BRODIES’ RESPONSE TO CALL FOR EVIDENCE ON PRESCRIPTION (S) BILL

1. Do you have any concerns about the approach taken in the Bill?

The Scottish Law Commission (SLC) consulted widely on the proposals now set out in the Bill and considered a wide range of suggestions and comments before finalising their recommended draft Bill.

We are satisfied with the general approach adopted in the Bill and welcome the proposed reforms.

2. Do you think that negative prescription produces harsh results in individual cases? (You could illustrate by way of examples if you think that would be helpful to the Committee). If so, is this acceptable in policy terms?

We accept that negative prescription can sometimes produce harsh results in individual cases.

That is particularly the case in relation to the 20 year negative prescription which, even as the law currently stands, may start to run before a pursuer is aware that any loss has actually been suffered.

In our experience however the loss of a claim through the application of the long negative prescription remains relatively rare.

As to the 5 year negative prescription, our view is that, in damages cases, the Bill will address any perceived harshness by the introduction of the three part knowledge test.

Our view is that the benefits of certainty and finality which negative prescription bring to the law outweigh the downside experienced in a minority of cases.

The only way to avoid the possibility of harsh results would be to adopt a purely discretionary approach to postponement of the start of the 5 year prescriptive period (Option 4 in the SLC Report). Such an approach would make it extremely difficult to predict the likely outcome in any individual case. That kind of uncertainty would be unwelcome.

3. Do you agree to the proposed extension in section 3 to the scope of the 5-year negative prescription, so it would apply to all statutory obligations to make payment (unless there are policy reasons to except them)?

We agree that the default position should be that statutory obligations to make payment are subject to 5 year negative prescription.

We have no difficulty with certain statutory obligations being excepted for policy reasons.
4. Do you agree with the list of exceptions to the general rule relating to statutory payments set out in section 3 of the Bill?

No comment

5. Do you have any concerns about the proposed new discoverability test in section 5?

No.

We provided the SLC with detailed comment on the proposed wording of the discoverability test in s5 when they consulted on the draft Bill. The wording was altered slightly prior to publication of the SLC Report and we consider that the changes have addressed concerns.

6. Do you agree with the proposed change to the starting date of the prescriptive period in relation to obligations to pay damages in sections 5 and 8?

Yes, we agree with the proposed changes in sections 5 and 8. Our reasoning is set out below:

Section 5 - 5 year prescription

Strictly speaking the default start date for the running of the 5 year negative prescriptive period in respect of obligation to pay damages set down in s11(1) of the 1973 Act is unchanged by s5.

s11(1) will continue to provide that the prescriptive period commences on the date on which loss, injury or damage occurred - being the date on which obligations to pay damages become "enforceable" for the purposes of s6.

However, the changes made by s5 to s11(3) of the 1973 Act in conjunction with the addition of new subsection (3A) are likely to result in a departure from the default position in a far greater number, possibly the majority, of damages cases.

s11(3) as amended will apply not only to “latent” claims (where the pursuer is merely unaware of the fact that she has suffered any loss injury or damage at all) but to all obligations to pay damages even where the loss injury or damage is patent. As a result the starting date for prescription will frequently be later than is currently the case.

If the pursuer is unaware (and could not with reasonable diligence have been aware) of one or more of the three facts set out in s11(3A) then prescription will start to run only when she is aware of all three.

The addition of s11(3B) confirms that knowledge that the act or omission which caused the loss injury or damage is actionable in law is irrelevant. That deals with the concern expressed by the Supreme Court in *Morrison v ICL Plastics* about the way in which the current version of s11(3) had been interpreted by the courts as requiring awareness that there had been negligence.

The changes made to the discoverability test by s5 of the Bill represent a reasonable compromise between the pre-Morrison and post-Morrison interpretation of the law.

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Section 8 - 20 year prescription

Section 8 makes a significant change to the start date for the 20 year negative prescription in respect of obligations to pay damages. It will now start to run on the date on which the act or omission (which caused the pursuer to suffer loss injury or damage) occurred. That date may be considerably earlier than the date that loss injury or damage is either sustained or becomes apparent.

The proposed change will give certainty as regards the start date and, as the SLC indicate in their Report, will provide a cut-off in respect of the risk of litigation resulting from historical acts or omissions.

We think it is possible that the change may lead to an increase in the number of cases which are perceived as producing harsh results. The SLC point out in their Discussion Paper that it will be possible for a right to claim damages to prescribe before any loss injury or damage has been suffered at all. It will also be possible for a right to claim to be extinguished before the pursuer is aware that any loss has been suffered.

It is worth noting however that awareness of loss injury or damage having been sustained is not currently a relevant factor in considering the commencement date of the 20 year prescriptive period. The change made by the Bill is to the start date of the prescriptive period rather than altering the law in relation to awareness of loss.

We are content that the proposed change strikes a reasonable balance between any potentially harsh consequences of the application of the 20 year prescription and the aim of avoiding stale claims.

We note in passing that, as presently drafted, the headings to sections 5 and 8 in the Bill are identical although they deal with separate (albeit connected) issues. It might be useful to amend the headings to distinguish them. Section 8 deals only with the start date for the 20 year prescriptive period applicable to obligations to pay damages while s5 deals with the start date of the 5 year prescriptive period for the same type of obligation.

7. Do you agree with the proposal in sections 6 and 7 to make the 20-year period no longer amenable to interruption by a relevant claim or relevant acknowledgement?

Section 6

Yes, we agree that the 20 year prescriptive period applicable to obligations should no longer be amenable to interruption by a relevant claim or acknowledgement.

In our response to the original SLC consultation paper we acknowledged that the proposal in s6 was likely to affect a very limited number of cases and considered that the SLC proposal had some merit in providing greater certainty.

Concern regarding the potential for a right to be extinguished while proceedings were ongoing led us to suggest that an alternative might be to provide for the 20 year period to be interrupted by court action with the period recommencing where it left off once the action is disposed of.
We are persuaded by the terms of the SLC report that our concern can be met by extending the 20 year prescriptive period until conclusion of proceedings as the SLC proposed.

Section 7

We have not previously commented on the terms of s7 but we have now considered the issues raised by the Faculty of Advocates in their written responses to the SLC consultation and in their oral evidence to the Committee.

We agree that there are conceptual difficulties which mean the section requires to be reconsidered or omitted.

The intention is to prevent the 20 year prescription applicable to property rights (by virtue of s8 of the 1973 Act) being interrupted by a relevant claim.

However, the prescriptive period will still be capable of being interrupted and re-started by exercise or enforcement of the property right. We are not sure what benefit there is in removing one source of interruption while others must necessarily remain in place?

If a pursuer’s court action making a relevant claim in relation to a property right is abandoned or dismissed for any reason then, at present, the mere raising of the proceedings would be enough to interrupt the prescriptive period and start a fresh period running.

We think that s7 is intended first to prevent such interruption of the prescriptive period and second to extend the prescriptive period for the duration of any court proceedings. The latter change will prevent a pursuer’s property right prescribing in circumstances where he has otherwise not exercised or enforced his right and the court has not yet pronounced judgment. This reflects the approach adopted to obligations covered by s7 of the 1973 Act.

However, it seems to us that s7 may, as the Faculty of Advocates suggest, go much further. It removes the ability of the creditor in the right to prevent the right being extinguished by the raising of a relevant claim. By raising a claim he can, if the 20 year period would ordinarily expire during the life of the legal proceedings, postpone the extinguishing of the right by maintaining the proceedings but the proceedings cannot stop prescription running. Accordingly, as amended, s8 of the 1973 Act would provide that any extended prescriptive period expires at the point of final disposal, and extinguishes the property right to which it relates.

Unlike obligations to pay damages for example, it seems to us that a decree resulting from a relevant claim does not necessarily supersede, satisfy or replace the property right.

In cases involving an obligation to pay damages, the obligation itself is no longer relevant once the court has found a party liable, assessed the damages and granted a decree for the appropriate sum. The underlying obligation is satisfied by the decree which will then be enforceable for a further 20 years.
The same is not true of property rights where the underlying right already existed and, depending upon the outcome of the action, should continue to exist after the court action is disposed of. Indeed, the point of raising the relevant claim will normally be to confirm that the pursuer may resume exercising or enforcing the relevant property right in future.

A relevant claim for the purposes of s8 of the 1973 Act is a claim to “establish” the property right (which we take to mean obtain judicial recognition that the right in fact already exists and can be exercised or enforced) or to “contest” any claim to a right inconsistent therewith which would prevent exercise or enforcement.

Success for a pursuer in court proceedings should mean that the right simply continues to be capable of being exercised or enforced. There should be no question of the underlying right prescribing when the court grants decree and brings the proceedings to an end. Any other result will have the effect of rendering proceedings meaningless, since the proceedings will not achieve their purpose of enabling the pursuer to exercise or enforce the property right.

In the event that a pursuer is unsuccessful on the merits then the court may have found that the pursuer is not the creditor in the property right either because the right itself does not exist or because it is not a right held by the pursuer. In either case, there is no need to provide that the right will prescribe when the proceedings are disposed of.

We appreciate that s7 of the Bill was added at a relatively late stage and did not feature in the original Discussion Paper. It may be that the wording can be clarified. In the absence of clarification and further discussion we consider that it might be appropriate to omit s7 from the Bill.

8. Do you agree with the proposal to allow the extension of the 20-year period in certain circumstances as set out in sections 6 and 7?

Yes

Section 6 of the Bill amends s7 of the 1973 Act to extend the 20 year prescriptive period until such time as any relevant claim made during the prescriptive period has been disposed of.

Section 7 of the Bill makes equivalent provision in respect of relevant claims made in respect of property rights.

We have commented in detail on the terms of s7 above.

Both changes are necessary standing the terms of s6 and s7 since there will otherwise be a risk of an obligation or right prescribing while a relevant claim is being made.

Section 12 of the Bill defines “final disposal”. It does not account for the possibility that a court or other body will grant leave or permission to appeal late or will allow an appeal to be lodged late.

As currently drafted, there seems to be a risk that an obligation/right could prescribe at expiry of the original time limit for seeking leave/permission or at expiry of the original time limit for making an appeal. The
definition should be amended to take account of the possibility that leave/permission to appeal may be granted late and that appeals may be allowed to proceed out of time.

9. Do you have any concerns about those sections of the bill (sections 4, 13 and 14) that seek to clarify the law on prescription?

Section 4 – Effect of fraud or error on computation of prescriptive period

No comment.

Section 13 – restrictions on contracting out.

We do have concerns about s13.

We welcome the proposal to allow parties to vary the prescriptive periods applicable in cases covered by s6 and s8A of the 1973 Act.

The general rule will be that parties cannot contract to disapply or otherwise alter the operation of sections 6, 7, 8 or 8A of the 1973 Act. The only exception will be an agreement entered into by a pursuer and defender under s13(1) to (3) to extend either the s6 five year prescriptive period or the s8A two year prescriptive period.

s.13(2) provides that

- any extension must be limited to a maximum period of one year
- only a single extension can be agreed in respect of an obligation.
- an extension can only be agreed once the relevant prescriptive period has started to run and before it has ended.

As we understand s13(4), a provision in an agreement attempting to vary the prescriptive period will be of no effect if it does not comply with those three requirements.

We have no difficulty with the restrictions imposed on the ability of parties’ to contract out of the 1973 Act.

Maximum one year period

We remain of the view that any variation of the prescriptive period should be for a limited period of time and support the one year period provided for in the Bill. We do not consider that parties should be allowed to agree a longer variation.

As drafted the Bill will allow an additional one year on top of the statutory 5 year period. We consider that is sufficient.
A single extension

We agree that only a single variation should be permitted.

Agreement during statutory prescriptive period

For the reasons given in our response to the SLC consultation we do not consider that parties should be able to enter into agreements prior to the start of the statutory prescriptive period.

We therefore support the provisions in the Bill which requires any agreement to vary the prescriptive period to be reached after prescription has started to run and before the obligation has prescribed.

Suspension of the running of prescription

In March 2017 our response to the SLC consultation on their draft Bill expressed the view that it would be better to structure s13 so as to allow parties to agree to suspend the running of the prescriptive period for a limited amount of time.

As we indicated at the evidence session before the Committee on 27 March 2018, we consider that the current wording of s13 will allow parties only to “extend” the prescriptive period.

Use of the expression “extend” in the Bill is likely to be interpreted as prohibiting parties from agreeing to “suspend” the running of the prescriptive period for up to one year.

We consider that the Bill should allow parties to choose to suspend the running of the prescriptive period.

We think that suspension has several advantages over extension:

- The concept of suspending a prescriptive period is one which is already familiar in the law of prescription. Although the word “suspend” is not explicitly used, it is the technique adopted in s.6(4) of the 1973 Act to cover certain situations involving fraud, error, and legal disability. Under s.6(4) relevant periods of time are not reckoned as part of the prescriptive period. This is commonly referred to as “suspending” the running of the prescriptive period. (See for example the heading to Ch 6, Part IV in Johnston, Prescription and Limitation 2nd Ed 2012)

- Provision for suspension of the prescriptive period is more straightforward and provides parties with greater certainty. Parties will know the precise calendar period of the suspension.

- Agreements to suspend can be entered into by parties even where, as is common, they are uncertain about the start date of the prescriptive period due to lack of information.

- The start and end dates of the period of suspension can be easily chosen so as not to exceed the maximum one year period. This would allow for suspension to be agreed even where parties do not know or do not agree the precise start date and end date of the prescriptive period.
The total period during which prescription will run will remain at 5 years and that period can be calculated in a familiar way by ensuring that periods of suspension are not reckoned in the computation of the prescriptive period.

Parties will know that an agreement to suspend will ensure that the claim cannot prescribe during the period of suspension. It will give them clear breathing space to investigate and negotiate knowing that prescription is not running.

Once the period of suspension is over, the pursuer will have any unexpired portion of the 5 year period remaining in which to raise proceedings.

Allowing parties to suspend the prescriptive period as well as extend it will be consistent with the existing approach adopted to "standstill agreements" in England & Wales. As we understand it, suspending the running of the limitation period is the more commonly adopted approach in that jurisdiction.

We consider that the terms of agreements to suspend will be more straightforward and accordingly are less likely to become the subject of satellite litigation.

**Interaction between different periods of suspension**

Amending the Bill to explicitly permit suspension will require some thought to be given to how an agreed period of suspension under s13 would interact with other statutory periods of "suspension" under s6(4) in the computation of the prescriptive period. In particular, would such periods run concurrently or consecutively?

**Extension of the prescriptive period**

We accept that the ability to extend the prescriptive period (as opposed to suspend it) may be attractive in some cases.

As presently drafted, s13 clearly envisages that one option open to parties is to specify a date in the agreement on which the prescriptive period, as extended, will expire. We certainly understand the attraction of that option. Parties can arrange their affairs with that definite date in mind.

However, we think it is important to recognise that there are potential drawbacks for parties albeit not in all cases.

- Agreeing an extension of a prescriptive period so that prescription runs to a particular date in the future could potentially result in the agreement providing for an extension of more than one year. To ensure that the one year maximum is not exceeded the parties must be certain about the date on which the statutory prescriptive period will expire. That, in turn requires knowledge of the date on which prescription started to run.
If, after the agreement is entered into, it is discovered that prescription started to run earlier than parties had thought then the agreement may result in an extension to the prescriptive period exceeding one year. In accordance with s.13(4) the agreement will then be of no effect. The result would presumably be that the original, unaltered, 5 year period would be applied when deciding whether the pursuer's claim had prescribed.

Similar difficulties may arise if the chosen date results in parties inadvertently shortening the prescriptive period. A defender who thought any claim against him had prescribed as at the date in the agreement may discover that in fact the agreement is of no effect because the original prescriptive period still has some time to run. Shortening of the prescriptive period is prohibited by s.13(4) and the agreement will be of no effect.

These potential difficulties could be avoided if parties forego the precision of extending the prescriptive period to an exact date. Parties might choose instead to extend the prescriptive period by a set period of time, say, 12 months.

However, we have doubts as to whether an open-ended agreement of that nature would provide sufficient certainty and security for parties.

**Differences between suspension and extension**

Finally, we think that it is important to note that an extension and a suspension do not have the same effect.

Under the Bill as presently drafted, if an extension is agreed, the prescriptive period will always be running.

- Prescription will run as normal until 5 years have elapsed but will then continue to run for a further agreed period or until an agreed date. The obligation will prescribe at the end of the agreed period or on the agreed date. In effect the total prescriptive period will be a maximum of 6 years.

If the Bill is amended to allow suspension

- Prescription would run as normal up until the start of the suspension and would then re-start once the suspension ends. The prescriptive period would remain 5 years and the obligation would not prescribe until the end of the statutory period.

The distinction was highlighted in England last year in *Russell v Stone* [2017] EWHC 1555 (TCC) where parties disagreed as to whether the (multiple) standstill agreements they had entered into had suspended the running of the limitation period until a certain date or had extended the limitation period to a definite expiry date.

The difference was very significant because an extension would result in the claim being subject to limitation immediately on expiry of the extension. If it was a suspension then the claimant would have the benefit of a further remaining period after expiry of the suspension to raise proceedings.
The court decided the effect of the standstill agreement had been to suspend the limitation period and allowed the claim to proceed.

Finally, it is also worth noting that extension of the limitation period in England & Wales does not cause the kind of problem we have highlighted above since there is no maximum period of extension. Parties do not need to know the statutory limitation period start or end dates because there is no question of the agreement extending the limitation period being found subsequently to be of no effect.

Conclusion

Our view is that extension of a prescriptive period will frequently not prove attractive to parties for the reasons set out above. If no other option is available then parties will continue to choose to raise protective proceedings instead.

The Bill should be amended so that suspension of the prescriptive period is available as an option for parties who wish to use s13 to enter into a “standstill agreement”.

Shortening the prescriptive period & contractual limitation clauses

We have given further thought to this issue following the oral evidence session on 27 March 2018 but remain of the view that parties should not be given the option of reducing the statutory prescriptive period.

Contractual agreements to shorten the prescriptive period would no doubt be included as a standard clause when negotiating contracts. They would be entered into well before any relevant act or omission had taken place and long before any loss injury or damage had been sustained by any party.

Parties should however be able to continue to agree to contractual limitation clauses setting a deadline for the raising of proceedings or the making of a claim.

The SLC Report at para 5.26 indicates that their draft Bill was not intended to impact on parties’ ability to enter into contractual limitation clauses. We appreciate the commercial utility of such clauses. If it is felt that the current terms of s13(4) may prevent such clauses being effective, then we consider that the subsection should be amended to clarify the position.

Section 14 – Burden of proof

In our response to the SLC consultation we indicated that we considered the onus of proof should rest on the pursuer in respect of both the 5 and 20 year prescriptive periods.

The amendment made by s14 introduces a new s13A into the 1973 Act.

Section 13A provides that if a question arises as to whether an obligation has been extinguished by prescription it will be presumed to have been extinguished unless the creditor (pursuer) proves otherwise.

We are content that the new section 13A achieves the aim of placing the burden of proof on the pursuer.
10. What are the financial implications of the Bill?

No comment.

11. The Scottish Government says that the Bill will increase clarity, certainty and fairness. It also says it will promote a more efficient use of resources (in that people will be less likely to have to raise court proceedings to preserve rights) and will reduce costs for those involved in insurance and litigation. Do you agree with this assessment?

For legal advisers and their clients, the Supreme Court decision in *Morrison v ICL Plastics* in 2014 was an unexpected departure from the previous approach adopted by the Scottish courts. In our view the reform of s11(3) will be welcomed since it is clarifies the essential facts which a party must be aware of before a 5 year prescriptive period starts to run in respect of an obligation to pay damages. In the long term the changes should result in greater certainty for parties to a dispute.

Subject to our comments above in relation to the drafting of s13, the ability of parties to agree to allow additional time to resolve disputes without requiring them to raise or defend expensive protective court proceedings will generally be welcomed by clients. The extra flexibility that the reform provides should be of economic benefit particularly for those involved in complex commercial disputes since currently the costs of raising protective proceedings can be significant.

If you have any questions in relation to this response please contact Douglas McGregor (douglas.mcgregor@brodies.com)

Brodies LLP

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