



Scottish Law Commission  
*promoting law reform*

| (DISCUSSION PAPER No 160)

# Discussion Paper on Prescription

discussion  
paper



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*promoting law reform*

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February 2016

**DISCUSSION PAPER No 160**

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**The Commission would be grateful if comments on this Discussion Paper were submitted by 23 May 2016.**

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<sup>1</sup> Amended by the Scotland Act 1998 (Consequential Modifications) (No 2) Order 1999 (SI 1999/1820).

# Contents

	<i>Paragraph</i>	<i>Page</i>
<b>Chapter 1 Introduction</b>		
Background to this project	1.3	1
The need for prescription	1.10	2
Contents of this paper	1.14	4
Legislative competence	1.15	4
Impact assessment	1.24	6
Acknowledgements	1.25	6
<b>Chapter 2 The scope of the five-year negative prescription</b>		
Introduction	2.1	7
The 1970 Report	2.4	7
The main issues	2.6	8
Statutory obligations	2.7	8
Time limits in other statutes	2.11	9
Statutes containing no time limits	2.15	9
The position in English law	2.17	10
The position in Scotland	2.22	11
Preliminary conclusions	2.44	15
Obligations arising from delict	2.47	17
Preliminary conclusions	2.55	19
Schedule 1 and some miscellaneous rights and obligations	2.60	20
Cases where amendment may not be necessary	2.62	21
Cases where amendment may be appropriate	2.68	22
<b>Chapter 3 Section 11(3) of the 1973 Act: the background and the current law</b>		
The 1970 Report	3.3	25
The 1989 Report	3.4	25
Case law	3.7	27
<b>Chapter 4 Options for reform of the discoverability test</b>		
The options available	4.1	30
The options in a comparative law context	4.5	31
Discussion of the options	4.18	34

# Contents (cont'd)

	<i>Paragraph</i>	<i>Page</i>
<b>Chapter 5 Other considerations relating to section 11</b>		
Loss, damage and knowledge	5.2	37
Materiality and the test for knowledge	5.8	38
Reasonable diligence	5.18	41
<b>Chapter 6 The long-stop prescriptive period under section 7 of the 1973 Act</b>		
Some unusual features of the long-stop prescription in Scotland; and some comparative material	6.4	44
The starting date	6.6	44
A brief review of some comparative material	6.7	44
The approach of the 1989 Report	6.13	45
A true long stop?	6.16	46
The possibility of interruption	6.21	47
Two further issues	6.26	48
The case of construction contracts	6.27	48
The length of the long-stop prescription	6.32	49
<b>Chapter 7 Contracting out and standstill agreements</b>		
The scope of section 13 of the 1973 Act	7.2	51
Options for reform?	7.10	53
Standstill agreements and some comparative material	7.11	53
Agreements to shorten the prescriptive period	7.16	54
Agreements to lengthen the prescriptive period	7.17	55
<b>Chapter 8 The burden of proof</b>		
The case law	8.3	57
Incidence of the burden of proof	8.6	58
Options for reform	8.7	59
<b>Chapter 9 Unjustified enrichment and discoverability</b>		
Introduction	9.1	61
Payment of a sum that was not due	9.6	62
Payment of a sum in anticipation of a future purpose which did not eventuate	9.10	63
Enrichment by the pursuer's expenditure or services	9.13	63
Conclusions	9.17	64

# Contents (cont'd)

	<i>Paragraph</i>	<i>Page</i>
<b>Chapter 10 Miscellaneous issues</b>		
Fraud, concealment and error	10.2	66
The definition of “relevant claim”	10.11	68
Further consideration of the 1989 Report	10.17	69
Act or omission	10.18	69
Knowledge that an act or omission is actionable	10.21	70
<b>Chapter 11 Summary of questions</b>		72
<b>Appendix Prescription and Limitation (Scotland) Act 1973, Schedule 1</b>		76

# Abbreviations

1973 Act,

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

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1970 Report,

Report on Reform of the Law Relating to Prescription and Limitation of Actions (Scot Law Com No 15 (1970)), available at:

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Consultative Memorandum on Prescription and Limitation of Actions (Latent Damage) (Consultative Memorandum No 74 (1987)), available at:

<http://www.scotlawcom.gov.uk/files/1613/1419/3158/cm74.pdf>

1989 Report,

Report on Prescription and Limitation of Actions (Latent Damage and Other Related Issues) (Scot Law Com No 122 (1989)), available at:

[http://www.scotlawcom.gov.uk/files/3512/8015/1839/26-07-2010\\_1443\\_345.pdf](http://www.scotlawcom.gov.uk/files/3512/8015/1839/26-07-2010_1443_345.pdf)

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<http://www.scotlawcom.gov.uk/files/3412/7989/7451/rep207.pdf>

2012 Report,

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*BP Exploration Operating Co Ltd v Chevron Shipping Company* 2002 SC (HL) 19

*Dunlop,*

*Dunlop v McGowans* 1979 SC 22; 1980 SC (HL) 73

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*Miller v City of Glasgow DC* 1988 SC 440

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*David T Morrison & Co Ltd v ICL Plastics Ltd* [2014] UKSC 48, 2014 SC (UKSC) 222

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DCFR,

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Evans-Jones, *Unjustified Enrichment*, vol 1,

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N Mullany, "Reform of the Law of Latent Damage", (1991) 54 MLR 349

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E Russell, *Prescription and Limitation of Actions* (7<sup>th</sup> edn, 2015)

Zimmermann, *Comparative Foundations*,

R Zimmermann, *Comparative Foundations of a European Law of Set-Off and Prescription* (2002)



# Chapter 1 Introduction

1.1 Prescription is an important doctrine in any legal system. Negative prescription establishes a time-limit within which a person who is aggrieved must raise his or her claim in court. If the time-limit is missed, the ability to pursue the claim is lost. That may at first sight seem unfair. But it should not be, provided that the choice of time-limit strikes a fair balance between competing interests. Because this is a fundamental point, we say more about it later in this chapter.

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

## Background to this project

1.3 In 1970 we published our Report on *Reform of the Law Relating to Prescription and Limitation of Actions*.<sup>1</sup> That led to the enactment of the Prescription and Limitation (Scotland) Act 1973 (“the 1973 Act”). The Act has over the years been substantially amended. We have also carried out further work on the subject of prescription. In particular, in 1989 we published a Report on *Prescription and Limitation of Actions (Latent Damage and Other Related Issues)*.<sup>2</sup> The recommendations put forward in that Report have not been implemented. More recently we have published a Report on *Personal Injury Actions: Limitation and Prescribed Claims*,<sup>3</sup> and a Report on *Prescription and Title to Moveable Property*.<sup>4</sup> These recommendations have not yet been implemented either.

1.4 Recently, the issue of prescription in relation to claims for latent damage has become topical. That follows the judgments of the UK Supreme Court in *David T Morrison & Co Ltd v ICL Plastics Ltd*.<sup>5</sup> As a result of that case, the law on prescription in relation to claims for latent damage is now different from what it had previously been thought to be. One of the Justices in the UK Supreme Court urged that fresh consideration should be given to the recommendations we made in the 1989 Report.<sup>6</sup>

1.5 Against that background, the proposal that we should re-examine this and certain other aspects of the law of prescription attracted support in the responses to the consultation

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<sup>1</sup> Scot Law Com No 15 (1970) (hereafter “the 1970 Report”).

<sup>2</sup> Scot Law Com No 122 (1989) (hereafter “the 1989 Report”).

<sup>3</sup> Scot Law Com No 207 (2007) (hereafter “the 2007 Report”).

<sup>4</sup> Scot Law Com No 228 (2012) (hereafter “the 2012 Report”). The Scottish Government has recently carried out a consultation on these issues.

<sup>5</sup> *David T Morrison & Co Ltd v ICL Plastics Ltd* [2014] UKSC 48, 2014 SC (UKSC) 222 (hereafter “*Morrison*”).

<sup>6</sup> *Morrison*, at [101] (Lord Hodge).

on the Ninth Programme of Law Reform.<sup>7</sup> It was duly included in the Programme, which was approved by the Scottish Government.

1.6 In this paper one of the main issues we review is the law relating to latent damage. The others are the scope of the five-year prescription; the structure of the 20-year prescription; whether it should be possible to contract out from the statutory prescriptive periods; unjustified enrichment and discoverability; and the burden of proof. We conclude with a number of miscellaneous points.

1.7 This is not a wholesale review of the law of prescription but a review of certain issues within the law of negative prescription which can cause difficulty in practice. It is worth making it clear at the outset that there are certain important issues which do not fall within the scope of this project. In particular, the project is concerned only with prescription and not with limitation of actions. Since in Scots law limitation applies principally to actions for personal injuries,<sup>8</sup> it follows that in this paper we are not concerned with actions of that kind. For the same reason this paper does not address the question of time limits for claims relating to historical sexual abuse.<sup>9</sup> Claims of that kind are affected only by the law on limitation of actions.<sup>10</sup>

1.8 There is an important conceptual difference between prescription and limitation. Prescription has the effect, after a certain period of time has passed, of extinguishing a right or obligation completely. By contrast, limitation does not extinguish a right or obligation but creates a procedural bar on raising legal proceedings.

1.9 There is one further important preliminary. This paper is concerned with prescription of obligations and not with prescription of property rights. Where we refer to rights and obligations, we do so in the sense that a creditor's right is the counterpart of a debtor's obligation.<sup>11</sup> We are not referring to property rights and our discussion is therefore to be understood as confined to rights which are correlative to obligations.

### **The need for prescription**

1.10 At first sight the doctrine of prescription may seem to be unfair, since its effect is that with the passage of time a person loses a legal right. But in fact, legal systems in general recognise that it is fair that in certain circumstances this should happen. Two quotations will help to make the point:

“... [T]he revival of a claim which has been long dormant, would generally be a greater injustice, and almost always a greater private and public mischief, than leaving the original wrong without atonement. It may seem hard that a claim,

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<sup>7</sup> Scot Law Com No 242 (2015), available at: [http://www.scotlawcom.gov.uk/files/6414/2321/6887/Ninth\\_Programme\\_of\\_Law\\_Reform\\_Scot\\_Law\\_Com\\_No\\_242.pdf](http://www.scotlawcom.gov.uk/files/6414/2321/6887/Ninth_Programme_of_Law_Reform_Scot_Law_Com_No_242.pdf)

<sup>8</sup> 1973 Act, ss 17-18 (and ss 22B-22C for personal injuries claims under the Consumer Protection Act 1987). The 1973 Act also contains limitation provisions in relation to defamation (s 18A); harassment (s 18B); actions under the Proceeds of Crime Act 2002 (ss 19B-19C); and exploitation proceeds orders (s 19D).

<sup>9</sup> These issues are considered in the 2007 Report. Since the Prescription and Limitation (Scotland) Act 1984 came into force, no period of prescription has applied to any action for personal injuries.

<sup>10</sup> This is the subject of a consultation by the Scottish Government: <http://www.gov.scot/Publications/2015/06/5970>.

<sup>11</sup> 1973 Act, s 15(1).

originally just, should be defeated by mere lapse of time; but there is a time after which, (even looking at the individual case, and without regard to the general effect on the security of possessors) the balance of hardship turns the other way.”<sup>12</sup>

“The effect of delay on the quality of justice is no doubt one of the most important influences motivating a legislature to enact limitation periods for commencing actions. But it is not the only one. Courts and commentators have perceived four broad rationales for the enactment of limitation periods. First, as time goes by, relevant evidence is likely to be lost. Second, it is oppressive, even ‘cruel’, to a defendant to allow an action to be brought long after the circumstances which gave rise to it have passed. Third, people should be able to arrange their affairs and utilize their resources on the basis that claims can no longer be made against them. Insurers, public institutions and businesses, particularly limited liability companies, have a significant interest in knowing that they have no liabilities beyond a definite period. ... The final rationale for limitation periods is that the public interest requires that disputes be settled as quickly as possible.

In enacting limitation periods, legislatures have regard to all these rationales. A limitation period should not be seen therefore as an arbitrary cut off point unrelated to the demands of justice or the general welfare of society. It represents the legislature’s judgment that the welfare of society is best served by causes of action being litigated within the limitation period, notwithstanding that the enactment of that period may often result in a good cause of action being defeated.”<sup>13</sup>

1.11 As these quotations make clear, prescription plays an essential part in balancing the interests of the parties on the one hand and serving the public interest on the other. Justice between the parties to a litigation means that after a certain lapse of time it is actually fairer to deprive a pursuer of a claim than to allow it to trouble a defender. That is connected with concerns about stale or missing evidence and the difficulties facing a court in trying to administer justice in those circumstances. But there is more to prescription than justice between the parties to a litigation. There is a wider public interest in having litigation initiated promptly if it is to be initiated at all. The reason is that that is conducive to legal certainty.

1.12 These aims are served by the doctrine of prescription. Even if in an individual case prescription may seem to involve hardship, as long as the law of prescription strikes a fair balance overall, it serves the wider interests of fairness, justice and certainty.

1.13 Identifying where the balance is fairly struck necessarily goes beyond generalities. It involves considering the detailed rules of the law of prescription, such as which rights and obligations should prescribe after what period; when the prescriptive period should start and whether and how it can be interrupted or suspended. In this paper we touch on all of these issues.

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<sup>12</sup> J S Mill, *Principles of political economy* (4th edn, 1857), 2.2.2 (while these words were written in relation to positive prescription, they appear to be equally applicable to negative prescription).

<sup>13</sup> *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541, 551 per McHugh J; the passage was cited more fully in *B v Murray (No 2)* 2005 SLT 982 at [21]; and also on appeal (under the name *AS v Poor Sisters of Nazareth*) 2007 SC 688 at [42]; 2008 SC (HL) 146 at [23]-[25].

## **Contents of this paper**

1.14 In Chapter 2 we examine the scope of the five-year negative prescription. Chapters 3 to 5 deal with claims for damages and when the prescriptive period ought to begin for claims for latent damage. Chapter 6 is concerned with the 20-year “long-stop” negative prescription. Chapter 7 deals with contracting out of the statutory prescriptive periods; Chapter 8 with the burden of proof; Chapter 9 with unjustified enrichment and discoverability; and Chapter 10 with a number of miscellaneous issues. There is a summary of the questions raised in the paper in Chapter 11. An Appendix contains the text of Schedule 1 to the 1973 Act.

## **Legislative competence**

1.15 In terms of section 29 of the Scotland Act 1998 a provision is outside the legislative competence of the Scottish Parliament if it relates to reserved matters (as defined in Schedule 5 to that Act) or is in breach of the restrictions in Schedule 4. The issues covered in this Discussion Paper relate to aspects of the Scots law of prescription. The law of prescription is not a reserved matter in terms of Schedule 5, and it accordingly falls in our view within the legislative competence of the Scottish Parliament.

1.16 There are, however, three points on which we think it appropriate to explain our reasoning about legislative competence more fully.

1.17 The first is the question whether there should be express provision in the 1973 Act that, where another statute applies a period of prescription or limitation to a particular right or obligation, the 1973 Act should not apply.<sup>14</sup> In our preliminary view express provision of this kind would be useful for the avoidance of doubt, although we think that on general principles of statutory interpretation a period set out in a specific statute would in any case apply to the exclusion of the general prescription legislation. To make express provision of this kind may therefore not change the law at all. We are of the view that, if provision of this kind were to be made, it would be within competence owing to the terms of section 29(3) and (4) of the Scotland Act 1998.<sup>15</sup>

1.18 This first point raises one further consideration. In Chapter 6 of the 2012 Report, we commented on negative prescription of intellectual property rights. While we recommended amendment of the 1973 Act to clarify that it would not apply to any right for which another enactment provided a fixed time period, we took the view that this would be a provision relating to reserved matters, because intellectual property is a reserved matter<sup>16</sup> and this recommendation was directed solely at intellectual property rights. For that reason, it was not a recommendation for a provision that could be described as applying consistently to devolved and reserved matters. It was therefore, we concluded, not saved by section 29(4).

1.19 The second point is the question whether the 1973 Act should provide generally for statutory rights and obligations to prescribe under the five-year prescription.<sup>17</sup> Again, we emphasise that we are concerned here only with rights correlative to obligations and not with property rights.

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<sup>14</sup> Paras 2.11-14 below.

<sup>15</sup> Para 1.21 below.

<sup>16</sup> Scotland Act 1998, Sch 5 S C4.

<sup>17</sup> Paras 2.15-46 below.

1.20 It is quite clear that, if provision of this kind were to be made, it would affect obligations that relate to reserved matters. The question is whether provision of that kind is permitted by the Scotland Act 1998. In our view it is: section 29(3) permits it because the purpose of a provision of this kind would not relate to reserved matters; the purpose would relate to the Scots law of prescription. But this is not the end of the matter, since section 29(3) is subject to section 29(4).

1.21 The effect of section 29(4) is that modifications of Scots private law as it applies to reserved matters are outside competence unless the purpose of the provision is to make the law in question apply consistently to reserved matters and otherwise. Provision of the kind we are discussing here clearly falls within the scope of section 29(4), so the issue is whether it is saved by the exception. In our view it is: provision of this kind would deal consistently with all statutory obligations, whether they relate to devolved or reserved matters. It appears to be precisely this sort of provision that section 29(4) is intended to permit. We note that in commentary on the Scotland Act 1998 it has been suggested that what this sub-section is clearly concerned with is “a general enactment making new private law or criminal law rules across the board and the aim is that such an enactment should not be held to be outside the competence of the Parliament.”<sup>18</sup> That seems to describe this provision well.

1.22 The third point is the question whether the definition of a “relevant claim” should be extended so as to apply to a claim in a company administration.<sup>19</sup> If viewed as relating to the law of insolvency, this provision would relate to a reserved matter (namely, Schedule 5 Section C2) and it does not appear to be saved by the kinds of argument under section 29(3) and (4) mentioned above. Nonetheless our considered view is that provision of this kind would be within competence. First, because we do not think that it would properly be characterised as a provision dealing with insolvency. It is a rule about what kinds of claim interrupt prescription. That is not a reserved matter. Second, we take the view that provision of this kind would be permitted by virtue of Schedule 4 paragraph 2(3), because the rule in question is not “special to a reserved matter”. This provision too, as explained during the passage of the Scotland Bill, was intended to enable the Scottish Parliament to legislate on the general rules of Scots law across the board, excluding only certain specified issues and rules “which are special to reserved matters – those which result in a distinct and separate treatment of a reserved matter”.<sup>20</sup>

1.23 A further aspect of legislative competence is that an Act of the Scottish Parliament must be compatible with the European Convention on Human Rights and with European Union law. We take the view that the proposals, if enacted, would be compatible with the requirements of both the ECHR and EU law.

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<sup>18</sup> CMG Himsworth and CR Munro, *The Scotland Act 1998* (2<sup>nd</sup> edn, 2000) (hereafter “Himsworth and Munro, *The Scotland Act 1998*”), 41.

<sup>19</sup> Paras 10.11-15 below.

<sup>20</sup> Himsworth and Munro, *The Scotland Act 1998*, 41; Hansard HL, vol 592, col 821.



## **Impact assessment**

1.24 In the report which follows this Discussion Paper we will provide an assessment of the probable impact of our eventual recommendations. In the meantime we will be grateful for any responses to this paper which provide evidence on, or otherwise address, either the economic impact of the present law or the anticipated impact of our proposals or both. A question on impact assessment can be found in the summary of questions at the end of this paper.

## **Acknowledgements**

1.25 The main issues raised in Chapters 3 to 9 of this paper were discussed at a seminar in Edinburgh on 25 June 2015. We are grateful to those who attended and gave us the benefit of their views either at the time or subsequently. We are grateful, too, for the responses received on the topic of prescription as part of the consultation on our current programme of law reform. We have attempted to take all views into account.

# Chapter 2      The scope of the five-year negative prescription

## Introduction

2.1 In the previous chapter we discussed the important role that prescription plays in a legal system and the need for it to strike a fair balance between the interests of those who wish to pursue claims and those who have to defend them.

2.2 In the present chapter we pursue that theme with reference to the five-year negative prescription of section 6. It does not apply to all obligations but only to those listed in paragraph 1 of Schedule 1 to the 1973 Act. By contrast, the 20-year negative prescription of section 7 applies to all obligations other than those specifically excluded from it.<sup>1</sup> Other sections of the 1973 Act contain rules of negative prescription applicable only to certain types of obligation, but we are not concerned with those here.<sup>2</sup>

2.3 Because the 20-year prescription is so long, in practice it is the five-year prescription which is the cornerstone of the regime of negative prescription in Scots law. In this chapter we review the scope of Schedule 1 paragraph 1 and consider whether it is appropriate or whether there are gaps that ought to be filled. The current text of Schedule 1 is reproduced in the Appendix to this paper.

## The 1970 Report

2.4 The 1973 Act is based on the 1970 Report. That Report recommended the abolition of the complicated miscellany of short prescriptive regimes that existed at the time and their replacement with a relatively short, uniform period of prescription. That became the five-year prescription of section 6 of the 1973 Act. The Report also recognised that there ought to continue to be a long negative prescription, which became the 20-year prescription of section 7. At the same time the Report identified the need to exclude certain kinds of rights and obligations from the five-year prescription, so that they would prescribe only after 20 years, as well as the need to exclude certain kinds of rights and obligations from prescription altogether.

2.5 In particular, the Report recommended that the following rights and obligations should not be subject to the five-year prescription: accounting for trust funds; legal rights and prior rights on succession; obligations founded upon attested writs; and rights and obligations relating to land.<sup>3</sup> It also recommended that the following rights and obligations, to which the existing long negative prescription did not apply, should be subject neither to the

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<sup>1</sup> For the 20-year prescription see Ch 6.

<sup>2</sup> Eg s 8A (obligations to make contribution between wrongdoers); s 22A (obligations arising from liability under the Consumer Protection Act 1987).

<sup>3</sup> 1970 Report, paras 60, 65(3) and 128.

five-year nor to the 20-year prescription: rights and obligations based on trusts; *res merae facultatis*; and real rights in heritable property.<sup>4</sup>

### **The main issues**

2.6 The main issues we discuss in this chapter are:

- (i) whether Schedule 1 ought to provide for the prescription of statutory obligations and, if so, whether that provision should be general or specific to certain kinds of statutory obligation;
- (ii) whether it ought to refer in subparagraph (d) to obligations arising from delict rather than obligations to make reparation; and
- (iii) whether it ought to extend to a number of miscellaneous (non-statutory) rights and obligations.

### **Statutory obligations**

2.7 The first issue examined in this chapter is whether the five-year prescription ought to apply to statutory obligations in general or at least to certain kinds of statutory obligations. This issue does not appear to have been considered in the 1970 Report or the consultation which took place before it was published.

2.8 As we discuss more fully later, Schedule 1 is drafted in such a way that, for the five-year prescription to apply to an obligation, it has to fall within one of the categories listed in paragraph 1 of Schedule 1. The consequence is that there are various statutory obligations which do not, or may not, fall within the scope of the five-year prescription. The question is whether they should.

2.9 That question can be broken down into two quite separate issues. The first is the situation where other legislation establishes a period of prescription or limitation in relation to a particular statutory right or obligation. The question may arise whether that statutory right or obligation is (also) subject to the provisions of the 1973 Act, but no question arises about its not being subject to any regime of prescription or limitation at all.

2.10 The second is the situation where the other legislation does not specify any period of prescription or limitation. If any period of prescription is to apply, it will need to be found in the 1973 Act. As we have noted already, in practice the most important question in cases of this kind is whether the particular right or obligation falls within Schedule 1 paragraph 1 with the consequence that the five-year prescription applies.

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<sup>4</sup> *Ibid* paras 65(2) and 129.

### *Time limits in other statutes*

2.11 Many statutes specify time limits for the particular areas which they regulate. For instance, there is a one-year limitation period for claims for loss of or damage to goods carried at sea;<sup>5</sup> there are 4 and 10 year periods of limitation for breach of planning control;<sup>6</sup> and there is a 6-year time limit on an action for delivery up of material infringing copyright or performance rights.<sup>7</sup>

2.12 There is no provision in the 1973 Act stating that it is not to apply where another enactment establishes a prescriptive or limitation period for a particular statutory right or obligation. In England and Wales, the Limitation Act 1980 does contain such a provision:

“This Act shall not apply to any action or arbitration for which a period of limitation is prescribed by or under any other enactment (whether passed before or after the passing of this Act) or to any action or arbitration to which the Crown is a party and for which, if it were between subjects, a period of limitation would be prescribed by or under any such other enactment.”<sup>8</sup>

2.13 Even without a provision of this kind in the 1973 Act, it would seem legitimate on general principles of statutory construction to conclude that an enactment of a special nature (in this case, a statute governing, for example, carriage of goods by sea or planning or copyright) should take precedence over one of a general nature (the 1973 Act and its general provisions on prescription).<sup>9</sup> The time limit set out in the particular legislation ought therefore to apply, to the exclusion of the 1973 Act. Nonetheless it would seem conducive to clarity if this were to be spelled out. And if there were such express provision, it would make unnecessary arguments on such questions as whether the 1973 Act should apply (for instance) to a claim for just satisfaction under the Human Rights Act 1998.<sup>10</sup>

2.14 We therefore ask:

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

### *Statutes containing no time limits*

2.15 Where another statute creates a right or obligation but does not at the same time establish a time limit in relation to its exercise, the question whether any time limit applies to that right or obligation necessarily depends on the interpretation of the 1973 Act.

2.16 Section 6(2) states: “Schedule 1 to this Act shall have effect for defining the obligations to which this section applies.” Schedule 1 paragraph 1 spells out exhaustively the obligations to which the five-year prescription applies; paragraph 2 lists certain obligations to

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<sup>5</sup> Carriage of Goods by Sea Act 1971, Sch, Art III, para 6.

<sup>6</sup> Town and Country Planning (Scotland) Act 1997, s 124.

<sup>7</sup> Copyright, Designs and Patents Act 1988, ss 113 and 203.

<sup>8</sup> S 39.

<sup>9</sup> *Fisher v Brooker* [2009] 1 WLR 1764 at [4]; *Martin v Most* 2010 SC (UKSC) 40 at [135].

<sup>10</sup> Human Rights Act 1998, s 7(5). *Docherty v Scottish Ministers* 2012 SC 150, a case considering claims for just satisfaction under the Scotland Act 1998, was decided before a statutory time limit on such claims was introduced into that Act: see Scotland Act 1998, s 100(3B).

which it does not apply. Before we look at Schedule 1 to the 1973 Act more closely, we think it instructive to compare the position in English law.

*The position in English law*

2.17 The Limitation Act 1980 contains two general provisions applicable to actions based on statutory obligations:

Section 8

“(1) An action upon a specialty shall not be brought after the expiration of twelve years from the date on which the cause of action accrued.

(2) Subsection (1) shall not affect any action for which a shorter period of limitation is prescribed by any other provision of this Act.”

Section 9

“(1) An action to recover any sum recoverable by virtue of any enactment shall not be brought after the expiration of six years from the date on which the cause of action accrued.

.....”

2.18 An action based on a statute is a type of action on a specialty. Others are actions based on deeds or on contracts under seal. Since statutes historically bore the royal seal, what these bases for action have in common is apparently that they are (or were) sealed. Section 8(1) has a broad scope: it applies as long as an action can properly be described as being based on a statute. But as section 8(2) makes clear, the 12-year limitation period is displaced by any shorter period provided by the 1980 Act. Section 9 does provide a shorter limitation period when what is in issue is a sum “recoverable by virtue of any enactment”: the result is then that the 12-year limitation period of section 8 is displaced and the 6-year limitation period of section 9 applies.

2.19 Since these two regimes exist with quite different limitation periods, the courts have inevitably been faced with demarcation disputes. It now appears to be settled that what determines whether a statutory action is governed by section 8 or by section 9 is the nature of the relief sought. Two examples will illustrate the point: on the one hand, an action under the Consumer Credit Act 1974 seeking to reopen an extortionate credit agreement has been held to fall within section 8, since it is directed not specifically at payment but more generally at relief from the obligations imposed by the agreement.<sup>11</sup> On the other, an action under the wrongful trading provisions of the Insolvency Act 1986 falls under section 9, since it is directed at obtaining a payment from a director to contribute to the assets of an insolvent company.<sup>12</sup>

2.20 It may well be thought that this dual regime is unduly complicated. In fact in its 2001 Report the Law Commission recommended that both types of action should be subject to the

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<sup>11</sup> S 139; *Nolan v Wright* [2009] EWHC 305 (Ch). S 139 was repealed by the Consumer Credit Act 2006; see further at para 2.38 below.

<sup>12</sup> *Re Farmizer* [1997] 1 BCLC 589.

same limitation regime, as this would have the advantage of eliminating the problems that arise in interpreting the relationship between them.<sup>13</sup> If both were subject to the same limitation period, that relationship would cease to be of much importance.

2.21 For present purposes, all that it is necessary to take from this glance at the Limitation Act 1980 is that it establishes rules of limitation in relation both to sums recoverable under an enactment and to statutory obligations of other kinds. Apart from cases which are excluded elsewhere in the 1980 Act, every action which proceeds on a statutory obligation is therefore subject to limitation under the 1980 Act.

### *The position in Scotland*

2.22 The structure of the 1973 Act is quite different. As mentioned earlier, for the five-year prescription to apply to a given obligation, it has to fall within one of the categories listed in paragraph 1 of Schedule 1.

2.23 The discussion in this section is regrettably somewhat technical. Owing to the structure of Schedule 1 we can see no way of avoiding that. The schedule is framed in terms of specified rights and obligations (as the Act makes clear, reference to an obligation is to be taken to include reference to the right correlative to it).<sup>14</sup> The purpose of the present chapter is to consider whether there are rights and obligations which the schedule does not but arguably should include. There is therefore no option but to embark on an analysis which focuses on the proper characterisation of particular rights and obligations.

2.24 Whether an obligation to make payment under a statute prescribes under section 6 is not always clear. A simple case is a statutory obligation to pay damages, for instance under the Occupiers' Liability (Scotland) Act 1960. That is capable of falling within the scope of the schedule: it is an obligation to make reparation and it arises from an enactment.<sup>15</sup>

2.25 More difficult are statutory obligations to make payment of sums other than damages, since in Schedule 1 there is no general category along the lines of an "obligation to make payment". Accordingly, unless a particular obligation to make payment can be fitted into one of the categories in the schedule (for instance, as an obligation arising from unjustified enrichment or as an obligation of accounting),<sup>16</sup> it will not prescribe under the five-year prescription. There are statutory obligations which we think cannot be accommodated within the scope of Schedule 1 as it currently stands. Some examples follow.

2.26 *Taxation.* At present the obligation to pay income tax appears not to fall under the five-year prescription. The reason for this is not, as might perhaps have been expected, that the tax Acts set out their own time limits.<sup>17</sup> Instead it is because the courts, on an analysis of Schedule 1 paragraph 1, have concluded that the liability to pay tax does not fall within its scope, and in particular that it is not properly characterised as an obligation of accounting.

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<sup>13</sup> Report on Limitation of Actions (Law Com No 270 (2001)) (hereafter "the 2001 Report"), paras 4.7-9.

<sup>14</sup> S 15(2).

<sup>15</sup> Sch 1 para 1(d), where there is express reference to "any enactment" as the source of an obligation to make reparation. Cf also the discussion in *O'Rourke v Camden LBC* [1997] 3 All ER 23 (HL).

<sup>16</sup> Sch 1 para 1(b) or (f).

<sup>17</sup> Taxes Management Act 1970, s 34: an assessment to tax is ordinarily to be made within 4 years of the end of the chargeable period to which it relates; by virtue of s 36 extended periods apply where loss of tax arises owing to deliberate or careless conduct of the taxpayer.

Once a tax assessment has been issued, the taxpayer's obligation is simply an obligation to make payment.<sup>18</sup> But, as just mentioned, there is no general reference in Schedule 1 to an "obligation to make payment". Equally, the courts have rejected the contention that interest on unpaid tax prescribes under Schedule 1 paragraph 1(a): the main reason for this is that under the tax Acts interest on unpaid tax falls to be treated as tax. It is therefore treated in the same way as payment of the principal sum of tax.<sup>19</sup>

2.27 Once again it is worth comparing the position in England. On the face of it, an obligation to pay a sum by virtue of an enactment would be capable of including the obligation to pay tax. Section 9 of the Limitation Act 1980 would apply. But that result is avoided by express provision in the Act:<sup>20</sup>

"(1) Except as otherwise expressly provided in this Act, and without prejudice to section 39, this Act shall apply to proceedings by or against the Crown in like manner as it applies to proceedings between subjects.

(2) Notwithstanding subsection (1) above, this Act shall not apply to—

(a) any proceedings by the Crown for the recovery of any tax or duty or interest on any tax or duty; ..."

2.28 The same point would no doubt apply to the obligations underlying the other proceedings mentioned in this provision of the Limitation Act 1980, namely proceedings for forfeiture under the Customs and Excise Acts or for forfeiture of a ship.<sup>21</sup>

2.29 The position with regard to national insurance contributions appears to be different. They do fall within the scope of the Limitation Act 1980, since they are obligations to make payment under an enactment and they are not expressly excluded from the scope of the ordinary limitation rules.<sup>22</sup> Whether the same is true in Scotland will depend, as ever, on whether the statutory obligation to make payment can be accommodated within one of the categories in Schedule 1 paragraph 1. If, as seems likely, they are properly characterised as obligations to make payment (as opposed to obligations to account), they do not fall within the five-year prescription.

2.30 *Child support maintenance.* The Child Support Act 1991 established a comprehensive new regime for the recovery of child maintenance payments from a non-resident parent. The key feature is that the responsibility for recovering these payments rests not on the parent who is caring for the child but on the Secretary of State.<sup>23</sup> The Secretary of State has various direct and indirect powers for the purpose of collection and enforcement of the liability to make child maintenance payments. The 1991 Act contains no provisions on

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<sup>18</sup> And so not an obligation within Sch 1 para 1(f): *Lord Advocate v Hepburn*, 1990 SLT 530, a case concerned with an assessment to pay surtax. Given the terms of the relevant legislation, it would seem that the same ought to apply to an employer's obligation to make payment to HMRC of amounts deducted under PAYE (Income Tax (Earnings and Pensions) Act 2003, ss 684-685 (and associated regulations)) or payment of the amount of VAT stated on a VAT return, which is recoverable as a debt due to the Crown (Value Added Tax Act 1994, ss 1(2) and 25(1) and Sch 11, para 5(1)).

<sup>19</sup> Sch 1 para 1(a)(i); *Lord Advocate v Butt* 1992 SC 140.

<sup>20</sup> Limitation Act 1980, s 37.

<sup>21</sup> S 37(2)(b), (c).

<sup>22</sup> *EDI Services Ltd v HMRC* [2006] STC (SCD) 60 at [13].

<sup>23</sup> See *R (Kehoe) v Secretary of State for Work and Pensions* [2006] 1 AC 42 (at the time this case was decided the responsibility rested on the Child Support Agency).

prescription or limitation.<sup>24</sup> It does not appear that the five-year prescription of the 1973 Act can apply: the obligation to pay child maintenance appears to be a statutory obligation to make payment in specified circumstances. It does not depend on any underlying contract or delict or on unjustified enrichment.

2.31 *Legal aid.* A recipient of legal aid receives it from the Scottish Legal Aid Board in the discharge of the Board's statutory functions. There is no contract between the recipient and the Board. In certain circumstances if the recipient is successful in bringing legal proceedings, he or she may come under an obligation to make a payment to the Board from property recovered or preserved by means of the proceedings.<sup>25</sup> What is the basis of this obligation? There is no underlying contract, and no delict, and recovery does not appear to rest on any notion of enrichment or on an obligation of accounting. In short, the obligation appears to be a purely statutory obligation to make payment in specified circumstances. That does not fall within any of the headings of Schedule 1 paragraph 1.

2.32 *Wrongful trading.* In certain circumstances a court, on the application of the liquidator of a company, may declare that a director is liable to make a contribution to the company's assets. The prerequisites for the court to make such an order are (a) that the company has gone into insolvent liquidation and (b) that, at some time before winding up commenced, a person who was a director of the company at that time knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation or entering insolvent administration.<sup>26</sup>

2.33 The liability to contribute to the company's assets appears not to rest on an obligation which falls within Schedule 1 paragraph 1. It does not arise from contract. It is not founded on unjustified enrichment, since it is not directed at recovery of a director's enrichment but is instead measured by the liabilities the company has incurred from the time at which the directors ought to have realised that the company could not avoid insolvent liquidation. Although an argument might be made that wrongful trading resembles a delict, that is not at all clear: one of the leading textbooks describes wrongful trading as a "completely new basis of civil liability".<sup>27</sup> Since – as we go on to discuss in this chapter<sup>28</sup> – in relation to delict Schedule 1 applies only to obligations to pay damages, it seems unlikely that the obligation to contribute to the company's assets on grounds of wrongful trading falls within Schedule 1 paragraph 1.

2.34 In short: there are statutory obligations which appear not to fall within the five-year prescription. In the case of taxation (or forfeiture), it may be thought that this is the appropriate result, not least since that is the position in England and Wales. In the other examples, it is difficult to detect any reason of principle why the five-year prescription should be inapplicable. These are not obligations of a kind that the 1970 Report recommended

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<sup>24</sup> Cf *Child Maintenance and Enforcement Commission v Mitchell* [2010] EWCA Civ 333, holding that the indirect enforcement measures of committal to prison and disqualification from driving did not fall within s 9 of the Limitation Act 1980: although these measures were intended to encourage payment of arrears of child maintenance, the proceedings did not amount to "an action to recover any sum recoverable by virtue of any enactment".

<sup>25</sup> Legal Aid (Scotland) Act 1986, s 17(2B).

<sup>26</sup> Insolvency Act 1986, s 214. "Insolvent liquidation" and "insolvent administration" are defined in s 214(6) and (6A) respectively.

<sup>27</sup> *Palmer's Company Law* (25<sup>th</sup> edn) (hereafter "*Palmer's Company Law*"), para 15-459.

<sup>28</sup> At paras 2.47-2.59.



should be excluded from the five-year prescription. Instead, they are omitted simply because they do not fall within any of the categories set out in Schedule 1 paragraph 1.

2.35 In general, for the reasons set out in Chapter 1 we incline to the view that, in order to strike a fair balance between the interests of pursuer and defender, the default rule should be that obligations prescribe within a relatively short period such as five years. Only in special cases should they instead prescribe after 20 years or not at all.<sup>29</sup>

2.36 So far as statutory obligations are concerned, the same should apply. Where there are good policy reasons why they should prescribe only after 20 years or not at all, then they should of course be excluded from the five-year prescription. But if there are no such reasons, the fact that a particular statutory obligation is omitted from the scope of that prescription seems to us to be evidence that the drafting of the Act is in need of review.

2.37 There is a further issue. Many statutory obligations are remarkably difficult to analyse in terms of Schedule 1. Clearly, this is of little importance if the particular statute in question makes its own provision for prescription or limitation. But what if it does not? An elaborate exercise may be involved in deciding whether an obligation is or is not covered by Schedule 1 paragraph 1. The best way to illustrate the point is by means of a somewhat complicated example.

2.38 The example is this: the Consumer Credit Act 1974 makes provision for a consumer to seek relief from a credit agreement on the grounds that the relationship between creditor and debtor under the agreement is unfair.<sup>30</sup> The court is empowered to grant a number of remedies in order to redress the unfairness. These include ordering the creditor to repay all or part of the sums paid under the agreement; reducing or discharging any sum due under the agreement; altering the terms of the agreement; and ordering an accounting.<sup>31</sup>

2.39 The 1974 Act makes no provision for a prescriptive or limitation period in relation to an order of this kind. The question arises whether the provisions of the 1973 Act or (in England and Wales) those of the Limitation Act 1980 are applicable. The answer given in England and Wales in relation to the statutory predecessor of this provision was that a claim of this kind was subject to limitation as an action on a specialty.<sup>32</sup>

2.40 In Scotland, the question whether section 6 of the 1973 Act applies is to be answered by reference to the various categories in Schedule 1 paragraph 1. Here the relationship between debtor and creditor is of course governed by contract. If the debtor's right (or the corresponding obligation on the creditor) arose from a contract or from a breach of contract, it would fall within Schedule 1 paragraph 1(g). But this is surely not the case: the contract does not give the debtor any right to relief from unfairness; and nor does such a right depend on the creditor being in breach of the contract. Instead the right arises because statute gives the debtor an additional right which is not contained in the contract and does not arise on

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<sup>29</sup> Cf our comments on the 1970 Report above at paras 2.4–2.5.

<sup>30</sup> S 140A. These provisions were introduced by the Consumer Credit Act 2006 and replace the original provisions of s 139 of the 1974 Act relating to reopening extortionate credit agreements.

<sup>31</sup> S 140B(1).

<sup>32</sup> *Nolan v Wright* [2009] EWHC 305 (Ch) at [7].

breach of the contract. And there does not appear to be scope for arguing that the debtor's right or creditor's obligation is based on delict or unjustified enrichment.<sup>33</sup>

2.41 It might perhaps be suggested that, insofar as a court's order under this legislation can be directed at an accounting, the obligation could be said to fall within Schedule 1 paragraph 1, since the obligation of accounting appears there. But this argument seems to us to be unconvincing: the statutory right is a general right to relief from unfairness; accounting is a remedy which is based on the right, yet which may be granted in one case but not in another. It seems unsound to categorise a right or obligation generally by reference to a remedy which may be given only sometimes.

2.42 The conclusion therefore appears to be that an obligation of this kind does not fit within Schedule 1 paragraph 1, with the consequence that the five-year prescription does not apply to it. It might fairly be described as a statutory obligation *sui generis* which is not amenable to categorisation within the traditional categories of private law which Schedule 1 employs.

2.43 We find it difficult to see why an obligation of this kind should not be subject to the five-year prescription, and we note that it is subject to limitation in England and Wales. But we also note - and this was the point of the example - that to identify whether a particular statutory obligation is subject to the five-year prescription may sometimes involve an extended, even elaborate analysis of the nature of the statutory obligation. We wonder whether it is appropriate that this should be necessary.

#### *Preliminary conclusions*

2.44 To review all statutory obligations in the context of the law of prescription would be an impossible task. Here we have attempted only to illustrate what appear to be the main issues. The key points may be summarised as follows:

First, many statutes contain their own time limits. These need not feature in our review of the 1973 Act, other than by raising the question asked above about whether the 1973 Act should make it clear that it does not apply where another Act contains a time limit for specific statutory rights or obligations.

Second, the 1970 Report identified the categories of rights and obligations which ought to prescribe after five years. It is worth noting that in recent years there have been numerous additions to the list of rights and obligations set out in Schedule 1 paragraph 1, in particular to take account of legislation abolishing the feudal system and reforming the law applying to such things as title conditions, tenements and long leases.<sup>34</sup> These additions were necessary only because of the narrow approach adopted in the drafting of Schedule 1 paragraph 1. In these recent enactments the legislature evidently regarded five years as the appropriate prescriptive period for the statutory rights and obligations in question.

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<sup>33</sup> Hence Sch 1 paras 1(b) and (d) do not apply either.

<sup>34</sup> See the various subparagraphs of Sch 1 para 1(a).

Third, the 1970 Report identified categories of rights and obligations which on policy grounds should be excluded from the five-year prescription and which should prescribe either after 20 years or not at all. With one notable exception there have been no substantial additions to either of these categories since the enactment of the 1973 Act.<sup>35</sup> It seems reasonable to conclude that the policy grounds identified in 1970 remain appropriate.

Fourth, there are nonetheless statutory rights and obligations which do not fall within the five-year prescription, but where no policy grounds appear to make this result appropriate.

2.45 Our provisional conclusions, on which we invite comment, are as follows:

First, that it would be appropriate to introduce a general rule that statutory obligations prescribe under the five-year prescription. This would remove the anomalies discussed earlier in this chapter.

Second, that the effect of this reform would be limited by two factors. The existing statutory lists of exclusions from the five-year prescription would remain in place.<sup>36</sup> And there would be no effect on statutory rights and obligations subject to their own specific time-limits.

Third, that the effect of this reform could be limited further by making express exceptions where this appeared appropriate. This approach would make the law clearer and more certain. We note that in England and Wales the law of limitation already applies to all statutory rights and obligations unless they are specifically excepted or subject to the limitation provisions of other enactments.

Fourth, that a reform of this kind should not be directed only at particular types of statutory obligation such, for example, as a statutory obligation to make payment. Instead, the five-year prescription should apply to all kinds of statutory rights and obligations. While payment is likely to be the most important class of case, the certainty and clarity which the law of prescription seeks to achieve may be at least as important in bringing finality to claims relating to things other than payment. Equally, as our earlier example showed, it can be difficult to categorise a particular statutory obligation where the statute provides more than one possible remedy. Moreover, we note that in its comprehensive review of the law of limitation of actions the Law Commission concluded that there should be a single rule of limitation in relation both to sums recoverable under an enactment and statutory obligations of other kinds. The limitation period proposed was three years.<sup>37</sup>

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<sup>35</sup> Sch 1 para 2 spells out the exclusions from the five-year prescription. The exception mentioned is that amendments have excluded from the five-year prescription obligations which are subject to limitation under Part II of the 1973 Act, notably obligations to make reparation for personal injuries. A transitional provision in relation to title conditions has also been added in paragraph 2(ee). Schedule 3 lists rights and obligations which are imprescriptible; it has not been amended in substance at all.

<sup>36</sup> Sch 1 para 2; Sch 3.

<sup>37</sup> 2001 Report, para 4.201.

2.46 We therefore ask:

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

### **Obligations arising from delict**

2.47 The second issue is whether, in relation to obligations arising from delict, the five-year prescription ought to be reformulated so as to refer to “delict” rather than “reparation”.<sup>38</sup>

2.48 The three main sources of obligation in private law are contract, delict, and unjustified enrichment. It is noticeable that within Schedule 1 to the 1973 Act delict is not mentioned by name. Schedule 1 refers in terms to obligations “arising from, or by reason of any breach of, a contract or promise”<sup>39</sup> and to “any obligation based on redress of unjustified enrichment”, as well as to *negotiorum gestio*.<sup>40</sup> There is, however, no reference to delict as a source of obligation, and instead the schedule refers to “any obligation arising from liability (whether arising from any enactment or from any rule of law) to make reparation”.<sup>41</sup>

2.49 It may be that the parliamentary draftsman did not intend to draw any distinction between delict and reparation. The two have often been regarded as synonymous: so, for example, Gloag and Henderson’s textbook states: “Reparation is the term used in Scots law for the obligation arising from wrongful conduct”.<sup>42</sup> It goes on to explain that the remedy for such wrongful conduct is not always damages. It is also worth noting that the relevant paragraphs in the 1970 Report refer throughout to actions, rights and obligations based on delict, and the relevant recommendation is framed in general terms: “a short prescription should be enacted to extinguish rights and obligations based on delict and quasi-delict, other than those affected by the Law Reform (Limitation of Actions, etc) Act 1954 as amended”.<sup>43</sup>

2.50 Nonetheless the case law on Schedule 1 to the 1973 Act construes the word “reparation” more narrowly, to mean only payment of damages. On that ground an obligation to make specific implement has been held not to constitute an obligation to make reparation.<sup>44</sup> Equally, a planning authority’s obligation to pay statutory compensation has been held not to be an obligation to make reparation, since it is not based on any underlying wrong.<sup>45</sup> The obligation of trustees to restore property which they have wrongfully alienated from the trust estate has been held not to be a claim for reparation but instead a claim for

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<sup>38</sup> Obligations relating to personal injuries are not within the scope of this discussion: see para 1.7 above.

<sup>39</sup> Sch 1 para 1(g).

<sup>40</sup> Sch 1 para 1(b) and (c).

<sup>41</sup> Sch 1 para 1(d).

<sup>42</sup> Gloag and Henderson, *The Law of Scotland* (13<sup>th</sup> edn, 2012), para 25.01.

<sup>43</sup> 1970 Report, paras 94-96, para 97 recommendation (1); cf para 103 recommendation.

<sup>44</sup> *Miller v City of Glasgow DC* 1988 SC 440 (hereafter “*Miller*”).

<sup>45</sup> *Holt v City of Dundee District Council* 1990 SLT (Lands Tr) 30.

restoration of the value of the trust property.<sup>46</sup> In short: the case law treats “reparation” solely as a claim for damages arising from a wrongful act.

2.51 The consequence of this interpretation of the expression “reparation” is that obligations arising from delict other than the obligation to pay damages do not fall within the five-year prescription. So obligations arising from delict that bind a person to do something or not to do something do not fall within it. The remedies based on obligations of this kind – specific implement and interdict – would therefore appear to remain available until cut off by the 20-year prescription.

2.52 This being so, the question arises whether Schedule 1 ought to refer not to obligations arising from reparation but to obligations arising from delict.<sup>47</sup>

2.53 Some examples may assist:

*Fraudulent or negligent misrepresentation.* Suppose that one party has made a fraudulent or negligent misrepresentation, which has induced the other to enter into a contract. The innocent party may wish to seek damages: the right to damages would clearly prescribe under the five-year prescription. But the innocent party might also wish to seek reduction of the contract. The obligation underlying that remedy is not an obligation arising from reparation in the narrow sense but it is an obligation arising from delict. It is difficult to see why it too should not prescribe after five years. The same point would apply to other delicts which give rise to a remedy in damages as well as some other remedy.<sup>48</sup> In general (and subject to what we say below) it is not obvious why, where one person has been affected by a delict committed by another, prescription should apply in relation to one kind of remedy but not another.

*Specific implement.* In many cases an obligation to do something will be contained in a contract, so the right to obtain specific implement of that obligation will be an obligation arising from contract and therefore within the scope of the five-year prescription. Here we are concerned only with specific implement based on delictual obligations. An example may be found in a case mentioned earlier. In the course of refurbishing a tenement, a local authority altered the layout of shop premises within the same building. The owner of the shop raised an action seeking reinstatement and repair of the shop premises.<sup>49</sup> The court found that the obligation to reinstate was not an obligation to make reparation. It had therefore not prescribed. Had the relevant provision in Schedule 1 been framed in terms of obligations “arising from delict”, an obligation of this kind would have been covered (unless it is properly described as “an obligation relating to land”: see immediately below).

2.54 Some obligations arising from delict which are not directed at payment of damages are, however, obligations relating to land and therefore expressly excluded from the five-year

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<sup>46</sup> *Hobday v Kirkpatrick's Trs* 1985 SLT 197.

<sup>47</sup> A subsidiary question, if this question were answered in the negative, would be whether it would be preferable for the Act to refer to obligations to pay damages rather than obligations to make reparation.

<sup>48</sup> In some instances there may be room for argument about whether both types of remedy are available: undue influence is an example: see McBryde on *Contract* (3<sup>rd</sup> edn, 2007), para 16-36.

<sup>49</sup> *Miller*.

prescription.<sup>50</sup> The same point arises with other obligations arising from delict which are not concerned with payment of damages. Three examples are:

(i) The right to reduce a disposition of land. Suppose that one person has fraudulently induced another to grant a disposition of land. That gives rise to an obligation based on delict. But it seems likely that the disponent's claim to reduce the fraudulently induced disposition is an obligation relating to land. It would therefore not prescribe under the five-year prescription.<sup>51</sup>

(ii) Nuisance appears to be another instance. The obligation to pay damages for nuisance is based on fault and as an obligation to make reparation prescribes under the five-year prescription.<sup>52</sup> The obligation to abate a nuisance is in a different category: not only is it not an obligation to make reparation, but it also appears to be an obligation relating to land. On that ground it would be excluded from the five-year prescription.<sup>53</sup>

(iii) For the same reasons obligations arising from such things as interference with the right to support of a building, even if properly described as arising from delict, would not fall within the five-year prescription.

### **Preliminary conclusions**

2.55 In principle it seems to us that obligations arising from delict generally – and not just obligations to pay damages – should fall within the five-year prescription, unless there is some good reason why they should not.

2.56 If the law were to be amended to provide for this, the effect of the amendment would be considerably reduced:

(i) by any provision that statutory obligations generally should prescribe under the five-year prescription, since this would clearly include statutory obligations properly described as delictual,<sup>54</sup>

(ii) by the existing exclusion of “obligations relating to land” from the five-year prescription.

2.57 The scope of such a reform might therefore be quite limited. Nonetheless, the example of misrepresentation shows that there are delictual obligations which do not currently fall within the five-year prescription; yet it is difficult to identify any convincing rationale why they should not. Our preliminary view is that it would be appropriate to extend the five-year prescription to cover them.

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<sup>50</sup> Sch 1 para 2(e).

<sup>51</sup> Sch 1 para 2(e); for further discussion, D Johnston, *Prescription and Limitation* (2<sup>nd</sup> edn, 2012) (hereafter “Johnston, *Prescription*”), para 6.58.

<sup>52</sup> Since nuisance is a continuing act, section 11(2) is likely to apply so that the prescriptive period will begin only when that act has ceased.

<sup>53</sup> Sch 1 para 2(e); for further discussion, Johnston, *Prescription*, paras 6.61-62.

<sup>54</sup> See paras 2.7-2.46 above.

2.58 Two consequential points arise.

First, the discussion so far raises the question whether the scope of the category “obligation relating to land” ought to be revisited. As we have noted already, the 1970 Report recommended this exclusion from the five-year prescription.<sup>55</sup> Our provisional view is that the exclusion should remain as it stands. The courts have over the years had occasion to consider the scope of the category and its boundaries are now not significantly in doubt.<sup>56</sup> Furthermore, the overarching system set up by the 1973 Act involves treating rights relating to property (and the obligations correlative to those rights) differently from other kinds of rights and obligations.<sup>57</sup> We are not aware that this overall structure has been problematic and we are reluctant to make proposals for change in this area in the absence of perceived problems.

Second, in relation to obligations to pay damages, the 1973 Act already makes special provision for continuing wrongs. Where a wrongful act is a continuing one, the start of the prescriptive period is postponed to the date when the wrongful act ceased (rather than, as usual, when it first took place).<sup>58</sup> If the five-year prescription were extended to apply to obligations arising from delict, a provision of this kind applicable generally to those obligations would seem appropriate. The same would appear to be true of the provisions for postponement of the start of the prescriptive period on the grounds of a pursuer’s lack of knowledge.<sup>59</sup> For wrongful acts which are not continuing, the existing provision in the 1973 Act that prescription starts when the obligation in question becomes enforceable appears to be sufficient.<sup>60</sup>

2.59 We therefore ask:

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

### **Schedule 1 and some miscellaneous rights and obligations**

2.60 The third issue considered here is miscellaneous non-statutory rights and obligations. If they cannot readily be accommodated within any of the categories of Schedule 1 paragraph 1, is that a matter that ought to be addressed?

2.61 Our review suggests that there are very few rights and obligations which are not already appropriately dealt with. We begin – largely for completeness – by noting the main areas which we have considered and in which our provisional view is that it is not necessary

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<sup>55</sup> 1970 Report, para 65(3). The recommendation was made notwithstanding the observation that most obligations relating to land would anyway be excluded by the recommended exclusion of obligations constituted by attested writs. The exclusion in relation to attested writs was repealed by the Requirements of Writing (Scotland) Act 1995.

<sup>56</sup> See eg *Glasgow City Council v Morrison Developments Ltd* 2003 SLT 263; Johnston, *Prescription*, paras 6,55-62.

<sup>57</sup> S 8.

<sup>58</sup> S 11(2).

<sup>59</sup> This is the subject of Ch 4 below.

<sup>60</sup> S 6(3).

to propose any amendment of the law. We then turn to those where we do provisionally make such a proposal.

### **Cases where amendment may not be necessary**

2.62 *Trusts and fiduciary obligations.* Schedule 3 to the 1973 Act makes certain obligations relating to trusts imprescriptible. The same applies to those obligations when they arise not within a trust narrowly defined but within a fiduciary relationship: this is because of the width of the definition of “trust” and “trustee” in the 1973 Act.<sup>61</sup> Nevertheless, claims which arise between creditor and debtor, where the debtor simply happens to be a trust or a fiduciary, are prescriptible.<sup>62</sup> Where the claims are simple claims for payment of debt (as opposed, for instance, to claims by trust beneficiaries in relation to the trust), there is no reason why they should be treated differently from any other claims for payment.

2.63 As it stands, it appears to us that the 1973 Act appropriately reflects the distinction between (a) rights and obligations (eg payment) where one of the parties simply happens to be a trustee or fiduciary and (b) rights and obligations which depend on the trust or fiduciary relationship. The former are capable of prescribing under the five-year prescription. The latter are not. We are not inclined to propose any change in this area.

2.64 *Cases related to enrichment.* We thought it appropriate to consider two cases which do not clearly fall within the category of unjustified enrichment and where there may therefore be doubt about whether they prescribe under the five-year prescription.<sup>63</sup> These are salvage and general average.

2.65 So far as salvage is concerned, it appears to be unnecessary for the 1973 Act to make any provision. The Merchant Shipping Act 1995 gave the force of law to the International Convention on Salvage 1989. That convention defines salvage and establishes a two-year limitation period for claims for salvage.<sup>64</sup> As discussed above,<sup>65</sup> we think that that should exclude the applicability of the 1973 Act.

2.66 As for general average, it has long been established that if during a voyage the ship, cargo or freight is sacrificed in the interests of all concerned in the voyage, the loss is to be shared rateably among all concerned.<sup>66</sup> There is room for argument about how well the obligation to contribute to the loss fits under the rubric “unjustified enrichment”. But in practice the application of the rules on average is dealt with under rules which are widely accepted internationally and commonly incorporated in bills of lading.<sup>67</sup> We incline to the view that it is unnecessary for the 1973 Act to deal with this matter more specifically, since in many if not most cases it will be covered by contract.

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<sup>61</sup> 1973 Act, s 15(1).

<sup>62</sup> *Cawdor v Cawdor* 2007 SC 285 at [20].

<sup>63</sup> Sch 1 para 1(b).

<sup>64</sup> Merchant Shipping Act 1995, s 224 and Sch 11, Pt I, art 23(1).

<sup>65</sup> See paras 2.11-2.14, together with the first conclusion at para 2.44.

<sup>66</sup> S 66(2) of the Marine Insurance Act 1906 contains a convenient definition of when this arises: “There is a general average act where any extraordinary sacrifice or expenditure is voluntarily and reasonably made or incurred in time of peril for the purpose of preserving the property imperilled in the common adventure.”

<sup>67</sup> Currently the York-Antwerp Rules 2004, art XXIII of which provides for any rights to general average contribution to be time-barred at the earlier of (a) one year after the date of the general average adjustment and (b) 6 years after the date of termination of the common maritime adventure.



2.67 *Spuilzie*. This remedy, which is now extremely rare,<sup>68</sup> is the means by which a person dispossessed of corporeal moveable property can seek recovery of the property as well as damages (in this context known as “violent profits”) for the defender’s interference with the property. The claim for damages would appear to fall within the five-year prescription, since it is based on an obligation to make reparation.<sup>69</sup> The claim for recovery of the property would not.<sup>70</sup> There is a general academic consensus that by virtue of section 8 of the 1973 Act ownership of corporeal moveable property prescribes after 20 years.<sup>71</sup> While the possessor of an object is not necessarily its owner, nonetheless it seems to us that it is appropriate that *spuilzie*, so far as asserting a right to recover property of which a person has been wrongfully dispossessed, should not fall under the five-year but only under the 20-year prescription. For these reasons we are not inclined to propose any change in this area.

### Cases where amendment may be appropriate

2.68 *Third party rights in contract*. Schedule 1 paragraph 1 applies to “any obligation arising from, or by reason of any breach of, a contract or promise”.<sup>72</sup> It is not certain that third party rights under a contract are covered by this expression. Our forthcoming report on third party rights in contract will deal with this point.

2.69 *Pre-contractual liability*. Many legal systems recognise the possibility of liability arising at the pre-contractual stage. Scots law does so too, under the exotic title of “Melville Monument liability”.<sup>73</sup> If parties have been negotiating a contract, the expectations to which their pre-contractual dealings give rise may found liability. So if one in good faith incurs expenditure in reliance on an assurance by the other that there is a binding contract between them, but the contract does not come into being, the law may recognise a liability to reimburse that wasted expenditure.<sup>74</sup> Elsewhere a doctrine of this kind is better known as *culpa in contrahendo*.

2.70 It is, however, difficult to locate this doctrine on the traditional map of the law of obligations. By definition the prospective contract has not come into being. It is not clear that these are cases directed at an obligation to redress unjustified enrichment, since liability is measured not by the enrichment of one party but by the loss sustained by the other. It is equally uncertain whether the liability is (as the term *culpa* might suggest) to be located within the law of delict. As Professor Zimmermann notes in relation to German law,

“Culpa in contrahendo falls squarely into the grey area between the law of contract and the law of delict; and there is much to be said for the proposition that it does not

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<sup>68</sup> For a recent example, see *Calor Gas Ltd v Express Fuels (Scotland) Ltd* 2008 SLT 13 at [51]-[54]. There is much discussion in the academic literature: see eg KGC Reid, *The Law of Property in Scotland* (1996), paras 161-6; DL Carey Miller with David Irvine, *Corporeal Moveables in Scots Law* (2<sup>nd</sup> edn, 2005), paras 10.24-31.

<sup>69</sup> Sch 1 para 1(d).

<sup>70</sup> The same would apply to *spuilzie* in relation to land, but this would anyway be excluded from the scope of the five-year prescription as an obligation relating to land: Sch 1 para 2(e).

<sup>71</sup> 2012 Report, para 2.2.

<sup>72</sup> Sch 1 para 1(g).

<sup>73</sup> The subject-matter of the original case, *Walker v Milne* (1823) 2 S 379.

<sup>74</sup> *Dawson International plc v Coats Patons plc* 1988 SLT 854, 865-6. In *Khaliq v Londis (Holdings) Ltd* 2010 SC 432 in [26] and [37]-[38] the court expressed doubts about whether this type of liability was still part of Scots law, a suggestion which is subject to trenchant criticism by M Hogg and H MacQueen, “Melville Monument liability: some doubtful dicta” (2010) Edin LR 451.

fit neatly into either of these, but rather forms an integral part of a third 'track' of liability."<sup>75</sup>

2.71 Pre-contractual liability therefore does not appear to fall within Schedule 1 paragraph 1 as it currently stands. Indeed, it is not certain whether it would do so even if that paragraph were amended to refer to obligations arising from delict. Since we see no reasons of policy why such liability should not prescribe under the five-year prescription, we provisionally propose that it should.

2.72 *Error, innocent misrepresentation, and setting aside transactions.* As mentioned earlier, the five-year prescription relates to rights and obligations rather than to actions or remedies. The action or remedy ceases to be available because the right or obligation on which it is founded ceases to exist. But in some cases it is difficult (or perhaps impossible) to identify a right or obligation which can prescribe. Is this a problem?

2.73 We can use the example of setting aside a contract.<sup>76</sup> We discussed this above<sup>77</sup> in relation to negligent and fraudulent misrepresentation. If we change the facts to contemplate a contract induced by innocent misrepresentation, the issues that arise are somewhat different. In that situation damages are not available. The only remedy available is reduction of the contract. Since the misrepresentation was innocent, it does not amount to a delict. There may well be no unjustified enrichment either. So far as contract is concerned, while the right to reduce a contract in these circumstances is a right under the general law of contract, depending on the particular facts and the terms of the contract, it may not be possible to describe it as a right "arising from a contract".

2.74 The same seems to be true more generally of situations in which a contract is vitiated by error. While certain types of error make a contract voidable, for the reasons just mentioned, it does not appear that the right to reduce a contract on those grounds is a right "arising from a contract" which will always fall within the scheme of Schedule 1 paragraph 1.<sup>78</sup> Should it?

2.75 An example can be found in the facts of an English case:<sup>79</sup> the claimant bought a drawing from the defendant gallery. The contract included an express term attributing the drawing to Ingres. More than 10 years after the purchase the drawing was identified as a reproduction rather than an original. The purchaser raised proceedings for rescission of the contract on the ground of mistake; the defendant pleaded limitation.<sup>80</sup> On these facts, in Scots law it could be said that, owing to the express term, the right to have the contract set

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<sup>75</sup> R Zimmermann, *The Law of Obligations* (1990), 245.

<sup>76</sup> Setting aside of deeds at least in relation to land appears to be in a different position, because they appear to fall within the scope of the term "obligation relating to land". Obligations relating to land were discussed at para 2.54 above in relation to delict. But the same would be true of other bases of obligation: take facts like those of *Anderson v Lambie* 1954 SC (HL) 43: if one person erroneously disposes to another an area of land that exceeds what the other bought, the disponent may no doubt wish to set the disposition aside. The obligation underlying the remedy of reduction would be directed at redress of unjustified enrichment. But it would also be an obligation relating to land.

<sup>77</sup> At para 2.53.

<sup>78</sup> Void contracts raise different issues. In the first place, in strict theory they do not stand in need of reduction. Second, ordinarily the rights of parties to the void contract should be adjusted under the law of unjustified enrichment.

<sup>79</sup> *Peco Arts Inc v Hazlitt Gallery* [1983] 1 WLR 1315.

<sup>80</sup> The only issue that the court had in the end to determine was whether the claimant could with the exercise of reasonable diligence have discovered the mistake: see 1318E.

aside was a right “arising from a contract”. But in the absence of an express term, any right would arise under the general law of contract with the result that the purchaser’s right to reduce the contract might not be subject to the five-year prescription. But why should it not be?

2.76 It may be thought undesirable in principle that transactions should be amenable to reduction without limit of time.<sup>81</sup> We recognise, of course, that this will not invariably be an issue. In some instances a pursuer will be unable to make *restitutio in integrum* to the defender – indeed that is something that is likely to become more difficult with the passage of time – with the result that the remedy of reduction will be refused. In others, the court may decide on grounds of undue delay that it should refuse to grant the equitable remedy of reduction. But these are flexible qualifications to the question whether a right can in practice be exercised and are in that sense quite different from prescription. It also appears to make little sense for there to be a time limit where the underlying ground for reduction is (for instance) delict<sup>82</sup> or enrichment but not where neither fault nor enrichment is involved. If it is thought desirable, it would be possible to introduce into Schedule 1 paragraph 1 an additional category of prescriptible right or obligation relating to the validity of a contract.<sup>83</sup> Another option would be to make it clear that the five-year prescription applies not just to rights arising from “a contract” but to rights that arise under the general law of contract.

2.77 We would be grateful for views on the following questions:

5. **Do you agree that Schedule 1 paragraph 1 should include obligations arising from pre-contractual liability?**
6. **Do you agree that Schedule 1 paragraph 1 should include rights and obligations relating to the validity of a contract?**
7. **Are there other obligations to which Schedule 1 paragraph 1 ought to be extended?**

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<sup>81</sup> It is worth noting that in English law, because the remedy of rescission of a contract is an equitable one, it is not subject to limitation under s 5 or s 8 of the Limitation Act 1980. But equity requires a claimant to decide promptly whether to rescind or affirm a contract, with the consequence that the right to rescind may be lost by delay or acquiescence: see eg Chitty on *Contracts* (32<sup>nd</sup> edn, 2015) 28-018, 28-145.

<sup>82</sup> Although, as discussed above at paras 2.47-2.50, the present Sch 1 para 1 applies only to delictual obligations directed at payment of damages.

<sup>83</sup> A possibility would be to follow a route similar to that taken in England and Wales, where the Limitation Act 1980 makes specific provision for actions “for relief from the consequences of a mistake”: 1980 Act, s 32(1)(c). It is now settled that, for an action to fall into this category, mistake must be an essential ingredient in the cause of action: *FII Group Test Claimants v HMRC* [2012] 2 AC 337.

# Chapter 3      Section 11(3) of the 1973 Act: the background and the current law

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

3.2 A critical question is precisely what knowledge is relevant for these purposes. In Scots law, that is a matter of the correct construction of section 11(3) of the 1973 Act. It provides:

“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.”

## The 1970 Report

3.3 The question what knowledge should be relevant to postponing the start of the prescriptive period was of course considered in the 1970 Report. The recommendation was that the start of the prescriptive period should be postponed only until such time as the creditor knew that he or she had suffered loss or damage or could with reasonable diligence have discovered that.<sup>2</sup> This is indeed how the UK Supreme Court has now authoritatively interpreted section 11(3) in *David T Morrison & Co Ltd v ICL Plastics Ltd*.<sup>3</sup>

## The 1989 Report

3.4 The 1989 Report contains a much fuller discussion of the issues relating to when the prescriptive period ought to start in cases of latent damage. It is worth noting the

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<sup>1</sup> 1973 Act, s 6.

<sup>2</sup> 1970 Report. See the third part of the recommendation at para 97: ... “(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.”

<sup>3</sup> [2014] UKSC 48, 2014 SC (UKSC) 222.

recommendations of the 1989 Report which are most relevant to the issues discussed in this and the following chapters (the original numbering from the 1989 Report is retained):<sup>4</sup>

- “1. The words ‘act, neglect or default’, currently used in the formula provided under section 11 of the 1973 Act for identifying the date when an obligation to make reparation becomes enforceable, should be replaced by the words ‘act or omission’.
2. The discoverability formula should provide that the damage within the claimant's actual or constructive knowledge must be sufficiently serious to justify his bringing an action of damages on the assumption that the defender does not dispute liability and is able to satisfy a decree.
4. Knowledge that the loss, injury or damage was attributable in whole or in part to an act or omission should be included in the discoverability formula.
5. Knowledge of the identity of a person liable for the damage sustained should be included in the discoverability formula.
7. The discoverability formula should incorporate a proviso to the effect that knowledge that any act or omission is or is not, as a matter of law, actionable, is irrelevant.
8. The date of the claimant's knowledge should be the date on which he became, or on which it would have been reasonably practicable for him in all the circumstances to become, aware of the relevant facts. The legislation should not contain any references to seeking the advice of experts.
11. No judicial discretion should be conferred upon the courts to permit the claimant to raise his reparation action outwith the short negative prescription.
13. The long negative prescription should be retained in respect of an obligation to make reparation prescribable under the short negative prescription.
14. No judicial discretion should be conferred upon the courts to permit the claimant to raise his reparation action outwith the long negative prescription.
15. The current law should be retained in fixing the starting point for the long negative prescription in relation to an obligation to make reparation prescribable under the short negative prescription.
16. The length of the long negative prescription in relation to an obligation to make reparation should be fifteen years.
29. Subject to Recommendation 30 below parties should be prohibited from entering into any agreement which purports to lengthen or dispense with the periods of the short and long negative prescriptions but should be free to agree to shorten any such prescriptive periods.

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<sup>4</sup> 1989 Report.

30. As an exception to the rule put forward in Recommendation 29 above, it shall be competent for the claimant and any potential defender in a reparation obligation, at any time after damage is sustained, to enter into an agreement to extend the running of the long or short negative prescriptive periods against the claimant for such period as is specified in the agreement so that the claimant can make further enquiries as to the cause of, and the person responsible for, that damage.”

3.5 Some of these issues have in the meantime been clarified by case law; and some of the problems foreseen in 1989 have not in fact caused difficulty in practice.

3.6 None of the recommendations made in the 1989 Report has been implemented. It is clear that the recommendations which caused particular concern, notably in the construction industry, were (i) recommendation 15, relating to the starting point for the long-stop prescription under section 7 of the 1973 Act and (ii) recommendation 29, to the effect that parties should be prohibited from entering into agreements purporting to lengthen the statutory prescriptive periods. These turned out to be recommendations sufficiently contentious that they were ultimately responsible for the government’s decision in 1995 not to proceed with the 1989 Report at all.<sup>5</sup> This is discussed further below.

### Case law

3.7 Until the decision of the UK Supreme Court in *Morrison*,<sup>6</sup> there was a more or less consistent line of decisions of the Scottish courts to the effect that section 11(3) postponed the start of the five-year prescriptive period until the date on which the pursuer was aware both (a) that he or she had sustained loss and (b) that the loss had been caused by fault or negligence.<sup>7</sup> On the other hand, the start of the prescriptive period was not postponed until the pursuer knew the identity of the defender (although clearly, given that knowledge of fault or negligence was needed, in some but not all cases this awareness would accompany awareness of the fault or negligence).

3.8 It is true that certain doubts had been expressed about this construction of section 11(3),<sup>8</sup> but it is equally true that it remained the prevailing view and was supported by such Inner House authority as there was.<sup>9</sup>

3.9 In *Morrison*, the pursuers were owners of a shop which was damaged by the explosion at the Stockline factory in Glasgow in May 2004. In August 2009 they raised proceedings against three companies which traded from the factory. The damage had clearly been sustained on the date of the explosion: *prima facie* the claim had prescribed. The pursuers therefore relied on section 11(3). They were unsuccessful. In the Outer House it was held that section 11(3) protects a pursuer against the running of time (a) while damage is latent and (b) while the pursuer is aware of the damage but unaware that it was

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<sup>5</sup> See paras 6.13-6.15 below.

<sup>6</sup> [2014] UKSC 48, 2014 SC (UKSC) 222.

<sup>7</sup> *Dunfermline District Council v Blyth & Blyth Associates* 1985 SLT 345; *Greater Glasgow Health Board v Baxter Clark & Paul* 1990 SC 237 (hereafter “*Greater Glasgow Health Board*”); *Kirk Care Housing Association Ltd v Crerar & Partners* 1996 SLT 150; *Glasper v Rodger* 1996 SLT 44 (hereafter “*Glasper*”); *ANM Group Ltd v Gilcomston North Ltd* 2008 SLT 835; *Pelagic Freezing (Scotland) Ltd v Lovie Construction Ltd* [2010] CSOH 145.

<sup>8</sup> *Adams v Thorntons WS* 2005 1 SC 30 at [2]-[3], [76]; *Ghani v McCann* 2002 SLT (Sh Ct) 135 at [12].

<sup>9</sup> *Glasper (obiter)*.

caused by fault, but that it does not protect a pursuer who simply does not know the identity of the person to sue.<sup>10</sup> Since buildings do not explode spontaneously, here the pursuers must be taken to have been aware on the date of the explosion not just of the damage but also that it was caused by fault (*res ipsa loquitur*). Accordingly, they could not rely on section 11(3) at all.<sup>11</sup>

3.10 The Inner House disagreed and allowed a proof before answer on prescription and the effect of section 11(3).<sup>12</sup> The court rejected the applicability of the maxim *res ipsa loquitur*. It did not accept that the fact that there had been an explosion in a building automatically meant that it had been caused by negligence. That maxim applied only where the cause of an accident was not known. But that meant that it could have no application here, since section 11(3) (as then interpreted) specifically required knowledge not just of the fact of loss but of the fact that it was caused by negligence.

3.11 A majority in the UK Supreme Court took an entirely different view.<sup>13</sup> The crucial words in section 11(3) are: "... 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 key issue is what weight is to be placed on the words "caused as aforesaid". The court recognised that section 11(3) is capable of being read in two different ways:

3.12 The first is to read the words "caused as aforesaid" as adjectival. They do no more than refer the reader back to the type of loss, injury or damage which is in issue – namely, loss, injury or damage caused by an act, neglect or default (as opposed to caused in some other way). On this reading, the creditor has to be aware of only one thing, the occurrence of loss. The words "caused as aforesaid" simply describe the kind of loss in question.

3.13 The second way of reading section 11(3) is to take it to refer to awareness of two things, not only the loss, injury or damage but also the way in which that has been caused. 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". The words "caused as aforesaid" refer back to the words "caused by an act, neglect or default" in section 11(1). On this approach the creditor has to be aware not just of the occurrence of loss but also of the act, neglect or default which caused it.

3.14 A majority of the court held that the first of these interpretations is correct. The main reasons may be paraphrased as follows:<sup>14</sup>

- (i) The first interpretation is the more natural reading as a matter of ordinary English.
- (ii) 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 made that intention clearer (as for example was done in the limitation provisions in the 1973 Act).

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<sup>10</sup> The Lord Ordinary relied in his analysis in particular on *Greater Glasgow Health Board*.

<sup>11</sup> [2012] CSOH 44.

<sup>12</sup> [2013] CSIH 19.

<sup>13</sup> [2014] UKSC 48, 2014 SC (UKSC) 222.

<sup>14</sup> *Ibid* at [18]-[33] (Lord Reed); at [46]-[56] (Lord Neuberger).

(iii) Given the way in which statutes are drafted, the argument that on this interpretation the words “caused as aforesaid” in section 11(3) are unnecessary is unpersuasive.

(iv) This interpretation of section 11(3) is consistent with the view that it is intended to deal with latent damage. If section 11(3) is interpreted in this way, all three subsections of section 11 share a common focus upon the occurrence and timing of loss.

(v) It would be odd to postpone prescription according to the creditor’s knowledge that an act or omission is actionable. That would mean that prescription would run more or less quickly according to the creditor’s awareness of the law. If he or she received accurate advice from a solicitor, it would begin on one date; if the advice was inaccurate, it would begin on another.

(vi) It is difficult to identify in what sense a creditor can be “aware” that there has been a breach of duty in advance of a judicial determination of the issue.

3.15 A dissenting view was that the start of the prescriptive period is postponed until the pursuer has “actual or constructive knowledge ... (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.”<sup>15</sup>

3.16 In short, following the judgments in *Morrison* the authoritative interpretation of section 11(3) is that the start of the prescriptive period is postponed until the creditor knows of the fact that he or she has sustained loss, injury or damage – but nothing more.

3.17 It is too early for there to have been many decided cases following *Morrison*.<sup>16</sup> But it is clear that it has caused – as any reinterpretation of key rules of law is likely to do – serious concern, especially to those who frequently have to deal with claims for latent damage, notably those involved in the construction industry, insurance, and litigation generally. At the most general level the key question that arises is whether the law is now fair.

3.18 In Chapters 4 and 5, we examine possible options for reform of the discoverability test and other considerations relating to section 11.

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<sup>15</sup> *Ibid* at [95] (Lord Hodge).

<sup>16</sup> An exception is *Gordon’s Trs v Campbell Riddell Breeze Paterson LLP* [2015] CSOH 31 (under appeal). In *Trustees of the Rex Procter & Partners Retirement Benefits Scheme v Edwards* [2015] CSOH 83, because the court concluded that the applicable law was English law, the judgment contains only brief *obiter* remarks on prescription (paras 197-211).



# Chapter 4      Options for reform of the discoverability test

## The options available

4.1 Two preliminary points should be made. First, in this paper we assume that, on grounds of fairness, there needs to be some discoverability provision such as section 11(3). There is of course more than one way of addressing that issue. A brief review of some comparative material will illustrate the main options.

4.2 Second, in the discussion that follows no mention is made of the option of returning the law by means of legislation to the *status quo* prior to *Morrison*. The main reasons for this are (a) as explained in that case, that position represents a somewhat unhappy blend of knowledge of matters of fact and knowledge about the law;<sup>1</sup> and (b) that approach was not in fact what the 1970 Report intended section 11(3) to cover.<sup>2</sup>

4.3 In principle the main options appear to be to postpone the start of the prescriptive period:

- (1) until the creditor knows of the fact of the loss; or
- (2) until the creditor knows of the facts (a) of the loss and (b) of the act or omission which caused it; or
- (3) until the creditor knows of the facts (a) of the loss and (b) of the act or omission which caused it and (c) the identity of the person who caused it; or
- (4) until such time as seems to the court to be just and reasonable having regard to all the circumstances of the case.

4.4 Some of these options give more and some less latitude to creditors than they have previously had; the corollary is that some will expose debtors to the risk of liability over a longer period than is the case at present. To decide which is most appropriate as a matter of policy must depend on examining the checks and balances in the system as a whole. In particular, our examination of the discoverability test here needs to be balanced by a consideration of the rules governing the long-stop prescription. That appears in Chapter 6.

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<sup>1</sup> [2014] UKSC 48, 2014 SC (UKSC) 222 at [26].

<sup>2</sup> See para 3.3 above; and in the 1970 Report the third part of the recommendation at para 97: ... "(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."

*The options in a comparative law context*

4.5 In the paragraphs which follow, we examine these options in a comparative law context.

*Option (1) Postponement of the start of the prescriptive period until the creditor knows of the fact of the loss*

4.6 This represents the current position in Scots law following the decision in *Morrison*.<sup>3</sup> Our review of comparative material to date has not found this option to be the law in any other jurisdiction.

*Option (2) Postponement of the start of the prescriptive period until the creditor knows of the facts (a) of the loss and (b) of the act or omission which caused it*

4.7 This represents the view of the UKSC justices who dissented in *Morrison*. Our review of comparative material to date has not found this option to be the law in any other jurisdiction either.

*Option (3) Postponement of the start of the prescriptive period until the creditor knows of the facts (a) of the loss and (b) of the act or omission which caused it and (c) the identity of the person who caused it*

4.8 This option is well represented in the comparative material both in civil-law and common-law jurisdictions.

4.9 In Germany the general prescriptive period starts at the end of the year in which the creditor's right comes into existence and he or she becomes, or should without gross negligence have become, aware of the facts giving rise to the right and the identity of the defender.<sup>4</sup>

4.10 In France, with certain exceptions, the prescriptive period starts to run in personal and real actions on the date when the creditor knew or should have known of the facts enabling him or her to exercise the right.<sup>5</sup>

4.11 The *Draft Common Frame of Reference* provision is to similar effect. It applies to obligations in general:

“The running of the period of prescription is suspended as long as the creditor does not know of, and could not reasonably be expected to know of:

(a) the identity of the debtor; or

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<sup>3</sup> [2014] UKSC 48, 2014 SC (UKSC) 222.

<sup>4</sup> BGB §199(1).

<sup>5</sup> Code civil Art 2224. Personal actions are those directed at enforcing an obligation owed by another person; real actions are directed at enforcing a right to (or in) property.

(b) the facts giving rise to the right including, in the case of a right to damages, the type of damage.”<sup>6</sup>

4.12 In South Africa the prescriptive period begins to run as soon as the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises.<sup>7</sup> The Supreme Court of Appeal has interpreted this as meaning knowledge of every fact which it is necessary to prove, as opposed to every piece of evidence which is needed to prove each fact.<sup>8</sup> It is not necessary for a creditor to be fully informed about all aspects of a contemplated litigation or to have sufficient evidence to prove the case “comfortably” before prescription can begin to run.<sup>9</sup>

4.13 In the common-law world, in England and Wales the definition of “relevant knowledge” introduced into the Limitation Act 1980 by the Latent Damage Act 1986 provides (in short) that such knowledge must extend to the seriousness of the damage, its attributability to a negligent act or omission, and the identity of the defendant.<sup>10</sup>

4.14 Throughout the United Kingdom, for product liability claims the limitation period under the Consumer Protection Act 1987 runs from the date of awareness of the following facts:<sup>11</sup>

“ ...

(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.”<sup>12</sup>

4.15 In New Zealand, the Limitation Act 2010 contains a more elaborate formula setting out all the facts of which a claimant must have gained knowledge: these include the fact that the act or omission on which the claim is based had occurred and the fact that that act or omission was attributable wholly or in part to, or involved, the defendant.<sup>13</sup>

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<sup>6</sup> III.-7:301. (The *Draft Common Frame of Reference* (hereafter “the DCFR”), Full Edition published in 2010, contains principles, definitions and model rules, in the form of a code, covering wide areas of Civil Law. It is based on comparative research from across the European Union.) See DCFR, Full Edition, 1165-1166 for a survey of other European approaches.

<sup>7</sup> Prescription Act 68 of 1969, s 12(3); cf M. Loubser, *Extinctive Prescription* (1996) (hereafter “Loubser, *Prescription*”), 104.

<sup>8</sup> *Van Staden v Fourie* 1989 (3) SA 200 (A).

<sup>9</sup> *Nedcor Bank Bpk v Regering van die Republiek van Suid Afrika* 2001 (1) SA 297.

<sup>10</sup> Limitation Act 1980, s 14A(6)-(8) (inserted by the Latent Damage Act 1986); see A. McGee, *Limitation Periods* (7<sup>th</sup> edn, 2014) (hereafter “McGee, *Limitation*”), 6.012-019. In *Haward v Fawcetts* [2006] 1 WLR 682 at [109] Lord Mance noted that the drafters of what became s 14 of the Latent Damage Act had deliberately not taken section 11(3) of the 1973 Act as a model because it appeared to be arguable that section 11(3) did not cover lack of knowledge of causation of the loss or the identity of the person liable.

<sup>11</sup> See s 22B of the 1973 Act (there is a 10-year long stop under s 22A).

<sup>12</sup> S 22B(3) of the 1973 Act. (The reference in (d) is to section 2 of the Consumer Protection Act 1987.)

<sup>13</sup> Limitation Act 2010, s 14(1): “A claim’s late knowledge date is the date (after the close of the start date of the claim’s primary period) on which the claimant gained knowledge (or, if earlier, the date on which the claimant

*Option (4) Postponement of the start of the prescriptive period until such time as seems to the court to be just and reasonable having regard to all the circumstances*

4.16 In the Australian Capital Territory, the Northern Territory and South Australia,<sup>14</sup> in relation to causes of action for latent damage to property or economic loss arising in respect of such damage to property,<sup>15</sup> the court may if it considers it just and reasonable to do so extend the limitation period. The precise formulation of the legislation differs between these three jurisdictions; for present purposes it is sufficient to note that in the Australian Capital Territory the circumstances to which the court is to have regard in deciding whether it is just and reasonable to extend the limitation period are set out in the following non-exhaustive list:

“(2) In exercising the powers given to it by subsection (1), the court shall have regard to all the circumstances of the case including, for example, the following:

(a) the length of time between the occurrence of the damage or loss and the time when the damage or loss might reasonably have been discovered by the plaintiff;

(b) the extent to which the plaintiff, after he or she became aware of the damage or loss, acted promptly and reasonably;

(c) the extent to which an extension of the limitation period would, or would be likely to, result in prejudice to the defendant;

(d) the conduct of the defendant after the relevant cause of action accrued to the plaintiff, including the extent to which the defendant took steps to make available to the plaintiff means of ascertaining facts in relation to the cause of action;

(e) the steps (if any) taken by the plaintiff to obtain, for the purposes of the cause of action, legal or other expert advice and the nature of any such advice.”<sup>16</sup>

4.17 This short survey of some comparative material indicates that both options (3) and (4) are found in a number of common-law and civil-law systems. In the next section we comment further on the options.

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ought reasonably to have gained knowledge) of all of the following facts:

(a) the fact that the act or omission on which the claim is based had occurred:

(b) the fact that the act or omission on which the claim is based was attributable (wholly or in part) to, or involved, the defendant:

(c) if the defendant's liability or alleged liability is dependent on the claimant suffering damage or loss, the fact that the claimant had suffered damage or loss:

(d) if the defendant's liability or alleged liability is dependent on the claimant not having consented to the act or omission on which the claim is based, the fact that the claimant did not consent to that act or omission:

(e) if the defendant's liability or alleged liability is dependent on the act or omission on which the claim is based having been induced by fraud or, as the case may be, by a mistaken belief, the fact that the act or omission on which the claim is based is one that was induced by fraud or, as the case may be, by a mistaken belief.”

<sup>14</sup> Limitation Act 1985 (ACT), s 40; Limitation Act 1981 (NT), s 44; Limitation of Actions Act 1936 (SA), s 48.

<sup>15</sup> In the Northern Territory and South Australia extension is possible in any kind of action.

<sup>16</sup> Limitation Act 1985 (ACT), s 40(2).

## *Discussion of the options*

### *Option (1) Postponement of the start of the prescriptive period until the creditor knows of the fact of the loss*

4.18 As noted earlier,<sup>17</sup> while the intention in the 1970 Report was evidently to propose option (1) above, that is not an option which has been adopted by other legislatures in the last 40 years or so. The general trend elsewhere has been towards devising rules on discoverability which are more generous to claimants and pursuers.<sup>18</sup> This is no doubt in part because, while a rule of this kind has the virtue of being clear, it appears to be harsh to the pursuer. But it may also be unwelcome to potential defenders. If pursuers are put in the position of having to raise proceedings against several defenders before the facts have been investigated, they necessarily cause expense and inconvenience to the defenders. Yet investigation of the facts may later reveal that some of the defenders have little or no responsibility for the loss. Take the facts of the *Morrison* case itself: the owners of the shop knew that they had sustained damage because of the explosion at the Stockline factory in May 2004. But they did not know what had caused the explosion: that was determined only in July 2009, after a lengthy public inquiry. The explosion might in principle have been caused by the fault of the owners of the building or its occupiers or the suppliers of utilities to the building or the designers of various systems within or connected to the building – or someone else. Or it might have been an act of God. For reasons mentioned elsewhere,<sup>19</sup> it seems (on the one hand) unfair to the potential pursuer and (on the other) unsatisfactory for the wide range of potential defenders in a case of this kind for the prescriptive period to start to run when so little is known about the loss or damage.

### *Option (2) Postponement of the start of the prescriptive period until the creditor knows of the facts (a) of the loss and (b) of the act or omission which caused it*

4.19 This is a slight improvement on option (1), so far as the points just mentioned are concerned. But, in considering whether and how to craft new legislative provisions, it does not seem either an obvious or an attractive position to adopt. As Lord Reed pointed out in *Morrison*:<sup>20</sup>

“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*.”

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<sup>17</sup> Paras 3.3 and 4.2 above.

<sup>18</sup> R Zimmermann, *Comparative Foundations of a European Law of Set-Off and Prescription* (2002) (hereafter “Zimmermann, *Comparative Foundations*”).

<sup>19</sup> See below on option (3).

<sup>20</sup> [2014] UKSC 48, 2014 SC (UKSC) 222 at [33].

4.20 Indeed, it seems not unreasonable to suspect that the minority in the Supreme Court was attracted by this option not so much on grounds of legal principle but because, compared with option (1), it represented a less dramatic departure from a line of authority which had been consistent over a period of some 30 years.<sup>21</sup>

*Option (3) Postponement of the start of the prescriptive period until the creditor knows of the facts (a) of the loss and (b) of the act or omission which caused it and (c) the identity of the person who caused it*

4.21 Option (3) appears at first sight to be more favourable to pursuers than to defenders. But this is not the whole story. Prescription at present can start to run before the pursuer has identified who is or may be at fault. The consequence is that, at a time when they are uncertain about the precise factual basis of their claims, pursuers may need to launch a raft of protective writs directed at numerous defenders, purely because of the need to protect their position against the running of prescription. This is inconvenient and wasteful of the resources of pursuers, but it is hardly satisfactory for defenders either. They have to investigate these claims and intimate them to their insurers, however little merit they believe them to have. Currently, it is more or less standard practice in construction cases for a pursuer to raise proceedings against all contractors, sub-contractors and members of the professional team. The current law can therefore generate expense (both in litigation and in the form of increased insurance premiums) and administrative inconvenience or worse, for pursuers as well as defenders. This problem would be alleviated if the prescriptive period did not start to run until the creditor was aware of the identity of the defender.

*Option (4) Postponement of the start of the prescriptive period until such time as seems to the court to be just and reasonable having regard to all the circumstances*

4.22 Option (4) would give the court a discretion to extend the prescriptive period. This is an option which was considered in the 1989 Report, that is, whether to allow a pursuer to bring an action outwith the prescriptive period if it appeared that it would be equitable to do so. The 1989 Report was not in favour of this option, since it regarded the exercise of judicial discretion as incompatible with a system of prescription. It pointed out that, if this approach were adopted, it would be necessary to state whether the effect of exercising the discretion was to be understood as meaning (i) that the right had actually never been extinguished or instead (ii) that it was in some way being revived.<sup>22</sup> This seems to us to be a point of substance; and the notion of reviving an extinguished right may in fact be incompatible with the European Convention on Human Rights.<sup>23</sup> It is noteworthy that the systems in which this approach has been adopted have been systems that operate with the concept of limitation as opposed to prescription, so the subject-matter of the discretion is not the substantive existence of a right but the question whether a procedural bar should or should not have effect. Quite apart from this, however, this option would clearly introduce a degree of uncertainty to the operation of prescription. Given that one of the principal aims of prescription is to achieve clarity, certainty and finality, that seems undesirable.

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<sup>21</sup> *Ibid* at [69].

<sup>22</sup> 1989 Report, paras 2.81-2.

<sup>23</sup> Cf the Commission's views in the 2007 Report, paras 5.12-13. While such issues are sensitive to the facts, if a defender's liability had been extinguished by prescription, in principle the revival of that liability associated with an obligation to pay damages to the pursuer might be regarded as an interference with a defender's peaceful enjoyment of possessions within the scope of Article 1 of the First Protocol to the ECHR.

4.23 Our preliminary view for these reasons is that it would be desirable to adopt option (3) as the discoverability test under section 11(3).

4.24 We therefore ask:

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

# Chapter 5      Other considerations relating to section 11

5.1      In this chapter we consider three other issues relevant to the detailed workings of the discoverability test: first, the meaning of loss or damage; second, materiality of loss or damage and its bearing on the discoverability test; and third, the question of reasonable diligence.

## **Loss, damage and knowledge**

5.2      The fact that prescription in terms of section 11(3) does not start to run until the pursuer is aware of the loss or damage means that a prior question arises, namely: what is loss or damage? Various practical problems have been drawn to our attention.<sup>1</sup> We need to consider whether these are capable of being addressed by legislative reform.

5.3      A typical example in practice is the case of the lender, where some years after the draw-down of the loan there turns out to be a defect in the title to the property over which the lender has a standard security;<sup>2</sup> or where the lender, owing to the negligence of the solicitor who prepared the security documentation, has not obtained a first-ranking security but instead one which ranks behind the securities of other creditors, so exposing the lender to greater risk; or where the property is simply worth less than its initial valuation. The lender may then seek redress against its professional advisers.

5.4      Suppose in a case of this kind that the lender's solicitor negligently failed to obtain a first-ranking security, and the debtor then defaulted. When would prescription start to run? Any of the following seems arguable in principle:

- (i)      the date on which the loan funds were advanced without a first-ranking security having been obtained;
- (ii)     the date on which the debtor fell into arrears on the loan;
- (iii)    the date on which the lender enforced its right under the standard security to enter into possession of the property;
- (iv)    the date on which the lender exercised its power under the standard security to sell the property.

5.5      We have considered whether the difficulties involved in identifying the starting date for prescription in a case of this kind could be reduced by reformulation of the prescription legislation. Our current view is that they cannot. The main reason for this is that it seems to us that the relevant date for prescription in any given case will depend on the precise facts. The only date on which one can say invariably and with certainty that the lender has sustained loss is when the property is sold for less than the amount outstanding on the loan.

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<sup>1</sup> For discussion, see also E Russell, *Prescription and Limitation of Actions* (7<sup>th</sup> edn, 2015) (hereafter "Russell, *Prescription*"), paras 3.42-43.

<sup>2</sup> A standard security is a security over land in Scotland; in layman's terms a "mortgage".



But it does not follow that that is the relevant date for prescription in every case. So, for example, if it was obvious at the outset that the debtor's finances were in a disastrous state, on the facts the appropriate conclusion might be that loss was sustained at the moment the loan was advanced.<sup>3</sup> On slightly less extreme facts, the conclusion might be that loss arose when the debtor fell into arrears (although that might not be so if there was only a temporary problem of liquidity). Even if the debtor was in dire financial straits, there might be sufficient equity in the property for the lender not to be exposed to a loss.

5.6 Since the analysis of loss or damage is sensitive to the precise facts, it does not seem to us that the practical difficulties can be addressed by legislative drafting. For prescription to start running, the law already requires certainty that the pursuer has sustained loss, rather than the prospect that he or she may do so in the future.<sup>4</sup> Our present view is that it is difficult to see how this rule could usefully be clarified.

5.7 There is a further consideration. We think it is likely to be preferable for the law on characterisation of loss or damage to develop within the substantive areas of delict and breach of contract, rather than for this to take place within the law of prescription.

### **Materiality and the test for knowledge**

5.8 For a system of prescription to operate fairly, in the context of a well-established rule that all damages must be sued for in a single action,<sup>5</sup> it seems appropriate that the prescriptive period should begin only when the creditor has sustained material (rather than trivial or minimal) damage. This is in practice how the courts interpret the legislation. It is worth considering whether the legislation should state this requirement expressly. We recognise, of course, that there are complexities about the definition of "material" damage which would need to be carefully considered in any legislative drafting.

5.9 While in general it seems desirable that the legislation should state the rules for identifying the start of the prescriptive period as clearly as possible, a degree of complexity is involved, because of the bearing this would have on the discoverability formula. In short: should section 11(3) include reference to the materiality of the loss and, if so, how should that be expressed? For example, in section 22B of the 1973 Act, as inserted by the Consumer Protection Act 1987, the pursuer needs to be aware, among other things, that "the damage was sufficiently serious to justify the pursuer ... in bringing the action .... on the assumption that the defender did not dispute liability and was able to satisfy a decree". There is a similar provision in relation to personal injuries in section 17(2)(b) of the 1973 Act. Is a more elaborate statutory test of this kind conducive to clarity?

5.10 Under the heading "The Discoverability Formula" the 1989 Report noted:

"2.18 The current discoverability formula includes knowledge of the damage sustained as a consequence of an act, neglect or default. As we point out in the Memorandum this formula fails to indicate the severity of damage required to be within the claimant's knowledge before time starts to run against him.

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<sup>3</sup> *Osborne & Hunter Ltd v Hardie Caldwell* 1999 SLT 153; *Santander UK plc v Allied Surveyors Scotland plc* [2011] CSOH 13; cf *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd* [1997] 1 WLR 1627.

<sup>4</sup> *Kusz v Buchanan Burton* [2009] CSIH 63.

<sup>5</sup> *Stevenson v Pontifex & Wood* (1887) 15 R 124.

2.19 We are concerned that this omission could cause hardship, particularly in cases where the damage sustained involves physical damage to property which is of a progressive nature. An example which illustrates this concern is that of minor cracks developing in a newly constructed building which are followed some years later by more serious building defects disclosing, on investigation, that the foundations are faulty, and as a consequence extensive remedial work is required to render the building safe.

2.20 It is thought that in such circumstances, where the minor settlement cracks are the first evidence of faulty foundations, prescription will start to run against the claimant under existing law when he becomes aware, or could with reasonable diligence have become aware, of the minor cracks. Accordingly by the time he ascertains the full extent of the damage the obligation to make reparation to him may have been extinguished.

2.21 In our view the discoverability formula should provide that the damage within the claimant's actual or constructive knowledge must be material damage, as distinct from purely minimal damage, before time starts to run against him. In implementation of this policy we suggested in the Memorandum that the discoverability formula should incorporate a provision similar to that adopted under section 17(2)(b)(i) of the 1973 Act for personal injury claims:

'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'."

5.11 It should be noted that the law in relation to latent damage and construction in particular has moved on considerably since the date of the 1989 Report – not least since, following the decision of the House of Lords in *Murphy v Brentwood District Council*, damage to a building is characterised as economic loss.<sup>6</sup> Nonetheless the wider point remains about the need to draw a distinction between material damage on the one hand and minimal damage on the other.

5.12 In its 2001 Report on Limitation of Actions, the Law Commission of England and Wales recommended that the statutory test should refer to the claimant's knowledge of the significance of the claim. That would delay the start of the limitation period where the claimant had suffered loss which at first sight seemed trivial, until such time as it was known to be significant. And it would relieve the pressure on a claimant to bring proceedings at once, without waiting to see whether the loss or damage got worse.<sup>7</sup>

5.13 A test of this type at once raises the question whether the assessment of significance is subjective or objective. The Law Commission ultimately took the view that a subjective test would be unsatisfactory, because claimants' views of what was significant would differ according to their circumstances, not least their resources. The consequence would be uncertainty. For that reason it recommended an objective test, to the effect that the damage in question was of such significance that a reasonable person would have thought it worth

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<sup>6</sup> [1991] 1 AC 398, 466; for further comment, H MacQueen, "Latent defects, collateral warranties and time bar", 1991 SLT (News) 77-80, 91-93, 99-103 (hereafter 'MacQueen, "Latent defects"'); Johnston, *Prescription*, paras 4.73-87.

<sup>7</sup> 2001 Report, para 3.18.

raising proceedings.<sup>8</sup> Tests along these lines are found in other jurisdictions, such as a number of Canadian provinces.<sup>9</sup>

5.14 In some instances, statutes provide for the claimant's knowledge of the materiality or significance of loss or damage to be assessed on the assumptions that the defender does not dispute liability and is able to satisfy a decree. That is the case in England.<sup>10</sup> In Scotland those assumptions are familiar from sections 17(2)(b)(i) and 22B of the 1973 Act, both of which are concerned with actions for personal injuries. There is relatively little case law on section 17(2)(b)(i) and none at all on section 22B. But some of it does point up the oddity of the statutory formulation.<sup>11</sup> In particular, loss does not need to be at all serious in order to justify a pursuer raising proceedings where the defender does not dispute liability and is able to pay. On those assumptions, an economically rational pursuer might choose to raise proceedings provided the damages anticipated were greater than the amount of irrecoverable legal expense that would be incurred. The equivalent statutory assumptions in the Limitation Act 1980 have been subject to criticism on the grounds that they introduce unnecessary complexity and uncertainty and are unrealistic (for example, in the construction industry both assumptions may often be counter-factual).<sup>12</sup> Nonetheless we bear in mind that the Law Commission examined this issue closely and concluded that the assumptions provide a measure of protection for defendants.<sup>13</sup> We have considered whether the law would be clarified by expanding the existing statutory test along these lines. Our current view is that there is no advantage to be gained by introducing such a complex test.

5.15 Our preliminary view is that the legislation should be amended so as to make it clear that time starts to run when loss or damage is material (under sections 6 and 11(1)) or when the pursuer knows it is material (under sections 6 and 11(3)). If that is to be done, it seems to us that it might make sense to clarify that the assessment of materiality is an assessment confined purely to the extent of the loss that has been sustained and has nothing to do with the prospects of recovery from the defender. In our 2007 Report (on limitation of actions), we recommended a reformulation of the applicable test essentially to the same effect, namely that the statutory assumptions should be deleted from the test.<sup>14</sup>

5.16 In summary: our preliminary view on these issues is that:

- (i) the need for damage to be material before time starts to run under section 11(1) should be stated in terms in the legislation;

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<sup>8</sup> 2001 Report, paras 3.20-24.

<sup>9</sup> Alberta: Limitations Act, RSA 2000, c L-12, s3(1)(a)(ii): "that the injury, assuming liability on the part of the defender, warrants bringing a proceeding". British Columbia: Limitation Act, SBC 2012, c 13, s 8(d): "a court proceeding would be an appropriate means to seek to remedy the injury, loss or damage". Ontario: Limitations Act, SO 2002, c 24, s 5(a)(iv) is similar to the provision in British Columbia.

<sup>10</sup> Limitation Act 1980, s 14A(7): "...the material facts about the damage are such facts about the damage as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment."

<sup>11</sup> *Blake v Lothian Health Board* 1993 SLT 1248; cf *B v Murray (No 2)* 2007 SC 688 at paras 25-7; for further comment, Johnston, *Prescription*, paras 10.47-53.

<sup>12</sup> See eg N Mullany, "Reform of the Law of Latent Damage", (1991) 54 MLR 349 (hereafter 'Mullany, "Latent Damage"'), 351 with further references.

<sup>13</sup> 2001 Report, para 3.27.

<sup>14</sup> 2007 Report, paras 2.9-14.

- (ii) the discoverability formula should similarly make reference to the need for the pursuer to be aware that he or she has sustained material damage; and
- (iii) it should be stated in terms that the materiality of the loss or damage is unaffected by any consideration of the pursuer's prospects of recovery from the defender.

5.17 We therefore ask:

- 9. **Do you agree that the 1973 Act should provide that loss or damage must be material before time starts to run under section 11(1)?**
- 10. **Do you agree that the discoverability formula in section 11(3) should refer, for time to start running, to the need for the pursuer to be aware that he or she has sustained material loss or damage?**
- 11. **Do you agree that the discoverability formula in section 11(3) should provide that the assessment of the materiality of the loss or damage is unaffected by any consideration of the pursuer's prospects of recovery from the defender?**

### **Reasonable diligence**

5.18 As part of the balancing of the interests of pursuer and defender, it seems clear that it is appropriate to take account not just of what the pursuer actually knows but of what he or she would know had he or she acted with reasonable care and attention. Most legal systems appear to adopt this approach.<sup>15</sup>

5.19 The 1989 Report expressed the view that the test for imputing constructive knowledge to a pursuer was unsatisfactory: "it seems to impose upon the claimant a positive duty to go searching for damage even where there may not be reasonable grounds for suspecting its existence".<sup>16</sup> It was suggested that the test ought to be what would be reasonable for the claimant to discover – but it was at once recognised that this threw up the thorny issue whether such a test should be an objective test of reasonableness or a question of what was reasonable for the particular claimant in the circumstances. The solution favoured in the 1989 Report was to refer to the date when it would have been reasonably practicable for the pursuer to become aware of the relevant facts.

5.20 In practice since 1989 the courts do not appear to have found the reasonable diligence test problematic. In *Adams v Thorntons WS* the test was construed as meaning that the pursuer would have done enough if he or she did what an ordinary prudent person would do having regard to all the circumstances.<sup>17</sup> This being so, our present view is that introducing a re-worded test would not be likely to improve on the clarity of the existing test as interpreted by the courts.

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<sup>15</sup> See eg for France: Code civil Art 2224; for Germany: BGB §199(1).

<sup>16</sup> 1989 Report, para 2.58.

<sup>17</sup> 2005 SC 1 30 at [23]-[24].

5.21 There is a question whether the exercise of reasonable diligence might in some circumstances require a pursuer to obtain expert advice and, if so, whether the legislation needs to make express provision about that. In England, the Limitation Act 1980 does so.<sup>18</sup> But the Law Commission, in its review of the law of limitation in England, observed that these provisions are “extremely complex and do not always achieve fair results”.<sup>19</sup> Complexity arises, for example, from the need to distinguish between what a claimant might reasonably have been expected to observe or become aware of and what might be expected of an expert; and how to deal with the situation where the expert fails to observe a relevant matter or gives the claimant incomplete or incorrect advice.<sup>20</sup>

5.22 In light of the complexities involved in interpreting (or even drafting) a statutory provision of this kind, we are of the provisional view that it is preferable that the legislation should not make express reference to the question of expert advice. That was, as it happens, the view set out in the 1989 Report.<sup>21</sup> There are two main reasons for our view. First, it seems to us undesirable to introduce special rules within the law of prescription about when a person is to be taken to have the knowledge that his or her agent (eg a solicitor) has acquired. It seems preferable to operate with the ordinary rule that the knowledge that a person’s agent actually has is imputed to him or her where the agent acquired it within the scope of his or her authority to act.<sup>22</sup> Second, we take the view that the courts can be relied upon to decide on particular facts what reasonable diligence requires of a pursuer and accordingly what knowledge ought in particular circumstances to be imputed to a pursuer. In our view the statutory test as currently formulated is broad enough to allow the courts in an appropriate case to place weight on the fact that the pursuer did not seek expert advice.<sup>23</sup>

5.23 We therefore ask:

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

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<sup>18</sup> Section 14A(10): “For the purposes of this section a person’s knowledge includes knowledge which he might reasonably have been expected to acquire—

(a) from facts observable or ascertainable by him; or

(b) from facts ascertainable by him with the help of appropriate expert advice which it is reasonable for him to seek; but a person shall not be taken by virtue of this subsection to have knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice.”

<sup>19</sup> See the 2001 Report, para 3.51; *cf* Mullany, “Latent Damage”, 351-2.

<sup>20</sup> For just one example of some of the complexities in the case law, see eg *Gravgaard v Aldridge & Brownlee* [2004] EWCA Civ 1529, a case concerning when the claimant ought to have taken advice from solicitors, per Arden LJ in [9]: “Subsection (10) provides for the imputation of constructive knowledge. For the purposes of constructive knowledge only, the question arises whether the claimant might reasonably be expected to have acquired knowledge of facts, and whether it was reasonable for him to seek advice. However, a claimant does not have constructive knowledge of facts simply because an expert, whom it was reasonable to expect the claimant to consult, could have obtained the knowledge or helped him ascertain facts. This is because, by virtue of the tailpiece in subs (10), a person does not have constructive knowledge of matters which are ascertainable only with the help of an expert if he has taken all reasonable steps to obtain and, where appropriate, to act on that advice. If, therefore, he has timeously instructed an expert, it must be shown that he had actual knowledge of the facts specified in s 14A(6) or constructive knowledge on some other basis. This helps to prevent a claimant who acts properly from being penalised for shortcomings on the part of his expert.”

<sup>21</sup> Para 2.64.

<sup>22</sup> Bowstead on *Agency* (20<sup>th</sup> edn, 2014), paras 8.207-210; Johnston, *Prescription*, para 6.89. *Cf* also L Macgregor, *The Law of Agency in Scotland* (2013), para 13.25.

<sup>23</sup> *Cf* the discussion in W Jajdelski, “Reasonable diligence under section 11(3) and professional advice”, (2015) Civil Practice Bulletin 2.

# Chapter 6      The long-stop prescriptive period under section 7 of the 1973 Act

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

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

6.3 We recognise that there will remain hard cases and cases in which there is a perception that prescription has operated harshly. One example is that of the owner of a house who discovers only when placing the house on the market 25 years after buying it that he or she does not have good title. In many cases positive prescription will after 10 years secure a possessor's title against challenge, but this will work only if the title has been registered. It would not help the owner if, for example, the solicitor had failed to register the title at all. On buying a house a purchaser cannot reasonably be expected to review or scrutinise the work done by the conveyancing solicitor, so there is every justification for him or her to be entirely ignorant of the title defect. The long-stop prescription would nonetheless cut off this claim after a set number of years. Another example is that of a lease subject to a rent review every 25 years.<sup>1</sup> If the drafting of the rent review clause was defective, with the consequence that the landlord had no power under the lease to increase the rent, that defect might well come to light only at the time of the first rent review, by which time the long-stop prescription would have cut off any claim. These are hard cases. But it is well known that hard cases make bad law. Cases of this kind cannot be avoided without sacrificing the certainty and finality which the doctrine of prescription aims to secure. These are legal policies which go beyond the interests of individuals and serve the wider public interest.

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<sup>1</sup> Cf the facts of *Beard v Beveridge, Herd & Sandilands* 1990 SLT 609.

## **Some unusual features of the long-stop prescription in Scotland; and some comparative material**

6.4 The question arises how best a long-stop provision should be structured. The structure currently employed by Scots law in section 7 of the 1973 Act is unusual in at least two respects. The first is that Scots law employs a long-stop period which runs from the same date as the basic five-year prescriptive period of section 6. The second is that the long-stop prescription is equally amenable to interruption by a relevant claim or acknowledgment as the five-year prescription of section 6.

6.5 The following paragraphs examine both of these features.

### **The starting date**

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

#### *A brief review of some comparative material*

6.7 In Germany there are three different regimes: the long stop for claims for damages for personal injuries is 30 years from the date of the wrongful act; for other claims for damages the period is 10 years from the date the claim arose or 30 years from the date of the wrongful act, whichever is earlier; and for claims other than for damages the period is 10 years from the date the claim arose.<sup>2</sup>

6.8 On the other hand, in France, the long-stop period is 20 years from the date on which the right arose;<sup>3</sup> while in South Africa there is no long stop under the Prescription Act 1969.<sup>4</sup>

6.9 The DCFR provides:

“The period of prescription cannot be extended, by suspension of its running or postponement of its expiry under this Chapter, to more than ten years or, in case of rights to damages for personal injuries, to more than thirty years. This does not apply to suspension under III.-7:302 (Suspension in case of judicial and other proceedings).”<sup>5</sup>

6.10 In the common-law world, in England and Wales, the Limitation Act 1980 provides a long stop of 15 years after the date of the last act which is alleged to constitute negligence to which the damage in question is wholly or partly attributable.<sup>6</sup> In Ireland there is no long

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<sup>2</sup> BGB §199(2)-(4).

<sup>3</sup> Code civil Art 2232. (There are exceptions; in particular, no long stop applies to actions for personal injuries.)

<sup>4</sup> Cf the discussion in Loubser, *Prescription*, 37.

<sup>5</sup> III.-7:307. (See DCFR, Full Edition, 1189-90 for a survey of other European approaches.)

<sup>6</sup> Limitation Act 1980, s 14B (inserted by the Latent Damage Act 1986); cf McGee, *Limitation*, paras 6.029-030.

stop.<sup>7</sup> In Canada the law differs between provinces: for example, in both British Columbia and Ontario the long stop is 15 years from the date of the act or omission; while in Alberta it is 10 years from the date the claim arose.<sup>8</sup> In New Zealand, the Limitation Act 2010 provides a long-stop period of 15 years after the date of the act or omission on which the claim is based.<sup>9</sup> The position is the same in the Australian Capital Territory.<sup>10</sup>

6.11 Throughout the United Kingdom, for product liability claims there is a long-stop period of 10 years which runs from the “relevant time”, an expression which is defined in the Consumer Protection Act 1987. Broadly, it has the effect that time runs from the date on which the product was last supplied by a producer, importer or person who branded the goods with his or her name or mark.<sup>11</sup>

6.12 This brief review of comparative material serves to indicate that the approach taken in Scots law is unusual. The issue of principle, however, is whether it is possible, without undermining one of the main rationales of prescription, to adopt a long-stop prescription in which time runs only from the date of loss or damage. The remainder of this chapter addresses that issue.

#### *The approach of the 1989 Report*

6.13 It is important to consider the approach taken in the 1989 Report. It examined the merits of recommending a change in the law on the starting date for the long-stop prescription but ultimately decided against it. In particular, it recommended (i) that the starting point for the long-stop prescription of section 7 of the 1973 Act should be the date on which loss or damage had flowed from an act or omission; and (ii) that parties should be prohibited from entering into agreements purporting to lengthen the prescriptive periods. It seems fair to say that neither of these recommendations attracted unanimous support.

6.14 So far as the starting date for the long stop is concerned,<sup>12</sup> the reasoning was that, if the date of an act or omission were adopted as the starting date for the long-stop prescription, that meant that prescription could start to run or even be completed before the obligation had become enforceable. The report twice refers to this as a “conceptual problem” and once to the “conceptual difficulties” of having a long-stop prescription which could expire before the claimant’s right had become actionable.<sup>13</sup>

6.15 We agree that there is a conceptual problem if one starts from the premise that the long-stop prescription should run from a date identified by reference to a concurrence of act or omission (on the one hand) and loss or damage (on the other). But that is not the only way of structuring the law. It is possible to establish a rule to the effect that there is a maximum period within which a claim must be made, for instance 10 or 15 years from the

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<sup>7</sup> Except for product liability claims – see immediately below.

<sup>8</sup> British Columbia: Limitation Act, SBC 2012, c 13, s 21; Ontario: Limitations Act, SO 2002, c 24, s 15; Alberta: Limitations Act, RSA 2000, c L-12, s 3(1)(b).

<sup>9</sup> Limitation Act 2010, s 11(3)(b).

<sup>10</sup> Limitation Act 1985 (ACT), s 40(1).

<sup>11</sup> 1973 Act, s 22A(1); Limitation Act 1980, s 11A; Consumer Protection Act 1987, s 4(2); cf McGee, *Limitation*, Ch 7.

<sup>12</sup> The issue of agreements about lengthening or shortening the prescriptive period is discussed below in Ch 7.

<sup>13</sup> 1989 Report, paras 3.28, 3.31 and 3.33.



date of an act or omission.<sup>14</sup> It is true that this involves a judgement about fairness in general and an assessment of whether a rule of that kind represents an appropriate balance between the interests of pursuer and defender. But, because it is an approach entirely detached from the question when a cause of action arose and focuses solely on the date of an act or omission, it does not involve any conceptual difficulty. For example, under the equivalent legislation in England, specific provision is made for the long stop to bar a right of action notwithstanding that the cause of action has not yet accrued.<sup>15</sup>

#### *A true long stop?*

6.16 While there is no uniformity among the jurisdictions reviewed here, there is a preponderance of jurisdictions in which there is a long stop which runs from the date of the wrongful act or omission.

6.17 It is not difficult to see why this is so. Take the example of latent damage to a building. The notion that the long stop should run from the date of loss or damage is not only unusual but perplexing. It has been described as a “highly suspect basis on which to rest any prescriptive period”; and it has been pointed out that “(t)here may be no damage in the *Pirelli* sense, and so the long stop will not start running until the building fails – that is to say, the long stop will start at the same time as the short period. This makes the long stop fundamentally irrelevant”.<sup>16</sup> Similarly, Professor Zimmermann observes:

“If a legal system accommodates the reasonable interests of the creditor by suspending prescription as long as the damage is not discoverable, it cannot sensibly operate with a long-stop period running from the moment when the damage occurs. This would be a long-stop that does not bite: occurrence of the damage (a moment which may be very difficult to determine, particularly in cases of patrimonial loss) and discoverability are often closely related.”<sup>17</sup>

6.18 While one of the key characteristics of a long-stop prescription is that it runs regardless of the creditor’s state of knowledge, another is that it should cut off a right of action clearly and absolutely within a defined period of time. 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 starting to run. That is capable of undermining one of the principal rationales of prescription, namely that after a certain period a defender should be able to arrange his or her affairs on the assumption that the risk of litigation has passed. That rationale is based on considerations of general fairness, as well as the practical consideration that with the passage of time witnesses may no longer be available and documentary evidence may be lost.

6.19 Our provisional view is for these reasons that the long-stop prescriptive period should run from the date of a defender’s last act or omission.

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<sup>14</sup> That is what happens under the Latent Damage Act 1986; and that is the approach set out in the DCFR, Full Edition, III.-7:307, where the maximum period is 10 years (30 years for personal injuries claims).

<sup>15</sup> Limitation Act 1980, s 14B(2)(a): “This section bars the right of action in a case to which subsection (1) above applies notwithstanding that — (a) the cause of action has not yet accrued; or (b) where section 14A of this Act applies to the action, the date which is for the purposes of that section the starting date for reckoning the period mentioned in subsection (4)(b) of that section has not yet occurred.”

<sup>16</sup> MacQueen, “Latent defects”, 92.

<sup>17</sup> Zimmermann, *Comparative Foundations*, 109-110 (footnote omitted).

6.20 We therefore ask:

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

### **The possibility of interruption**

6.21 The second unusual feature of the Scots law on the long-stop prescription is that, under the existing provisions of the 1973 Act, it is amenable to interruption by a relevant claim or acknowledgment in just the same way as the five-year prescription of section 6.<sup>18</sup> So, for instance if, 19 years after the 20-year prescriptive period has started to run, a pursuer raises a relevant claim in court, that interrupts prescription.<sup>19</sup> The consequence is that a new 20-year period begins from the date of interruption. The long stop will now end not earlier than 39 years after the date on which the loss or damage occurred. This being so, in what sense can the current Scottish provisions truly be described as a "long stop"?

6.22 This problem does not arise in most of the various jurisdictions mentioned earlier, since the legislation is drafted simply to state that after the long-stop period no proceedings can be brought.<sup>20</sup> In Germany the approach is different but the problem is addressed: if the prescriptive period is interrupted by a claim, the period ends six months after the claim has been disposed of.<sup>21</sup> On either of these approaches, there is no scope for the supposed long stop to be perpetuated indefinitely.

6.23 The 1989 Report recognised this issue and recommended reform. It distinguished between the two ways in which prescription can be interrupted. Since the question whether or not to make a relevant acknowledgment of an obligation is within a defender's own control, the view was taken that an acknowledgment that met the statutory test should be capable of interrupting prescription and bringing about the start of a new 20-year prescriptive period.<sup>22</sup> On the other hand, in relation to a relevant claim by the pursuer the 1989 Report (in summary) expressed the view that prescription should not be interrupted but that, if a relevant claim had been made during the prescriptive period and had not been disposed of, the prescriptive period should be extended until such time as the claim had been disposed of or abandoned.<sup>23</sup> The model the 1989 Report proposed for relevant claims is broadly the same as the one which is in place for prescription of obligations arising under the Consumer Protection Act 1987.<sup>24</sup>

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<sup>18</sup> This is in terms of s 7(2) of the 1973 Act, read with ss 9 and 10.

<sup>19</sup> Cf the comments of MacQueen, "Latent defects", 101.

<sup>20</sup> England: Limitation Act 1980, s 14B(1); New Zealand: Limitation Act 2010, s 11(3)(b); Australian Capital Territory: Limitation Act 1985 (ACT), s 40(1); British Columbia: Limitation Act, SBC 2012, c 13, s 21(1); Ontario: Limitations Act, SO 2002, c 24, s 15(2); Alberta: Limitations Act, RSA 2000, c L-12, s 3(1)(b); France: Code civil Art 2232.

<sup>21</sup> BGB § 204(2). In the case of acknowledgment, the prescriptive period begins again on the date of the acknowledgment, on the view that a debtor who acknowledges a debt is not in need of the protection of prescription: BGB § 212 (cf the case of an agreement to lengthen the prescriptive period: below, Ch 7).

<sup>22</sup> 1989 Report, paras 4.60-62.

<sup>23</sup> 1989 Report, paras 4.63-65.

<sup>24</sup> See 1973 Act, s 22A(2), (3) – this provision has in the meantime been amended to take account of Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters.

6.24 In order to achieve the result that prescription under section 7 genuinely does operate as a long stop, our provisional view is that it should not be amenable to interruption either by claim or by acknowledgment. It should, however, be capable of being extended, where a claim has been made during the prescriptive period, until such time as that claim is finally disposed of.

6.25 We would be interested in the views of consultees and therefore ask:

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

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

### Two further issues

6.26 Two further issues arise. The first is the case of construction contracts; the second is the length of the long-stop prescription.

#### *The case of construction contracts*

6.27 First, in relation to construction contracts, it is sometimes suggested that a special rule should apply, namely that the long stop should run from the date of practical completion of the construction works. This was proposed, for example, in response both to our consultation in 1987<sup>25</sup> and the Law Commission's consultation on limitation of actions in 1998.<sup>26</sup> It is also favoured by some commentators.<sup>27</sup> Our understanding, however, is that since the time of these consultations construction contracts have evolved significantly. In modern practice, contracts often contain provision for sectional completion of the contract works, with the result that the date of practical completion is not as important as it once was.

6.28 To provide (for example) that the prescriptive period should start to run from the date of practical completion would offer the advantage of simplicity, compared with the need otherwise to identify when an act or omission occurred or when loss flowed from it. A provision of this kind would not necessarily be to the benefit of those working in the construction industry, since the date of practical completion would mostly be later than the date of an act or omission; indeed, for those contractors involved only at the early stages of a project, such a provision might extend the period of exposure to claims considerably.

6.29 One practical objection which has been thought to stand in the way of such a special rule is the supposed difficulty in defining the contracts to which it would apply, raising the unattractive prospect of litigation about where the borderline lies. This objection seems to us

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<sup>25</sup> 1987 Consultative Memorandum, paras 5.26-28.

<sup>26</sup> Limitation of Actions (Law Com Consultation Paper No 151 (1998)) (hereafter "the 1998 Consultation Paper"), paras 12.106-108.

<sup>27</sup> Eg Mullany, "Latent Damage", 382.

to be superable, if the proposal otherwise has merit. For example, the Housing Grants, Construction and Regeneration Act 1996 contains a definition of “construction contract”.<sup>28</sup>

6.30 There is, however, a larger issue: in general, on grounds of simplicity, clarity and reducing the scope for error about the particular prescriptive period involved, there seems to be much to be said for having a uniform prescriptive period, unless there are compelling reasons for treating some kinds of damage differently. The question is whether the issues that arise from construction contracts are sufficiently peculiar that the law of prescription ought to depart from a uniform prescriptive regime in favour of (a degree of) fragmentation. Our present view is that they are not.<sup>29</sup>

6.31 We therefore ask:

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

*The length of the long-stop prescription*

6.32 Second, the question arises how long the long-stop period should be. In comparison with some other jurisdictions, the current period of 20 years is actually quite long. Other jurisdictions, as noted earlier, operate variously with periods of 10, 15, 20 and 30 years. The longest periods are generally reserved for obligations relating to personal injuries. There is, as ever, a balance to be struck, but it is evident that after a very lengthy period the quality of evidence may well have seriously deteriorated. A further consideration is the ability of defenders to maintain, or to obtain, insurance cover for the prescriptive period.

6.33 If ultimately the view is taken that the long-stop prescription should run from the date of the wrongful act or omission rather than, as at present, the date of the loss, the consequence is that prescription will in some cases start to run at an earlier date than under the present law. That being so, our provisional view is that, if the prescriptive period under section 7 were to be reduced, it should not be reduced substantially.

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<sup>28</sup> Housing Grants, Construction and Regeneration Act 1996, s 104 –

“(1) In this Part a ‘construction contract’ means an agreement with a person for any of the following—

(a) the carrying out of construction operations;  
(b) arranging for the carrying out of construction operations by others, whether under sub-contract to him or otherwise;  
(c) providing his own labour, or the labour of others, for the carrying out of construction operations.  
(2) References in this Part to a construction contract include an agreement—  
(a) to do architectural, design, or surveying work, or  
(b) to provide advice on building, engineering, interior or exterior decoration or on the laying-out of landscape, in relation to construction operations.  
(3) References in this Part to a construction contract do not include a contract of employment (within the meaning of the Employment Rights Act 1996).”

<sup>29</sup> Cf 2001 Report, paras 3.111-12 rejecting a proposal of this kind.

6.34 We therefore ask:

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

# Chapter 7      Contracting out and standstill agreements

7.1 Section 13 of the 1973 Act prohibits agreements which purport to disapply the statutory rules of negative prescription. There is room for doubt about which agreements fall within the scope of the prohibition. There is also a wider issue: whether a prohibition of this kind is in fact necessary. Both issues are addressed below.

## **The scope of section 13 of the 1973 Act**

7.2 Section 13 of the 1973 Act provides:

### **“Prohibition of contracting out**

13.- Any provision in any agreement purporting to provide in relation to any right or obligation that section 6, 7, 8 or 8A of this Act shall not have effect shall be null.”

7.3 The general effect of this provision is that an agreement that at the end of a prescriptive period a right or obligation shall not have prescribed is to have no effect. The precise scope of the provision is not entirely clear. There are various possible issues:

(1) Prescription is concerned only with what happens after an obligation becomes enforceable. For that reason, an agreement or suspensive condition that an obligation is not to be enforceable until a certain date does not fall foul of section 13.<sup>1</sup>

(2) An agreement that a period longer than the relevant statutory prescriptive period should apply in its place appears to be the principal mischief at which section 13 is directed.

(3) An agreement that a shorter prescriptive period should apply is not clearly an infringement of section 13, although the reality is that it does disapply the relevant statutory prescriptive period. Since the rationale for prescription is essentially that obligations should cease to be enforceable after an excessively long period, it is not clear that agreements which shorten the prescriptive period are struck at by section 13. In conveyancing, it is common for missives to contain what is in effect a two-year contractual prescription.

(4) An agreement that a relevant claim or acknowledgment should not interrupt prescription is an agreement which makes prescription more difficult to achieve and may be struck at by section 13.

(5) An agreement that, under the five-year prescription of section 6, prescription should not be suspended during a period of minority or legal disability might

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<sup>1</sup> See *McPhail v Cunninghame DC* 1983 SC 246; *Ferguson v McIntyre* 1993 SLT 1269.

reasonably be regarded as contrary to the public interest.<sup>2</sup> It would appear to be within the proper scope of section 13 and so void.

7.4 The 1970 Report did not provide much explanation for what became section 13 of the 1973 Act. The report observed:<sup>3</sup> “To permit contracting-out would clearly be undesirable and would not be consonant with the traditional approach to prescription in Scots law. We seek a clear statement of the law of prescription and limitation of actions, and we recommend that, for the avoidance of doubt, the proposed new statute on these subjects should state that the operation of its provisions may not be elided by agreement of the parties affected.”

7.5 It is notable that the prohibition is not directed purely at making the length of the statutory prescriptive period mandatory but appears to be concerned with making the statutory rules mandatory as a whole. The justification advanced is not fairness or public policy but instead apparently the wish to achieve clarity and uniformity, by prohibiting agreements which vary the statutory provisions. So it may indeed be that the intention was that section 13 should invalidate not just agreements to lengthen the prescriptive period but also some of the other kinds of agreement mentioned above.

7.6 The question was revisited in the 1989 Report:<sup>4</sup>

“4.76 In our view the ability to extend the prescriptive periods will provide scope for lengthening the defender’s period of risk, give rise to uncertainty, and possibly increase the cost, or reduce the likelihood, of securing, where appropriate, insurance cover against potential claims. It will also result in an increase in the incidence of stale claims.

4.77 Accordingly, although we recognise as a general principle that a party’s freedom to contract should be protected, in this instance, it appears to us to be contrary to public policy to remove the existing prohibition against contracting out of the statutory rules of prescription by permitting parties to extend or dispense with the prescriptive periods. The majority of consultees supported this approach.

4.78 We expressed the view in the Memorandum that section 13 did not prohibit parties from agreeing to a reduction in the period of prescription – a practice with which we did not propose to interfere. During the course of consultation, however, two consultees indicated disagreement with our interpretation of this provision. In their opinion parties were also prohibited from entering into an agreement to reduce the prescriptive period.

4.79 We are unable to identify any public policy reasons which would justify restricting a party’s freedom to contract for a reduction in the prescriptive period. Furthermore, if such a contracting out provision proved to be unreasonable in the particular circumstances the party adversely affected might be able to challenge its enforceability under the Unfair Contract Terms Act 1977. Accordingly as there would appear to be some doubt as to the interpretation of section 13 in this respect we propose that this doubt should be dispelled by ensuring that legislation specifically permits parties to agree to a reduction in the statutory periods.”

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<sup>2</sup> So in France: see JCP 1980 19311 (describing the suspension provisions of the Code civil as rules of *ordre public*; these provisions are now in Arts 2234-9).

<sup>3</sup> 1970 Report, para 141.

<sup>4</sup> 1989 Report, paras 4.76-79.

7.7 The 1989 Report therefore made the following recommendation:

“29. Subject to Recommendation 30 below parties should be prohibited from entering into any agreement which purports to lengthen or dispense with the periods of the short and long negative prescriptions but should be free to agree to shorten any such prescriptive periods.”<sup>5</sup>

7.8 While the 1989 Report was not in favour of permitting agreements extending the prescriptive period in general, it did propose one exception, which is summarised in the following recommendation:<sup>6</sup>

“30. As an exception to the rule put forward in Recommendation 29 above, it shall be competent for the claimant and any potential defender in a reparation obligation, at any time after damage is sustained, to enter into an agreement to extend the running of the long or short negative prescriptive periods against the claimant for such period as is specified in the agreement so that the claimant can make further enquiries as to the cause of, and the person responsible for, that damage.”

7.9 The rationale for this exception is explained as being to seek to reduce the need for a pursuer to protect his or her position by serving (often skeletal) protective writs<sup>7</sup> on all possible defenders in order to interrupt the running of prescription; this is wasteful of resources, since the parties cited need to investigate the validity of the claim, take legal advice and incur expense, which will not be recoverable in full.<sup>8</sup> That is clearly a particular issue in complex multi-party transactions such as construction contracts.

### **Options for reform?**

7.10 We think the drafting of section 13 could usefully be clarified. Quite apart from that, however, the question arises whether a wide restriction such as this is still appropriate in current practice. It is clearly a substantial restriction on the autonomy of parties and their freedom of contract.

#### *Standstill agreements and some comparative material*

7.11 The main practical issue here is the validity of so-called standstill agreements, of which extensive use is made in some other jurisdictions. These enable parties to enter into an agreement that prescription or limitation will not run for a specified period and so to preserve the *status quo* while they seek to negotiate an end to their dispute. Agreements of this kind offer the advantage that parties may be spared the need to raise protective proceedings. At our seminar in June 2015 there seemed to be a consensus among participants that the ability to employ standstill agreements was valuable in other jurisdictions and support for the view that they could be useful in Scotland too.

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<sup>5</sup> Recommendation 29.

<sup>6</sup> 1989 Report, para 4.90 and Recommendation 30.

<sup>7</sup> See para 4.21 above.

<sup>8</sup> 1989 Report, paras 4.82-83.



7.12 The position in other jurisdictions, however, is far from uniform.<sup>9</sup> In some jurisdictions it is not permissible to agree that the statutory prescriptive period be either shortened or lengthened.<sup>10</sup> In others it is permissible to agree that it be shortened but not lengthened.<sup>11</sup> In still others both are permissible.<sup>12</sup> In England one of the Law Commission's (unimplemented) recommendations was that parties should be able to agree to shorten or to lengthen the limitation period.<sup>13</sup>

7.13 The DCFR provides:<sup>14</sup>

“(1) The requirements for prescription may be modified by agreement between the parties, in particular by either shortening or lengthening the periods of prescription.

(2) The period of prescription may not, however, be reduced to less than one year or extended to more than thirty years after the time of commencement set out in III.-7:203 (Commencement).”

7.14 This is very similar to the position under the French Code civil, except that there (i) the maximum period is 10 years and (ii) there are exceptions for a number of specified obligations such as the obligation to pay wages or make periodic payments at frequencies of a year or less.

7.15 While views about the permissibility of standstill agreements evidently diverge across jurisdictions, we detect sufficient support for them in some legal systems to make it appropriate to go on to consider whether Scots law should revisit its existing prohibition.

#### *Agreements to shorten the prescriptive period*

7.16 As noted earlier,<sup>15</sup> these may in fact be permitted by section 13 of the 1973 Act, but the position is not entirely clear. In principle we see no objection to permitting such agreements. The main concern would appear to be the need to protect consumers from standard form or other contracts purporting to cut off their rights at an early date. But that mischief can be addressed by means of legislation on unfair contract terms.<sup>16</sup>

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<sup>9</sup> For a short survey, see Zimmermann, *Comparative Foundations*, 162-7.

<sup>10</sup> Eg Switzerland: §129 OR; Germany: § 202 I BGB provides that in the case of liability for intentional acts it is not possible to agree in advance to facilitate the completion of the limitation period.

<sup>11</sup> Austria: §1502 ABGB. Germany: § 202 II BGB provides that the limitation period cannot be extended beyond thirty years from the start of the statutory limitation period.

<sup>12</sup> France: Code civil Art 2254.

<sup>13</sup> 2001 Report, paras 3.170-175; 1998 Consultation Paper, paras 14.1-6. One of the reasons given in support of the recommendation is that, since a party is free to waive the defence of limitation, it is difficult to see why he or she should not be able to enter into an agreement to that effect – this is a reason that clearly does not apply in relation to prescription, since it is not purely a procedural bar.

<sup>14</sup> III.-7:601; see the discussion in the DCFR, Full Edition, 1203-6.

<sup>15</sup> See para 7.3(3) above.

<sup>16</sup> Originally by virtue of the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999. Part 2 of the Consumer Rights Act 2015 provides that (i) the 2015 Act rather than the 1977 Act governs business-to-consumer contracts; (ii) the 1977 Act as amended by the 2015 Act governs business-to-business and consumer-to-consumer contracts only; and (iii) the 1999 Regulations are revoked.

### *Agreements to lengthen the prescriptive period*

7.17 Agreements of this kind do fall foul of section 13.<sup>17</sup> At present the only way, short of litigation, in which parties can bring about an extension of the prescriptive period is for the debtor in the obligation to make a relevant acknowledgment which complies with the requirements of section 10 of the 1973 Act. That would interrupt the running of prescription. But the debtor may not be willing to do this, since the effect of an interruption of prescription is that the prescriptive period starts again from the beginning. In effect, therefore, the parties can by means of section 10 bring about an extension of the prescriptive period, but only for a minimum period of 5 years. This seems unduly cumbersome.

7.18 It is not clear to us that it is necessary to have an absolute prohibition on agreements to lengthen the prescriptive period. Agreements of this kind can prevent the waste of resources which the use of protective writs brings about. They can serve the valuable purpose of reducing the volume of litigation and enabling settlement negotiations to be concluded without the creditor needing first to raise proceedings to preserve his or her right.

7.19 If such agreements are to be permitted, two consequential issues arise.

7.20 First, whether it should be possible to enter an agreement of this kind at any time or whether (as suggested in the 1989 Report) this should be possible only after damage has been sustained.<sup>18</sup> As mentioned earlier,<sup>19</sup> the concern in 1989 was that permitting such agreements in general would lengthen the defender's period of risk, give rise to uncertainty, affect the ability to obtain insurance cover, and increase the incidence of stale claims. It is evident that these are possible consequences, but it is not clear to us that an agreement to extend the prescriptive period offends against any principle of public policy. If that is so, it is difficult to see why parties should not be free to contract on these terms.

7.21 Second, if these concerns are substantial, they can be addressed or mitigated by limiting the freedom of the parties to some extent. So, for instance, as in the DCFR, provision could be made for the maximum (and indeed the minimum) period which could be fixed by agreement.

7.22 The experience of other jurisdictions suggests that what is valuable in practice is the ability to extend a short prescriptive period in order to allow investigation or settlement discussions to take place.<sup>20</sup> It seems unlikely that there is a pressing need to enter into agreements that would extend the prescriptive period beyond the long stop. That being so, it may be sufficient simply to provide that agreements to extend the prescriptive period are permissible but that the long-stop prescription will operate nonetheless.

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<sup>17</sup> This is suggested mainly by the fact that the 1973 Act itself spells out the means by which prescription can be interrupted or suspended and says nothing about suspension by agreement.

<sup>18</sup> See para 7.8 above and the quotation of recommendation 30 of the 1989 Report.

<sup>19</sup> See para 7.6 above and the quotation of para 4.76 of the 1989 Report.

<sup>20</sup> See paras 7.11-7.14 above.

7.23 We therefore ask:

18. Do you favour permitting agreements to shorten the statutory prescriptive periods? Should there be a lower limit on the period which can be fixed by such agreements?
19. Do you favour permitting agreements to lengthen the statutory prescriptive periods? Should there be an upper limit on the period which can be fixed by such agreements?

## Chapter 8            The burden of proof

8.1 It is generally accepted – and this seems correct in principle – that the burden of proof so far as section 11(3) and section 6(4) are concerned rests on the pursuer. In those cases it makes sense for the pursuer to have to establish when he or she became aware of the facts relevant under section 11(3) or the period for which he or she was led by fraud or error not to raise proceedings.

8.2 But the question who bears the burden of proof in the ordinary case, where discoverability or alleged fraud or error are not in issue is not clear. The 1973 Act says nothing about it. Should it?

### The case law

8.3 Most of the old cases deal with one of the forms of limitation which existed prior to 1973 and are therefore not directly in point.<sup>1</sup> Sometimes it has been conceded that the burden rests on the defender.<sup>2</sup> For prescription proper under the 1973 Act the question appears to have been mentioned only in six cases. In the first it was held that it was for the defenders to show that, owing to the date on which loss had occurred, the pursuer had raised proceedings after the prescriptive period had been completed.<sup>3</sup> In the second it was held that the burden was on the party alleging the affirmative, in that case the defenders.<sup>4</sup> In the third it was remarked (*obiter*) that once the question of prescription had been raised it was for the pursuer to prove that his title to sue had been preserved.<sup>5</sup> In the fourth the defenders conceded in relation to prescription under section 7 that the onus was on them to aver when loss had arisen and therefore when time started to run.<sup>6</sup> In the fifth the parties were in agreement that the burden of proving the date on which an obligation to make reparation became enforceable lay on the defenders. The court evidently thought that that was correct, but it did not have to decide the point.<sup>7</sup> In the final case there was an extended discussion of the issues, and it was held that the burden rested on the pursuers.<sup>8</sup>

8.4 The final case was that of *Pelagic Freezing (Scotland) Ltd v Lovie Construction Ltd*.<sup>9</sup> There Lord Menzies accepted that, even if the defender did not raise the issue, a court could take notice of the absence of a legal right, but only in the clearest of circumstances. He

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<sup>1</sup> For the distinction between prescription and limitation, see para 1.8 above. The most relevant cases are *Caledonian Railway v Chisholm* (1886) 13 R 773; *Alcock v Easson* (1842) 5 D 356; *Neilson v Mags of Falkirk* (1899) 2 F 118, all dealing with the Triennial Prescription Act 1579 (in spite of the name actually a provision for limiting proof to writ or oath after completion of the limitation period); *Shaw v Renton & Fisher Ltd*, 1977 SLT (Notes) 60 (limitation under s 17 of the 1973 Act but on its pre-1984 wording).

<sup>2</sup> *Strathclyde Regional Council v Border Engineering Contractors Ltd* 1997 SCLR 100; *Sinclair v MacDougall Estates Ltd*, 1994 SLT 76 at 81D.

<sup>3</sup> *Dunlop v McGowans* 1979 SC 22 (hereafter “Dunlop”) at 27 (the point was not raised in the Inner House or House of Lords).

<sup>4</sup> *Strathclyde Regional Council v W A Fairhurst & Ptns* 1997 SLT 658.

<sup>5</sup> *Richardson v Quercus Ltd*, J F Wheatley QC, Outer House, Court of Session, March 25, 1997, unreported.

<sup>6</sup> *Paterson v George Wimpey & Co Ltd* 1999 SLT 577.

<sup>7</sup> *ANM Group Ltd v Gilcomston North Ltd* 2008 SLT 835 at [8].

<sup>8</sup> *Pelagic Freezing (Scotland) Ltd v Lovie Construction Ltd* [2010] CSOH 145 at [86]-[94].

<sup>9</sup> [2010] CSOH 145.

pointed out that it was difficult to understand why there should be a burden on a defender of proving that a pursuer has no legal right of action; and that the proposition that the pursuer has an existing legal right of action is no less an affirmative proposition than the proposition that a right of action has prescribed. The conclusion was that the pursuers bear the burden: they must satisfy the court that they have a legal right of action against the defenders.<sup>10</sup> Lord Menzies continued:

“It does not seem to me that there is anything innately unfair or contrary to principle in requiring the pursuers to satisfy the court that they have a legal right of action. There is no greater difficulty for the pursuers in discharging the burden of proof than there would be for the defenders; what they require to do is to lead evidence that the concurrence of *damnum and iniuria* occurred after 4 February 2004. That is no more difficult a burden to discharge than it would be for the defenders to prove that this concurrence occurred before 4 February 2004. In circumstances in which there is no particular unfairness in placing the burden on one side or the other, it is consistent with principle to place the burden on the pursuers who assert that they have a legal right against the defenders. If, in a clear case, the court can have regard *ex proprio motu* to the extinction of an obligation meaning that there is no legal right in existence, I find it difficult to understand why (in a clear or unclear case) the burden of proving that there is no legal right in existence should rest with the defenders. I agree with the view expressed in *Richardson v Quercus* that once the question of prescription has been raised it is for the pursuer to prove that his title to sue has been preserved.”<sup>11</sup>

8.5 This variety of approaches certainly shows that the legal position is unclear. It may suggest that it could usefully be clarified by legislation. For the five-year negative prescription under section 6, because the start of the prescriptive period may be postponed until the date when the pursuer knew or ought to have known that he or she had sustained loss,<sup>12</sup> the problem is often not particularly acute. Nonetheless, if the pursuer fails to make a case for postponing the starting date, the court will still have to decide who has to prove when, viewed objectively, the loss occurred. But real doubt about when an obligation became enforceable is most likely to occur in relation to latent defects and prescription under section 7.

### **Incidence of the burden of proof**

8.6 If statutory provision is to be made in relation to the burden of proof, what should it be? And should the provision be the same for section 6 as for section 7? Before returning to these questions it is worth reviewing briefly the arguments that tend to be advanced in favour of the burden resting on one party or the other:

(1) The burden should rest on the party who asserts the affirmative proposition. Accordingly, a defender who asserts that an obligation has prescribed will bear the burden of proving that.<sup>13</sup> But, since the same proposition can be advanced in positive form or in negative form, this argument may be thought to place excessive weight on precisely how pleadings are framed. It may therefore be more satisfactory to say that

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<sup>10</sup> *Ibid* at [92]-[94].

<sup>11</sup> *Ibid* at [95].

<sup>12</sup> S 11(3).

<sup>13</sup> Walker and Walker, *The Law of Evidence in Scotland* (4th edn, 2015), para 2.2.4.

this rule is to be understood simply as indicating that where an allegation, either positive or negative, is essential to a party's case the proof of it rests on him or her.<sup>14</sup>

(2) Since prescription means that the right in question has ceased to exist, presumably at least in a clear case the court could take notice of it, whether or not it was pled by the defender.<sup>15</sup> If that is right, then the issue of prescription and the contents of the pleadings are separate. Accordingly, it cannot be conclusive to maintain that the burden of proof must lie on the party who pleads prescription.

(3) The burden should not rest on a party to prove a negative or facts peculiarly within the other party's knowledge. For example, where a defender is under a duty not to do a particular act, the prescriptive period will run from the date when he or she breaches that duty. If the date of breach is within the defender's own knowledge, it would be odd to insist that the pursuer should prove it or prove the negative proposition that the defender did not infringe until a particular date within the prescriptive period.

(4) Prescription of any kind and any length clearly favours the defender. But that proposition is true in a stronger sense for the 20-year prescription than for the 5-year one, because it cuts off all but imprescriptible rights and obligations after 20 years, without regard to whether the person enjoying the benefit of the right or obligation knew of their existence or not. As discussed earlier, the conception underlying the 20-year prescription is to provide finality for a defender, as a means of balancing the latitude given to pursuers by the discoverability regime which applies under the 5-year prescription. This being so, it might be argued that the defender should bear the burden in relation to the 20-year prescription.

## Options for reform

8.7 The possible formulations of a statutory rule that seem to us to merit consideration, and on which we would welcome views, are:

- (i) that the burden of proof should rest on the pursuer; or
- (ii) that it should rest on the defender; or
- (iii) that for the 5-year prescription it should rest on the pursuer, and for the 20-year prescription on the defender.

8.8 Enough has been said above about the arguments for and against the first two possibilities.

8.9 In relation to the third, it is worth noting that in Alberta the pursuer bears the burden of proof in relation to the short prescription, while the defender does in relation to the long-

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<sup>14</sup> *Pullen v Gutteridge Haskins & Davey Pty Ltd* [1993] 1 VR 27, 76.

<sup>15</sup> See *Dunlop* at 34 (IH); Russell, *Prescription*, para 1-05; cf McGee, *Limitation*, para 7.021 on prescription under s 2 of the Consumer Protection Act 1987. This proposition seems to be correct unless it is, as for example in South Africa, expressly stated that the court shall not of its own motion take notice of prescription: Prescription Act 68 of 1969, s 17.

stop prescription.<sup>16</sup> In its (unimplemented) 2001 Report the Law Commission recommended that the burden of proof in relation to the proposed primary limitation period and the date of knowledge should rest on the claimant, while in relation to any other defence – including the long stop – it should rest on the defendant.<sup>17</sup> Other jurisdictions disclose different approaches.<sup>18</sup>

8.10 We therefore ask:

- 20. Do you favour statutory provision on the incidence of the burden of proof?**
- 21. If you do favour statutory provision on the incidence of the burden of proof, do you favour provision to the effect:**
  - (i) that it should rest on the pursuer; or**
  - (ii) that it should rest on the defender; or**
  - (iii) that for the 5-year prescription it should rest on the pursuer, and for the 20-year prescription on the defender?**

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<sup>16</sup> Limitations Act, RSA 2000, c L-12.

<sup>17</sup> 2001 Report, paras 5.29-32; *cf* 1998 Consultation Paper, paras 14.28-14.32. (So far as the existing law is concerned, the Law Commission pointed out that it was not entirely clear who bore the burden of proof but that, if a defendant raised a limitation defence, it seemed to be for the claimant to disprove it: 1998 Consultation Paper, paras 9.23-35; 2001 Report, para 5.29.)

<sup>18</sup> Eg in New Zealand the burden rests on the defendant in relation to the primary limitation period, but on the claimant so far as discoverability (or “late knowledge” as it is described there) is concerned: Limitation Act 2010, ss 11(1) and (3) and 14(2).

# Chapter 9                      Unjustified enrichment and discoverability

## Introduction

9.1     In Chapters 3 and 4 we examined the question of postponing the start of the prescriptive period on grounds of discoverability under section 11(3). That subsection applies only to obligations to pay damages. Here we consider whether it would be appropriate to have some equivalent provision for obligations to redress unjustified enrichment. It was suggested to us at the seminar on prescription which we held in June 2015 that we should consider this issue.

9.2     Obligations to redress unjustified enrichment prescribe under the five-year prescription.<sup>1</sup> The ordinary starting date for prescription is the date when the obligation became enforceable.<sup>2</sup> That is the date on which the defender became unjustifiably enriched at the pursuer's expense. It may not always be the same as the date on which the enrichment was received if, for example, there was no lack of justification at the time the defender was enriched.<sup>3</sup> An example would be an engagement to marry, later broken off.

9.3     Unjustified enrichment may take different forms, including receipt of money, property or services. So far as obligations to redress unjustified enrichment are directed at money, it goes without saying that they are obligations not to pay damages but to make payment. They cannot be accommodated within section 11 of the 1973 Act: they are not directed at "loss, injury or damage" in the same sense as damages claims; and in many (perhaps most) cases there will be no "act, neglect or default".

9.4     It follows that any discoverability provision postponing the start of the prescriptive period would need to be entirely new, as opposed to a minor amendment to section 11(3). If it were broadly equivalent to the discoverability test set out in Chapter 4 as option 3, it would postpone the start of the prescriptive period until the creditor in the obligation knew of (a) the facts constituting the enrichment; (b) the facts making it unjustified; and (c) the identity of the defender. As with section 11(3), any provision on discoverability ought no doubt to take account not only of the pursuer's actual awareness but the awareness he or she would have gained with the exercise of reasonable diligence.

9.5     In order to consider whether this would be appropriate, we need to review the main types of situation giving rise to a defender's obligation to redress unjustified enrichment (we are not seeking here to advance a comprehensive analysis of unjustified enrichment). In each case it is useful to compare the date on which the prescriptive period would ordinarily

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<sup>1</sup> 1973 Act, Sch 1 para 1(b).

<sup>2</sup> 1973 Act, s 6(3).

<sup>3</sup> See R Evans-Jones, *Unjustified Enrichment*, vol 1 (2003) (hereafter "Evans-Jones, *Unjustified Enrichment*, vol 1"), paras 10.44-47; vol 2 (2013) (hereafter "Evans-Jones, *Unjustified Enrichment*, vol 2"), paras 3.22-29.



start to run under section 6(3) with the date which would be fixed by considerations of discoverability.

### **Payment of a sum that was not due**

9.6 A simple example is a payment that is undue because it was made to discharge a debt that had already been repaid. That is a straightforward error of fact. A more difficult example is payment of tax on the basis of a demand which turns out to be *ultra vires*. That is an error of law. Scots law allows for recovery of undue payments or performances whether the error is one of fact or law.<sup>4</sup>

9.7 In each example the ordinary date for prescription to start to run would be the date on which the defender received the undue payment. Under a discoverability rule the starting date would be postponed until the pursuer knew or ought to have known the facts (a) that the payment had been made and (b) that it was undue. The first of these points is unlikely to cause difficulty in practice, so the real issue will be the second one.

9.8 In our first example, prescription would not start to run until the pursuer knew (or ought to have known) the fact that the debt had already been repaid. Depending on the particular facts, it might seem fair that time should start to run only then.

9.9 In the second example, prescription would not start to run until the pursuer knew (or ought to have known) the fact that payment had been made on a mistaken view of the law. Cases of this kind raise numerous difficult problems.<sup>5</sup> First, for error of law cases it is not possible completely to exclude the question of the pursuer's knowledge of the law. Second, the fact that the pursuer's view of the law was mistaken may not come to light for a considerable period. Third, many people may be affected by an error of law, so there are potentially serious consequential considerations. Fourth, if the error of law arises because what was a settled view of the law has been changed by judicial decision, the question arises whether it would be necessary to protect the recipients of affected payments from the reopening of transactions. Many of these issues are discussed in our Report on *Unjustified Enrichment, Error of Law and Public Authority Receipts and Disbursements*.<sup>6</sup> We will not elaborate further on that discussion here, other than to note that, in relation to the consequential issues arising from payments made on a mistaken view of the law, that report drew some reassurance from the fact that the prescriptive period in relation to an obligation arising from receipt of an undue payment ordinarily starts on the date when the payment was received.<sup>7</sup>

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<sup>4</sup> See the discussion in Evans-Jones, *Unjustified Enrichment*, vol 1, para 3.82.

<sup>5</sup> Evans-Jones, *Unjustified Enrichment*, vol 1, paras 3.74-82, discussing in particular *Morgan Guaranty Trust Co of New York v Lothian Regional Council* 1995 SC 151; *Kleinwort Benson v Lincoln City Council* [1999] 2 AC 349.

<sup>6</sup> Scot Law Com No 169 (1999) (hereafter "the 1999 Report"), especially in Part 2.

<sup>7</sup> 1999 Report, paras 2.31-32.

## **Payment of a sum in anticipation of a future purpose which did not eventuate**

9.10 Some of the cases describe this as total failure of consideration. The classic example is a gift in contemplation of a marriage that did not take place.<sup>8</sup>

9.11 The ordinary date for prescription to start to run would appear to be the date when the engagement was broken off. It would not be the date of the gift: at that time it could not be said that the defender was unjustifiably enriched, since there was a legal ground for making the gift. Unjustified enrichment would occur only when the legal ground for the payment fell away. In this example that would be the date of breaking off the engagement. That may be a good deal later than the date of the gift. A second example is a claim to recover a deposit paid under a contract (to supply ship engines to an Austrian firm) which was frustrated by the outbreak of war.<sup>9</sup> On the same principle, the relevant date for prescription would be the date of the failure of consideration rather than the date of payment of the deposit. In other words, it would be the date of the failure to supply the goods in relation to which the deposit had been paid.

9.12 Under a discoverability rule the starting date would be postponed until the pursuer knew or ought to have known the facts (a) that the payment had been made and (b) that the consideration had totally failed (no marriage or no supply of goods actually took place). Again the first point is unlikely to be problematic in practice, so the real issue will be the second one. Under the ordinary regime of prescription a pursuer already has five years from the date on which there was a total failure of consideration to raise proceedings. That being so, it is not obvious that fairness demands any further extension of time. In the marriage case, it should be obvious that the engagement has been broken off. In our second example it should be equally obvious that the goods for which the deposit has been paid have not been supplied.

## **Enrichment by the pursuer's expenditure or services**

9.13 The situations discussed so far are ones in which a payment or gift was made directly to the defender, who was enriched by it. There are also enrichment cases which involve no direct payment or transfer. One example is where the pursuer provides goods or services in circumstances where it is not possible to claim their value in terms of a contract. This might occur where there is in fact no contract or where the work done is so materially different from the contractual specification that a contractual claim is not possible. Here the defender is without justification enriched by the goods or services.<sup>10</sup> Another example is where a pursuer in good faith expends money on a property in the mistaken belief that it belongs, or will belong, to him or her. The defender is without justification enriched by that expenditure.<sup>11</sup>

9.14 The ordinary date for prescription to start to run in these cases would be the date of the defender's unjustified enrichment. In the first example that would be the date on which

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<sup>8</sup> For a recent example of unwinding a property transaction on grounds of unjustified enrichment when a marriage did not in fact take place, see *Thomson v Mooney* [2013] CSIH 115.

<sup>9</sup> See *Cantiere San Rocco SA v Clyde Shipbuilding and Engineering Co* 1923 SC (HL) 105.

<sup>10</sup> *Ramsay v Brand* (1898) 25 R 1212; *Forrest v Scottish County Investment Co* 1916 SC (HL) 28.

<sup>11</sup> *Magistrates of Selkirk v Clapperton* (1830) 9 S 9; *Newton v Newton* 1925 SC 715.

the defender was enriched by the pursuer's provision of goods or services; in the second, it would be the date on which the value of the defender's property was increased by the pursuer's expenditure.

9.15 A discoverability rule would postpone the starting date until the pursuer knew or ought to have known the facts (a) that the defender had been enriched by the pursuer's provision of goods or services or expenditure on the property and (b) that (in the first example) the goods or services had been provided without any contractual basis or (in the second) that the property did not in fact belong to the pursuer. Once again the first of these facts is unlikely to be problematic in practice.

9.16 In the first example it is difficult to see why any extension on grounds of discoverability would be appropriate, since by definition, in order to be entitled to an enrichment-based remedy, the pursuer must have provided the goods or services in the expectation of payment. Five years from the date on which they were provided seems a sufficient period for a claim to be brought. The second example is less clear: it may sometimes seem harsh to hold that prescription starts to run from the date of expenditure, since the bona fide possessor will be unaware of his or her lack of title. Nonetheless, the facts of cases of this kind are somewhat special: if the possessor is dispossessed less than five years after incurring the expenditure, the obligation to redress unjustified enrichment will not have prescribed; if dispossession takes place later than that, prescription may have operated, but the possessor will by then have had more than five years in occupation of someone else's property. The short point is that at this intersection of property and obligations there are several ways in which a court can resolve the matter.<sup>12</sup> We are therefore inclined to think that, although this is a stock example, it is not particularly helpful in answering the general question about the appropriateness of a discoverability rule in relation to unjustified enrichment.

## Conclusions

9.17 In our view, in relation to obligations to redress unjustified enrichment, no provision should be made for postponement of the start of the prescriptive period on grounds of discoverability. The main reasons for this conclusion are the following.

9.18 First, at present the law relating to recovery of undue payment or performance is the same, regardless whether the error is one of fact or law. If a discoverability provision were to be introduced, it would (as discussed earlier) potentially give rise to serious consequential issues in relation to error of law. For that reason we are not inclined to recommend such a provision. Because it seems more satisfactory that the law should continue to deal with errors of fact and law in the same way, we also come to the view that we should not recommend such a change for errors of fact either.

9.19 Second, our discussion of the "total failure of consideration" cases suggests to us that fairness does not appear to require extension of time on grounds of discoverability. The

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<sup>12</sup> Evans-Jones, *Unjustified Enrichment*, vol 2, esp paras 5.28-29, 5.105 ff, a discussion among other things of the equitable and flexible nature of the remedy; and the possibility that a court might decide that the owner of the land should sell it to the improver.

same is true of at least some instances of enrichment otherwise than by way of direct transfer.

9.20 Third, section 6(4) of the 1973 Act already provides protection for the pursuer who, owing to fraud of the defender or error induced by the defender, has failed to raise proceedings. While this would not assist in a case of error as to the general law, it may well provide protection for the pursuer in other cases of error.

9.21 Fourth, if provision were to be made for a discoverability rule in relation to obligations for redress of unjustified enrichment, the question arises: why stop there? Why should there not be equivalent provision for contractual obligations? It is no doubt true that in most cases a contracting party would find it difficult to maintain that he or she neither knew nor ought to have known of a right under a contract. But that conclusion is less obvious, for example, in the case of a third-party right under a contract.

9.22 Fifth, we are therefore inclined to think that it is difficult to find a principled way of introducing a discoverability test in relation only to obligations arising from unjustified enrichment. Instead, if that were to be done, it would appear to be necessary to reconfigure our system of prescription at large, so that the default starting date for prescription in relation to any obligation was the date on which the pursuer had (or ought to have had) the knowledge relevant to the cause of action. This, indeed, was what the Law Commission proposed in 2001 in its recommendations for wholesale reform of the law of limitation in England and Wales<sup>13</sup> – but those recommendations have never been implemented. To propose a change of this sort in Scots law would be a major step. We do not think the law is in a state so unsatisfactory that it is appropriate to recommend that course. We incline instead to the opposite view, that to change the law so substantially might be seriously detrimental to legal certainty.

9.23 We therefore ask:

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

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<sup>13</sup> 2001 Report, paras 3.5-3.7; 4.76-79; what is described as the “core regime” begins from the date when the claimant had the knowledge relevant to the particular cause of action.

# Chapter 10      Miscellaneous issues

10.1 There are two points where we think the drafting of the 1973 Act could usefully be revisited. The first is the formulation of section 6(4), relating to the effect of fraud, concealment and error on the computation of the prescriptive period. The second concerns possible expansion of the definition of “relevant claim” in section 9. There are also two recommendations put forward in the 1989 Report which we think it appropriate to advance in this paper too.

## **Fraud, concealment and error**

10.2 The 1970 Report recommended that on equitable grounds a creditor should have a defence against the five-year prescription if he or she had been deterred from taking action within the prescriptive period by fraud or concealment on the part of the debtor or by error induced by the words or conduct of the debtor.<sup>1</sup>

10.3 We are in no doubt that on equitable grounds provision of this kind is an important element in the overall scheme of the five-year prescription. But the drafting of the relevant provisions has given rise to difficulties. The Act excludes from the five-year prescription “any period during which by reason of (i) fraud on the part of the debtor or any person acting on his behalf, or (ii) error induced by words or conduct of the debtor or any person acting on his behalf, the creditor was induced to refrain from making a relevant claim in relation to the obligation”.<sup>2</sup>

10.4 In *BP Exploration Operating Co Ltd v Chevron Shipping Company* the House of Lords explained how the section works.<sup>3</sup> In short, first it is necessary to identify when the relevant obligation arose and when proceedings were served on the defender: if the period between those two dates exceeds five years, the obligation has at first sight been extinguished. The next step is to deduct from that primary period any period during which the failure to serve proceedings was the result of fraud or error induced by or on behalf of the debtor. The third step is to take account of what the creditor ought reasonably to have known: if the debtor can establish that with reasonable diligence the creditor should have

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<sup>1</sup> 1970 Report, para 93.

<sup>2</sup> The full text of s 6(4) and (5) is:

“(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.”

<sup>3</sup> 2002 SC (HL) 19, (hereafter “*BP Exploration*”), esp at [102]-[110]; cf also [26]-[36] and [60]-[69].

discovered the error earlier than he or she actually did, the excluded period will end on that earlier date.

10.5 It was observed in the House of Lords that “[t]he language of subsec (4) is not entirely happy. The word ‘induced’ is used twice in the critical passage, first to refer to the error having been induced by the debtor and secondly to refer to the creditor being induced to refrain. The word implies a more vigorous connection than a merely causal one, although that element must be embodied in it.”<sup>4</sup> While the House of Lords has now clarified the correct approach to the section, it is clear that the use of the word “refrain” in the section caused confusion: in particular it led to the view that the creditor needed to prove that he or she had at a particular time had an actual intention to raise proceedings but had refrained from doing so owing to fraud or error induced by the debtor. We think the drafting of the section could be improved so that it better reflects both the policy expressed in the 1970 Report and the authoritative interpretation given by the House of Lords.

10.6 A further issue about the drafting of section 6(4) arose in the case of *Rowan Timber Supplies (Scotland) Ltd v Scottish Water Business Stream Ltd*.<sup>5</sup> The defenders had for a period of years issued invoices to the pursuers for drainage services. During repair work it transpired that, unknown to either party, the pursuers’ building was not in fact connected to the defenders’ drains. The basis of the pursuers’ claim was the unjustified enrichment of the defenders at their expense. The defenders accepted that they must repay the undue payments that they had received within the five years preceding the pursuers’ claim. The pursuers relied on section 6(4) to argue for more. It was contended that by issuing the invoices the defenders had induced the pursuers to refrain from making a claim; and that the prescriptive period should not run for the period during which they had refrained from doing so.

10.7 This case places in sharp focus the question how broad the approach to section 6(4) should be. In it there was no question of bad faith: the defenders were in ignorance of the facts. Nonetheless they had issued invoices for their services: could that be said to have induced the pursuers to refrain from making a claim? To issue an invoice for providing services might be thought to be a way of inducing the other party to pay that invoice, rather than to refrain from making a claim on earlier invoices. But, where there is a series of invoices, it may be said that a person who issues an invoice does in effect induce the other person to refrain from making a claim for unjustified enrichment in relation to earlier invoices relating to provision of the same services. This was the approach that the Inner House preferred. The court regarded the appropriate principle as being “that time should not run against a creditor who had been induced, fraudulently or innocently, by his debtor not to take proceedings timeously”.<sup>6</sup>

10.8 The use in section 6(4) of the word “induced” (twice) and “refrain” might have led one to expect “a more vigorous connection”<sup>7</sup> between a defender’s conduct and a pursuer’s failure to raise proceedings than is found in *Rowan Timber*. Equally, the word “induce” might

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<sup>4</sup> *BP Exploration* at [65] (Lord Clyde).

<sup>5</sup> *Rowan Timber Supplies (Scotland) Ltd v Scottish Water Business Stream Ltd* [2011] CSIH 26, (hereafter “*Rowan Timber*”).

<sup>6</sup> *Rowan Timber* at [10].

<sup>7</sup> *BP Exploration* at [65].

tend to imply that the defender has knowledge sufficient to enable him or her to induce the pursuer to fail to raise proceedings. The view which the Inner House took in *Rowan Timber* of what caused or contributed to the failure to raise proceedings is broader than this. But the policy reasons in support of it are not in doubt.<sup>8</sup> It seems that the drafting of the section could usefully be improved in order to reflect this policy intention.

10.9 In short: it appears to us that the drafting of section 6(4) should make it clear that it is intended to address failure to raise proceedings as a result of fraud or error induced by a defender; that for these purposes what matters is that the words or conduct of the defender caused this failure; and that in determining that matter the defender's own state of knowledge is irrelevant.<sup>9</sup>

10.10 We therefore ask:

- 23. Do you agree that section 6(4) should be reformulated to the effect that the prescriptive period should not run against a creditor who has been caused by the debtor, innocently or otherwise, not to raise proceedings?**

#### **The definition of “relevant claim”**

10.11 A prescriptive period may be interrupted by the making of a “relevant claim”.

10.12 Section 9 defines “relevant claim” as “a claim made by or on behalf of the creditor for implement or part-implement of the obligation.” In short, to be relevant, the claim must be made in one of the following ways: (a) in “appropriate proceedings”,<sup>10</sup> (b) by presenting or concurring in a petition for sequestration or submitting a claim in a sequestration; (c) by submitting a claim to a trustee under a trust deed; (d) by presenting or concurring in a petition for winding up of a company or submitting a claim in a liquidation; or (e) by executing diligence directed at enforcement of the obligation.

10.13 There is one point which, it seems to us, could usefully be the subject of amendment.<sup>11</sup> Corporate insolvency procedures are frequently conducted within the framework of administration rather than liquidation. As is well known, one of the effects of an administration order is that it inhibits creditors from raising proceedings against the company in administration.<sup>12</sup> Accordingly, once a company is in administration it is not open to a creditor to protect his or her position by raising proceedings in court to interrupt prescription.

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<sup>8</sup> Cf *Dryburgh v Scotts Media Tax* [2014] CSIH 45 at [20] “... as a matter of basic fairness a creditor should not be prejudiced by delay induced by the debtor”.

<sup>9</sup> For completeness we note that we are aware that *Dryburgh v Scotts Media Tax* [2014] CSIH 45 raised another issue about the interpretation of s 6(4), namely how to apply it where there is a single director of a company. In that case it was held that the director's lack of knowledge ought to be imputed to the company and that, although the director had not necessarily actively misled the company, he had induced error in the company. Somewhat similar issues were considered in *Heather Capital Ltd v Burness Paull & Williamsons* [2015] CSOH 150 at [32]. We have considered the issue and come to the view that these issues are essentially matters of company law (especially in relation to single-member companies) and/or the ordinary rules on the imputation of the knowledge of agents to their principals. We do not think these are issues which should be addressed within this project.

<sup>10</sup> These are defined in s 4(2) (in brief) as meaning any proceedings in a court of competent jurisdiction in Scotland or elsewhere and any arbitration in Scotland or in a country other than Scotland provided the award would be enforceable in Scotland.

<sup>11</sup> We are grateful to Mr Craig Connal QC for drawing this to our attention.

<sup>12</sup> Insolvency Act 1986, Sch B1 para 43(6), read with s 8.

Instead all that can be done<sup>13</sup> is to submit a claim in the administration. The fact, however, that section 9 of the 1973 Act spells out in detail the various procedures that fall within the definition of “relevant claim” but does not include a claim made in an administration makes it at least arguable that a claim of that kind does not interrupt prescription.

10.14 We can see no reason of policy why a claim submitted in an administration should not interrupt prescription. On the contrary: where a creditor has no other means of seeking to prevent the extinction of a claim by prescription, it seems fair that submitting a claim in an administration should have the effect of interrupting prescription. It also seems appropriate that the position should be brought into line with the law as it currently applies to sequestrations, trust deeds, and liquidations.

10.15 It may be that similar provision should be made in relation to receiverships. Following the changes introduced by the Enterprise Act 2002,<sup>14</sup> this is no doubt less important in practice. Nonetheless, since a receiver has extensive powers in relation to the property attached by the floating charge and also owes certain duties even to unsecured creditors,<sup>15</sup> it may be appropriate to provide that a creditor’s claim made to a receiver should also fall within the definition of “relevant claim”.

10.16 We therefore ask:

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

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

### **Further consideration of the 1989 Report**

10.17 The following drafting points were made in the 1989 Report, and we think it is appropriate to advance them here as well.

### **Act or omission**

10.18 The 1989 Report said this:<sup>16</sup>

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

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<sup>13</sup> Unless the administrator were willing under s 10 of the 1973 Act to make a relevant acknowledgment of the liability. This would have the effect of an interruption; but it can hardly be taken for granted, especially when the administrator may take some time to acquire the information necessary to take a view on whether such an acknowledgment would be appropriate.

<sup>14</sup> Insolvency Act 1986, ss 72A-72G.

<sup>15</sup> Insolvency Act 1986, s 55 and Sch 2; Palmer’s *Company Law*, paras 14.214-215, 219, 227-238.

<sup>16</sup> 1989 Report, paras 2.15-16 (footnotes omitted).



10.19 As noted elsewhere in the 1989 Report,<sup>17</sup> the language of act and omission also has the advantage of going “some way towards excluding knowledge of the defender’s liability in law from the discoverability formula” and focusing the test more clearly on matters of fact. The 1989 Report made a recommendation to that effect, which we support.

10.20 We therefore ask:

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

### **Knowledge that an act or omission is actionable**

10.21 The 1989 Report stated:<sup>18</sup>

“2.52 We examined in the Memorandum whether the discoverability formula should include knowledge, not only that the defender’s act or omission has given rise to the loss, injury or damage sustained by the claimant, but also that such act or omission is actionable *in law*.

2.53 We are not in favour of including this aspect of knowledge in the formula, supporting the view put forward by The Lord Chancellor’s Law Reform Committee that its inclusion would cause considerable hardship to the defender ‘by enabling a plaintiff to institute proceedings, many years after receiving advice that he had no case, on the basis that the advice was wrong when given or that a later decision had shown the law to be other than it was thought to be or that a later statute had changed the law.’ The majority of consultees agreed with our view on this issue.

2.54 It is unclear however whether the existing discoverability formula in section 11 of the 1973 Act includes or excludes knowledge of the defender’s liability in law. As we pointed out in the 1983 Report there is a danger that the words used in subsection (1) –‘act, neglect or default’– could be taken ‘to connote elements of fault and liability as well as of causation’. Furthermore we wonder whether Lord McDonald’s observations in the *Dunfermline District Council* case go as far as to suggest that this aspect of knowledge forms part of the discoverability formula.

2.55 Implementation of Recommendation 1 above which proposes substituting the words ‘act or omission’ for ‘act, neglect or default’ would go some way towards excluding knowledge of the defender’s liability in law from the discoverability formula ...”.

10.22 For the avoidance of doubt the 1989 Report recommended that the discoverability formula should incorporate a proviso to the effect that knowledge that any act or omission is or is not actionable as a matter of law is irrelevant.

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<sup>17</sup> 1989 Report, para 2.55.

<sup>18</sup> 1989 Report, paras 2.52-55 (footnotes omitted).

10.23 In our view it would be appropriate for the avoidance of doubt to incorporate a provision of this kind in the legislation. It is no doubt true that, following *Morrison*,<sup>19</sup> on the current wording of the section there is little room for doubt. But it seems to us to be desirable that the Act should state the position expressly. We have already made a recommendation to the same effect in relation to the law on limitation of actions.<sup>20</sup>

10.24 We therefore ask:

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

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<sup>19</sup> [2014] UKSC 48, 2014 SC (UKSC) 222.

<sup>20</sup> 2007 Report, para 2.30.

## Chapter 11      Summary of questions

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

(Paragraph 2.14)
2. Do you agree that the 1973 Act should provide generally for rights and obligations arising under statute to prescribe under the five-year prescription?  

(Paragraph 2.46)
3. If the 1973 Act were to provide generally for rights and obligations arising under statute to prescribe under the five-year prescription, are there rights and obligations which ought to be excepted from this regime?  

(Paragraph 2.46)
4. Do you agree that Schedule 1 paragraph 1(d) should refer not to obligations arising from liability to make reparation but to obligations arising from delict?  

(Paragraph 2.59)
5. Do you agree that Schedule 1 paragraph 1 should include obligations arising from pre-contractual liability?  

(Paragraph 2.77)
6. Do you agree that Schedule 1 paragraph 1 should include rights and obligations relating to the validity of a contract?  

(Paragraph 2.77)
7. Are there other obligations to which Schedule 1 paragraph 1 ought to be extended?  

(Paragraph 2.77)
8. Do you agree that it is appropriate to revisit the discoverability test of section 11(3)? If so, which option do you favour?  

(Paragraph 4.24)
9. Do you agree that the 1973 Act should provide that loss or damage must be material before time starts to run under section 11(1)?  

(Paragraph 5.17)

10. Do you agree that the discoverability formula in section 11(3) should refer, for time to start running, to the need for the pursuer to be aware that he or she has sustained material loss or damage?
- (Paragraph 5.17)
11. Do you agree that the discoverability formula in section 11(3) should provide that the assessment of the materiality of the loss or damage is unaffected by any consideration of the pursuer's prospects of recovery from the defender?
- (Paragraph 5.17)
12. Do you agree that the present formulation of the test of "reasonable diligence" is satisfactory?
- (Paragraph 5.23)
13. Do you agree that the starting date for the long-stop prescriptive period under section 7 should be the date of the defender's (last) act or omission?
- (Paragraph 6.20)
14. Do you agree that the long-stop prescriptive period under section 7 should not be capable of interruption by a relevant claim or relevant acknowledgment?
- (Paragraph 6.25)
15. Where a relevant claim is made during the long-stop period, do you agree that the prescriptive period should be extended until such time as the claim is disposed of?
- (Paragraph 6.25)
16. Do you agree that construction contracts should not be subject to any special regime in relation to the running of the long-stop prescriptive period?
- (Paragraph 6.31)
17. (a) Do you regard 20 years as the appropriate length for the prescriptive period under section 7?
- (b) If not, would you favour reducing the length of that period?
- (Paragraph 6.34)
18. Do you favour permitting agreements to shorten the statutory prescriptive periods? Should there be a lower limit on the period which can be fixed by such agreements?
- (Paragraph 7.23)

19. Do you favour permitting agreements to lengthen the statutory prescriptive periods? Should there be an upper limit on the period which can be fixed by such agreements?

(Paragraph 7.23)

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

(Paragraph 8.10)

21. If you do favour statutory provision on the incidence of the burden of proof, do you favour provision to the effect:

(i) that it should rest on the pursuer; or

(ii) that it should rest on the defender; or

(iii) that for the 5-year prescription it should rest on the pursuer, and for the 20-year prescription on the defender?

(Paragraph 8.10)

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

(Paragraph 9.23)

23. Do you agree that section 6(4) should be reformulated to the effect that the prescriptive period should not run against a creditor who has been caused by the debtor, innocently or otherwise, not to raise proceedings?

(Paragraph 10.10)

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

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

(Paragraph 10.16)

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

(Paragraph 10.20)

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

(Paragraph 10.24)

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

# Appendix

## Prescription and Limitation (Scotland) Act 1973

### SCHEDULE 1

### Section 6

#### OBLIGATIONS AFFECTED BY PRESCRIPTIVE PERIODS OF FIVE YEARS UNDER SECTION 6

1 Subject to paragraph 2 below, section 6 of this Act applies—

(a) to any obligation to pay a sum of money due in respect of a particular period—

(i) by way of interest;

(ii) by way of an instalment of an annuity;

[...]<sup>1</sup>

(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]<sup>2</sup>, 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;]<sup>3</sup>

[(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;]<sup>4</sup>

[(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);]<sup>6</sup><sup>5</sup>

[(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;]<sup>7</sup>

[(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);]<sup>8</sup>

[(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;<sup>9</sup>

[(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);]<sup>10</sup>

(b) to any obligation based on redress of unjustified enrichment, including without prejudice to that generality any obligation of restitution, repetition or recompense;

(c) to any obligation arising from *negotiorum gestio*;

(d) to any obligation arising from liability (whether arising from any enactment or from any rule of law) to make reparation;

[(dd) to any obligation arising by virtue of section 7A(1) of the Criminal Injuries Compensation Act 1995 (recovery of compensation from offenders: general);]<sup>11</sup>

(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.

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#### Notes

1. Repealed by Abolition of Feudal Tenure etc. (Scotland) Act 2000 asp 5 (Scottish Act) Sch 13(1) para 1 (November 28, 2004: as SSI 2003/456)
2. Words substituted by Title Conditions (Scotland) Act 2003 asp 9 (Scottish Act) Sch 14 para 5(3)(a) (November 28, 2004 being the day appointed by SSI 2003/456 art.2 for the purposes of 2003 asp.9 s.71)
3. Added by Leasehold Casualties (Scotland) Act 2001 asp 5 (Scottish Act) s.4(a) (April 12, 2001)
4. Possible drafting error, para.1(aa) is purportedly inserted but that provision already exists so a second para.1(aa) is inserted by Abolition of Feudal Tenure etc. (Scotland) Act 2000 asp 5 (Scottish Act) Pt 3 s.12(a) (November 28, 2004)
5. Added by Title Conditions (Scotland) Act 2003 asp 9 (Scottish Act) Pt 8 s.88(a)(April 4, 2003: as 2003 asp 9)
6. Added by Title Conditions (Scotland) Act 2003 asp 9 (Scottish Act) Pt 8 s.88(a)November 28, 2004: as SSI 2003/456)
7. Added by Tenements (Scotland) Act 2004 asp 11 (Scottish Act) s 15(a) (November 28, 2004)
8. Added by Long Leases (Scotland) Act 2012 asp 9 (Scottish Act) Pt 4 s.60(a) (November 28, 2013)
9. Added by Land Registration etc. (Scotland) Act 2012 asp 5 (Scottish Act) Sch. 5 para.18 (December 8, 2014)
10. Added by Consumer Protection (Amendment) Regulations 2014/870 reg. 7 (October 1, 2014 in relation to contracts entered into, or payments made, on or after October 1, 2014)
11. Added by Management of Offenders etc. (Scotland) Act 2005 asp 14 (Scottish Act) s.20(4) (December 8, 2005)

2 Notwithstanding anything in the foregoing paragraph, section 6 of this Act does not apply—

(a) to any obligation to recognise or obtemper a decree of court, an arbitration award or an order of a tribunal or authority exercising jurisdiction under any enactment;

(b) to any obligation arising from the issue of a bank note;

[...]<sup>1</sup>

(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)]<sup>2</sup> 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 of the Land Registration etc. (Scotland) Act 2012 (asp 5)]<sup>3</sup>;

[(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;]<sup>4</sup>

(f) to any obligation to satisfy any claim to [...]<sup>5</sup> legitim, *jus relict* or *jus relictæ*, 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;

[(gg) to any obligation to make reparation or otherwise make good in respect of defamation within the meaning of section 18A of this Act;]<sup>6</sup>

[(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);]<sup>7</sup>

(h) to any obligation specified in Schedule 3 to this Act as an imprescriptible obligation.

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#### Notes

1. Repealed subject to savings specified in s.14(3) by Requirements of Writing (Scotland) Act 1995 c. 7 Sch.5 para.1 (August 1, 1995)
2. Words substituted by Land Registration etc. (Scotland) Act 2012 (Incidental, Consequential and Transitional) Order 2014/190 (Scottish SI) art.2(1) (December 8, 2014)
3. Words inserted by Land Registration etc. (Scotland) Act 2012 asp 5 (Scottish Act) Sch. 5 para.18(7)(b) (December 8, 2014)
4. Added by Title Conditions (Scotland) Act 2003 asp 9 (Scottish Act) Pt 8 s.88(b)(ii) (April 4, 2003 for the purposes specified in 2003 asp 9 s.129(3); November 28, 2004 being the day appointed by SSI 2003/456 art.2 for the purposes of 2003 asp.9 s.71 otherwise)
5. Words repealed by Abolition of Feudal Tenure etc. (Scotland) Act 2000 asp 5 (Scottish Act) Sch.13(1) para 1 (November 28, 2004: as SSI 2003/456)
6. Para. 2(gg) inserted by Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 (c. 73), s. 12(5)
7. Sch. 1 para. (ggg) inserted by Consumer Protection Act 1987 (c.43) ss. 6, 41(2), 47(1)(2), Sch. 1 para. 11

[...]<sup>1</sup>

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#### Note

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)

4 [In this Schedule, “*title condition*” shall be construed in accordance with section 122(1) of the Title Conditions (Scotland) Act 2003 (asp 9).]<sup>1</sup>

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#### Note

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)

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