OFFICIAL REPORT
AITHISG OIFIGEIL

Delegated Powers and Law Reform Committee

Tuesday 20 March 2018

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 20 March 2018

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DELEGATED POWERS AND LAW REFORM COMMITTEE
10th Meeting 2018, Session 5

CONVENER

*Graham Simpson (Central Scotland) (Con)

DEPUTY CONVENER

*Stuart McMillan (Greenock and Inverclyde) (SNP)

COMMITTEE MEMBERS

Neil Findlay (Lothian) (Lab)
*Alison Harris (Central Scotland) (Con)
*David Torrance (Kirkcaldy) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Jill Clark (Scottish Government)
David Johnston QC (Scottish Law Commission)
Gillian Swanson (Scottish Law Commission)

CLERK TO THE COMMITTEE

Euan Donald

LOCATION

The Adam Smith Room (CR5)

Scottish Parliament

Delegated Powers and Law Reform Committee

Tuesday 20 March 2018

[The Convener opened the meeting at 10:00]

Decision on Taking Business in Private

The Convener (Graham Simpson): I welcome members to the 10th meeting in 2018 of the Delegated Powers and Law Reform Committee.

Before the evidence session on the Prescription (Scotland) Bill starts, the committee must decide whether to take business in private. It is proposed that we take agenda items 4, 5 and 6 in private. Item 4 is consideration of the delegated powers provisions in the Management of Offenders (Scotland) Bill; item 5 is a draft report on the Scottish Crown Estate Bill; and item 6 is an update on the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill. Does the committee agree to take those items in private?

Members *indicated agreement.*

Prescription (Scotland) Bill: Stage 1

10:00

The Convener: Agenda item 2 is consideration of the Prescription (Scotland) Bill. The Delegated Powers and Law Reform Committee has been designated as the lead committee for the bill, and we will begin our stage 1 scrutiny this morning.

We have before us Jill Clark, the head of the Scottish Government's civil law reform unit; Neel Mojee, a solicitor from the Scottish Government; David Johnston QC, a commissioner from the Scottish Law Commission; and Gillian Swanson, a project manager from the Scottish Law Commission. I welcome you all.

I will start with a couple of general questions about the consultation exercise. Will the Scottish Law Commission tell us what the key features of its consultation were, how it went about the consultation, what documents were published, who was consulted, and what the responses were?

David Johnston QC (Scottish Law Commission): Yes. Thank you very much, convener.

We carried out a comprehensive consultation exercise. At an early stage, we held a seminar for interested people—various professionals and business interests—and we used that to formulate the proposals. We drew the proposals together in a discussion paper, which was put out for consultation for a period of three months. We publicised the discussion paper to around 110 people directly and made news of the consultation available on our website and through Twitter.

Having received the responses to the consultation, we drew together our report. As members know, such reports always include a draft bill. We then carried out a further exercise to consult on a working draft of the bill, which we found to be quite productive. We tried to follow the same pattern in publicising that as widely as possible and drawing it to the specific attention of various stakeholders, including local authorities, central Government departments, insurance companies, business interests and professionals.

Those are probably the key features of the consultation. If I have missed something, I am, of course, happy to expand on that.

The Convener: What were the main points that emerged from the consultation?

David Johnston QC: The main topics that consultees were interested in included the scope of the five-year prescription. As the committee is

aware, we propose that that be expanded for various reasons. That particularly engaged the interest of central and local government, especially when they saw the working draft of the bill. That was one key issue.

The key issues for business professionals and insurers probably related to the so-called discoverability test—that is to say, changing the time at which, in claims for damage that was originally latent, the prescriptive period begins to run. As the committee knows, we recommended changes to that as well as to the length and the starting point of the 20-year cut-off prescription. Those people were especially interested in that.

The question of whether the bill should be permitted to extend the prescriptive period and, if so, in what circumstances, is important in practice for solicitors and professionals; it was an issue on which they certainly expressed their views fully in the consultation.

Those are the main issues.

The Convener: Thank you very much for that. Did the Government carry out a public consultation?

Jill Clark (Scottish Government): In general, the Scottish Government does not consult on bills that have been identified as being suitable for this process, which is mainly because the SLC has undertaken a comprehensive consultation of its own, as it has recently done in this case. However, we carry out targeted and focused consultation with key stakeholders. To that end, last September, the Minister for Community Safety and Legal Affairs wrote to a number of representative bodies, including the Association of British Insurers, the Institute of Chartered Accountants of Scotland, the Royal Incorporation of Architects in Scotland, the Scottish Law Society, the Faculty of Advocates, the Convention of Scottish Local Authorities, the Royal Institution of Chartered Surveyors, Construction Scotland and the Civil Engineering Contractors Association. We received two responses. One offered continued assistance with the bill—I think that the respondent had been assisting the Scottish Law Commission. The other sought clarification on a couple of technical issues. We wrote back to the body and it confirmed that it was content.

The Convener: Was the latter body COSLA?

Jill Clark: Yes.

The Convener: Do members have any questions about the consultation?

Stuart McMillan (Greenock and Inverclyde) (SNP): Did either the SLC or the Government write to Citizens Advice Scotland or to any other welfare rights organisation?

Jill Clark: We did not do so.

Gillian Swanson (Scottish Law Commission): I do not think that we did on this occasion. Citizens Advice Scotland recently informed us that it is paring down its responses; it will pick up from our Twitter feed issues to which it is interested in responding.

The Convener: We will move on. Alison Harris has a question.

Alison Harris (Central Scotland) (Con): Good morning. In England and Wales, debts relating to council tax and business rate arrears are extinguished after six years. What is the policy rationale and/or the legal reasons for allowing councils 20 years to recover such debt in Scotland?

Jill Clark: I will leave the legal reasons to colleagues to comment on. On the exceptions relating to council tax and business rates, the bill basically maintains the status quo. We cannot comment on why the position is different in England and Wales, but that difference will have subsisted for some time. Here, local authorities made representation to the Scottish Law Commission on the matter, and among their points was that the policy reasons that justify accepting taxes payable to the Crown, such as Her Majesty's Revenue and Customs and Revenue Scotland, for the five-year prescription apply equally to taxes payable to local authorities.

Although it was acknowledged that, as a rule, five years should be sufficient time in which to collect such taxes, there were cases in which local authorities faced difficulty in collecting those taxes when they fell due, as well as in collecting arrears of tax from previous years. The Scottish Law Commission was persuaded by those arguments. It noted that both taxes benefit from the same special provisions for enforcement by diligence and by summary warrant procedure, and it seemed appropriate that their amenability to prescription should be the same.

The Convener: If somebody has managed to dodge paying council tax for more than five years down south, they can get away with it, but not here.

Jill Clark: It is six years; here, it is 20 years.

Alison Harris: Do you want to come in, Mr Johnston?

David Johnston QC: There is not very much that I can add to that. When we first consulted, we were not much persuaded that special rules needed to be made for council tax, albeit that—as Jill Clark has explained—it is generally understood that council tax is not covered by the five-year prescription and therefore only the 20-year prescription is available.

It is perhaps worth adding that the difference between the six-year period in England and the 20-year period in Scotland is less stark than it first appears, because if you get a liability order within the six-year period you can enforce it without any limit of time. In practice, the differences in timescale might not be so stark.

After the representations that have been described, and given that there were difficulties in recovering arrears, we decided that we should not be too dogmatic about saying that we were not persuaded and that we should stick with the status quo, which is where we have ended up.

David Torrance (Kirkcaldy) (SNP): The combined effect of section 3 of the bill and section 38 of the Social Security (Scotland) Bill is that five-year prescription would apply to devolved benefits but 20-year prescription would apply to reserved benefits. Why is there a divergence of approach?

Jill Clark: As I said, the Department for Work and Pensions policy on the reserved social security benefits is a matter for the DWP and I cannot comment on that. The bill provides for maintenance of the status quo for the DWP—it was 20 years before and it remains 20 years.

The Social Security (Scotland) Bill, which is currently before the Scottish Parliament, sets out that obligations to make payments to Scottish ministers for recovery of devolved social security payments made in error will prescribe after five years. The effect will be that it will not be possible to recover overpaid, devolved social security payments after five years unless Scottish ministers were misled into making the overpayment.

Scottish ministers considered that that approach fitted better than any longer period of prescription, given the fundamental principle that underpins the Scottish social security system, that is, that people should be treated with dignity and respect.

Having a five-year prescription might also act as a driver of continuous improvement in the new social security agency, supporting prompt action on whether to recover overpayments. The difference in the approaches is probably a natural consequence of the devolution of powers to the Scottish Parliament and the fact that the Scottish Government can do things differently, based on the priorities set by Scottish ministers.

David Torrance: More generally, when the proposals were being developed, what consideration was given to the possible interaction between the Social Security (Scotland) Bill and the Prescription (Scotland) Bill?

David Johnston QC: The timing meant that, when the Scottish Law Commission was formulating its proposals on the Prescription (Scotland) Bill, we did not give consideration to the Social Security (Scotland) Bill. The Social Security (Scotland) Bill was introduced in June 2017 and our report was published two to three weeks after that. We were not in a position to take into account the provisions of that bill when we formulated our policy and made recommendations.

However, once the Government took on board our report and was considering how best to progress it, in the course of August and December 2017, we had discussions about how the bills would interact. I will leave the story for Jill Clark to take over.

Jill Clark: The position is as described. The Department for Work and Pensions has a prescription of 20 years and that is what it wants in policy terms. For the Scottish Government's policy terms, five years was seen as more appropriate and that is why there is a divergence.

The Convener: Why is it seen as more appropriate?

Jill Clark: I am speaking about a policy area that is not the one that I deal with, so forgive me if I take some time over my answer. My social security colleagues would say that they have taken a different approach in the Social Security (Scotland) Bill, by setting out its principles and because having benefits is a human right in the bill. Dignity and respect are paramount in the approach that they have taken. Therefore they consider that five years is a much more appropriate prescriptive period.

The Convener: It was probably not fair to ask you that question, Ms Clark. I should direct it to someone else.

David Torrance: In Scotland, recovery of an overpayment of reserved benefits or tax credits is to be subject to a 20-year prescription. However, England and Wales take a different approach, with a distinction between recovery by court action and recovery by a deduction from on-going payments. Did the Scottish Government or the SLC consider whether Scots law should make that distinction? If so, what conclusions were reached?

10:15

David Johnston QC: The commission did not get into that issue. At a more general level, we considered what exceptions should be made to the proposed general rule that statutory obligations to make payments should prescribe after five years. We did not get into the question of what the appropriate procedures for recovery of benefits should be. We regarded that question as a policy matter for others, and it was probably strictly outside the narrow confines of our project on prescription.

Stuart McMillan: An earlier version of the proposals included a specific exception to five-year prescription for forfeiture. What is forfeiture and why are you now content that that exception is not necessary?

Jill Clark: It is really just a technical change to remove unnecessary provisions. Proceedings for forfeiture in relation to customs and excise and proceedings for the forfeiture of a ship were excepted from the five-year prescription. They were included in the bill to align Scots law with the position in England and Wales under the Limitation Act 1980. However, further work revealed that those provisions are not necessary. In relation to statutory obligations to pay tax and duties, the proceedings relate to underlying obligations that are covered already by the exception of tax and duties. If the underlying obligation to pay tax does not prescribe after five years, the means to enforce that obligation by proceedings for forfeiture remain open as long as the obligation exists. The provisions were removed from the bill following discussion with the Scottish Law Commission, and with its agreement. Their removal makes no practical difference.

Stuart McMillan: Is it really just a tidying up exercise?

Jill Clark: Yes—otherwise there would be duplication.

Stuart McMillan: The SLC's option 2 in relation to section 5 of the bill is to go back to the law as previously understood before the Morrison case. That option got a reasonable amount of support during the consultation. What is the policy benefit of adding the requirement that the pursuer must know the identity of the defender? You can respond by reference to examples of situations in which you think that that would be important, if that would be helpful.

David Johnston QC: At the most straightforward level, it seemed to us that prescription is about the extinction of obligations once they are enforceable. It is hard to say that there is an enforceable obligation unless it is known against whom we should enforce it. That is the simple answer.

A slightly more sophisticated answer is that it also seems fairer, if we do not know who was responsible for an act or an omission, that prescription should not start running against someone.

To take up your invitation to provide an example, I think that, in many instances, construction cases provide the best examples, partly because they are complex and involve many parties. When a defect in a building emerges, there is often an argument about whether it was caused by inadequacies in the design, which might be down to the architect or possibly the structural engineer, or by inadequacies in the construction, which would be the fault of the contractor or perhaps one or more of the subcontractors. The key difference that the requirement would make in such a case is that, if a design problem was identified, it would need to be known whether the architect or the structural engineer was at fault. It would be a similar story if there were construction problems.

I will develop the point a little further. As the committee will know, one of the problems that we identified in the existing law is that, if something goes wrong with a building contract, employers to the contract typically sue everybody—the architect, the engineers, the surveyors, the contractors and the subcontractors—because they do not want to miss anyone out in case they lose their claim by prescription. We think that that is wasteful of resources for the parties, the insurers and also for the courts. The difference that is made by adding the identity criterion—the third of the three facts in the bill—is that employers will not be at risk from prescription until they have identified who is at fault. In my example, they have identified that there is a design problem and that it is the architect who is responsible for that. Without the identity query, you will still potentially be faced with having to sue engineers, architects and anyone else who had some involvement in the design. The identity criterion should obviate that need.

Stuart McMillan: I am not an expert in contract law or building but it strikes me that, in your example, if the question of the nature of the defect was still not clear, all the parties would state that they were not at fault and that it was not their responsibility. If you do not know which person or company is responsible, how would that aspect of the bill work? Would people just do what they do at the moment, and pursue litigation against everyone?

David Johnston QC: That is one possibility, I suppose. We have been seeking to ensure that the time does not start too early. As I said, if it starts too early in a situation in which you do not have enough information, you will be forced to sue everybody just to protect the position.

The proposed tripartite test in the bill means that, first, you need to know that you have suffered some loss. That is usually easy if there is an evident defect in the building. The difficulty then is determining whether it was caused by somebody's act or omission—that is, did someone either do something or fail to do something that should have been done? I think that the short answer to your question is, with regard to this test, if it was impossible to pinpoint what the problem was, the time would not be running yet against the pursuer,

so the claim would still be alive and not subject to being cut off by prescription.

Stuart McMillan: The claim would remain alive until such time as it was possible to identify one party or multiple parties.

David Johnston QC: Exactly. For each relevant person—that is, each party that might be sued—you need to be able to tick all three boxes: defect; act or omission; and identity. Once you have done that, the time will start to run, and you have five years in relation to each of those people.

Stuart McMillan: Thank you, that is helpful.

The Convener: I would like to ask a supplementary question that is based on the example of a case that I dealt with. If I have bought a new house and problems emerge with the foundations, I might think that I will make a claim against the people who built the house. However, the people who built the house might make a claim against the people who put in the foundations, and the people who put in the foundations might make a claim against the person who designed the foundations, and so on. I, as the householder, cannot possibly go all that way down the chain, so what am I to do?

David Johnston QC: Obviously, there are difficulties in cases in which people are unable to get professional advice. That is something that we just have to live with in relation to the creation of the legal system. However, in the case that you describe, what one would do is go to an expert and ask for an expert report that says what the problem is, how it was caused and who is at fault. Good-quality expert advice will tell you that the fault lies with the person who designed the foundations, the person who inadequately poured the concrete or whoever. That will allow you to start to accumulate the knowledge that you need for prescription to begin.

The Convener: In that case, I do not have a contract with those people. I bought the house from the builder, so surely my claim is against the builder and, if there is another claim, it is up to them to pursue it.

David Johnston QC: Yes. Clearly, if the claim is in contract, you have to rely on the person with whom you contracted.

The Convener: The clock starts ticking as soon as I take action against the builder.

David Johnston QC: Yes, I think that that must be right. For example, if you were able to find a claim in delict to bring against somebody else—which it is not totally straightforward to do under the current state of the law—the question of when time started to run against that claim would have to be addressed by looking at the same three factors that we have been discussing. That start time would not necessarily be the same date as the one for the contractual claim.

The basic position, as you have said, is that if someone has a contract, that should be the first recourse that they seek. If someone is simply seeking, for example, the making good of defects in the building, that might not be in the territory of a damages claim at all. All those things will be quite sensitive to the particular facts of each case.

Stuart McMillan: You mentioned subcontractors. Clearly, the economy has not been totally solvent over the course of the past 10 years, particularly in the house-building sector. Many house builders will have brought in—and will still be bringing in—subcontractors. If there was a problem in a house that was ultimately down to the work of a subcontractor, but the subcontractor had gone out of business, would the claim go against the house builder, for them to attempt to recover money to get the problem fixed? Whom would they recover money from, and what would happen to the person who had purchased the house?

David Johnston QC: If you were working on such a case in practice, you would first look closely at the contract for the remedies that it makes available to the contracting party who has been let down. Typically in a case like that, you would expect the remedy to be against the seller of the house, who might be a property developer or a building contractor—I imagine that that is where most contracts would make the liability lie. It is difficult to give a general answer, because it will depend entirely on the contractual situation. Typically, you might find that there is no contractual entitlement to pursue other parties in such contracts; the only remedy is to pursue the party with whom one entered into the contract. I am not sure that I can give you a more specific answer, because it will depend very much on the content of each contract.

The Convener: Do you have a question, Alison?

Alison Harris: No, I am listening with interest and I think that Mr Johnston answered my question.

Stuart McMillan: On section 8 of the bill, some responses to the discussion paper expressed doubt that the proposed rules will work well in relation to the defender's omissions or on-going breaches compared with how they will work for the defender's actions. Can the Scottish Government offer the committee any reassurance on that?

Jill Clark: I look to David Johnston to answer that.

David Johnston QC: Yes. The commission considered the submissions that were made about the difficulty in applying the proposed new rules to

omissions. We were not persuaded that the bill introduces anything that is not already an issue under the existing system. Under the existing legislation, there is already reference to continuing acts or omissions; therefore, even under our current system, in certain cases you have to be able to identify when an omission took place. Typically, you can say that it took place when it becomes impossible for it to be remedied—that is, you have to do something by a certain date or it becomes impossible to do it. That is often the date that you identify as the date that an omission occurred, as a matter of law.

The short answer is that that is an issue under the current law, and we were not persuaded that referring to "the act or omission" in section 8 would introduce a problem that lawyers are not already used to dealing with under the existing legislation.

10:30

The Convener: We will move on to section 6, which deals with interruptions and extensions to the 20-year prescription. It would amend the law so that the main type of 20-year prescription could no longer be interrupted and halted by a relevant claim or a relevant acknowledgment. However, there would be the possibility of an extension to that prescription period, which would be only to allow litigation that has commenced to finish.

The proposals received majority support on consultation. However, Brodies was one of a minority of respondents that expressed reservations about section 6. It suggested that the period should still be able to be interrupted but that it should restart not from the beginning but from where it left off in the first place. Would you like to comment on that suggestion?

David Johnston QC: We have common ground with Brodies in thinking that there is an issue that needs to be addressed. It is simply a question of what the best mechanism for doing that is. As you have explained, this is the single exception that we propose to the position of there being an absolute cut-off after 20 years. The rationale for that is that prescription is meant to cut off old or stale claims, but clearly that does not apply if someone is actively pursuing a claim when the 20-year cut-off period arrives.

In common with Brodies, we regarded that as an issue that needed to be addressed, and we gave some thought to its proposal that we might do it differently from the way that we have suggested, which is simply tacking on a bit to the end of the 20-year period. However, we thought that our solution was preferable. Under Brodies' suggestion, if a litigation that took five years to conclude was raised in the middle of the 20-year period, we would then have, in effect, a 25-year prescriptive period. That is certainly one way of doing it. However, we thought it preferable to extend the period simply by whatever balance of time is needed to complete the proceedings that are in play at the end of the 20 years. We hope that, in the rare cases in which the issue arises, that balance of time would be really quite short. We are relying partly on the fact that, nowadays, courts tend to manage cases and do not allow them to drag on indefinitely. On the whole, it seemed to us that, in order to keep as close to the 20-year limit as possible, our solution would be preferable to the one proposed by Brodies, although they aim to achieve the same thing.

The final point that I would make is that, when Brodies responded to our consultation on the draft bill, it expressed the view that it was content with the scheme that we had proposed, so I think that it is satisfied with the provision in the bill as it stands.

The Convener: Right. Thanks for that.

Alison Harris has a question on section 13, which is on standstill agreements.

Alison Harris: When the SLC, in its discussion paper, proposed the possibility of contracting out of prescription, it got a mixed response. Is the Scottish Government content that the conditions that are now set out in section 13 of the bill will remove any controversy and make it a suitable proposal for this committee to consider?

Jill Clark: Yes, absolutely. David Johnston can perhaps explain the rationale behind our position.

David Johnston QC: I will briefly outline the background thinking. The starting point is that the act lays down the prescriptive periods and therefore we think that, in general, those ought to be the periods that actually apply. That is one premise. A second premise is that, if we are to allow any extension to those periods, the extension must balance the interests of parties—which obviously diverge—and must not be capable of undermining the system as a whole. That led us to the view that it should not be possible to extend the 20-year period, with the single exception that we have already discussed about proceedings that were continuing. The period is meant to be an absolute cut-off, so to allow people to extend it would clearly undermine that principle.

We then focused our attention on the shorter periods, such as the five-year period. Should it be possible for parties to change that? A key factor for us was that we thought that it would be inappropriate for parties to be able to change the prescriptive period in advance—for example, while making a contract. We were concerned that if, for example, parties were to enter into a contract that stated that there would be a 10-year prescriptive

period instead of a five-year one, that would, first, undermine the system, which is supposed to be as clear and have as few different periods as possible, and, secondly, favour the party in the stronger bargaining position. That is what led us to the view that the right balance is struck if we permit some agreements to extend beyond the period but only in strictly limited circumstances. As I have just been saying, we proposed that the dispute must have arisen already. You do not invent a new prescriptive period in advance; you enter into the agreement after the dispute has arisen. We also proposed that the agreements should be limited in time and should be capable of being made only once.

To go back to the construction example, if the employers in a building contract have learned all the relevant facts and know that they have suffered a damage as a result of a design problem that was caused by the architect, they then have five years. Under the existing system, the only way in which to preserve their claim is to raise proceedings. The provision in the bill seeks to give them another option, which is to agree with the architect, before the five years have run out, that they will have a short extension—say, for six months or a year—to see whether they can settle out of court. We thought that that was a more efficient use of resources. It also avoids raising the stakes, or increasing the pressure, in the way that litigation does, and it saves costs, too. It seemed to us that that was an appropriate way of dealing with the issue and that it struck the right balance.

The other point to make in addressing Alison Harris's question is that, although there was some divergence of view about whether these agreements were a good thing, a lot of it was really predicated on the particular conditions that applied. We think that the three conditions that I have mentioned—that the period can be changed only after the event, that it can be extended only by one year and that there can be only one extension—address all the reservations that were expressed by consultees.

The Convener: Stuart McMillan is going to ask about the Hugh Paterson case, which is a very interesting one. Stuart, can you outline the background to the case?

Stuart McMillan: Mr Paterson submitted a petition—PE1672—to Parliament in October 2017. He had experienced the effect of the 20-year prescription when the conveyancing associated with a house purchase went wrong, which he did not find out about until many years later. He then tried to sue his solicitor for damages. What Mr Paterson found was that the legal obligation to pay damages can be extinguished by the 20-year prescription without the five-year prescriptive period even starting to run and without the pursuer having been aware that the legal obligation to pay him or her damages existed.

The SLC acknowledged that Mr Paterson's case was a difficult one, in which the prescription had operated harshly, but said that the need for the law to be certain meant that no proposals to help people in Mr Paterson's position could be included in the bill. The Scottish Government supports the SLC's position on that, and the latest correspondence from Mr Paterson to the Public Petitions Committee suggests that he now thinks that reform to land registration law and practice might be the appropriate avenue for change.

The committee is aware of Mr Paterson's petition relating to his experience of the 20-year prescription. For the benefit of the record, is the solution to the problem that he outlines the reform of the law of prescription? If not, can the Scottish Government indicate where it thinks the solution might lie?

Jill Clark: We note that Mr Paterson understands the law of prescription and that the liability cannot be carried in perpetuity. The Scottish Government's view is that the 20-year longstop is important in creating legal certainty, finality and fairness.

We were asked by the Public Petitions Committee for our view on notifying purchasers of the title at time of registration, which is an approach that was suggested in one of the committee's meetings. We commented that relevant legislation is in place under section 40 of the Land Registration etc (Scotland) Act 2012, such that when an application for registration is accepted or rejected by the keeper of the registers, the keeper must notify the applicant, as long as it is reasonably practicable to carry out the notification. In most cases, the applicant is the solicitor who is acting for the party involved in a property transaction. The person submitting the application can specify on the application two email addresses to which the notification should be sent. A further two email addresses may be provided for notification to the granter of any deed and/or their solicitor.

We are going to check with the Law Society of Scotland what solicitors do in practice about notifications. Hopefully, there is an administrative solution to the issue that would remedy the difficulty that Mr Paterson faced and that does not disturb the law of prescription.

Stuart McMillan: It is clear that Mr Paterson's case started some years before the 2012 act came into force.

Jill Clark: Yes.

Stuart McMillan: I sat on the committee that scrutinised the 2012 act and it was a welcome

update to that area of law. However, Mr Paterson's case predates that act and I am sure that we all accept that it is a hard case. Something has happened that has had a negative effect on Mr Paterson. In terms of a remedy or some kind of successful outcome for Mr Paterson, there has to be some other way of using legislation—whether that is the Prescription (Scotland) Bill, other legislation or, as you suggested, an administrative step—to try to prevent such a thing happening again.

Jill Clark: We can try to prevent it or look at remedies to prevent it happening, but I do not think that anything can be done for Mr Paterson's position.

Stuart McMillan: Is there no way to achieve successful closure for Mr Paterson?

Jill Clark: His claim has prescribed, as far as I am aware, so there is no remedy in that aspect of the law. I do not think that the solicitor firm is functioning any longer—I think that it went bust.

Stuart McMillan: I imagine that the Law Society would be very involved in that particular case.

Jill Clark: I do not know whether that is the case.

Stuart McMillan: Okay. Thank you.

The Convener: That was a brief session, but we are only at the start of the process of considering the bill. I thank the witnesses for their time.

10:44

Meeting suspended.

10:45

On resuming—

Instrument subject to Negative Procedure

National Health Service (General Medical Services Contracts and Primary Medical Services Section 17C Agreements) (Scotland) Amendment Regulations 2018 (SSI 2018/94)

The Convener: The third item on our agenda is consideration of an instrument subject to negative procedure.

The regulations make various corrections to rectify errors that the committee reported on in its 10th report, published on 6 March. The regulations were laid before the Parliament on 14 March and come into force on 1 April. That does not respect the 28-day rule, which is the requirement that at least 28 days should elapse between the laying of an instrument that is subject to the negative procedure and the coming into force of that instrument. The Scottish Government has explained in correspondence that the rule has been breached so that the various corrections could come into force timeously on 1 April.

Does the committee wish to draw the regulations to the attention of the Parliament on reporting ground (j), as they fail to comply with the requirements of section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010?

Members *indicated agreement.*

The Convener: Does the committee find the failure to comply with section 28 acceptable in the circumstances outlined in correspondence from the Scottish Government to the Presiding Officer of 14 March 2018?

Members *indicated agreement.*

10:47

Meeting continued in private until 12:00.

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