in relation to the obligation to pay damages s.11(3) should be amended so that, 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) of 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. This formula is included in the draft Bill annexed to the report in s.5(1), (4) and (5). As the commission has observed, it is an approach which is well represented in both civil law and common law jurisdictions (Discussion Paper No.160, para.4.8). The First Minister has announced on 5 September 2017 that the Scottish Government intends to bring forward a Bill to reform the law of prescription as part of its legislative programme. It will be the task of the members of the Scottish Parliament to decide whether they agree with the Scottish Law Commission's recommendation for the reform of the discoverability test achieves a fair balance between the interests of the creditor and the debtor in the obligation to make reparation.

Conclusion

[26] I would dismiss the appeal.

Counsel for Appellants, *R Howie, QC*, *R Sutherland*; Solicitors, Drummond Miller LLP
Counsel for Respondent, *D Johnston, QC*, *A McKinlay*; Solicitors, Brodies LLP.

MIDLOTHIAN COUNCIL v RAEBURN DRILLING AND GEOTECHNICAL LTD

COURT OF SESSION (OUTER HOUSE)

Lord Doherty: 20 March 2019

[2019] CSOH 29; 2019 S.L.T. 1327

Prescription—Negative prescription—Commencement date of prescriptive period—State of pursuer's knowledge—Social housing development located above coal strata and former mine workings requiring demolition because of gas ingress—Point at which pursuer becoming aware that loss and damage caused by negligence—Prescription and Limitation (Scotland) Act 1973 (c.52), ss.6 and 11(3).

A local housing authority raised an action of damages against *inter alia* consultant engineers (the fourth defender) who had advised on site investigation and assessment in relation to a social housing development site located above coal strata and former mine workings. The pursuer had developed 64 houses on the site which were subsequently found to be uninhabitable and required to be demolished because of the danger to health caused by gas ingress. The pursuer averred that the defender had failed to advise that a gas defence system was required to prevent noxious gas seeping up from the coal strata and mine workings below. At debate, the defender maintained that any right to claim damages had been extinguished by the operation of the short negative prescription in s.6 of the Prescription and Limitation (Scotland) Act 1973: there had been the concurrence of *injuria* and *damnum* by June 2009 at the latest, thus any obligation to make reparation had been extinguished in June 2014, more than four years before the present action was raised on 4 September 2018.

Held, (1) that it was common ground that the breach of contract in 2006 was the date of *injuria* and both parties accepted that, as a matter of objective fact, loss, injury or damage had occurred by 2009, albeit by different hypotheses but both proceeded on the basis that the pursuer had funded and carried out the construction work in reliance on the defender's advice, and that, with hindsight, the construction expenditure had been wasted and did not achieve its purpose (paras 13–14); (2) that the pursuer suffered loss, injury or damage before practical completion and as soon as it accepted the defender's advice and acted upon it, there was *damnum* (paras 17–18); (3) that the pursuer might have been unaware before 7 September 2013 that it had suffered a detriment but it did not follow that it was not aware that it had suffered loss: it knew, between December 2007 and June 2009, that it was incurring expenditure on construction of the development in reliance on the defender's advice and while it did not know at that time that the expenditure was wasted, as a matter of objective fact and with the benefit of hindsight, the expenditure failed to achieve its purpose; it followed that the pursuer was aware of having suffered loss, injury or damage more than five years before the action was raised and accordingly the defender's obligation to make reparation had been extinguished (paras 20–22); and decree of dismissal *granted*.

Gordon's Trustees v Campbell Riddell Breeze Paterson LLP [2017] UKSC 75; 2017 S.L.T. 1287; 2018 S.C.L.R. 129, *followed*

Observed, that the interpretation of s.11(3) of the 1973 Act in *Gordon's Trustees*, and followed by the court, did not render it redundant, it undoubtedly had a narrower ambit than was previously thought to be the case but there were circumstances where it did postpone the commencement of the prescriptive period (para.23).

Action of damages

Midlothian Council raised an action of damages against (first) David Anderson Keith, Samuel Anthony Sweeney, Allan D Rennie, and Stephen Blennerhassett, as former partners of the now dissolved partnership of the Firm of Bracewell Stirling Architects; (second) Raeburn Drilling and Geotechnical Limited; (third) RPS Planning and Development Ltd; and (fourth) Blyth & Blyth Consulting Engineers Ltd in respect of a social housing development at Gorebridge.

The case against the first defender was dismissed on 11 August 2017, the third defender was assoilzied from the conclusion of the summons on 27 June 2018.

The action came to debate before the Lord Ordinary (Doherty) on the fourth defender's plea of prescription in which the second defender did not participate.

Statutory provisions

The Prescription and Limitation (Scotland) Act 1973 provides:

> "6.— (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: …
>
> 11.— (1) Subject to subsections (2) and (3) below, any 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, 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, neglect or default loss, injury or damage has occurred before the cessation of the 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, 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, 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."

Cases referred to

Agro Invest Overseas Ltd v Stewart Milne Group Ltd [2018] CSOH 120.

David McBrayne Ltd v Atos IT Services (UK) Ltd [2018] CSOH 32.

David T Morrison & Co Ltd (t/a Gael Home Interiors) v ICL Plastics Ltd [2014] UKSC 48; 2014 S.C. (U.K.S.C.) 222; 2014 S.L.T. 791.

Dunlop v McGowans , 1980 S.C. (H.L.) 73; 1980 S.L.T. 129.

Gordon's Trustees v Campbell Riddell Breeze Paterson LLP [2017] UKSC 75; 2017 S.L.T. 1287; 2018 S.C.L.R. 129.

Heather Capital Ltd (In Liquidation) v Levy & McRae [2017] CSIH 19; 2017 S.L.T. 376.

Huntaven Properties Ltd v Hunter Construction (Aberdeen) Ltd [2017] CSOH 57.

Jackson v Clydesdale Bank Plc , 2003 S.L.T. 273.

Kennedy v Royal Bank of Scotland Plc [2018] CSIH 70; 2018 S.L.T. 1261; 2018 Hous. L.R. 120.

Kusz v Buchanan Burton [2009] CSIH 63; 2010 S.C.L.R. 27.

Textbook referred to

Johnston, *Prescription and Limitation* (2nd edn), para.4.21.

On 20 March 2019 the Lord Ordinary *granted* decree of dismissal.

LORD DOHERTY.—

Introduction

[1] This commercial action arises out of a social housing development at Gorebridge which had to be demolished a few years after it was built. The development site was located above coal strata and former mine workings. The second and fourth defenders advised the pursuer in relation to site investigation and assessment. In reliance on the advice the pursuer built a development of 64 houses on the site. It had no ground gas defence system. The houses were occupied by tenants of the pursuer. Following complaints of gas in some of the houses all of the houses were found to be uninhabitable because of the danger to health caused by gas ingress. The pursuer decanted the tenants. It demolished the houses. It proposes to rebuild housing on the site, but with a ground gas defence system.

[2] The present action for damages was formerly against four defenders. The case against the first defender was dismissed on 11 August 2017. The third defender was assoilzied from the conclusions of the summons on 27 June 2018. The action is now directed only against the second and fourth defenders. The pursuer avers that they did not advise it that a ground gas defence system was required to prevent noxious gas seeping up from the coal strata and mine workings into the houses.

[3] The fourth defender maintains that any right the pursuer had to claim damagers from it has been extinguished by the operation of the short negative prescription. It also maintains that the pursuer's averments anent prescription are irrelevant. These issues were the subject of a debate at the fourth defender's insistence. The second defender did not participate in the debate. Counsel for the pursuer and counsel for the fourth defender lodged written notes of argument, which they adopted and supplemented with oral submissions. I provide an outline of each party's submissions below. The fourth defender denies liability and disputes many of the pursuer's averments, but for the purposes of the debate I require to take the pursuer's averments *pro veritate*.

The pursuer's pleadings

[4] The pursuer avers that it appointed the fourth defender in or around early 2004 to provide site investigation advice and services for several sites, and that in 2005 the development site was added to the list of sites covered by the contract. It avers that the second and fourth defenders failed to carry out adequate site investigations and failed properly to interpret and act upon the results of such site investigations as were carried out. The pursuer further avers that appropriate site investigations and risk assessment would have revealed the risk of ingress from ground gas and would have led to the installation of a ground gas defence system within, or as part of, the foundations to be installed at the site; and that the fourth defender was negligent in failing to advise that such a system should be installed. It avers that had appropriate advice been given it would have accepted it and that a ground gas defence system would have been incorporated in the development. It further avers that, in reliance on the site investigation and assessment, it engaged contractors to construct the development, and its architects issued construction drawings which did not provide for a ground gas defence system; that the development was built between December 2007 and 26 June 2009; and that it incurred expenditure on its construction throughout that period, but that the scheme as designed and constructed did not include the specification or installation of any ground gas defence system. The houses were occupied by tenants without incident until 7 September 2013. On that date residents of one of the houses became ill. On investigation it soon became apparent that dangerous levels of toxic gas were present in the houses. The tenants and their families were all decanted. The pursuer avers (arts 31 and 42) that it was necessary to demolish the development in its entirety, and that that was the only feasible solution. The development was demolished between 6 May 2015 and 24 June 2016.

[5] The pursuer claims damages of £12,077,080 from the second and fourth defenders jointly and severally or severally (the first conclusion and art.42). It avers (art.42.11) that its losses arise from the need to demolish the houses. About two thirds of the damages claimed represent the costs which it is averred will be incurred to contractors to rebuild the development with a ground gas defence system. Other substantial heads of the damages claimed include demolition costs and the costs associated with decanting and rehousing tenants and their families. The pursuer does not seek to recover the costs incurred constructing the failed development.

[6] In response to the fourth defender's prescription plea the pursuer admits that it incurred considerable expenditure in relation to the construction of the development throughout the course of those construction works, and that it was aware of the expenditure at the time it was incurred. It avers (art.27): "(i) that expenditure did not constitute loss for the purposes of prescription; (ii) [it] could not with reasonable diligence have been aware, until in or around 7th September 2013, that it had suffered any loss, injury or damage (its loss in fact being the completion of an inherently defective development in 2009); and (iii) accordingly, although loss had been occasioned on completion of the development in 2009, commencement of the prescriptive period was postponed until (no earlier than) 7th September 2013, in terms of s.11(3) of the Prescription and Limitation (Scotland) Act 1973. Knowledge of the expenditure in relation to the design and construction of the development was not knowledge of loss, for the purposes of the 1973 Act, since that expenditure was not loss for those purposes. As hereinafter condescended upon the defective nature of the Works was latent until in or around 7th September 2013 at the earliest … Proceedings against [the fourth defender] commenced on 4th September 2018, prior to the expiry of the quinquennium …".

The fourth defender's pleadings

[7] The fourth defender avers (answer 27) that the pursuer incurred considerable expenditure in relation to the construction of the development throughout the course of the works, which were completed in June 2009; that it was aware of the expenditure being incurred; and that the expenditure constituted loss for the purposes of prescription. In answer 43 the fourth defender avers:

> "… On the denied hypothesis of the [pursuer's] averments, [the fourth defender] breached its duties to the [pursuer] in 2006, in that there was a failure to recommend the installation of a ground gas defence system, such as a gas membrane. In due course … construction of the Development proceeded in reliance on the assessment of risk by [the fourth defender], and on the basis that no ground gas defence system needed to be installed. The [pursuer] paid for the construction of the Development. It incurred considerable expenditure in relation to the construction of the Development throughout the course of the works. Those works were completed in June 2009. The Development was completed without any ground gas defence system (such as a gas membrane) being installed. On the [pursuer's] case, the Development was, in the absence of a gas membrane, inherently defective. The [pursuer] was — obviously — aware of the expenditure which it had incurred in connection with the construction of the Development up to and including 2009. That expenditure was, on the denied hypothesis upon which the [pursuer's] case proceeds, wasted or failed to achieve its purpose — in that it did not achieve the construction of habitable properties … ."

Prescription and Limitation (Scotland) Act 1973

[8] Sections 6 and 11 of the Prescription and Limitation (Scotland) Act 1973 provide: [his Lordship quoted their terms set out supra and continued:]

Counsel for the fourth defender's submissions

[9] Senior counsel for the fourth defender moved the court to sustain the fourth defender's first and seventh pleas in law (to relevancy and prescription). He submitted that the breach of contract upon which the pursuer founds occurred in 2006. That was the date of *injuria*. *Damnum* had occurred when the pursuer had incurred expenditure constructing the development in reliance upon the fourth defender's advice (*Gordon's Trs v Campbell Riddell Breeze Paterson LLP*, per Lord Hodge JSC at 2017 S.L.T., pp.1291–1293; 2018 S.C.L.R., pp.136–138, paras 18–24; *Kennedy v Royal Bank of Scotland Plc*, per Lord President Carloway at 2018 S.L.T., pp.1266–1267; 2018 Hous. L.R., pp.124–125, paras 19–22). It made no difference that the pursuer's damages claim was based on the costs of demolition and rebuilding rather than recovering the construction costs which ultimately proved to be abortive. That did not alter the fact that the wasted expenditure had been a loss. That expenditure took place between December 2007 and June 2009. It had been of the order of £6 million. It was clear with hindsight that it had been wasted expenditure. Wasted expenditure was plainly a loss (see e.g. *David McBrayne Ltd v Atos IT Services (UK) Ltd*,

per Lord Doherty at paras 112 and 113). When the expenditure was incurred the pursuer suffered loss. There had been the concurrence of *injuria* and *damnum* by, at the latest, June 2009. The pursuer had been aware of the expenditure at the time it was incurred. That was sufficient awareness of the occurrence of loss. It did not need to know that it had suffered some detriment or that something had gone awry. With hindsight, and as a matter of objective fact, the expenditure was a loss. The pursuer's averments in art.27 to the effect that the obligation had not been extinguished were irrelevant. Any obligation upon the fourth defender to make reparation to the pursuer had been extinguished in June 2014, more than four years before the action against the fourth defender was raised on 4 September 2018.

Counsel for the pursuer's submissions

[10] Senior counsel for the pursuer submitted that the pursuer's averments set out a relevant case that the obligation it seeks to enforce has not been extinguished by prescription. While he did not dispute the principle that wasted expenditure could be loss, injury or damage, the pursuer did not maintain that the expenditure which had been incurred to contractors had been wasted. Rather, it maintained that the pursuer's loss here had been that it had been left with a development which was uninhabitable because it had no ground gas defence system. There had been loss as a result of the fourth defender's breach but it had not occurred until June 2009 — when practical completion of the development had been achieved. However, the pursuer had not become aware of having suffered loss, and could not with reasonable diligence have become so aware, until 7 September 2013 at the earliest when the first complaint was made by a tenant.

[11] Read properly, *Gordon's Trs v Campbell Riddell Breeze Paterson LLP* did not support the fourth defender's argument. In that case the court had found that the pursuers suffered loss on 10 November 2005 when they did not obtain vacant possession of a 40 acre field and a 50 acre field. Since they were aware then that they had not obtained vacant possession, the commencement of the prescriptive period was not postponed by virtue of the operation of s.11(3). Legal expenses incurred after that date seeking to assert a right to vacant possession had been wasted expenditure, and a head of loss, but they were not what triggered the start of the quinquennium. Moreover, in *Dunlop v McGowans* and in *Gordon's Trs* the pursuers had incurred the legal expense of the defective notices to quit before the date when each pursuer ought to have obtained vacant possession; but in each case the date of *damnum* was that date and not the earlier date when expenditure by them on the notices had been incurred. If the fourth defender's argument was correct the conclusion in each case ought to have been that *damnum* occurred at the time of the earlier expenditure. The consequences of the argument being right would be far reaching. It would mean that in any contract for work or services where a creditor did not get what he bargained for, the payment (or part payment) of the price by the creditor would be *damnum*; and since the creditor would be aware of the expenditure when it was incurred he could not rely on s.11(3) to postpone the start of the prescriptive period. If the fourth defender's argument was correct it would effectively render s.11(3) redundant.

Decision and reasons

The law at present

[12] When s.5 of the Prescription (Scotland) Act 2018 is brought into force it will effect substantial amendment to s.11 of the 1973 Act. However, this case has to be decided on the basis of the current law.

The fourth defender's breach of contract

[13] The alleged failures by the fourth defender, which the pursuer maintains were a breach of contract, occurred in about 2006. I understand it to be common ground that that was the date of *injuria*. The pursuer does not aver that there was a continuing breach after that date. It does not seek to rely upon s.11(2).

When did damnum occur?

[14] The pursuer's claim against the fourth defender is not one for physical damage to property. It is a claim for financial loss. In *Gordon's Trs* Lord Hodge JSC observed (pp.1291–1292 (p.136)):

> "[19] … In s.11(1) the phrase 'loss, injury or damage'… is a reference to the existence of physical damage or financial loss as an

> objective fact. … No question arises under subs.(1) as to the creditor's knowledge of that objective fact. …
>
> Thus if, as a result of a breach of contract, a person purchases defective goods, incurs expenditure or fails to regain possession of his property when he or she wished to do so, the s.11(1) clock starts when the person acquires the goods, the expenditure is incurred or when the person fails to obtain vacant possession of the property."

I understand both parties to accept that, as a matter of objective fact, loss, injury or damage had occurred by June 2009. However they arrive at that conclusion by different routes. The rival contentions are (for the fourth defender) that there was *damnum* when the pursuer incurred expenditure constructing the development in reliance on the fourth defender's negligent advice; and (for the pursuer) that *damnum* did not occur until June 2009 when practical completion of the development was achieved. It seems to me that on a proper analysis both contentions proceed on the basis (a) that the pursuer funded and carried out the construction work in reliance on the fourth defender's advice; and (b) that, with hindsight, the construction expenditure was wasted and did not achieve its purpose.

[15] The pursuer characterises its loss as getting a development which was uninhabitable, which it says did not happen until practical completion. While it has opted to frame its damages claim in terms of the costs associated with demolishing and reconstructing the development, it accepts that loss was caused by the *injuria* long before the demolition. *Ex hypothesi* of its pleadings, it ended up with an uninhabitable development; and since the development required to be demolished, in my opinion it may reasonably be inferred that the construction expenditure was wasted. It is difficult to see why that expenditure was not a loss until practical completion. The date of practical completion of a construction contract may often be significant where the contractor is obliged to perform an obligation (or obligations) by that date (see e.g. *Huntaven Properties Ltd v Hunter Construction (Aberdeen) Ltd*, per Lord Doherty at paras 55, 64; *Agro Invest Overseas Ltd v Stewart Milne Group Ltd*, per Lord Clark at paras 101–102). If the relevant obligation is not duly performed by then the contractor will be in breach, and the date of practical completion will be the date of *injuria*. If the breach causes immediate loss, injury or damage, there will be the concurrence of *injuria* and *damnum* at that time. The obligation to make reparation will become enforceable from that point unless the appropriate date is deemed to be a later date because of the operation of s.11(3).

[16] Here, the fourth defender was not the contractor under the construction contract for the development. Its contract with the pursuer was an earlier agreement relating to site investigation and assessment. The breach of the relevant obligations under that contract, the *injuria*, occurred in 2006, three years before practical completion. The development had a fundamental defect of which the pursuer was unaware at practical completion; but that defect was present in the design of the development, and its construction proceeded in accordance with that design.

[17] In my opinion the pursuer suffered loss, injury or damage before practical completion. As soon as the pursuer accepted the fourth defender's advice and acted upon it there was *damnum*. The pursuer (and the construction professionals and contractors it engaged) relied upon the advice in determining the development's design and in carrying out its construction. The pursuer entered into contractual obligations, and it incurred expenditure, upon the basis of the advice. Unfortunately, the design and construction of the development were destined to fail from the start because they were based on the advice which the fourth defender had given. Even if, through the intervention of an extraneous factor, the problem had been discovered before construction began, in order to put matters right the site investigation and assessment would have had to be revisited and varied, as would the design of the development and the content and terms of the construction contract. Inevitably, that would have been productive of additional costs. In any case, in my opinion it is not appropriate to approach the matter on the basis that an extraneous factor might have intervened (*Jackson v Clydesdale Bank Plc*, per Lord Eassie at 2003 S.L.T., p.281, para.28; *Kusz v Buchanan Burton*, per Lord President Hamilton at 2010 S.C.L.R., p.32, para.20; *Heather Capital Ltd (In Liquidation) v Levy & McRae*, per Lady Paton at 2017 S.L.T., p.388, para.56). Rather, in my view the correct approach is to proceed on the basis that the development was fated to be defective because of the fourth defender's breach, and that the

expenditure involved in constructing it would be wasted (as proved to be the case).

[18] In my opinion the expenditure which the pursuer incurred constructing the development between December 2007 and June 2009 was loss, injury or damage caused by the fourth defender's breach. The expenditure was wasted. It did not achieve its purpose. The whole development required to be, and was, demolished.

Section 11(3)

[19] The pursuer avers that it was not aware before 7 September 2013 (at the earliest) that it had suffered loss, injury or damage. It maintains that before then it had no actual or constructive knowledge of having suffered any loss, injury or damage.

[20] I agree that on the pursuer's averments it was unaware before that date that anything had gone wrong, or that it had suffered a detriment. However, I do not agree that it follows from that that it was not aware that it had suffered loss.

[21] In *Gordon's Trs* Lord Hodge JSC reasoned (p.1292 (pp.136–137)):

> "[20] Section 11(3), which postpones the start of the prescriptive period, is concerned with the awareness of the creditor. But that which the creditor must actually or constructively be aware of before the prescriptive period begins is the same 'loss, injury or damage' of which s.11(1) speaks, because subs.(3) uses the same language and also refers back to subs.(1) when it speaks of 'loss, injury or damage caused as aforesaid'. The phrase 'loss, injury or damage' must have the same meaning in each of the subsections of s.11. There is therefore no scope for reading any additional meaning into those words in subs.(3).
>
> [21] It follows that s.11(3) does not postpone the start of the prescriptive period until a creditor of an obligation is aware actually or constructively that he or she has suffered a detriment in the sense that something has gone awry rendering the creditor poorer or otherwise at a disadvantage. The creditor does not have to know that he or she has a head of loss. It is sufficient that a creditor is aware that he or she has not obtained something which the creditor had sought or that he or she has incurred expenditure.
>
> [22] This approach is harsh on the creditor of the obligation, where the creditor has incurred expenditure which turns out to be wasted or fails to achieve its purpose, because the circumstances when the prescriptive period begins may not prompt an enquiry into the existence or likelihood of such loss. Thus a person may begin a legal action and incur expenditure on legal fees on the basis of negligent legal advice or he or she may purchase a house at an over value as a result of the negligent advice of a surveyor. In each case the person may be aware of the expenditure but not that it entails the loss. But it offers certainty, at least with the benefit of hindsight. The trustees' formulation by contrast would create uncertainty. If it were necessary in order for the prescriptive period to begin that the creditor be aware that something had gone awry and that he or she has suffered a detriment in the form of wasted expenditure, would an adverse judgment at first instance be sufficient to establish such an awareness of detriment if there were strong grounds for an appeal? The result might be prolonged uncertainty. Further, a requirement that there be an awareness of a head of loss would involve knowledge of the factual cause of the loss, which is an interpretation that this court has rejected in *Morrison v ICL*."

[22] Here, the pursuer did not know that it had not obtained what it had sought from the fourth defender (i.e. competent site investigation and assessment). However, it knew between December 2007 and June 2009 that it was incurring expenditure on construction of the development in reliance on the fourth defender's advice. It did not know at the time it was being incurred that the expenditure was wasted or would fail to achieve its purpose. Nevertheless, as a matter of objective fact, and with the benefit of hindsight, the expenditure was wasted and it did fail to achieve its purpose. As a matter of objective fact it was "loss, injury or damage".

[23] I do not accept that the interpretation of s.11(3) in *Gordon's Trs* — which I have followed — renders s.11(3) redundant. The subsection undoubtedly has a narrower ambit than was thought

to be the case before *David T Morrison & Co Ltd (t/a Gael Home Interiors) v ICL Plastics Ltd* and *Gordon's Trs* were decided. However it is not redundant. There are circumstances where it does postpone the commencement of the prescriptive period.

[24] In my opinion, for the foregoing reasons, it follows that the pursuer was aware of having suffered loss, injury or damage more than five years before the action was raised on 4 September 2018; and that, accordingly, the obligation of the fourth defender to make reparation has been extinguished by the short negative prescription. That is sufficient to decide the case. However, I think it is also appropriate to add some observations.

[25] First, in my view it is not necessary in this case to express views on scenarios different from the one before me. I think it preferable that guidance in relation to each such scenario is given in a case where it forms a necessary part of the court's decision, and where the court has heard full submissions in relation to it. For present purposes I confine myself to the following remarks on a scenario which senior counsel for the pursuer prayed in aid, i.e. a construction contract between employer and contractor. Senior counsel for the pursuer suggested that if knowledge of the incurring of expenditure could be awareness of loss for the purposes of s.11(3), then an employer who paid sums to a contractor as work proceeded would thereby have knowledge of loss, injury or damage if the expenditure ultimately turned out to be wasted because of the contractor's breach of contract. At first blush that scenario appears to be materially different from the present case. Here, the relevant expenditure was not payment for the fourth defender's advice. It was further expenditure incurred in reliance on the advice. In the posited scenario the expenditure was the consideration for the services being provided, not further expenditure incurred by the employer in reliance on advice given by the contractor. Besides, *injuria* must either precede or be contemporaneous with *damnum* (Johnston, *Prescription and Limitation* (2nd edn), para.4.21); and the *damnum* must be caused by the *injuria*. It is not clear that those requirements are satisfied in the posited scenario.

[26] Second, I am not persuaded that there is anything to be taken from the fact that in *Dunlop v McGowans* and *Gordon's Trs* the date of *damnum* was the date when vacant possession ought to have been obtained, rather than the earlier dates when the pursuers incurred the legal expense of the defective notices to quit. In those cases no one suggested that *damnum* occurred at the earlier date. The expenditure on the notices was the consideration for the solicitors' services, not further expenditure incurred in reliance on their advice. It seems doubtful that the *injuria* preceded or was contemporaneous with the expenditure, or that the expenditure was caused by the *injuria*.

Disposal

[27] Senior counsel for the fourth defender asked me to sustain both his relevancy plea and his plea of prescription. The relevancy plea seeks dismissal and the prescription plea seeks absolvitor. Plainly, I cannot grant both dismissal and absolvitor. Having regard to that, and to the fact that the hearing was a debate on the pleadings, I think the appropriate course is to sustain both pleas but to grant decree of dismissal rather than decree of absolvitor. I shall reserve all questions of expenses.

Counsel for Pursuer, *Thomson, QC*; Solicitors, Shepherd & Wedderburn LLP
Counsel for Fourth Defender, *Borland, QC, A N McKenzie*; Solicitors, BTO.

WPH DEVELOPMENTS LTD v YOUNG AND GAULT LLP

No 3
29 July 2021
[2021] CSIH 39

First Division
Sheriff Court

WPH Developments ltd, Pursuers and Respondents—*DEL Johnston QC*
Young and Gault LLP (in liquidation), Defenders and Appellants—*S Manson*

Prescription – Quinquennial prescription – Creditor's awareness of loss – Residential development – Whether pursuers aware of loss when walls built on neighbouring land – Prescription and Limitation (Scotland) Act 1973 (cap 52), sec 11(3)

Section 6(1) of the Prescription and Limitation (Scotland) Act 1973 (cap 52) ('the 1973 Act') provides, so far as material, ''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''. Section 6(3) provides, ''In subsection (1) . . . 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.'' Schedule 1 provides, *inter alia*, that sec 6 applies to obligations arising from liability to make reparation. Section 11(1) provides, so far as material, ''any obligation . . . to make reparation for loss, injury or damage caused by an 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.'' Section 11(3) provides, so far as material, ''In relation to a case where on the date referred to in subsection (1) . . . the creditor was not aware, and could not with reasonable diligence have been aware, 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.''

In October 2012, the pursuers engaged the defenders to provide architectural services in relation to a residential development at Newton Mearns. The defenders' task included plotting the boundaries of the development. The pursuers averred that, as a result of the defenders' incorrect plotting of boundaries, walls were built on neighbouring land. In autumn 2013, the defenders provided drawings to be used in the conveyance of individual plots. The pursuers averred that these drawings did not depict the true boundary of the pursuers' title and that, as a result, when plots were sold, the disponees did not acquire title to all of the land disponed to them. On 20 February 2014, the neighbouring landowner raised issues as to the boundary of the pursuers' title. Later that month, the pursuers were asked to remove the encroaching walls. The pursuers raised an action for damages against the defenders. The action commenced on 21 November 2018.

The defenders averred that any obligation on their part to make reparation had been extinguished. They averred that the pursuers had incurred wasted expenditure more than five years before commencement of the action. *Injuria* and *damnum* had concurred before 21 November 2013.

The pursuers averred, in response, that no loss had been incurred until 2014, when they required to purchase extra land and relocate the encroaching walls. Had loss been incurred before 21 November 2013, they averred, in reliance on sec 11(3) of the 1973 Act, that they had not been aware, and could not with reasonable diligence have become aware, that loss had occurred before

February 2014, when the neighbouring landowner had raised issues as to the boundary of their title.

The sheriff held that loss had occurred before 21 November 2013, when walls were built on neighbouring land. However, the pursuers had made relevant averments that they were not aware, and could not with reasonable diligence have become aware, of loss until they were informed of the encroachment. The sheriff reasoned that, if hindsight was applied, the date of *damnum* and the date of the creditor's awareness of loss would always coincide, rendering sec 11(3) redundant. He concluded that, if the creditor incurred expenditure, that could constitute latent damage, engaging sec 11(3). Although that analysis was contradicted by passages in *Gordon's Trs v Campbell Riddell Breeze Paterson LLP* (2017), those passages were erroneous *obiter dicta*. *Midlothian Council v Raeburn Drilling and Geotechnical Ltd* had been wrongly decided. Hindsight could not be applied to determine the creditor's awareness of loss.

On appeal, the defenders submitted that the sheriff had failed to understand and to apply binding authority. Had that binding authority been applied, their plea of prescription would have succeeded.

The pursuers supported the sheriff's reasoning, submitting that hindsight had no role to play in the operation of sec 11(3). They had become aware of loss only in February 2014, when they became aware of the encroachment.

Held that: (1) in *Gordon's Trs v Campbell Riddell Breeze Paterson LLP* the UK Supreme Court held that sec 11(3) of the 1973 Act started the prescriptive clock when the creditor of the obligation was aware that he or she has spent money, but did not know that that expenditure would be ineffective; while it was understandable that the sheriff had difficulty with the notion of hindsight being used to create an awareness on the part of a creditor of a detriment at a point in time when the creditor had no such awareness, hindsight knowledge of the circumstances that rendered the loss detrimental had formed no part of the Supreme Court's analysis of sec 11(3) in *Gordon's Trs* and contemporaneous knowledge of the objective facts which constituted the loss was sufficient to preclude reliance on sec 11(3) (paras 30, 31); (2) had the sheriff applied the authorities binding upon him, he would have been bound to hold that the pursuers' averments in reliance on sec 11(3) were irrelevant; the pursuers were aware of the objective facts which constituted loss as and when they occurred and the prescriptive clock started then, and the fact that an accurate calculation of all consequential loss could not be made until later did not alter that position (paras 37, 39, 41); and appeal *allowed*.

Observed that the pursuers' submissions and the sheriff's judgment were, in effect, eloquent pleas for a return to something similar to the understanding of sec 11(3) of the 1973 Act before *David T Morrison & Co Ltd (t/a Gael Home Interiors) v ICL Plastics Ltd* and *Gordon's Trs v Campbell Riddell Breeze Paterson LLP* (2017); it was, however, a lower court's task to apply authoritative expositions of the law, not to evaluate them (para 42).

Glasgow City Council v VFS Financial Services Ltd 2020 SLT 1227 *approved* and *Gordon v Campbell Riddell Breeze Paterson LLP* 2016 SC 548, *Gordon's Trs v Campbell Riddell Breeze Paterson LLP* 2017 SLT 1287 and *Kennedy v Royal Bank of Scotland plc* 2019 SC 168 *applied*.

WPH Developments ltd raised an action against Young and Gault LLP (in liquidation) in the sheriffdom of Glasgow and Strathkelvin at Glasgow. The initial writ was served on 21 November 2018. On 28 October 2019, the cause called for debate before the sheriff (S Reid). On 8 April 2020, the sheriff allowed a proof before answer ([2020] SC GLA 27; 2020 SLT (Sh Ct) 185). The defenders appealed to the Sheriff Appeal Court.

On 4 August 2020, on the defenders' unopposed motion, the Sheriff Appeal Court (Sheriff Principal CD Turnbull, Sheriff AM Cubie and Sheriff N McFadyen) remitted the appeal to the Court of Session in terms of sec 112 of the Courts Reform (Scotland) Act 2014 (asp 18) ([2021] SAC (Civ) 7; 2020 GWD 29-376).

Cases referred to:
Dunlop v McGowans 1980 SC (HL) 73; 1980 SLT 129
Glasgow City Council v VFS Financial Services Ltd [2020] CSOH 92; 2020 SLT 1227
Gordon v Campbell Riddle Breeze Paterson LLP [2016] CSIH 16; 2016 SC 548; 2016 SLT 580
Gordon's Trs v Campbell Riddell Breeze Paterson LLP [2017] UKSC 75; 2017 SLT 1287; 2018 SCLR 129
Kennedy v Royal Bank of Scotland plc [2018] CSIH 70; 2019 SC 168; 2018 SLT 1261; 2018 Hous LR 120
Midlothian Council v Raeburn Drilling and Geotechnical Ltd [2019] CSOH 29; 2019 SLT 1327
Morrison (David T) & Co Ltd (t/a Gael Home Interiors) v ICL Plastics Ltd [2014] UKSC 48; 2014 SC (UKSC) 222; 2014 SLT 791; 2014 SCLR 711; [2014] CILL 3561

The cause called before the First Division, comprising the Lord President (Carloway), Lord Malcolm and Lord Pentland, for a hearing on the summar roll, on 2 June 2021.

At advising, on 29 July 2021, the opinion of the Court was delivered by Lord Malcolm—

Opinion of the Court—

Introduction

[1] This action concerns a claim for damages based on allegedly negligent architectural services which caused the pursuers to build on land they did not own. The sheriff heard a debate limited to the question of whether any claim had been extinguished by the operation of the five-year short negative prescription. It was submitted that the alleged breach of duty (*injuria*) and resulting loss (*damnum*) had occurred more than five years before the commencement of the action. The sheriff held that this was correct. However the pursuers had made relevant averments to the effect that they were not aware, and could not with reasonable diligence have become aware, of the occurrence of *damnum* until they were informed of the encroachment, all in terms of sec 11(3) of the Prescription and Limitation (Scotland) Act 1973 (cap 52). This was said to have happened within the five years preceding the raising of the action on 21 November 2018. The sheriff ordered a proof before answer, which, since the pursuers' averments as to awareness of boundary problems were not admitted, would include determination of the prescription issue ([2020] SC GLA 27).

[2] The defenders appealed to the Sheriff Appeal Court ([2020] SAC (Civ) 7). It granted an unopposed motion to remit the appeal to this court in terms of sec 112 of the Courts Reform (Scotland) Act 2014 (asp 18). It was satisfied that the appeal raised a complex point of law in that, notwithstanding the recent decisions in the UK Supreme Court on the subject of sec 11(3) of the 1973 Act, 'it would appear that uncertainty remains'.

1973 Act

[3] An obligation to make reparation is subject to the five-year short negative prescriptive period, after which any obligation is extinguished. It runs from the date when the obligation becomes enforceable (1973 Act, sec 6 and sch 1). Section 11(1) states the general rule that an obligation

> 'to make reparation for loss, injury or damage caused by an act, neglect or default shall be regarded . . . as having become enforceable on the date when the loss, injury or damage occurred.'

Section 11(3) qualifies the above as follows: if on the date referred to in subsec (1) 'the creditor was not aware, and could not with reasonable diligence have been aware, that loss, injury or damage caused as aforesaid had occurred' there shall be substituted 'a reference to the date when the creditor first became aware, or could with reasonable diligence have become, so aware.' Thus sec 11(3) can operate to postpone the start of the prescriptive clock notwithstanding that an act, neglect or default has caused loss, injury or damage.

The pleadings

[4] In October 2012 the pursuers, who are residential property developers, instructed the defenders to provide architectural services in respect of a development in Newton Mearns. This was to include the plotting of the precise location of its boundaries. The pursuers aver that the construction drawings were erroneous in this respect thereby causing walls and garden ground to be built on land belonging to a neighbouring landowner. In the autumn of 2013 drawings of individual plots were provided by the defenders and used for the purpose of dispositions to individual house purchasers, but again they wrongly depicted the boundary of the pursuers' title. Absolute warrandice was granted to the purchasers, meaning that the pursuers were liable if the buyers did not gain title to all of the disponed property.

[5] On 20 February 2014 the neighbouring landowner's agents raised issues as to the boundary. Later that month, under reference to a surveyor's opinion, the pursuers were asked to remove the encroaching walls. In May 2014 it emerged that the Keeper of the Land Registers of Scotland was rejecting the dispositions granted by the pursuers because of boundary discrepancies. Various heads of loss resulted in the pursuers raising the current proceedings seeking damages in the sum of £300,000 plus interest. As noted above (para 1), the action commenced on 21 November 2018.

Issue before the sheriff

[6] The defenders averred that any obligation to make reparation had prescribed in that the five-year prescriptive clock started before 21 November 2013. In particular, on the pursuers' pleadings any wrongdoing began in 2012 when erroneous drawings were supplied. The following month loss occurred when walls were built on the neighbour's land. Furthermore two houses were sold with warrandice in September and October 2013. In terms the pursuers stated that they had incurred wasted expenditure prior to 21 November 2013. Thus there was concurrence of *injuria* (a wrongful act) and *damnum* (loss caused thereby) at a time which meant that any claim had been enforceable for more than five years before the action commenced.

[7] The pursuers averred that the plots were sold for full value. It was contended that no loss occurred until 2014 when they required to purchase extra land and relocate certain boundary walls. If this was wrong and loss was sustained before 21 November 2013, the pursuers were not aware, and could not with reasonable diligence have become aware, that loss, injury or damage had occurred before February 2014 when boundary issues were raised by the nearby landowner's agents. It followed that the pursuers had presented a relevant case which, if it could be established at proof, would have the result that sec 11(3) of the 1973 Act postponed the start of the five-year period until the pursuers were aware of the

problem, with the effect that the action was raised timeously. (The pursuers placed no reliance on sec 6(4) of the Act.)

[8] The defenders submitted that even if the pursuers established that they first knew of the difficulty in early 2014, nonetheless sec 11(3) did not operate to postpone the start of the prescriptive clock. At the time the pursuers knew that the walls had been built and that the houses had been sold. On the admitted facts it was clear that any claim had prescribed.

Sheriff's decision

[9] The sheriff held that *injuria* occurred when the defenders supplied the faulty construction drawings and again when erroneous plot plans were provided. *Damnum* is when someone suffers a detriment or is worse off, whether physically or economically, because of wrongdoing. The pursuers sustained loss before 21 November 2013 when, in reliance on the drawings, walls were built on land they did not own. Thereafter they were under a legal liability to remove them. Furthermore the expenditure incurred in constructing the walls was wasted in that they would require to be demolished and relocated (sheriff's judgment, para 82). The sheriff rejected an argument that the *damnum* was uncertain or contingent. No cross-appeal has been taken against these parts of his judgment.

[10] The sheriff then addressed the defence under sec 11(3) of the 1973 Act. He asked himself: When did the pursuers become aware of the *damnum*? He noted that the effect of sec 11(3) was to postpone the start of the five-year period if and for so long as the pursuers were not aware, and could not with reasonable diligence have become aware, that loss, injury or damage had occurred.

[11] In pleading that any claim was extinguished the defenders had relied on the decisions of the UK Supreme Court in *David T Morrison & Co Ltd (t/a Gael Home Interiors) v ICL Plastics Ltd* and *Gordon's Trs v Campbell Riddell Breeze Paterson LLP*. They also relied upon the opinion of Lord Doherty sitting in the Outer House in *Midlothian Council v Raeburn Drilling and Geotechnical Ltd*. At para 103 the sheriff recorded the submission as being that, with the benefit of hindsight, and as a matter of objective fact, the pursuers had the requisite degree of knowledge of the occurrence of *damnum* prior to 21 November 2013. The sheriff understood the defenders' position to be that throughout sec 11 *damnum* is an objective fact 'to be determined with the benefit of hindsight'.

[12] Hindsight is a concept which plainly influenced the sheriff's thinking when rejecting the defenders' submission. He considered that if hindsight is to be applied to ascertain the state of the creditor's awareness, the date of *damnum* and the date of knowledge of its occurrence will always coincide. Section 11(3) would be made redundant. Viewed with the benefit of hindsight, no damage could ever be said to be latent, concealed or unknown.

[13] At para 106 the sheriff considered it a key fallacy of the defenders' approach that it applied hindsight to ascertain the pursuers' actual or constructive knowledge of the occurrence of *damnum*. Another fallacy was the equiparation of the 'awareness of the mere *incurring* of expenditure with awareness of the *occurrence* of *damnum*'. Further, the defenders' analysis 'fails to recognise that wasted expenditure can itself be latent, for the purpose of section 11(3) of the 1973 Act'.

[14] The sheriff elaborated on his reasoning in paras 107 to 116. He observed (para 114) that it cannot be correct that mere awareness that expenditure has been

incurred (which turns out, with hindsight, to have been wasted) is sufficient to start the prescriptive clock; and this because it wrongly assumes that all expenditure by a creditor is manifest detriment. Later he noted that there will be times when a creditor is well aware that expenditure amounts to a detriment, but this was not such a case. He summarised his thinking as follows (para 117):

> '[A]wareness of the *incurring* of expenditure is not necessarily the same as awareness of the *occurrence* of *damnum*, for the purpose of section 11(3). *Damnum* (the ''detriment suffered by the creditor'' or the state of ''being worse off'') may have occurred, but the creditor may be entirely unaware of the occurrence of any such detriment or of being worse off. It is in this sense that *damnum* is latent. Why? Because the detriment (the wasted expenditure) is concealed or disguised as expenditure to the benefit of the creditor, not to its detriment; it is masquerading as due and proper payment for a valuable consideration; it has the appearance of being a *quid pro quo* for a sought-after return. The creditor is obviously aware of the incurring of expenditure but is wholly unaware of the occurrence of *damnum*, because the detriment suffered by the creditor (the wasted expenditure) is latent, being concealed, disguised or masquerading as something other than ''detriment''.'

In short, the conclusion was that the defenders' submissions failed to recognise that, even if caused by a wrongful act, expenditure might not present as a manifest detriment, and could constitute latent damage which engaged the sec 11(3) defence.

[15] The sheriff recognised (paras 145–158) that certain sections of the judgment of the UK Supreme Court in *Gordon's Trs* contradicted his analysis, but he considered those passages to be erroneous *obiter dicta*. (*Obiter dicta* are judicial observations not directly bearing on the court's decision and therefore not establishing legal precedent.) The sheriff considered (para 133) that the defenders' submission was not supported by *Gordon's Trs* true *ratio decidendi* (literally, the rationale of the decision — the legal principle upon which the decision is based), nor by that in *Morrison* (or other binding authority).

[16] In the sheriff's view both *Morrison* and *Gordon's Trs* concerned *damnum* that was manifest and patent from the moment it occurred. In those decisions it was held that sec 11(3) had no application because the *damnum* was never latent. *Morrison* involved an explosion causing extensive damage to a shop, and *Gordon's Trs* turned on a known problem, namely the failure to recover vacant possession of two fields, something which was apparent more than five years before the action was commenced. The sheriff stated (para 142):

> 'Further, importantly, the issue in *Gordon's Trustees* was not whether, for the purpose of section 11(3), the landlords' awareness of the occurrence of *damnum* (the manifest failure to recover possession of the fields) was to be determined with the benefit of hindsight ... the landlords had *actual* awareness of the occurrence of the *damnum*.'

They knew this 'on the day it occurred'.

[17] In the final section of his judgment the sheriff addressed other decisions, including *Midlothian Council v Raeburn Drilling and Geotechnical Ltd*. He explained (paras 167, 168) why he considered that on the issue of the creditor's awareness of the occurrence of *damnum* under sec 11(3) it had been wrongly decided. The council did not know (actually or constructively) that the expenditure had been wasted or that they had suffered a detriment. The Lord Ordinary erred in applying hindsight to both the occurrence of loss and the creditor's knowledge of it. Such was legitimate

for the former, but not for the latter. The wasted expenditure should have been treated as latent damage.

Submissions to this court

Defenders

[18] While we intend no disrespect to counsel's full and detailed presentation, the defenders' submissions can be summarised in brief terms. The essence of the defenders' position was that the sheriff failed to understand and apply authority that was binding upon him, principally *Gordon's Trs* (to be discussed in detail below: paras 29 *et seq*). There can be no real doubt as to its *ratio decidendi*, not least given that the leading judgment in the Inner House clearly specified the question posed in the case and in any subsequent appeal. If the law as laid down by the UK Supreme Court had been applied, the plea of prescription would have succeeded. In the absence of a cross-appeal on the points decided adverse to the pursuers, the only issue is whether the sheriff was mistaken in his approach to sec 11(3) of the 1973 Act. Once *Gordon's Trs* is properly understood it is apparent that the sheriff erred and that the appeal should be upheld.

Pursuers

[19] The pursuers' note of argument states that losses were sustained when expenditure was wasted by building on land belonging to another and by incurring a liability to remove the encroachment, and that both occurred more than five years before the action was commenced. However, the pursuers did not know of the losses until February 2014. The sheriff was correct to reject the defenders' submission based on the use of hindsight, which has no role to play in the operation of the statutory provisions. Section 11(3) of the 1973 Act is concerned with the creditor's awareness or otherwise of the occurrence of loss, which is a subjective matter. Economic loss can be latent if and when it is not recognised as such. It would be unjust if a claim could be lost before the creditor was aware of its existence.

[20] The pursuers supported the sheriff's reasoning, including his analysis of the UK Supreme Court decision in *Gordon's Trs*. Its *ratio decedendi* related to loss arising from the inability to recover possession of the fields, not to expenditure incurred by the pursuers. The trustees were aware that the tenant had not quit, thus sec 11(3) did not postpone the start of the five-year period. The decision does not require the court to regard knowledge of expenditure caused by a wrongful act as awareness of a loss for the purposes of sec 11(3). Passages to that effect were non-binding *obiter dicta*.

[21] *Midlothian Council v Raeburn Drilling and Geotechnical Ltd* was wrongly decided. The loss was the fact that the building works were inherently defective because of the missing gas membrane. This was made up of various heads of loss, such as decanting tenants; demolition and rebuilding; and professional fees. The council knew it paid for the original works, but at that time it was unaware of the claim. Why should that trigger the five-year period? For sec 11(3) the true question was: When did the pursuers know that the works were defective? Similarly, in the present case, why should the five-year period begin simply because a wall was paid for and built on someone else's land? Section 11(3) was designed to give relief in such circumstances.

[22] The loss here was the liability arising from an unauthorised encroachment. One then applies the statutory test to that loss. In both *Dunlop v McGowans* and *Gordon's Trs* the loss occurred when, because of defective notices to quit, vacant possession of the lands concerned could not be obtained. In the former case Lord Russell identified the loss as that arising from the inability to obtain vacant possession and pursue development plans(see p 79). The equivalent here was the liability arising from the encroachment. That liability is particularised in the heads of loss set out in the claim, namely the cost of demolishing and relocating the walls; compensating purchasers in respect of the diminution in the value of their property; and associated legal and professional fees. All of that occurred less than five years before the action began.

[23] For these purposes expenditure is relevant only if caused by a wrongful act. The costs of building the walls and marketing the development were not caused by the alleged negligence. They would have been incurred even if the advice had been correct. Knowledge of these matters cannot amount to awareness of loss. What was required was knowledge of the encroachment, which the pursuers offer to prove was not obtained until February2014. Only then were they aware of something being amiss with the development.

[24] Senior counsel elaborated upon this argument which, if we understood it properly, differs from anything said to or by the sheriff. Counsel accepted that, as is made clear in *Dunlop v McGowans*, the loss caused by a wrongful act is single and indivisible. The prescriptive clock starts only once. However, for present purposes the loss to be identified is 'the global loss' arising from the wrong. Here the 'relevant loss' was the liability arising from the encroachment on the neighbour's land which is particularised in the various heads of loss set out in the initial writ.

[25] While the encroachment occurred more than five years before the action was raised, the question is when did the pursuers become aware of the loss? In *Gordon's Trs* (para 18) Lord Hodge identified the fundamental issue as:

> '[W]hether in s. 11(3) the creditor must be able to recognise that he has suffered some form of detriment before the prescriptive period begins.'

This was a subtle distinction; 'detriment' goes beyond the statutory wording of 'loss'. To comprise loss for these purposes, expenditure must be wasted in the light of the detriment suffered. Thus, for example, awareness of the price paid for defective goods or services is not awareness for the purposes of sec 11(3). One would need to know that the money had not bought the desired object. In similar fashion, money applied to the building of the encroaching walls was not incurred as a result of the breach of contract. It would have happened if the advice was correct. The pursuers were first aware of the liability for encroachment in February 2014. The subsequent costs were incurred to correct the consequences of the alleged negligence. Accordingly a relevant case under the subsection had been pled.

Case law and discussion

Gordon in the Inner House

[26] It is helpful to begin with the Extra Division's decision in *Gordon v Campbell Riddle Breeze Paterson LLP*. In that case the submission for the defenders was that the prescriptive clock began when the pursuers knew they were incurring legal fees even if at the time they were unaware that the notices to quit were invalid and that but for a breach of duty the costs would not have been incurred. In the

leading judgment I described the question raised in the appeal as follows: Does expenditure on services bought and paid for start the clock even if at the time it was not ascertainable that they were or might have been caused by a legal wrong? The matter was put this way (para 15):

> 'What is meant by ''discovery of loss, injury or damage''? Did the prescriptive period begin when the pursuers knew they had incurred a liability in fees to solicitors, or was it postponed until they were aware, or should have been aware, of the background facts which demonstrate that the costs may be recoverable from the solicitors? Can it be said that only then were the pursuers actually or constructively aware of having suffered ''loss, injury or damage''?'

It is clear that the sheriff would answer these questions on the basis that if all that is known is the fact of the expenditure, it is latent damage, and the start of the prescriptive period awaits further relevant information being made available to the creditor. However the Extra Division held, 'not without hesitation', that such could not be reconciled with the majority opinions in *Morrison*. It upheld the Lord Ordinary's decision which was to the effect that the five-year period began when the pursuers knew they had incurred a liability in respect of fees and outlays, 'not when they became aware that they had sustained a compensable loss in the reparation sense'. At para 16 I noted that there was no finding by the Lord Ordinary that the pursuers should have realised that something had gone wrong. 'The Lord Ordinary's decision rested solely on the pursuers' knowledge that legal fees were being incurred'.

[27] Exactly the same can be said about my judgment, which enjoyed the agreement of the other members of the court. While Lady Paton noted that a finding of knowledge or constructive awareness of something having gone wrong might have been made, the sheriff's decision in the present case cannot be reconciled with the Extra Division's reasoning. (It is not clear whether he was referred to it.) At para 22 of the Division's judgment the decision in *Morrison* was described as follows:

> 'In short, in respect of sec 11(3) . . . the test is objective. Has the creditor suffered an injury? If so, is he aware of the facts which constitute the injury? If yes, the prescriptive period has begun.'

It was appreciated that certainty was being achieved at the cost of the creation of 'hard cases'.

[28] It was acknowledged (para 24) that if the case reached the UK Supreme Court the Justices, using their 'greater insight' into their thinking in *Morrison*, might contradict all of this and opine that the creditor would have to know of an injurious event or at least 'something untoward such as would prompt inquiry into the cause'. It would appear that the sheriff so interprets the judgment in the subsequent appeal. It is therefore appropriate to turn to that decision.

Gordon's Trs in the UK Supreme Court

[29] Lord Hodge delivered a judgment with which the whole court agreed. At para 17 he explained the decision in the earlier case of *Morrison* as follows:

> 'The focus of the court's judgment . . . was on the words ''caused as aforesaid'' in subs. (3). They are a reference back to subs. (1) which speaks of loss, injury or damage ''caused by an act, neglect or default''. The phrase ''caused as aforesaid'' thus connects the loss to the cause of action. But the phrase is

> adjectival; it does not require additional knowledge on the part of the creditor. The subsection falls to be read as if it said: ''the creditor was not aware . . . that loss, injury and damage, which had been caused as aforesaid, had occurred''; thus it, like subss. (1) and (2), focuses on the occurrence and timing of loss (*viz*. Lord Reed paras 16 and 25, Lord Neuberger para 47).'

This discussion of *Gordon's Trs* in the UK Supreme Court could stop here. There is nothing to suggest that the court intended any different approach to sec 11(3) of the 1973 Act from that laid down in *Morrison*. If it did, it would have said so in clear terms. It can also be noted that the sheriff's analysis in the present case, and his understanding of what should be taken from *Gordon's Trs* in the Supreme Court, cannot be reconciled with the reasoning in *Morrison* as explained by the Extra Division and by the Supreme Court in the passage just mentioned. *Morrison* is the foundation decision from which all else followed.

[30] Lord Hodge recognised that the property damage at issue in *Morrison* was obvious from the outset, and that in the case of financial expenditure, for example, that incurred in reliance on negligent professional advice, the client might be unaware of the circumstances which meant that it amounted to loss or damage. He said (para 18):

> 'A question which the current appeal raises is whether s. 11(3) starts the prescriptive clock when the creditor of the obligation is aware that he or she has spent money but does not know that that expenditure will be ineffective.'

There can be no real doubt that the court answered that question in the affirmative, and that this formed part of the operative decision in the case. For the purpose of illustrating the nature and the effect of the court's decision, at paras 20 and 21 reference was made to the purchase of defective goods and to a breach of contract which caused expenditure or a failure to recover possession of property. It was noted that in sec 11, subsecs (1) and (2) both refer to the same objective fact of the incurring of 'loss, injury or damage'. Lord Hodge continued as follows:

> 'There is . . . no scope for reading any additional meaning into those words in subs. (3).
>
> It follows that s. 11(3) does not postpone the start of the prescriptive period until a creditor of an obligation is aware actually or constructively that he or she has suffered a detriment in the sense that something has gone awry rendering the creditor poorer or otherwise at a disadvantage. The creditor does not have to know that he or she has a head of loss. It is sufficient that a creditor has not obtained something which the creditor has sought or that he or she has incurred expenditure.'

The sheriff thought that something must have gone wrong with the wording at this passage, which we note would have been carefully reviewed by the other four Justices, and in particular in respect of the last eight words. We see no basis for that proposition. In the following paragraph Lord Hodge expressly recognised that this analysis of the operation of the statute could be harsh on a creditor who incurs expenditure which turns out to be wasted or which failed to achieve its purpose. In particular he might be aware of the expenditure, but not that it entails loss.

[31] Then came a phrase which may be partly responsible for the sheriff's analysis: 'But it offers certainty, at least with the benefit of hindsight.' Lord Hodge contrasted this with the pursuers' alternative approach which created uncertainty, and potentially prolonged uncertainty, which might not be resolved even by first instance litigation. As mentioned above, the sheriff had difficulty with the notion of

hindsight being used to create an awareness on the part of a creditor of a detriment at a point in time when in fact he had no such knowledge. As stated, that is a wholly understandable difficulty; but it is important to make it clear that hindsight knowledge formed no part of the UK Supreme Court's analysis of sec 11(3). It held that contemporaneous knowledge of the objective facts which constitute the loss or detriment is sufficient to preclude reliance on the subsection. Hindsight knowledge of the circumstances which rendered it detrimental played no part in the reasoning. In its context 'hindsight' was mentioned in this passage to explain that once all relevant facts are known then, unlike with the pursuers' approach to subsec (3), the proper outcome can be readily identified.

[32] There is a further reference to hindsight in para 24 of the judgment. This paragraph is headed 'Application to the facts', no doubt meaning application of the court's construction of the legislation to the circumstances of the case. The paragraph was influential in the sheriff's opinion that the *ratio* of the UK Supreme Court's decision can be restricted to one of excluding reliance on sec 11(3) when, more than five years before the action is begun, the creditor knows that he has suffered a detriment; with much of the rest being *obiter*, and erroneous *obiter* at that. In this regard it can be recalled that in the Inner House in a short concurring opinion Lady Paton observed that the view could have been taken that the trustees knew or should have known that something was wrong as early as November 2005 when the tenant failed to remove and the solicitors then instructed withdrew from acting. However, this possibility played no part in the Lord Ordinary's decision, nor in my opinion. In a sense her Ladyship was suggesting that perhaps it had been unnecessary to agonise as to whether, in itself, the payment of fees to the solicitors did or did not start the clock.

[33] In para 24 of his judgment Lord Hodge made three points. First, he rejected the pursuers' argument that the prescriptive period began when they lost the Land Court action. Secondly, on an objective assessment they suffered loss in November 2005 when they did not gain vacant possession of the fields and thus could not realise their development value. The trustees may have believed that this was because of the tenant's intransigence, but it did not matter whether this was the case or whether it was caused by someone else's acts or omissions. It was also possible that loss might have been avoided if the tenant waived his right to challenge the defective notices to quit or had otherwise surrendered possession of the fields, but he did neither,

> 'and with the benefit of hindsight the failure to obtain vacant possession on 10 November 2005 can be seen as having caused loss to the trustees. At that moment, as in *Dunlop* v *McGowans*, the prescriptive period began to run under s. 11(1), unless it was postponed by subs. (3).'

Pausing here it can be seen that hindsight is being mentioned in the context of sec 11(1), not sec 11(3), and for the uncontroversial proposition that loss can occur even though at the time it is not appreciated, but subsequent events allow it to be recognised as such.

[34] Thirdly, the court held that there was no postponement of the five-year period. In November 2005 the trustees knew that they had not recovered the fields. As a matter of fact that was a detriment. Thus, and in accordance with the proper interpretation of the provisions, that fact and that knowledge was enough to start the clock. It was not said that knowledge, actual or constructive, of detriment was needed and was present. The judgment added that in any event the clock

would have commenced by February 2006 when the trustees were incurring fees in respect of the legal proceedings, again with no need for awareness that they were caused by a breach of duty or something having gone wrong. The action having been raised in May 2012, it followed that any obligation to make reparation had prescribed.

[35] The decision on the facts of the case was entirely in line with the preceding discussion in Lord Hodge's judgment. We do not accept the sheriff's categorisation of the *ratio decidendi* as being limited to a known detriment in November 2005 when vacant possession was not obtained. It is of course true that this might well have been appreciated as being a harmful event, but this was not the crux of the decision. Rather, consistently with all that had gone before, the judgment focused on the knowledge of objective facts which amounted to loss or damage, not on any subjective understanding of loss. In any event it was made clear that the fees paid to the new solicitors would, if it was not already ticking, start the prescriptive clock without any need for actual or constructive awareness that they had been caused by a wrongful act.

[36] The decision in *Gordon's Trs* was discussed in *Kennedy v Royal Bank of Scotland plc*. It was confirmed that the prescriptive period will commence as soon as defective goods are supplied or when, because of a breach of contract, expenditure is incurred, even if the creditor is unaware of a head of loss, see the opinion of Lord Drummond Young (para 38). Mention can also be made of observations of Lord Tyre in *Glasgow City Council v VFS Financial Services Ltd*. In his opinion (para 104) he took the view that to hold that sec 11(3) postponed the operation of prescription until the pursuers became aware that they had suffered detriment because of wrongdoing would be 'wholly inconsistent with the decisions in *Morrison* v *ICL* and *Gordon's Trs*, which are of course binding on me'. He was referred to the sheriff's analysis in the present case but considered that it 'fails to take account of the fact that Lord Hodge's analysis addresses both patent and latent injury'. His Lordship stated that the decision in *Gordon's Trs* confirmed that the prescription clock can be started by the incurring of expenditure. As may be apparent by now, we agree with both Lord Drummond Young and Lord Tyre.

Decision

[37] We consider that the sheriff erred in understanding the approach to sec 11(3) of the 1973 Act in *Gordon's Trs* to be based on the use of hindsight knowledge. In our view he should have applied sec 11(3) in the manner described by the Extra Division and by the UK Supreme Court in *Gordon's Trs*, all as discussed above. Had he done so he would have been bound to uphold the submission that the pursuers' averments in reliance on sec 11(3) are irrelevant, and that any claim had prescribed.

[38] At the hearing counsel for the pursuers described as 'inelegantly phrased' the passage in their note of argument accepting that loss was sustained when the walls were built and also when plots were sold under absolute warrandice. He wanted the court to focus on heads of loss occurring within the five-year period, such as the relocating of the walls and compensating the purchasers. He described this as the 'relevant loss', as we understood it on the view that it arose from the fact of the encroachment and demonstrated an awareness on the part of the pursuers of a liability arising from a detrimental event.

[39] We consider that the concession in the note of argument could hardly have been withheld. The sheriff correctly held that as soon as the encroachment occurred

the pursuers were under a legal liability to remove it. In addition, the cost of constructing the offending walls was wasted expenditure. Unless sec 11(3) operated to postpone it, the five-year period for any claim based on the architect's negligence began then. As explained in *Dunlop v McGowans*, the fact that an accurate calculation of all consequential loss could not be made until later does not alter that position. We see no basis for interpreting the recent decisions as giving some special status to heads of loss quantified by reference to subsequent events occurring at a time when it was clear that the creditor was out of pocket. As the Lord President (Carloway) said in *Kennedy v Royal Bank of Scotland plc* (para 20), 'where loss is inevitable, as a matter of law, in almost all cases, loss will have already occurred'.

[40] We doubt that the erroneous plot drawings gave rise to a separate cause of action, but even if they did, again loss occurred more than five years before the action commenced when the pursuers sold the houses.

[41] Once it comes into force the provisions of the Prescription (Scotland) Act 2018 (asp 15) will supersede those of the 1973 Act. In the meantime the proper approach to sec 11(3) has been authoritatively determined by the decisions in *Morrison* and *Gordon's Trs*. In short, the pursuers knew of the objective facts which amounted to 'loss, injury or damage' in terms of both subsecs (1) and (3) as and when they occurred. In particular it was known that the walls had been built and that houses had been sold. There is no scope for a postponement of the start of the five-year prescriptive period until the pursuers were told of the problem. The decision in *Morrison* was by a narrow majority, and after it there remained doubt as to whether its reasoning should be applied to economic loss. The concern was that while known physical damage would generally be easily recognisable as harmful, the same may not apply to financial matters. Such doubts were addressed and resolved in *Gordon's Trs*.

[42] We summarised the oral submissions of counsel for the pursuers above (see paras 19 *et seq*). Although he disclaimed any challenge to the correctness of the recent UK Supreme Court decisions, the submissions were, in effect, an eloquent plea for a return to something similar to the pre-*Morrison* understanding of sec 11(3). The same could be said of the learned sheriff's judgment. However, as was noted by the Extra Division in *Gordon*, it is a lower court's task to apply authoritative expositions of the law, not to evaluate them.

[43] For these reasons the appeal is upheld. The sheriff's interlocutor of 8 April 2020 will be recalled. We shall substitute an order sustaining the defenders' pleas in law that the averments made in reliance on sec 11(3) are irrelevant and that any obligation to make reparation has been extinguished by the operation of prescription. The defenders will be granted decree of absolvitor.

The Court allowed the appeal.

Mitchells Roberton Ltd – DWF LLP

C & L MAIR v MIKE DEWIS FARM SYSTEMS LTD

Court of Session (Outer House)

Lord Braid: 1 July 2022

[2022] CSOH 47; 2022 S.L.T. 1021

Process—Pleadings—Relevancy and specification—Prescription—Land slip on embankment next to slurry tank installed on farm by contractor four years earlier, causing damage to tank—Proprietor and owner of farm raising action of damages against contractor—Contractor averring that any obligation owed by it extinguished by prescription—Whether purely contingent loss capable of starting prescriptive period—Whether relevant case of prescription pled—Prescription and Limitation (Scotland) Act 1973 (c.52), ss.6, and 11(3).

Prescription—Negative prescription—Commencement date of prescriptive period—State of pursuer's knowledge—Land slip on embankment next to slurry tank installed on farm by contractor four years earlier, causing damage to tank—Proprietor and owner of farm raising action of damages against contractor—Contractor averring that any obligation owed by it extinguished by prescription—Whether purely contingent loss capable of starting prescriptive period—Prescription and Limitation (Scotland) Act 1973 (c.52), ss.6, and 11(3).

The proprietor and operator of a farm raised an action of damages against a contractor for loss averred to have been caused by the defender's breach of contractual obligation and breach of duty. The pursuer had contracted with the defender for the supply and installation of a slurry tank. Work was completed in early 2012. In 2016, there was a circle slip of the embankment next to where the tank was situated, which caused the ground to move. The pursuer averred that the tank was so damaged thereby that it would have to be demolished and built elsewhere, and that the defender failed to give any consideration to the risks posed by the embankment or to advise that

engineering advice be taken. The defender denied that any breach on its part caused the pursuer any loss. It also pled that in any event, any obligation owed by it had been extinguished by prescription in terms of s.6 of the Prescription and Limitation (Scotland) Act 1973. The matter came before the Lord Ordinary for debate on the relevancy of the defender's averments on prescription. The pursuer submitted that there was no loss until the slip occurred and the tank was damaged as a result; a loss which might or might not be suffered, dependent on a future contingency, was not *damnum* sufficient to commence the prescriptive period. The defender, with reference to *Gordon's Trustees v Campbell Riddell Breeze Paterson LLP* [2017] UKSC 75; 2017 S.L.T 1287, submitted that *damnum* always occurred when wasted expenditure was incurred, no matter the circumstances, subject to there being a causal link between the wrongful act and the loss.

Held, (1) that Johnston, *Prescription and Limitation*, para.4.41, opined that so long as a pursuer was merely exposed to a contingent loss or liability, they sustained no loss or damage until the contingency was fulfilled and the loss became actual (para.13); (2) that ultimately, each case had to turn on its own facts, and the authorities showed that Scots law at least admitted of the possibility that there were situations where *damnum* would not be held to have occurred where loss was wholly dependent upon a future event which might or might not occur, or was otherwise merely contingent (para.18); (3) that *Gordon's Trustees* was not making an exhaustive statement of the circumstances in which loss, injury or damage might occur, and it was not expressing the view that in every case where expenditure had been incurred, loss had to necessarily be held to have occurred; the Inner House in *WPH Developments Ltd v Young & Gault LLP* [2021] CSIH 39; 2022 S.C. 28; 2021 S.L.T. 905, eschewed any notion that the approach to s.11(3) in *Gordon's Trustees* was based on the use of hindsight knowledge, and made no suggestion that it was no longer part of the law of Scotland that contingent loss did not amount to *damnum* (paras 18, 19); (4) that there was nothing in the authorities which required the prescriptive clock to begin running where any loss was purely contingent; the starting point in all cases had to be to ask when, objectively assessed, loss first occurred, but there remained a distinction between loss which had occurred, even though not appreciated as such at the time, and loss which had not yet occurred, but might do so in the future, the latter being purely contingent and not amounting to *damnum* (para.20); (5) that even with the benefit of hindsight, it could not be said that loss had occurred in 2012; there was merely a risk that a slip might occur in which event the pursuer would suffer loss, but until that happened the pursuer could not be said to have suffered detriment; the pursuer's loss was purely contingent until the slip did in fact occur; accordingly, *damnum* did not, on the facts averred, occur until 2016, and the pursuer's claim had not prescribed (paras 23, 24); and defender's plea of prescription *repelled* and proof before answer *allowed*.

Gordon's Trustees v Campbell Riddell Breeze Paterson LLP [2017] UKSC 75; 2017 S.L.T 1287, *applied*, and *WPH Developments Ltd v Young & Gault LLP* [2021] CSIH 39; 2022 S.C. 28; 2021 S.L.T. 905, *considered*.

Action of damages

The firm of C & L Mair raised an action of damages against Mike Dewis Farm Systems Ltd in respect of damage to a slurry tank installed by the latter following a land slip.

The matter came before the Lord Ordinary (Braid) for debate on the relevancy of the defender's averments on prescription.

Cases referred to

Beard v Beveridge Herd and Sandilands WS, 1990 S.L.T. 609; 1990 S.C.L.R. 335; [1992] E.C.C. 111.

David T Morrison & Co Ltd (t/a Gael Home Interiors) v ICL Plastics Ltd [2014] UKSC 48; 2014 S.C. (U.K.S.C.) 222; 2014 S.L.T. 791.

Dunlop v McGowans, 1980 S.C. (H.L.) 73; 1980 S.L.T. 129.

Gordon's Trustees v Campbell Riddell Breeze Paterson LLP [2017] UKSC 75; 2017 S.L.T. 1287; 2018 S.C.L.R. 129.

Kennedy v Royal Bank of Scotland Plc [2018] CSIH 70; 2019 S.C. 168; 2018 S.L.T. 1261.

Khosrowpour v Taylor [2018] CSOH 64.

Kusz v Buchanan Burton [2009] CSIH 63; 2010 S.C.L.R. 27.

Law Society v Sephton & Co [2006] UKHL 22; [2006] 2 A.C. 543; [2006] 2 W.L.R. 1091.

Midlothian Council v Raeburn Drilling and Geotechnical Ltd [2019] CSOH 29; 2019 S.L.T. 1327.

Wardley Australia Ltd v Western Australia (1992) 109 ALR 247.
WPH Developments Ltd v Young & Gault LLP [2021] CSIH 39; 2022 S.C. 28; 2021 S.L.T. 905.

Legislation referred to
Prescription and Limitation (Scotland) Act 1973 (c.52).

Textbook referred to

Johnston, *Prescription and Limitation* (2nd edn).

On 1 July 2022 the Lord Ordinary *repelled* the defender's plea of prescription and *allowed* a proof before answer.

LORD BRAID.—

[1] The pursuer is the proprietor of (and carries on business from) Townhead Farm, Dumfries. In 2011 it commenced a project to improve the facilities at the farm, which included the installation of a slurry tank to sit on a large area of level ground, beyond which was an embankment. The pursuer contracted with the defender for the supply and installation of the slurry tank. The work was completed in February 2012, and was paid for by the pursuer at around that time.

[2] In September 2016 a circle slip of the embankment occurred, causing the ground at the base of the embankment to move, which the pursuer avers caused such damage to the slurry tank that it will have to be demolished and built elsewhere. The pursuer sues the defender for the loss which it avers flowed from the defender's breach of contractual obligation and breach of duty. In particular, the pursuer avers that the defender failed to give any consideration to the risks posed by the embankment or to advise that engineering advice be taken.

[3] The defender denies that any breach on its part caused the pursuer any loss, and a proof before answer on the merits of the action has been fixed for 19 July 2022. The defender also pleads that in any event, any obligation owed by it has been extinguished through the operation of prescription by virtue of section 6 of the Prescription and Limitation (Scotland) Act 1973, having subsisted for a continuous period of 5 years from the date when it became enforceable without any relevant claim having been made. The pursuer disputes that prescription has occurred, and the case called before me for debate on the defender's plea of prescription. Although Johnston, *Prescription and Limitation* (2nd edition), expresses the view at paragraph 4.42 that it is undesirable that in anything other than the clearest cases decisions about prescription should be made solely on the pleadings, parties were agreed that the relevancy of the defender's averments about prescription could usefully be discussed at debate. It was common ground that if those averments were held to be irrelevant, the court could dispose of the defender's prescription plea at this stage, allowing parties and the court to focus exclusively on the merits of the action at proof, with some saving in time. That advantage was tempered to some extent by the fact that it was also common ground that if the defender's averments were held to be relevant, the issue of whether the pursuer's claim had in fact prescribed would require to be held over until the proof, for inquiry into the pursuer's averments that prescription had not in fact operated, through the operation of section 11(3) and section 6(4) of the 1973 Act.

[4] I did raise with counsel for the pursuer whether, in light of the authorities referred to below, there might have to be inquiry into the likelihood of the embankment slipping and whether it might have been inevitable; but he pointed out (without contradiction by counsel for the defender) that it is not the defender's position on record that the slip was inevitable. Accordingly, the debate was conducted on the footing that while there was a risk of a slip, it was not inevitable that such a risk would ever be purified.

The issue

[5] It is settled law that prescription begins to run when there is concurrence of injuria and damnum: *Dunlop v McGowans* 1980 SC (HL) 73. This requires both a wrongful act, usually a breach of contract or breach of duty (injuria), and loss caused by that act (damnum). Necessarily, the loss must occur either contemporaneously with, or at some time after, the wrongful act. Section 11(1) of the 1973 Act provides that an obligation to pay damages arising from a breach of contract or duty "shall be regarded [for the purposes of the short negative prescriptive period of five years] as having become enforceable on the date when the loss, injury or damage occurred". In ascertaining the date when prescription began to run the first task is to establish when loss, injury or damage occurred. The issue which falls to be determined in this case is

whether the pursuer suffered loss injury or damage in (or by) February 2012, when the installation was completed and paid for, as the defender contends; or whether, as the pursuer contends, it did not suffer loss until the slip occurred in September 2016. If the former, any obligation owed by the defender had prescribed before the action was raised. If the latter, the action was raised within the prescriptive period.

The pursuer's submissions

[6] Counsel for the pursuer submitted that there was no loss until the circle slip occurred and the slurry store was damaged as a result. A loss which might or might not be suffered, dependent on a future contingency, was not damnum sufficient to commence the prescriptive period: Johnston, *Prescription and Limitation*, at paragraph 4.41; cf *Law Society v Sephton & Co (A Firm)* [2006] 2 AC 543, Lord Hoffman at paragraphs 22 and 30. While that was an English case concerned with the application of the conceptually different regime of limitation, the analysis had been recognised as being applicable in Scots law: *Khosrowpour v Taylor* [2018] CSOH 64, per Lord Doherty at [26]. Further support for the proposition that a merely contingent loss did not amount to damnum came from Lord President Carloway in *Kennedy v Royal Bank of Scotland plc* 2019 SC 168 at [20].

[7] It was not always easy to identify on which side of the divide an individual case lay. Clear examples of cases where the loss was inevitable were *Midlothian Council v Raeburn Drilling and Geotechnical Limited* 2019 SLT 1327; *WPH Developments Limited v Young & Gault LLP* 2022 SC 28 (in which the First Division upheld the correctness of *Midlothian Council* and *Kennedy*); *Beard v Beveridge Herd and Sandilands WS* 1990 SLT 609; and *Khosrowpour*. By contrast, *Kusz v Buchanan Burton* 2010 SCLR 27, was an example of a case where loss was held not to have occurred.

[8] In the final analysis, the circle slip was not an event that was certain to occur. It might never have occurred, in which event there would never have been any loss. The matter could be tested by asking whether the pursuer could have raised proceedings in advance of the circle slip on the basis that if it were to occur at some future date, loss would have been suffered. It could not. It followed that the prescriptive period did not commence until the circle slip actually occurred.

The defender's submissions

[9] While counsel for the defender appeared initially not to take issue with the pursuer's overarching submission that where a loss was merely contingent, no damnum had occurred, his analysis of the law appeared to leave no room for that proposition to have any practical effect, since his submission came to be that damnum always occurred when wasted expenditure was incurred, no matter the circumstances (subject to there being a causal link between the wrongful act and the loss). When pressed, he conceded that he had been unable to think of a single hypothetical example where the occurrence of damnum was postponed until the purification of a contingency.

[10] The defender's submission was mainly predicated on *Gordon's Trustees v Campbell Riddell Breeze Paterson LLP* 2017 SLT 1287, per Lord Hodge, from which the following factors could be derived. "Loss, injury or damage" meant physical damage or financial loss as an objective fact (paragraphs 18 and 19). Hindsight must be applied in determining when loss had occurred (paragraphs 22 and 24), the corollary of which was that the creditor did not have to know, at the time, that he or she had a head of loss (paragraph 21). It was sufficient if the creditor was aware that "he or she has not obtained something which [he or she] had sought or that he or she has incurred expenditure" (paragraphs 19 and 22). Section 11(3) did not postpone the start of the prescriptive period until a creditor was actually or constructively aware that he or she had suffered a detriment in the sense that something had gone awry; the creditor did not have to know that he or she had a head of loss (paragraph 21). A causal link between the wrongful act, and the loss, was required. So, in *Midlothian Council*, above, Lord Doherty had held that loss had occurred as soon as the pursuer incurred wasted expenditure acting in reliance on the defender's advice. Likewise the need for causation was emphasised in *WPH Developments*. In that case, the court also endorsed the focus on knowledge of objective facts which constituted the loss or detriment.

[11] Applying that approach to the facts of the present case, the defender's position was that injuria had occurred by February 2012 at the latest; and

that, with the benefit of hindsight, damnum occurred when the pursuer incurred (what turned out to be) wasted expenditure which failed to achieve its purpose. As a matter of objective fact, loss was therefore sustained at that time – February 2012 – both when the pursuer paid a third party to construct the slurry tank and when it paid the defender for the advice it had tendered.

Decision

[12] The first question is whether, as the pursuer submits, it is correct that in Scots law loss which is wholly dependent on a contingency which may or may not occur does not amount to damnum until the contingency in fact materialises. Putting that in a slightly different way, does *Gordon's Trustees* (and the earlier case of *David T Morrison & Co Ltd (t/a Gael Home Interiors) v ICL Plastics Ltd* 2014 SC (UKSC) 222, which was applied in *Gordon's Trustees*) leave any room for the operation of such a rule? And, if it does, was the pursuer's loss in the present case one which was wholly dependent on a contingency which therefore did not occur until 2016; or did it occur in 2012 when the pursuer incurred expenditure which, as it transpired, was wasted?

[13] The starting point is the opinion expressed in Johnston, *Prescription and Limitation,* at paragraph 4.41 that so long as a pursuer is merely exposed to a contingent loss or liability, they sustain no loss or damage until the contingency is fulfilled and the loss becomes actual. Although Australian authority - *Wardley Australia Ltd v Western Australia* (1992) 109 ALR 247 at 258 - is cited in support of that proposition, the author also derives support from *Law Society v Sephton*, above, in which the House of Lords held that a purely contingent claim was not in itself damage until the contingency occurred, for the purposes of the limitation regime in England. At paragraph 22, Lord Hoffman drew a distinction between "bilateral transaction cases" where the plaintiff's failure to get what it should have got from a bilateral transaction was quantifiable damage even though further damage might result; and cases (such as that one) in which a purely contingent obligation had been incurred, concluding at paragraph 30 that a contingent liability which stands alone is not damage until the contingency occurs. The facts in *Sephton* were that the defendants had negligently certified that they had examined a solicitor's accounts and that they were compliant with the Solicitors' Accounts Rules 1991. In fact, the accounts were not compliant, and the solicitor subsequently misappropriated funds from clients, which the Law Society eventually had to make good out of its Compensation Fund. An issue arose as to whether damage occurred, and the limitation period began, when the solicitor misappropriated money, or only when a claim was made on the fund. The House of Lords held that it was the latter. Until then, there was the possibility of a liability to pay a grant out of the fund, but until a claim was actually made, no loss or damage was sustained by the fund: Lord Hoffman at paragraph 18.

[14] Lord Doherty in *Khosrowpour*, above, described "some of the discussion" in *Law Society v Sephton* as persuasive, although it should be noted for completeness that in saying that, he was not referring to the paragraphs mentioned above (other than paragraph 22). In *Khosrowpour*, the pursuer had given £8,000 to his mother-in-law to assist with the purchase of a council house at a discount on the basis of an informal agreement that she would leave the house to him in her will. While in her first will she did bequeath the house to him, she subsequently revoked that bequest in a second will. The pursuer sued his solicitor, averring that the failure to advise the pursuer to enter into an agreement with his mother-in-law whereby she was bound to leave him the house was negligent. An issue arose as to prescription, and although it was argued that there had merely been a contingent loss until the second will had been executed, Lord Doherty held that damnum had occurred immediately the pursuer had parted with the £8,000: it was self-evident that what he got in return for payment was less than he ought to have got and that all he had was a precarious expectancy which could be defeated at any time.

[15] Earlier, in *Kusz* above, the Inner House also referred with approval to *Law Society v Sephton* in holding that, where a solicitor had negligently failed to raise an action and inhibit a builder on the dependence of an action, no immediate loss had occurred and there was no damnum until the pursuer obtained a decree but was unable to enforce it because the builder had alienated his assets and left the country; only then could the claim against the builder be said to have a value, the court stating that there was then "perfection of the contingency by the obtaining of decree for a substantial sum": paragraph [22].

[16] Finally, in *Kennedy*, above, Lord Carloway stated that "where loss is inevitable, as a matter of law, in almost all cases, loss will have already occurred", which suggests that he had in mind that there may be a small category of cases where even future inevitable loss does not amount to loss; from which it must follow that where loss is contingent on an uncertain future event (or is not inevitable), it has not already occurred.

[17] For completeness, I should mention that counsel for the pursuer founded upon Lord Drummond Young's observation at paragraph [42] of *Kennedy* that apprehended damage is different from actual damage and is not sufficient by itself to justify a claim for compensation. However, reading on, Lord Drummond Young appears to state that even in the case of apprehended damage where there is no quantifiable loss, there might be sufficient "loss, injury and damage" for the customer to vindicate his or her rights, and therefore for damnum to have occurred; so that passage does not entirely support the pursuer's case.

[18] Ultimately, however, each case must turn on its own facts, and the authorities show that Scots law at least admits of the possibility that there are situations where damnum will not be held to have occurred where loss is wholly dependent upon a future even t which may or may not occur, or is otherwise merely contingent. As I have said, counsel for the defender did not dispute that proposition as such, but his approach appeared to leave little, if any, room for its operation, leading on to the next question, which is whether the decision in *Gordon's Trustees* leaves any room for such a rule. The first point to note is that *Kennedy* was decided after *Gordon's Trustees* and the dicta of the Lord President and Lord Drummond Young referred to above leave open the possibility, at least, that there may be cases where any loss is merely contingent and where damnum has not yet occurred. Second, the issue in *Gordon's Trustees* was not whether the loss was merely contingent upon a future event, and none of the cases mentioned above was cited or referred to. Turning to consider *Gordon's Trustees* in more detail, the facts in that case were that the defenders had served defective notices to quit, and, on an objective assessment, loss was held to have occurred on the date of the expiry of the leases in question, when the tenants had not removed from the subjects. The high point of the defender's argument is the reference by Lord Hodge to damnum occurring when (among other things) expenditure is incurred. However, I respectfully agree with Lord Doherty's observation in *Khosrowpour* at [26] that Lord Hodge was not making an exhaustive statement of the circumstances in which loss, injury or damage might occur, so much as providing examples to illustrate the principle he was elucidating. While Lord Doherty's point was that there may be other instances where loss can be said to have occurred, equally it can be said that Lord Hodge was not expressing the view that in every case where expenditure has been incurred, loss must necessarily be held to have occurred since, as I have observed, he was not addressing his mind to the issue of purely contingent losses.

[19] As Lord Hodge made clear at [19] of *Gordon's Trustees*, the starting point is to ask, under reference to section 11(1), when loss, injury or damage, caused by a breach of contract (or as the case may be) first existed as a matter of objective fact. That is the date when the prescriptive clock begins ticking, unless it is postponed by the operation of section 11(2) or 11(3). It is section 11(3) which deals with awareness of the creditor, and what the Supreme Court held in *Gordon's Trustees* was that what the creditor must be aware of is the same loss, injury or damage of which section 11(1) speaks - viz, that he or she has not obtained something which he or she had sought, or had incurred expenditure, there being no need for awareness that it had been caused by a breach of duty or something going wrong. Lord Hodge made a reference at [24] to the failure to obtain vacant possession in that case being seen as having caused loss "with the benefit of hindsight". That (and other) references to hindsight was the subject of discussion by the Inner House in *WPH Developments*. The Inner House eschewed any notion that the approach to section 11(3) in *Gordon's Trustees* was based on the use of hindsight knowledge; rather, it had been mentioned simply for the "uncontroversial proposition that loss can occur even though at the time it is not appreciated, but subsequent events allow it to be recognised as such": paragraph [33]. Finally, it should be observed that in *WPH Developments*, the sheriff had rejected an argument that the damnum was uncertain or contingent, and that part of his judgment was not challenged, but there was no suggestion in the Inner House that it was no longer part of the law of Scotland that contingent loss did not amount to damnum.

[20] Drawing all of this together, there is nothing in the ratio of *Gordon's Trustees*, or in Lord Hodge's reasoning, or in the reasoning of the Inner House in *Kennedy* or *WPH Developments* which requires the prescriptive clock to begin running where any loss is purely contingent. In accordance with *Gordon's Trustees* the starting point in all cases must be to ask when, objectively assessed, loss first occurred, but there remains a distinction between loss which has occurred (even though not appreciated as such at the time) and loss which has not yet occurred (but may do so in the future), the latter being purely contingent and not amounting to damnum.

[21] That all said and as counsel for the pursuer acknowledged, it is not always easy to decide on which side of the line an individual case lies. In some cases, the loss can clearly be seen to have been inevitable from the outset. In *Midlothian Council* the fourth defender (a firm of engineers) had failed to carry out adequate site investigations and failed to advise the pursuer on the need for a ground defence system. In reliance on the advice given by that defender, the pursuer, between December 2006 and June 2009, incurred the costs of construction of a housing development on the site, which was uninhabitable because of ground gas, and later had to be demolished. Damnum was held to have occurred by, at the latest, June 2009. The site had been uninhabitable from the outset, and it was inevitable that the expenditure incurred by the pursuer would turn out to have been wasted, even though they had not known it at the time. In *WPH Developments Limited* the pursuer property developers suffered loss as soon as they constructed walls on land they did not own, in reliance on negligent site drawings prepared by the defender architects. Again, it was inevitable that the walls would have to be moved even though that had not been known at the time. However, inevitability cannot be the sole test. In *Khosrowpour*, the pursuer's loss cannot be said to have been inevitable from the outset, since the pursuer's mother-in-law might not have revoked her will. That is, rather, an example of a case where immediate loss was incurred because the pursuer had obtained something which was less valuable than it ought to have been, another example of which is *Beard v Beveridge Herd and Sandilands* in which there was a negligent failure to include a rent review clause in a lease, rendering the lease immediately less valuable.

[22] On the other hand, nor can the test be whether the pursuer was in a more precarious position, which could have been said of the creditors in both *Law Society v Sephton* and *Kusz*, the only cases cited in argument where the creditor's loss was held to be contingent, and the facts of which are outlined above. In *Law Society v Sephton*, Lord Hoffman drew a distinction between transaction cases, where some loss could be said to have occurred at the outset through the acquisition of something immediately less valuable, and those other cases where the loss was merely contingent. That seems to be the correct test to apply, rather than asking whether the loss was inevitable or whether the creditor was in a more precarious position, although doubtless these will both be relevant considerations to take into account. Putting it another way, if the creditor has suffered no more than a mere risk of future loss - as was the situation in both *Law Society v Sephton* and *Kusz* - then loss cannot be said to have occurred. There must be something more, such as acquisition of an asset which is immediately less valuable than it ought to have been.

[23] I turn now to the fact of the present case. Applying *Gordon's Trustees*, when can it be said that some loss, injury or damage first existed as a matter of objective fact? To hold that it occurred in 2012, more than four years before the slip occurred, is not so much to apply hindsight as to look at matters in 2012 through the prism of a hypothetical crystal ball. Even with the benefit of hindsight, it cannot be said that loss had occurred in 2012, in the sense that it had in any of the cases discussed above. In 2012, there was merely a risk that a slip might occur in which event the pursuer would suffer loss; but until that happened the pursuer could not be said to have suffered detriment. The pursuer had not acquired something that was necessarily less valuable than it ought to have been. It was simply not known whether or not a slip would occur. The pursuer would have been unable to raise an action against the defender before the slip occurred. The situation is to be contrasted with that which would have existed if (unknown to anyone at the time) the slip had already occurred but had not yet caused the slurry tank to suffer damage; or a chain of events had been set in motion whereby it was inevitable that the embankment would slip. In both of those scenarios, it could objectively be said that the pursuer had suffered loss, albeit it did not know it; but that is not pled by the defender.

[24] It follows that the pursuer's loss was purely contingent until the slip did in fact occur in 2016. Until then, it could not be said that the pursuer had suffered any loss; there was merely a risk that it might. Accordingly, damnum did not (on the facts averred) occur until 2016, and the pursuer's claim has not prescribed.

Disposal

[25] For all of the above reasons, I have repelled the defender's fourth plea-in-law. The action will proceed to proof before answer on the remaining averments and pleas.

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