Delegated Powers and Law Reform Committee

Prescription Bill

I had the privilege of appearing at the Evidence Session of the Committee on 27 March 2018.

Following that appearance I submit further written evidence on two points arising from that discussion:

1. I also had the opportunity of listening to the Speaker Panel immediately before my appearance. Taking the sessions I heard as a whole, it seemed to me that there was a concern evidenced in some of the discussions with Committee Members about the whole concept of imposition of any particular time limit, if the consequence of the imposition of that time limit might be that an individual who had a sound case on the merits might lose their claim.

On the 10th April this year in the Court of Session a decision was issued by Lord Tyre (a highly respected Judge) in the case of Brian Gracie against City of Edinburgh Council (2018 CSOH37; link). The case raised the question of time limits and at paragraph 8 of the decision (which I reproduce in full) Lord Tyre (like Lord Drummond Young – another highly respected Judge – in a previous decision) approved a comment by a Judge in an Australian case. The Committee might find that of some assistance in articulating, more eloquently than I could, the logic behind arrangements for time limits.

"[8] Like Lord Drummond Young, I have derived considerable assistance from the passage cited by him from the judgment of McHugh J in Brisbane Regional Health Authority v Taylor. The following observations seem to me to be particularly apposite to the circumstances of the present case:

“The discretion to extend time must be exercised in the context of the rationales for the existence of limitation periods. For nearly 400 years, the policy of the law has been to fix definite time limits... for prosecuting civil claims. The enactment of time limitations has been driven by the general perception that '[w]here there is delay the whole quality of justice deteriorates': R v Lawrence, [1982] AC 510 at 517, per Lord Hailsham of St Marylebone LC. Sometimes the deterioration in quality is palpable, as in the case where a crucial witness is dead or an important document has been destroyed. But sometimes, perhaps more often than we realize, the deterioration in quality is not recognizable even by the parties.

Prejudice may exist without the parties or anybody else realizing that it exists. As the United States Supreme Court pointed out in Barker v Wingo 407 US 514 at 532 (1972), ‘what has been forgotten can rarely be shown’. So, it must often happen that important, perhaps decisive, evidence has disappeared without anybody ‘knowing’ that it ever existed. Similarly, it must often happen that time will diminish the significance of a known fact or circumstance because its relationship to the cause of action is no longer as apparent as it was when the cause of action arose...

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. As the New South Wales Law
Reform Commission has pointed out (Limitation of Actions for Personal Injury Claims (1986) LRC 50, page 3):

‘The potential defendant is thus able to make the most productive use of his or her resources and the disruptive effect of unsettled claims on commercial intercourse is thereby avoided. To that extent the public interest is also served.’

Even where the cause of action relates to personal injuries, it will be often just as unfair to make the shareholders, ratepayers or taxpayers of today ultimately liable for wrongs of the distant past, as it is to refuse a plaintiff the right to reinstate a spent action arising from that wrong. 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…’

I have had regard to these observations when addressing the question whether I should, in the exercise of the discretion conferred upon the court by section 19A, allow an amendment to be made 28 years after expiry of the three-year limitation period imposed by the legislature.”

2. At the evidence session another Panellist, Fenella Mason, raised a question of parties in construction contracts borrowing from English practice and using what was said to be private prescriptive periods. The Convenor invited participants to submit any further thoughts on that topic.

I am not myself engaged in the drafting of construction contracts, but I have discussed the matter with colleagues. I have not carried out exhaustive research into the topic, but I offer what I set out below in the interests of being of assistance. What I set out below is also my reconciliation and understanding of what I have been told.

On that basis, my understanding is that drafters recognise that it is not permissible to have a private provision in a contract which eliminates a claim in all senses in the way that prescription does as a matter of law. That is because they understand contracting out of the statutory regime is not permitted. However, a practice has developed of specifying in contracts what is treated as the maximum period of liability which a particular party might have. The period conventionally adopted is 12 years, which is a period borrowed from English practice for no reason other than convenience.

However, it is accepted that if the law of prescription applied to a particular claim with the effect that the claim had been brought to an end prior to the 12 year period, that is not an issue. The intention was not to extend any legal period of liability. If, on the other hand, the prescriptive period was for one reason or another still running, the intention is to make plain that while the claim may not prescribe after 12 years, the parties agree between themselves that it cannot be pursued after the 12 year period.

It is probably a matter for others but the effect of such a provision, however labelled, may be little different to a contract provision providing that claims must be made within, say, three months of delivery or whatever. In terms of strict legal and logical analysis one can readily see questions over that drafting practice, but I pass the information I have gained on to the Committee for what it is worth.

R Craig Connal QC
12 April 2018