

Compass Chambers



Stop the Clock: Prescription and Limitation

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Friday 18 November 2022



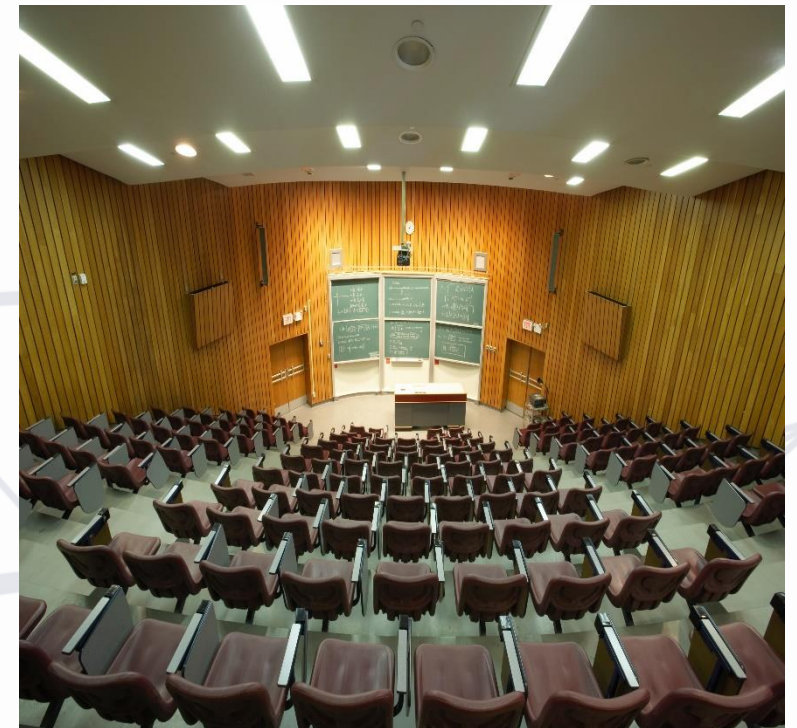
Introduction:-

- Over the course of this session, we intend to cover:-
 - (i) The changes made to the law of negative prescription by the Prescription (Scotland) Act 2018, insofar as it relates to reparation actions.
 - (ii) What further changes we have to look forward to as Act continue to come into force.
 - (iii) Recent case law dealing with limitation.



Back to basics:-

- Law governed by 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 relates to actions for damages for personal injuries which must be brought within 3 years of:
 - a) The date the injury was sustained, or where the injury is sustained as a result of a continuing act or omission, the date the act or omission ceased; or
 - b) The date on which it would have been reasonably practicable, in the opinion of the court, for the injured person to be aware of –
 - a) That the injury was sufficiently serious to justify raising an action;
 - b) The injuries were attributable to an act or omission; **and**,
 - c) The defender caused the injury by their act or omission.
- Limitation allows for exercise of the Court's equitable discretion to proceed. Prescription doesn't.



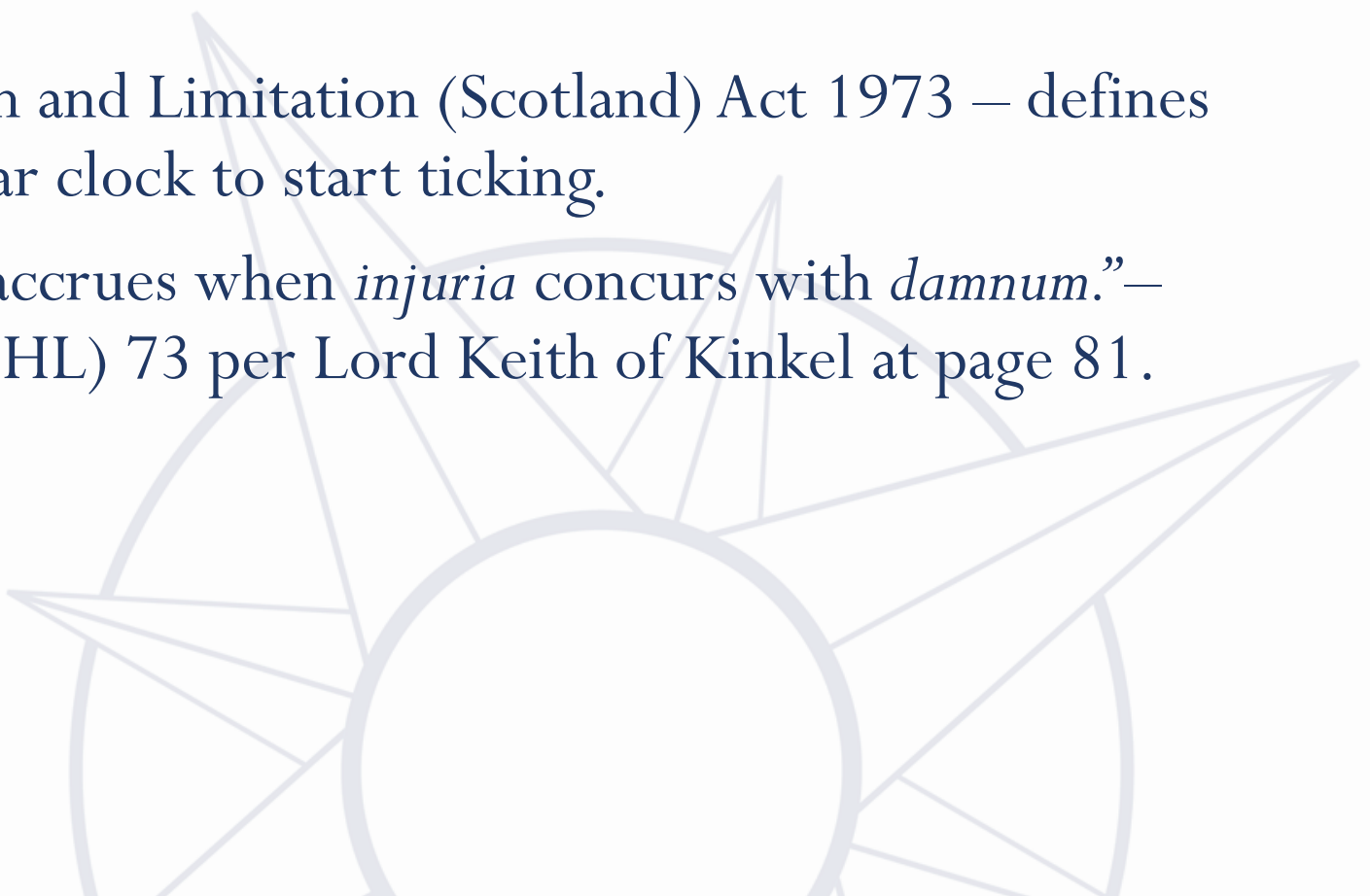
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Prescription pre-2018 Act:-

- Section 6 of the Prescription and Limitation (Scotland) Act 1973 – prescription by 5 years
 - Section 11 of the Prescription and Limitation (Scotland) Act 1973 – defines appropriate date for the 5 year clock to start ticking.
 - “The right to raise an action accrues when *injuria* concurs with *damnum*.” – *Dunlop v McGowans* 1980 SC (HL) 73 per Lord Keith of Kinkel at page 81.
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Prescription pre-2018 Act:-

- *David T Morrison & Co Ltd (t/a Gael Home Interiors) v ICL Plastics Limited* 2014 S.C. (U.K.S.C.) 222
- *Gordon's Trustees v Campbell Riddle Breeze Paterson LLP* 2017 S.L.T. 1287
- *Midlothian Council v Raeburn Drilling and Geotechnical Limited* 2019 S.L.T. 1327
- *WPH Developments Limited v Young and Gault LLP (in liquidation)* 2022 S.C. 28
- *C & L Mair v Mike Dewis Farm Systems Ltd* 2022 S.L.T. 1021
- Question is: (i) when has the wrong occurred (*injuria*); and, (ii) what is the loss (*damnum*)?
- Fact specific

The problem with prescription:-





Current s11:-

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] 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] loss, injury or damage has occurred before the cessation of the [act or omission] 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] 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)] , the said subsection (1) shall have effect as if for the reference therein to that date there were substituted a reference to the date when the creditor first became, or could with reasonable diligence have become, so aware.

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

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

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

(c) the identity of that person.

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

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



Post February 2025 s11:-

11.— [Obligations to pay damages]

(1) Subject to subsections (2) and (3) below; any obligation [to pay damages (whatever the source of the obligation)] for loss, injury or damage caused by an act or omission 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 loss, injury or damage has occurred before the cessation of the act or omission 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 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) , 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) 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.]



Other highlights:-

- Increase to 18 types of claim subject to negative prescription
- Amendment of s6(4) regarding fraud and inclusion of s6(4A) which states that the debtors intent doesn't matter when considering whether a creditor was induced into failing to make a claim
- Clarification that a claim is to be treated as being made continuously until finally disposed of.
- Agreement to extend timebar for no more than one year
- S13A – shifts burden of proof

Problem solved?



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