OFFICIAL REPORT
AITHISG OIFIGEIL

Delegated Powers and Law Reform Committee

Tuesday 27 March 2018

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

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DELEGATED POWERS AND LAW REFORM COMMITTEE
11th 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:

Craig Connal QC (Pinsent Masons)
Iain Drummond (Shepherd and Wedderburn)
Robert Howie QC (Faculty of Advocates)
Fenella Mason (Burness Paull LLP)
Douglas McGregor (Brodies LLP)
John Paul Sheridan (Law Society of Scotland)

CLERK TO THE COMMITTEE

Euan Donald

LOCATION

The Adam Smith Room (CR5)

Scottish Parliament

Delegated Powers and Law Reform Committee

Tuesday 27 March 2018

[The Convener opened the meeting at 10:06]

Decision on Taking Business in Private

The Convener (Graham Simpson): I welcome members to the 11th meeting in 2018 of the Delegated Powers and Law Reform Committee. We have apologies from Alison Harris MSP.

Before we start the evidence-taking session, we must decide, under agenda item 1, whether to take in private item 4, which will be consideration of the delegated powers provisions in the Social Security (Scotland) Bill, as amended at stage 2. Does the committee agree to do that?

Members *indicated agreement.*

Prescription (Scotland) Bill: Stage 1

10:06

The Convener: Agenda item 2 is consideration of the Prescription (Scotland) Bill. We have a couple of panels with us representing the legal profession. I welcome John Paul Sheridan, who is the convener of the obligations sub-committee of the Law Society of Scotland, and Robert Howie QC of the Faculty of Advocates. Thank you very much for coming, gentlemen. I open the session by passing over to Neil Findlay, who has the first two or three questions.

Neil Findlay (Lothian) (Lab): Good morning. We will try not to fall into cliché and stereotype when talking about lawyers and money—I am sure that we will get those gags over with early.

Section 3 of the bill will extend five-year prescription to obligations to pay money. Will you comment on the general principles of section 3 and the specific exemptions in it?

John Paul Sheridan (Law Society of Scotland): The general view is that parties—or anyone—should be able to move on with their circumstances after five years, so they should not be chased for debts after that time. For example, if someone has a credit card debt or bank overdraft, they should be able to arrange their affairs so that they cannot be chased after that five-year period. That legal principle is applicable in most countries around the world.

The vast bulk of the exemptions are not because of any legal or logical reason for the debt to be treated any differently. The principle should be whether it is fair to the common good if, after a period, people are able to avoid paying council tax and other taxes, social security payments and the like.

The Law Society's previous response indicated that council tax should not be exempted because, as we understand it, in England and Wales council tax is prescribed after six years, which is the English-equivalent limitation period.

We have come across situations where there can be particularly harsh results, because council tax is subject to joint and several liability. There could be two tenants, one of whom has paid their fair share. They could split up and move away, but be chased seven, eight or nine years down the line. However, we understand that there might well be political reasons for such debt not being treated in the same way as, say, a commercial debt arrangement.

That is the general statutory exclusion. Certainly tax and social security are reasonably common exemptions.

Neil Findlay: What about child maintenance?

John Paul Sheridan: Again, there is no legal or logical reason for treating that differently from any other debt. It is a matter for the committee, which is better able to assess political dimensions than I am, but I see no reason in principle why that should not be exempted.

Robert Howie QC (Faculty of Advocates): I have relatively little to say about this. The Faculty of Advocates takes the view that these are political considerations and, as such, it expresses no view on them.

Neil Findlay: In its response to the bill, the faculty highlighted various drafting points in relation to section 3. Can you summarise them briefly?

Robert Howie: The short answer is no, because they are detailed, which is why we have put them down in print. With respect, I think that there is little benefit in discussing individual drafting matters, because I know from many years of unhappy experience that that tends not to work. It is better to look at why it is being contended that the drafting has become unclear, as was suggested with regard to the original drafting. You should bear it in mind that the faculty is talking about the original draft of the bill, and certain changes have been made in order to meet a number of the objections that we made with regard to the drafting. As a result, a number of our objections are no longer relevant.

In any case, as these items tend to be rather detailed, they are best read in print. You have the benefit of legal advice, and you can operate on that principle. I suspect that I would not be putting your time to the best use by saying it all again, perhaps using different language, because someone might say, "Yes, but the other word is here. What's the difference between this word and that word?" Of course, that is exactly the kind of thing that we are talking about.

I do not know whether you are intending to ask about this, but an almost ideal example is the proposal to change the reference to "neglect or default" later on in the bill. We have said that we do not see the need to change it, because everybody knows—or, at least, all lawyers know—what neglect and default mean as a result of the House of Lords case that tells you what they mean. If you had not been brought up with Cranmer since you were so high in a good Presbyterian country, you might be a bit bemused by some of this or not have an immediate grasp of it, but there is a House of Lords case that tells you what the answer is. Once you have been told the answer as it applies to a Scottish appeal, why change it? It looks as though you are trying to achieve some change in meaning when my understanding is that you are not.

That just demonstrates part of the difficulty with talking about drafting changes. With respect, as I have said, they are best looked at in print.

Neil Findlay: Your brevity is welcome.

The Convener: Thank you for sparing us, but in your view are these drafting errors a significant issue?

Robert Howie: I would call them drafting questions. I would like to avoid the word "errors", because it is an exercise in hypocrisy to talk very much about "drafting errors". Everyone knows that this is fearsomely difficult. You think that you have got it right, but as those who do this sort of thing commercially will say, you can guarantee that the one thing that happens is the one thing that you did not draft for. That problem is writ large when it comes to parliamentary draftsmen. It is very easy for us to sit in court and say, "Well, that wasn't terribly clever drafting", even though that might frequently be the case.

However, this is simply a drafting matter; it is not hiding a particularly substantive issue. That kind of issue was lurking in one of the drafting questions that we had highlighted, but it has since been corrected. We mentioned the matter, and the commission changed the drafting as a result.

The Convener: That is good.

Section 5 relates to the start date for five-year prescription in relation to the obligation to pay damages, and it reverses the effect of a Supreme Court case—the Morrison case. The SLC consulted on four options for section 5, and decided to use option 3. Which option do both of you favour, and why? Are there any drawbacks to the option that has been used in section 5? You can give some examples to illustrate your point, if you like.

10:15

John Paul Sheridan: The Law Society favoured option 3, although we would not have had any significant problems with option 2.

To summarise the issue, the case of David T Morrison & Co Ltd v ICL Plastics Ltd involved an explosion at the plastics factory in Maryhill a number of years ago. Everyone had understood the law to mean that the five-year period started from the date it was known that there had been a loss and that the loss had been caused by someone else.

There had obviously been a loss—everyone knew that there had been an explosion—but it had

taken a number of years to work out what had happened. There had been prosecutions for deaths and a fatal accident inquiry, and a number of years had passed. Everyone had taken the view that there needed to be both a loss and an awareness of who had caused the loss before the five years started to tick. However, in that case, the Supreme Court said that it was the awareness of the loss that was key. That ruling has been followed on a number of occasions and has led to some problems or what people view as harsh results.

Another case that features heavily in the Scottish Law Commission report is Gordon v Campbell Riddell Breeze Paterson LLP. I hesitate to go into that in too much detail, because I am conscious that my fellow panellist appeared in the Supreme Court in that case and probably knows a great deal more about it than I do. The case was to do with a farming tenancy. The landlord had issued notices to remove the tenant. It turned out some years down the line that those notices were defective. The court said that, when someone incurred costs in trying to remove a person, that was a loss.

I have a slight concern that the way in which the bill has been drafted means that it does not deal with that particular problem. It is a question of what "loss" is. Take, for example, a standard case in which somebody has bought a house and paid the solicitor and the surveyor. Years later, it could turn out that there is a problem in that they do not own part of the ground or there is a difficulty with the building. According to one view, the person incurred the loss when they paid the professional fees to the solicitor or surveyor. That would not be the intention, but according to one view of the wording of the bill, the loss would have been incurred at that time. I have a slight concern about that.

Generally, the Law Society is of the view that the bill provides more clarification and puts the law back to what was understood prior to the decision in the Morrison case.

Robert Howie: I have to declare an interest. You have already heard part of it, but I was the losing senior in both of the cases mentioned. I have to be a little careful about what I say about them.

Section 5, as I understand it, is directed to a rewrite of Morrison, so as to restore the law to what it had previously been. There was something known as the actionability test. One had to be aware of the fact that the "act, neglect or default" was the source of the problem—there was something legally exceptionable that had caused the loss.

In Morrison, as Mr Sheridan said, everybody knew immediately that there was a horrible hole where there used to be a wall. However, it did not follow that they knew that the reason the hole existed was down to the negligence of some third party.

With respect to Mr Sheridan—it may have been a slip of the tongue on his part—the law was not that you needed to know the identity of the person responsible. You never needed to know that. That is why there were building contracts with about five sets of defenders—it was known that one of them was responsible, but not necessarily which one. The fact that it was known that one of them had to be responsible meant that the time was running. The responsible lawyer did not hang around and let his client wait before suing. They got in, sued and then could sit back and think once it was safe.

Section 5(5) is designed to restore the actionability test. As Mr Sheridan said, it is not directed immediately to the Campbell Riddell problem, which was about what is "loss" for this purpose. Presumably, that is because the commission considers that "loss" should continue to mean whatever it is that it came out of the Campbell Riddell meaning.

The trouble in the Campbell Riddell case was that the loss could be said to have arisen as soon as the unfortunate landlords had paid their solicitors their fees for drafting the notices that turned out to be defective a year later. Therefore, one year had gone before they knew anything about it.

There are still worse examples than the rather harsh outcome for the unfortunate landlords in that case. The classic example involves the situation in which there is a trust defect in drafting that emerges only after a generation, when someone dies at the age of 98, and time has long since run before anybody knew that there was even a problem. The other example, which is perhaps more common, involves cases in which a terrible mistake has been made in conveying land, which shows up when somebody sells the house 22 years later, and there is nothing to be done about it. As I understand it, section 5 is not designed to address such cases. It is designed to reverse the outcome in the Morrison case and to change the law in relation to the Dunfermline District Council v Blyth & Blyth Associates case, which is the one that says that it is not necessary to know the identity of the defender.

The result of that is that the time for prescription will start running a lot later than it does now. The faculty was of the view that that was no bad thing. We were in the same position as the Law Society but the opposite way round—we were not really concerned whether Parliament chose to legislate

in favour of the second option or the third option, as long as it legislated for one of them. We had a marginal preference for the second option; I understand that the Law Society had a marginal preference in the other direction. It is entirely marginal, and if it seems proper to Parliament to legislate for the identity of the person to be known, we would not complain about that.

The Convener: Do members have any follow-up questions?

Neil Findlay: Can you explain what practical differences the proposals in the bill will make in situations in which there has been a conveyancing error?

Robert Howie: Let us assume that a conveyancing error is made that is fatal but the matter is not noticed at the time, the document goes on to the registers and nobody bothers to look at it again for 20 years until the owner wants to sell the house. As matters stand, loss is looked at with hindsight and paying the lawyers is considered to be the first item of loss, because that payment was wasted. The person bought—if I can use that word—a good title to their house, but they did not get it; they got a piece of paper with words on it that was quite worthless, legally speaking. Because the money was thrown away, it can be said, in retrospect, that that was a loss. The person knew perfectly well that the action that they took in paying their lawyers led to loss, because their pockets were lighter as a result of doing so. However, that means that time starts running against the person, and by the time they find out that anything is wrong, they discover that time ran out 10 years ago.

Section 5 is designed to say that it is necessary to know—constructively or actually, but I will use the shorthand for the moment—the three sets of facts, the first of which is that loss has actually occurred. Of course, the idea is that that is meant to hold up the date until the person finds out that there is a problem when they try to sell their house, which is a loss that was caused by act or omission. In the house-sale context, that is unlikely to be terribly difficult—it is more of a problem elsewhere.

I go back to the Morrison case. What happened there could have been no one's fault. Let us imagine that the gas system was simply designed wrongly but not negligently—in other words, it was not possible to point to a fault that was objectionable or which no ordinarily skilled designer would have included in the design if they were acting with ordinary care. It was just that the state of science when that system was put in was such that it was not known that there was a problem there. The design was wrong and caused the system to blow up, but that was not anyone's fault. The case was one in which we had to try to find out that it was somebody's fault—or, at least, that is what we all thought that we had to do, until I made the nasty discovery in London.

That is not the real problem in the conveyancing case, in which nobody has any reason to believe that there has been loss at all. Section 5 seeks to say that until someone knows that they have a loss that has been caused by an identifiable person's fault, and the identity of that person—in this case knowing that identity will not be difficult either—time will not run against them until they know the later of those things. It will move time running from the point at which they paid their lawyers in the first place, 20 years ago, to when they find out that there is a problem and they are told that it is because somebody made a terrible mess of the conveyancing. It will move the date quite dramatically in such cases.

Neil Findlay: What is the role of the insurance industry in that, as far as using delaying tactics is concerned? Does that mean that the egg timer is running down for all the time in which it prevaricates and delays?

John Paul Sheridan: If we look at the Law Commission's submission, we can see that, generally, insurers favoured retaining the decision in Morrison as being the applicable law.

Robert Howie: As did the solicitors.

John Paul Sheridan: Yes—as indeed did the firms of solicitors that are viewed as being the insurer firms. The society takes a neutral view of that, as it has solicitor members who act on both sides of such matters. Personally, I do not act for any insurers. I tend to act in pursuing claims of this nature and therefore, understandably, favoured lengthening the prescription period. The general view among members of the society's obligations committee was that the prescriptive period should be extended because the decision in Morrison was unfair and harsh and the position should be returned to what it had been previously.

Neil Findlay: I have a personal interest in a case with which some of you may be familiar. It is known as the Happy Valley Road conveyancing case, and the Law Society of Scotland has been involved with it. It does not relate particularly to prescription; it relates to the owners of property who have never done anything wrong but who have been badly let down by the insurance industry and the legal profession and still do not have title to their property, as far as I am aware. Anyway, I will divert away from that.

Robert Howie: We need to be a little careful of instantly jumping to the assumption that the insurance industry is always delaying things.

Neil Findlay: I did not say "always", but in this case it has.

Robert Howie: In the kind of example that I was giving you in relation to the conveyancing flaw—the Morrison type of case—the insurers could do nothing, for good or ill, about changing the time at all. The problem is wholly independent of anything that they do. The issue that may arise with delays is one that was canvassed by some respondents, which was about delay in prosecution of actions and whether prescription should keep being interrupted permanently by actions that are raised and which may take an awful long time to go. Then, when they are thrown out, let us say, we start a new period of prescription for an immensely long period of time away. However, with respect, it is a little too easy just to jump to the conclusion that the insurance industry is always out for its own fell purposes—to delay things in order to secure prescription. Frequently, it is not doing anything.

Neil Findlay: You said that; I did not.

The Convener: I wonder whether that leads into David Torrance's question on the Hugh Paterson case.

David Torrance (Kirkcaldy) (SNP): Good morning, panel. The committee is aware of a parliamentary petition from Hugh Paterson, which provides an example of a situation in which 20-year prescription has operated harshly. The petition relates to a situation in which a solicitor makes a significant mistake when applying to register a change of ownership of a house. Furthermore, the mistake is not discovered until 20-year prescription has extinguished the associated right to sue the responsible solicitor for damages. How common is that type of situation at the moment? Can such cases be successfully dealt with by measures other than reform of 20-year prescription?

The Convener: Do panel members know that case?

10:30

Robert Howie: I have no immediate knowledge of the case, but I take it that it is an example of the genus that we have just been talking about. The fact that I know nothing about it probably makes it a lot easier to say something.

There is a difficulty here. The critical purpose of 20-year prescription is to ensure certainty. In that regard, as it seemed to the Faculty of Advocates, there are different interests at play from those that are at play with a short negative prescription, in relation to which one can see grounds for extending time in the interests of pursuers. However, the whole point of the 20-year prescription is to bring things to a final halt. That is the critically important thing, generally on the basis of the public interest. There will be hard cases—Mr Paterson's might be one of them; I do not know—in which people go over the 20-year period and find themselves simply without remedy. That brings into play the classic adage of the hard case making bad law if you legislate on the basis of it. One has to legislate on the basis of the general cases and accept that, unfortunately, from time to time, there will be hard ones.

I cannot answer at all the suggestion whether there would be other ways of getting around the kind of problem that arises in Mr Paterson's case, because I just do not know enough about it.

John Paul Sheridan: I do not have anything to say beyond that, other than that we are supportive of having a final cut-off point at 20 years. I have read Mr Paterson's petition, but I do not know the full circumstances. However, as Mr Howie says, there will always be problematic cases and I do not think that we can design a law that covers everything.

The Convener: Is it not right, though, that if you discover that there has been an issue only after 20 years—say, when you sell the property—you should still be able to do something about that in law?

Robert Howie: With respect, no. Indeed, as I understand it, what is being proposed by the SLC would make it even clearer that you cannot do anything about it. The object of the exercise is to secure an absolutely certain cut-off date that the insurance industry and, indeed, all of commerce that insures itself against risks can work against. What you cannot have is a situation in which liabilities can keep on running. That feeds into the question about whether 20-year prescription should be able to be interrupted, to which the Faculty of Advocates certainly said no. The reason for that is that, if you can interrupt it—by "interrupt it" I mean stop it and restart it again from the beginning—you have a situation in which you never know when liabilities are going to end. I think that the SLC had an example of a situation in which a liability would last 39 years. That makes the liabilities difficult—certainly expensive and perhaps even impossible—to insure against, and that is not in anyone's interest.

It seemed to members of the Faculty of Advocates that, therefore, the crucially important thing was bringing about a final end date. Undoubtedly, some people will suffer because of that. There will be bad cases and there will be cases where, if they came before any of us, we would be sitting there trying to find some scheme or other that we could use to get around the issue or recharacterise it somehow—that is what lawyers are paid to do, and that is when our professional ingenuity would be put to a test. However, with regard to the purposes of determining how one legislates on the general

case for the good of the public at large, I suggest that allowing the period to be interrupted is not the best way of approaching it. Legislation for individual cases has been found in the past to be legislation that proves to be the most problematic, to put it politely.

David Torrance: Section 8 would change the start date of 20-year prescription for the obligation to pay damages. You expressed some concern about how that would work in relation to omissions to act and on-going breaches. The SLC said in oral evidence to the committee that the language that is used in section 8 would be familiar to the courts from the Prescription and Limitation (Scotland) Act 1973 and that it therefore could not see a difficulty here. Are you now content on that point, or do you remain concerned?

Robert Howie: We remain concerned. We are concerned that it is difficult to say when an omission stops and nothing happens. How do I distinguish between nothing happening any longer and an omission carrying on? It is just not possible. It may be that what was being done by someone is no longer being done by them, but other effects from elsewhere mean that nothing appears to be happening or nothing is being noticed to be happening. There is a concern about an importance attending the need to notice or to be able to notice what is going on, but in relation to the technical and legal breaches that we have been talking about, how is an ordinary member of the public to know that that is or is not happening? It cannot be done.

I grant that it might be a problem that cannot be fixed and that this is possibly as good as we can get because one cannot distinguish the end of an omission. The Faculty of Advocates was nervous that in the case of omissions in particular, it would not work readily. It may be a fair point for the SLC to say that it cannot be made to work readily.

John Paul Sheridan: The Law Society had similar concerns about on-going breaches and omissions cases. We put that in our previous submission and our draft response to the bill, too. Like Mr Howie, I am not sure that there is a solution.

David Torrance: Section 8 proposes a new start date for the 20-year prescription on the obligation to pay damages. That date will be earlier in some cases—and never later—than under the current law. Is there a risk that, under section 8, there will be more cases where the obligation to pay damages is extinguished by the 20-year prescription without the right holder ever having been aware that there was a problem in the first place? If so, is section 8 a good idea?

John Paul Sheridan: The answer to the first part of your question is yes. The current law provides a prescription of 20 years from when the obligation became enforceable and the proposal under section 8 is 20 years from the date that the act or omission took place, which will always be at the same time or earlier. There will be situations where people have no awareness of a problem. Whether that is a good idea takes us back to our earlier discussion about certainty and the whole purpose of having the 20-year cut-off point, which is to have finality. If such certainty is deemed to be good, then yes, it is a good idea.

Robert Howie: The faculty was fairly firmly of the opinion that securing certainty was an advantage and that tying the prescription to the act or omission was wiser than trying to tie it to loss, because loss would simply mean that the date one starts from bounces off farther into the future, so we could end up with 39-year or indefinite obligations, which are thoroughly undesirable. Therefore, we felt that section 8 was an advantage.

We are not persuaded that the problem to which Mr Torrance refers will be particularly significant statistically or in seriousness. Most of the cases of damages will be covered by five-year prescriptions in respect of discoverability and all the rest of it. There comes a point at which one has just got to say that an end has to be reached. I was about to say, “Enough is enough”, but it is probably unwise to use that phrase right now.

The Convener: You have just used it.

Robert Howie: True. An end has to be brought to the process. We thought that that would be an advantage because the number of cases that would present the problem that is of concern will be very limited. Such cases will mostly be caught by the five-year prescription or extensions of that.

Stuart McMillan (Greenock and Inverclyde) (SNP): Good morning, panel. I want to return to section 6, although you have touched on some of that in your answers in respect of the 20-year prescription. Mr Howie, you were quite clear that you do not feel that there should be any interruptions. Mr Sheridan, can you clarify the Law Society’s position?

John Paul Sheridan: The Law Society is happy for there not to be any interruption to the prescriptive period of 20 years, which is different from the approach to the five-year period. We are at one with the faculty on that.

Stuart McMillan: In response to the SLC’s discussion paper, Brodies suggested that an interruption should be possible. Do you have any comments on that suggestion?

John Paul Sheridan: No. There is a representative of Brodies on the next panel, so I

will let them answer that. Certainly, that is not the view of the society as a whole.

The Convener: They are suitably primed now.

Stuart McMillan: Section 7 states that the 20-year prescription period that applies to certain property rights will no longer be able to be interrupted, but it can be extended, although only to allow on-going litigation to finish. In response to the consultation on the draft bill, the faculty suggested that the approach in section 7 might not work as well for property rights such as servitudes. Can you explain why that is the case and say whether there are any alternative approaches that might work better?

Robert Howie: The faculty's concern is that servitudes are rights that run with the land and keep on going indefinitely into the future. Prescription must not be allowed to stop continuing property rights simply by saying that they continue until an action finishes and then are apparently somehow prescribed at the end of the action. If there are land rights that are meant to continue, are those not meant to be rights that, broadly speaking, relate to property and are therefore meant to be imprescriptable?

You do not lose your rights to property simply because you are not litigating about them. Therefore, if someone has a dispute about them and that dispute is still going after 20 years, why is it that the rights last only until the end of that litigation? Should not the right to servitudes continue in any event, whatever the outcome of the litigation? If the outcome of the litigation is that the person does not have a servitude right, there is nothing to talk about; if the outcome is that there is a servitude right, why has it been declared that they have a servitude right when, apparently, under the bill, that right has automatically been prescribed now that the 20-year period has passed? That seems to us to be wrong.

Stuart McMillan: Do you have anything to add to that, Mr Sheridan?

John Paul Sheridan: No.

The Convener: Gents, as you are doing so well at explaining things in plain English, will you explain what the issue is over the contracting out of prescription? I will then ask for your views on that.

John Paul Sheridan: The contracting out position is that, under the 1973 act, parties cannot agree to put the five-year period on hold, so they have to raise proceedings and serve them in order to interrupt the five-year period. The bill proposes that parties will be entitled to enter into a contract to suspend the period without the need to raise proceedings. The proposal in the bill is slightly narrower than that in the original discussion paper, in that the period is restricted to only one year. Parties will be able to put the process on hold for only a year, which would extend the prescription period from five years to six.

The Law Society does not see any reason why the period should be restricted to one year. If the parties want to agree to put things on hold for two or three years, we do not see any particular reason in principle why that should be objectionable. There can be all sorts of reasons why investigations might need to continue. There can be issues about loss or calculations, or different remedial solutions might have to be considered, which might take longer than a year. The purpose of section 13 is to prevent people from having to incur the costs of raising proceedings. If the process can be delayed for only one year, people might end up contracting out for a year and then still need to raise proceedings anyway because the issues have not been resolved.

The Convener: So basically, both parties would agree to put things at a standstill for only a year under these proposals.

John Paul Sheridan: Yes, that is what—

The Convener: And your argument is that you should be able to agree to almost any period you like.

John Paul Sheridan: It would be subject to the 20-year maximum but yes, I have no particular problem with anything along the lines of two, three, four or five years, for example. I do not see any problem with that.

The Convener: So long as both parties agree to it.

John Paul Sheridan: Yes.

10:45

Robert Howie: The faculty was much more antagonistic to this idea. We said that there had to be tight restrictions on the so-called standstill agreements if you were to allow them at all. We would very much favour the agreements being restricted to no more than one year. The danger is that if you allow them on an open-ended basis, they will be abused roundly. What will end up happening is that provisions to extend will be put in contracts if you do not have, for example, the restriction in section 13(2)(a) of the 1973 act, which says that you can do it only after the period has commenced. The importance of that is that it stops people writing it into standard form contracts right at the start; otherwise, they would say in effect, "I will write in a provision in my standard form contract because I have lots of money and you do not, and I am bigger than you are. I will use my commercial power so your obligations to me

last for 40 years and mine to you last for 40 minutes." We regard that as thoroughly undesirable. Unless you have a restriction—for example, about when you can make these agreements—that is what we fear will happen. We are not persuaded that legislation against unfair contract terms will be able to get at that problem. People will draft around it—they do that regularly.

We are also concerned that the other danger is that, if you do not restrict the period of time for which you do it and the number of times that you do it, it will become an excuse for procrastination—for Fabian tactics, for delaying for foul reasons or fair. It is an invitation for nothing to happen. In fact, it will invite the very problems that prescription is there to prevent—evidence going stale, actions not happening on time, people being persecuted with old claims that cannot be proved because everybody has forgotten what happened and the documents have been lost. Generally, all the reasons that we have prescription in the first place are in danger of being thrown out with the bath water.

Lastly, it seems to us that there is a question about the logical sense in having legislation in which Parliament says, "We have produced a carefully calibrated balance between the interests of pursuers and defenders and we say that it is five years"—or 20 years or whatever number you care to insert, with whatever rights of extension you care to insert—but then says, "However, parties can contract out of it on an open-ended basis whenever they want." One might ask why Parliament was bothering to legislate in the first place, because it is a free-for-all.

The current legislation simply prohibits it—sorry, I say that with a certitude that may mislead you. There is not actually any real authority about it, but the general understanding is that it is simply prohibited under section 13 of the 1973 act. The faculty was of the view that that should still be the general ruling proposition and that, if standstill agreements are to be allowed, they should be very tightly controlled to deal with the kind of case where it is necessary to try to obviate the need to go into court immediately because of some particular difficulty—cases where the whole thing is likely to be sorted out but the difficulty is getting somebody to sign up at the end. We need to be able to allow for such cases, as opposed to it being an excuse for putting the matter off and off and off until eventually somebody says, "I am not playing any more," so that it is in fact being used as a weapon to delay them long enough until the evidence is gone and then you refuse to agree the next time, and they are caught.

I also suspect that the argument about people being required to sue in a great number of cases for lots of things on a protected basis can be readily exaggerated. It does happen, and it is certainly true that the construction industry is particularly notorious in that respect, but it does not in fact take up much resource. What tends to happen is that you raise your action against all the people and they serve the thing, they get protection, and run around to all the defenders and say, "It is all right—you do not need to waste time defending this; we are going to agree to stop this. We will call it if we have to sist it. Once we have the time bar broken, we will stop and everybody can sort it out." It is not actually that much of an imposition and we fear that you may be producing something worse to cure a minor problem by allowing anything other than the tightest of rules on standstill agreements.

Basically, we consider that if Parliament has decided that these are the rules under which people's rights are to be extinguished in these circumstances, they should not be entitled to be altered by parties "agreeing" to something when the agreements may be more or less in somebody's interests. This is a situation in which, in some respects, Parliament may have to protect people from themselves.

The Convener: Mr Sheridan, Mr Howie vehemently disagrees with you; do you want to respond?

John Paul Sheridan: On the first point that Mr Howie made, I think that we might have been speaking at cross-purposes to some extent, because it is not the Law Society's position that people should be able to contract out of something in advance. The example that he gave is a good one. We are not suggesting that a bank will have a bunch of solicitors on its panel who say, "You're responsible for 30 years." The bill covers that.

I do not accept the suggestion that there would be some sort of free-for-all. Both sides would have to agree to a standstill agreement. If, for example, the insurers thought that it was unreasonable to continue the period, they would not need to agree and proceedings would need to be raised. If both parties must agree to the extension of the period, I see no reason in principle why parties should be prevented from agreeing a contractual position.

Mr Howie suggested that there is not a big problem in practice. That is not the society's experience. There are several hundred claims a year. Construction is a good example. Another is banks and lender claims—several hundred actions are raised and served, which wastes time not just for the solicitors and parties who are involved but for judicial resources. I see no reason in principle why there should not be agreement among commercial parties or individuals.

The Convener: Do you want the final word on this, Mr Howie?

Robert Howie: With respect, as far as judicial resources are concerned, the position is in danger of being misunderstood, because of course the whole point of the approach, if it operates properly, is that judicial resources are never involved; all that happens is that the case goes into court to be called—if it has to be in the Court of Session; in the sheriff court it does not even need that, because it is simply served. The case might never see a judge, because people promptly sist the things, to ensure that neither time nor money is spent that can be avoided.

I suspect that m'learned friend Mr Sheridan and I have a fundamental difference of view about the right thing to do and that the legislators will have to do what they are there to do, which is to make up their minds which way to jump.

Neil Findlay: The number of difficult cases might be small—let me take us back to the conveyancing case that I mentioned, as well as the Paterson case—but such cases are fundamental to confidence, particularly in the conveyancing system. Do we just say, "Oh, well, these are just odd cases, and in the big scheme of things they do not really matter"? Ultimately, when such cases get a high profile, people say, "These people thought that they had purchased a property and everything was fine, because they had engaged a professionally qualified solicitor, but what they expected did not materialise", and the conveyancing system is called into question.

John Paul Sheridan: I do not know anything about the Happy Valley Road case that you are talking about, and I am not sure of the full details of the Paterson case. However, I accept your point in principle. There has to be an element of confidence in the conveyancing system as a whole. The Parliament has looked at the land registration process, including deeds and so on, and I understand that there is an incentive to register all land on the land registry within the next seven or eight years. That might do something to resolve the issue.

I am not sure what the solution is, because if there is a cut-off point of 20 years, as a point of general principle, there will still always be people who do not know that there is a problem until after the period has elapsed. People can buy homes and own them for 30, 40 or 50 years without ever looking at the title deeds. I am not sure what the solution is to that.

Robert Howie: I suspected that we might be asked how many of these hard cases there are. When Campbell Riddell was in the inner house, Lord Malcolm observed that there would be more such harsh cases than had perhaps been thought when Morrison was decided. I bent my mind to devising a way whereby one could get, on the basis of scientific evidence as opposed to anecdotal material from the likes of me, an idea of how many such cases there are. I regret that I do not think that there is a way of doing that. One of the reasons is that, if cases are abandoned for Morrison or Campbell Riddell-type reasons, it will happen in private, quietly. Nothing will appear above the waterline. What will be seen in court is a document that is indistinguishable from the document that would go in if a pursuer had won on a settlement, if a defender had won on a settlement, or if the case had gone away for umpteen reasons. There is simply nothing that would give it away. The best that you could do is rely on anecdote, and Morrison and Campbell Riddell have done quite a lot of damage, and will kill quite a lot more cases yet.

The difficulty that you have, particularly with conveyancing cases, is that you are talking about losses that happen at such long terms that, if you used that as the determinant of where you were going to fix your ultimate long negative prescription—what we have been talking about is a vicennium, or 20-year period—you would end up with a period so long that applying it across the board as the general cut-off for all obligations would pick up all the other obligations that had not been picked up by the five-year period, and the sets of five years could carry on not four times but 10 times. Let us say that 50 years was the ultimate cut-off date. You would find yourselves in the kind of difficulty and with the kind of cases that you will find if you look up 17th and 18th century law books. When we had 40 years as the period of long negative prescription, cases were fought on and on and on. The whole reason why things were pulled back in the 1970s to 20 years was to make a major reduction from the 40-year period, because it was felt that people were trying to pursue obligations at 35 years, when everybody was dead, half the evidence was lost and it was a hopeless endeavour for a court to work out what to do.

The difficulty is that the issue simply demonstrates the old adage about hard cases and bad law. If there is a particular problem in relation to conveyancing, that would suggest that the place to attack it is not the general law of prescription, which is what you are considering here, but in legislation relating to conveyancing. However, I would caution that the problem may just be impossible. It is a function of this: if you have any line drawn in the sand to show the point beyond which your rights are extinguished, there is always some poor soul who will find himself in some case on the wrong side of that line through no fault of his own, and there is nothing that human power can do about that.

Neil Findlay: I agree. I do not think that the remedy is in prescription.

The Convener: Those are all our questions for you, Mr Howie. We still have the second panel to go. Thank you for your time.

10:57

Meeting suspended.

10:59

On resuming—

The Convener: I welcome our second panel this morning—Douglas McGregor of Brodies LLP, Craig Connal QC of Pinsent Masons, Fenella Mason, head of construction and projects at Burness Paull LLP, and Iain Drummond of Shepherd and Wedderburn. Mr Drummond—am I right in saying that your firm has not given us any written evidence so far?

11:00

Iain Drummond (Shepherd and Wedderburn): That is right—we participated in the earlier workshop stage, but we did not provide a written response.

The Convener: Okay. It was suggested earlier that you might be the wild card on the panel. We have no idea what you are going to say.

Moving to questions, you have all been invited because you are involved in construction and engineering disputes and perhaps come at the matter on a different tack from the previous panel. We will start off with a question from Neil Findlay.

Neil Findlay: At the start of the session with the previous panel, I asked about section 3 and the extension of prescription to all obligations to pay money. What comments does the panel have on that section? Do you approve of what is being proposed and do you agree with the exemptions?

Fenella Mason (Burness Paull LLP): Prescription is not something that regularly troubles us in the construction arena, but I agree with the commission's approach and the introduction of the five-year prescriptive period in relation to statutory obligations to make payment. The Scottish Law Commission has approached the matter by distinguishing between statutory obligations, which are more akin to private-law rights, and public-law rights such as taxes, which have been carved out as exceptions.

One of the few experiences that I have had in the arena of statutory obligations to make payment was with clients in relation to Scottish Environment Protection Agency invoices, which look like contractual invoices but do not prescribe. That did not seem to be terribly fair, because the invoices came about through what looked like a contract and were operated in a way that was like a contract. However, although the invoices had not been followed up, and the client organisation had been bought and sold and so papers were lost, it was still exposed to an imprescriptable claim. Therefore, I agree with the approach that has been taken.

Douglas McGregor (Brodies LLP): We also agree with the approach that the commission has adopted and have no difficulty with the proposed exceptions that have been agreed. We have not been privy to the submissions that were made to the commission by various bodies about the exceptions, and in an ideal world there probably would not be any exceptions to a general rule, but the decision has been taken and we do not have any problem with it.

I heard the previous session, in which there was some talk about preserving the status quo. That is potentially a good reason for including some of the exceptions. We should perhaps make the point that the number of exceptions should be limited. This is meant to be a general rule about statutory payments; if we get into a situation in which every statute introduces a new exception to the general rule, that might cause problems. Therefore, we would like there to be a limited number of exceptions, but we have no difficulty with the ones that are in the bill.

Iain Drummond: I will not deploy my wild card just yet; I agree with what has been said, and Shepherd and Wedderburn does not have any particular issue with the approach that has been taken. The exceptions that are listed are really policy exceptions, and I can understand the policy behind them. It is clearly a matter for Parliament to decide whether they are correct.

Craig Connal QC (Pinsent Masons): I have nothing useful to add on the matter. I am not particularly representing a construction industry focus. My position is more general, but I agree with what the other panellists have said.

Neil Findlay: In terms of construction, can the panel give examples of the kinds of areas that they would be involved with in relation to payments between two parties? Would it be the type of arrangement that exists between a main contractor and subcontractor? As a construction lawyer, what would your involvement be in disputes around payment?

Fenella Mason: Normally, disputes would relate to private rights, so the answer to your question would be yes. This is about disputes between the contractor and his employer, between the contractor and his subcontractor or between the design team.

Neil Findlay: Are disputes in those areas an increasing phenomenon?

Fenella Mason: Things seem to be very busy, but that seems to be something that is cyclical. We tend to see more disputes when the economy is buoyant, and we are very busy with construction disputes at the moment.

Neil Findlay: I realise that this is going wider than the current topic, but I am very interested in the matter. It seems to me that it is becoming standard practice in contracts—some main contractors see disputes as part of the process. Some people recently told me, "We do work for company X, but we know that we will be in dispute with them, irrespective of how well we do the job, of the quality and standard of our work or of the timescale that we do it in." Companies seem to operate on the basis that they will have disputes.

Fenella Mason: I am not sure that I would say that parties go into a contract intending to have a dispute, but they probably go into one without putting enough money into it. If there is not enough money in the contract, people will end up in a dispute. They will be desperate for more money, so they will not price any risks that are inherent in the job.

Iain Drummond: I tend to agree with that. People in the industry are talking about two particular issues, the first of which is how tight the margins are. With margins at between 1 per cent and 3 per cent, even a fairly minor problem can eat up the margin for the contractor, so they have to find some way of making it back.

The other problem is, as Ms Mason has highlighted, the lack of attention to design and planning. Everything is done in such a rush now that the temptation is often to skimp on those aspects. Construction is, apart from anything else, a complex business. There will be problems, and it will be difficult to sort them out when the margins are so tight. Contractors would say that, in the olden days, when margins were better, they were able to resolve difficulties with their clients and perhaps allow some of the margin to be swallowed for the sake of future relationships. However, that sort of thing is much more difficult at the moment.

Neil Findlay: Was that culture partly behind the collapse of Carillion?

Fenella Mason: It is difficult to say, but my sense is that a lot of it had to do with overoptimistic bidding. The market is very competitive.

Neil Findlay: I am sorry to deviate, convener, but since the witnesses were here, I had to ask the question.

The Convener: That is okay. I like to give a bit of leeway, and the questions were interesting.

Who comes after you, Mr Findlay? Have you finished your questions?

Neil Findlay: I am sorry, convener—I have another question, which is about the start date for the five-year prescription in relation to paying damages. In response to the reversal in the Morrison case, the Scottish Law Commission consulted on four options for section 5 before deciding on option 3. What would be your preference? Are you happy with option 3 being favoured?

Iain Drummond: I am certainly in favour of option 3, which I think represents the best balance in respect of curing the current situation and moving back to what the law was before the ICL Plastics case. It also includes the new ingredient of needing to know the identity of the person in question. I know that concern has been expressed that that will unduly lengthen the time before the five-year period starts to run, but in my opinion it is actually quite a short hop between paragraphs (b) and (c) in proposed new section 11(3A) of the 1973 act, which would be inserted by section 5 of the bill. Once the party with the potential claim knows that

"the loss, injury or damage was caused by a person's act or omission",

the gap between that and knowing the identity of the person tends to be short.

It is fair to say that someone who does not pursue their rights within a certain period should lose those rights, but the corollary is that you must allow that person to discover that the loss has occurred due to someone's "act or omission" and to know the identity of the person so that they can pursue their rights in court. The balance, therefore, is a fair one.

The concern was discussed earlier that the five-year period might be moving on too much. The Law Commission pointed out that the fact that the 20-year period is, arguably, becoming shorter acts as a balance to that. I think that the commission feels—I agree—that that is a counteracting aspect that helps to keep the balance.

Fenella Mason: I agree with that. We were horrified by the Stockline decision; it seemed unfair and unduly harsh. The proposed reform strikes a much fairer balance between the two parties.

Douglas McGregor: Brodies also opted for option 3 when we responded to the consultation. We are quite happy with the bill.

The Convener: Mr Connal, did you go for option 3?

Craig Connal: No, I did not. Committee members should understand that this area of law is every lawyer's nightmare. Such matters are very difficult, and whatever the Scottish Government says, under the bill they will continue to be difficult.

Prescription gives everybody nightmares. It is the least favourite question to be asked.

Perhaps I can illustrate the position by disagreeing with something that Mr Howie said earlier. I will use the Stockline example. The place blew up. Generally speaking, the conclusion would be that such things tend not to happen due to an act of God: there is likely to be some fault somewhere. I suspect that many people took the view that proceedings ought, if it were at all possible, to have been raised against somebody within five years of the incident. There might have been a debate about who, and more than one target might have been identified.

One of the difficult questions that arises in such areas—I am sorry to raise a broader issue—is what the five-year period is intended for. I raised that question with the commission. If you follow the average case through and you know that there has been a loss, you know that it was somebody's fault and you know who that somebody is, what policy purpose does the five years fulfil? That is quite a long time to wait just to start proceedings, which then take more time.

I do not necessarily agree with Mr Howie that proceedings nowadays will take ages, because other policy initiatives, of which the committee might be perfectly aware, are designed to make court proceedings more efficient and speedier.

It is quite a difficult exercise. Mr Drummond talked about balance, and the commission has referred to trying to strike a balance between competing interests. Everybody's anecdotal material is different, but in my experience, over a depressingly large number of years in contentious work, 20-year prescription cases, in any form, are pretty rare animals. I do not know how many times I have been asked about a 20-year prescription, but it is not many.

Five-year cases are always on the table somewhere in the mix, so an extension of the five-year period—potentially, by quite a long time, by the time one has all the elements—would impact on far more cases, just in terms of volume of claims, than a change to the 20-year period. It is quite difficult to find that balance. The commission has decided to fix that.

The issue of identity is quite well illustrated by the Stockline case. In that case, a person might well have thought, "The building has blown up and I'm injured, so I have a claim". Really, the only question was who was responsible. There was an obvious target, and further investigation revealed another less obvious target in relation to the gas systems and so on.

Undoubtedly, though, option 3 has scope for substantially extending the period, although broadly speaking, the world is going the way of tightening time limits. You will see that the average personal injury case ends after three years if people do not get off their mark and sue. Other statutory provisions use one year, and most people who have contracts that have bars on claims have shorter periods.

I felt that the balance had tilted a bit more, but that is just a personal view.

The Convener: Thank you for that.

11:15

David Torrance: Section 8 proposes a new start date for 20-year prescription that, in some cases, will be earlier than the current law, and never later. What are your views on that?

Iain Drummond: I agree with that approach. It has the benefit of certainty, which is the overriding aim of the change to the legislation. In the sphere of work that I and Ms Mason are in—disputes in building contracts—it will probably shorten the 20-year prescription period. I do not think that that will create a problem in practice; I do not believe that lots of cases will fall foul of the new slightly shorter period.

At the moment, the difficulty is usually with the five-year period. In my career to date, I think that I have only once had an issue with a potential 20-year period. It is not a big issue, so I think that the approach that is being taken is important. If you asked most people who practice what the point is of the 20-year period, they would say that it is a long-stop. Most people—even solicitors who practice in this area—will not appreciate that the period can start quite a lot later than they think it would. There is then the possibility of the period being interrupted. However, because it is a true long-stop and it is certain, I favour the approach that is being taken.

Fenella Mason: I agree that it is a difficult area and that we are now moving towards looking at when the wrong occurred, as opposed to the previous situation, when there had to have been damage. In my area of work, the 20 years would previously have started when cracking occurred in the building. Now, the 20 years will start from the wrongful design that allowed the cracking to occur.

Let us take as an example a big infrastructure project—the Queensferry crossing. Let us assume that, back in 2008, one of the bridge's designers created a doomed or defective design. The structure did not open until 2017. It is not unusual for it to take 10 or 12 years for a problem to manifest itself, by which time it would be too late, because it would be more than 20 years since the wrongful design was created. I suppose that it is exactly the same for Mr Paterson's example of

defective conveyancing—the right to pursue an action has gone.

It is harsh and difficult, but we have talked around and around it, and we have come back to the same position, which is that we have to draw a line somewhere. The problem is that after 20 years, records and witnesses cannot be found, people will have died and people will have left the company, so it becomes incredibly difficult to pursue an action. Overall, the change is the right thing to do.

The Convener: Do you think that it is the right thing to do because it is difficult to do something else?

Fenella Mason: The proposal is simpler and cleaner, and it is logical.

The Convener: Your example of the bridge was very good, because the projects are long-term projects. Mr Howie seems to think that it is right to set a limit. In a case where problems may emerge some years down the line, is it right to set a 20-year limit?

Fenella Mason: For us, there is a marked difference between the position of the designer and the position of the contractor. With the contractor, it is much easier to see that 20 years from the date of the wrong is fair, because the wrong will be when the contractor completes the structure and hands it over. On the Queensferry crossing, for example, the 20 years would start for the contractor in 2017, but the designer on such a big project will have done a great deal in advance, before anybody ever puts the project in place. There is a disparity there, but I cannot see a way of dealing with that in legislative reform.

The Convener: There is a disparity, and we would have no idea that the designer had done something wrong until, for example, the bridge was open and had been in operation for years.

Craig Connal: I agree with the principle of the 20-year period. We have to acknowledge that it is simply a question of policy. Most jurisdictions have some kind of long stop and they just take a view on that. Other jurisdictions have a period of less than 20 years. Twenty years is not particularly short or out of place. I think that it is the right thing to do. If you have a simple rule, once everybody knows that they can gear themselves up and inspect the bridge to find out what the situation is.

The reality of trying to deal with claims after a very long period is quite significant. We had a case, as I mentioned in my submission to the committee, in which somebody was complaining about something that was done on a document 47 years previously. Everyone wondered, "Who was that? I can see initials on the document, but this person is dead and anyone who worked with them has gone." Papers get destroyed, and even in the electronic world it can be very difficult to track random emails from a long period ago.

There was a case involving the Kingston bridge in Glasgow that I have a vague recollection of—I cannot remember now why—and it caused enormous problems because, under the previous law, it was said that no loss had been incurred until many years after the event, and that therefore time had not started to run, so people were trying to traipse back into history. You will encounter great difficulties in getting a just solution after that time. It is just a question of policy, and I think that 20 years is the right period.

Douglas McGregor: We agree that that is the right policy, for the reasons that have been given, as it provides clarity and certainty. It is also more in keeping with the idea of the 20-year period as a long-stop. In the bill, we have a package of reforms to the 20-year period that all, taken together, create that long stop period. It is worth pointing out that, as far as the 20-year prescriptive period is concerned, awareness of loss has never been an issue. It is not like the five-year prescription, where the period is delayed by lack of awareness. For the 20-year period, awareness has never been an issue. What is looked at is the fact of loss, injury and damage having occurred; that in itself is a separate argument that people have in cases from time to time, but it is not as if the awareness issue is being removed by the bill.

David Torrance: The Law Society and the Faculty of Advocates have previously expressed concerns about how section 8 would work in relation to omission and continuing breaches. What are your views on that topic, including the comments by the Scottish Law Commission's representative during our first evidence session today?

Iain Drummond: Rather like the previous panel, I struggle to see a solution to that. An omission is, by definition, something that has not been noticed. It is an act that has not been done that ought to have been done. If it has not been done, it is difficult to know that it is absent. I do not see a solution, but I agree with the approach that is taken in section 8. That is probably all that I can say.

Craig Connal: I listened to what was said earlier, which I found quite interesting. The only reconciliation that I could make is that, if you are dealing with a claim that arises from the involvement of some former professional, such as a surveyor or a lawyer, there is usually a time when that person ceases to be involved in the matter; the omission would presumably cease when their engagement finished, so in practice it might not be as repeatedly difficult to deal with as

has been suggested. Beyond that, however, I have nothing useful to add.

Douglas McGregor: I agree. Omissions are harder to deal with than acts, but I do not think that there is any way in which the bill can deal with or address that problem.

The Convener: I should mention to the witnesses that not everyone ought to feel that they must answer every question.

Neil Findlay: Are the panel members all defending cases from people who are claiming, or are you on both sides—both prosecuting and defending?

Fenella Mason: We are all on both sides.

Stuart McMillan: Section 6 addresses whether the 20-year prescription will be able to be interrupted and whether it can be extended to allow continuing litigation or other proceedings to finish. What are your thoughts on that?

Iain Drummond: I have probably answered that already. Most practitioners would consider the 20-year prescription to be a pure long stop—it starts and finishes and that is it. They would not readily appreciate that it can be judicially interrupted by proceedings. I agree with the commission's approach that that goes against the policy of it being a true long stop, so I agree with the approach that is being taken.

Douglas McGregor: In the consultation, we suggested that one possible alternative—I think that it was referred to earlier—might be that the 20-year period could simply be suspended for the period of the court action so that there would be a period that had run before the action was raised, the period of the court action and the remainder of the 20-year period. That is only one possible alternative and there are benefits to it in the sense that it is a halfway house between what we have at the moment and what the commission proposes.

However, our real problem and the reason that we raised the issue in the first place was the concerns that we had about the possibility of rights prescribing during litigation. The commission is dealing with that elsewhere in the bill, so that concern flies off. In those circumstances, we accept that the proposals that the commission has made fit better within the framework of the 1973 act and we are content with the decision that the 20-year period should not be capable of any interruption or suspension.

Fenella Mason: I agree. The current situation of restarting the clock makes no sense. The 20-year period should run and that should be it.

Craig Connal: I have nothing to add to that.

Stuart McMillan: I have a question on the back of what Mr McGregor and Ms Mason said. Mr Drummond, your position is just to continue. Do you agree or disagree with your colleagues on the panel or do you have anything further to add?

Iain Drummond: My position is the same, actually. The 20-year period should start and run over those 20 years continuously, which is what the commission proposes. I did not mention the subsidiary point, which is that there ought to be a short extension at the end if proceedings are on the go, for example. We cannot have a situation in which rights are litigated prior to the end of the 20-year period and then end just because the 20-year period comes to an end. That is good common sense.

Stuart McMillan: Section 7 says that the type of 20-year prescription that is applicable to certain property rights can no longer be interrupted. Again, there is the possibility of an extension to allow continuing litigation or other proceedings to finish. The Faculty of Advocates has suggested that that approach might not work as well for property rights such as servitudes. What are your thoughts on that issue?

Fenella Mason: Property law is not my area, but I listened to what Mr Howie said and was in complete agreement with him. It made complete sense.

Craig Connal: I agree. It makes logical sense. I do not think that the intention of the drafting was to cut off any right. That was not the way in which it was structured. However, I do not have any concrete examples to offer the committee.

The Convener: The witnesses heard the earlier discussion about contracting out. What are your views on that?

Douglas McGregor: We agree entirely with the commission that the option of contracting out should be available to parties. It would be available only in relation to the section 6 five-year and section 8A two-year prescriptive periods under the 1973 act. We agree that it should be limited to one chance at varying the period, that the variation should be a maximum of one year and that it must be made during the statutory prescriptive period.

Our only remaining concern is about the language in section 13, which talks specifically about extending the prescriptive period and provides parties with the right to do that. It does not talk about suspending the prescriptive period. Our view is that suspending the period is often a more attractive option for parties. It would also work better with the one-year restriction, because parties would have more certainty about the length of time for which they were agreeing to suspend the prescriptive period.

11:30

When you are looking to extend a period by no more than one year, there needs to be some knowledge of the start date and the end date of the prescriptive period. Allowing only extensions will cause problems in the future. We are keen that the bill should be amended to allow extension, possibly alongside suspension; both can operate successfully, but we would like to make sure that suspension is a possibility.

Craig Connal: I endorse what Mr McGregor said about suspensions. I discussed that with him before we joined the committee; I had not considered that before, but as soon as he told me about it, I thought that it was an excellent point. In reality, such things arise. People have not worked out a precise start date and end date and, when we are talking about extension, we are actually talking about pressing the pause button. In my experience, what happens is that you think that your claim is against A and everybody thinks that A is probably the right target, but it might be against B, so then you start to worry about the time bar so you pause on B until A gets sorted out.

For that reason, I agree with the Law Society's comment about timing. I do not see why the period should be restricted to one year in all cases; there might be cases in which a longer period could be agreed. I certainly do not agree with the faculty's view that this is some kind of abusive process.

Everyone's experience is different, but these things tend to arise in discussions between lawyers on both sides. If someone was bothered that a lay party was going to be bulldozed into something unwise, no doubt, as in other legislation, it could be written in that it would be possible only if the party had independent legal advice or something of that kind. However, I suspect that that is an unnecessary precaution. Such issues are usually discussed between lawyers in a messy situation in which there is good reason to press the pause button. I think that it is an excellent idea.

The proposed solution is commonly used in England and Wales and, although that is no reason to do anything, it is a practical solution. Mr Howie was right to say that judicial resource is not usually deployed to deal with such claims when they are commenced, but it is not always easy to do that in the Scottish system, where proceedings have to be served to break the time bar—in England, they are just issued and passed to court—and that might mean having to find someone when you are not sure where they are because they have changed address, or their company has changed or whatever. Being forced to rush about and do that can mean worry and expense.

The option is therefore worth while. The issue of how big a difference in cost it would make could be exaggerated, but the option is worth while.

Fenella Mason: We are in favour of the introduction of a standstill agreement and we have had experience of English clients and lawyers asking us for a standstill agreement. We are all talking about the problem and we do not know the cause of the defect that has emerged; we want to investigate it but we do not want to litigate. Our advice on that has to be that we cannot do it; we have to litigate to stop the clock running. That sets the scene and it can set parties against one another when they have been working together. A standstill agreement would be a welcome introduction.

There is another point about contracting out that causes us real concern. For some reason, the Scottish Law Commission has not picked up this point in its report; it has been sort of dismissed. However, it was picked up in the 1989 report. It is in relation to the parties' ability to shorten the prescriptive period; we come across that issue regularly.

I understand that the commission is reluctant to get into the issue because of the distinction between prescription and limitation. You are all probably looking blank now; indeed, a lot of lawyers look blank, too. To my mind, the distinction is pretty artificial. The commercial reality is that parties need to be able to price for risk, and in the big infrastructure jobs that we see, they will accept around a 12-year period. Everyone knows that that is the position, and we do not want parties arguing over whether the clause in the contract that says, "We're on the hook for only 12 years" is prescription—and therefore void and null, because it is an attempt to contract out—or limitation, which is allowed. If the language is incorrect, it might fall foul of the legislation. We know that the purpose of the legislation is to produce certainty and avoid stale claims, but it is not there to interfere with the freedom to contract.

A real opportunity has been missed in this legislation. The wording in the draft bill in the 1989 report is, to my mind, very adequate to deal with this problem, and it makes it clear that one can, by contract, limit one's exposure. That provision is not in the bill, and I think that it is a great shame that we have not taken the opportunity to reassert that.

The Convener: That was very useful.

Iain Drummond: I tend to agree with most of what has been said, but I want to pick up on two points. First, I think that limiting the standstill agreement to one year would, in practice, undermine the utility of such agreements. I can think of three cases that my small team is handling

in which the investigation of building and engineering defects is taking far longer than a year, because they are so complex. If these agreements were restricted to a year, the tendency would be to not use them and to raise proceedings in a protective way, as happens at the moment. That would be my concern: if we are going to have standstill agreements, we must ensure that they have a commercial utility.

Secondly, I absolutely agree with the point about there being no reference in the bill to restricting the limitation period. In its report, the commission specifically picks up on contractual limitation clauses not only in the area of conveyancing but in building contract claims, and it says that it does not want the provisions in section 13 to disturb the ability of commercial parties to enter into contractual limitation clauses. However, my concern is the same. Section 13 does not make that clear, and I think that, in future, there will be arguments in the courts over whether, in particular, proposed new section 13(4)(b) of the 1973 act, as inserted by section 13 of the bill, strikes down contract limitation clauses, which the commission has said is not the intention. I would prefer section 13 to be clarified so that it specifically says that contractual limitation clauses are not intended to be struck down by the provision.

It is perhaps a general rule that it is not particularly good statutory drafting to include a "for the avoidance of doubt" provision, but that sort of thing already happens in the bill in, for example, proposed new section 11(3B) to the 1973 act, as inserted by section 5(5). After the provision in proposed new section 11(3A) setting out the facts that a litigant needs to know for the five-year period to start running, proposed new subsection (3B) says, almost for the avoidance of doubt, that the individual does not need to be

"aware that the act or omission ... is actionable".

I would prefer to see a similar provision in proposed new section 13(4)(b) of the 1973 act that preserves contractual limitation clauses.

The Convener: Does everyone else agree?

Douglas McGregor: I do not necessarily agree, but I see the problem that is being talked about. The view that we formed was that the bill as drafted would not prevent contractual limitation clauses, but clearly others have formed a different view. As that will no doubt become an argument at some date, there might be some advantage in clarifying matters, just to prevent any dispute from arising in the future.

Fenella Mason: That is the problem. It leaves scope for argument, which is unnecessary and unhelpful.

Iain Drummond: These clauses are in widespread use across private finance initiative contracts, building contracts and so on. The practice comes from English law, but it is now established here, and if there is no clarity to protect it, it will give rise to a lot of arguments.

Craig Connal: I have not come across the argument about this particular section and where it falls foul, but that might be down to the random nature of people's general practice. As the committee will be aware, it is commonplace for contracts of every kind that everyone will enter into to contain a provision that basically says, "If you want to complain, you must make a claim or whatever within a particular period." In the main, that does not seem to have caused any problems. I have nothing more to add on the matter.

The Convener: I thank Ms Mason for raising the issue. If anyone wants to write to us with further thoughts on the matter, please feel free to do so.

As members have no more questions, I thank our witnesses very much for their time. We have had a couple of very interesting evidence sessions this morning.

11:41

Meeting suspended.

11:42

On resuming—

Housing (Amendment) (Scotland) Bill

The Convener: Agenda item 3 is consideration of the Scottish Government's response to the committee's stage 1 report on the Housing (Amendment) (Scotland) Bill. The Government's response does not refer directly to the committee's report, but its recommendations with regard to sections 8 and 9 are relevant to the committee's concerns.

Section 8 concerns the power to modify the regulator's functions in relation to social landlords, while section 9 concerns the power to reduce local authority influence over registered social landlords. In each case, the committee was concerned that the powers were too broad to achieve the stated policy objective of ensuring compatibility with registered social landlords being classified by the Office for National Statistics as private sector bodies in the UK national accounts, and it considered that the powers in sections 8 and 9 could be framed more narrowly. The Government has responded by confirming that it will lodge an amendment at stage 2 to provide for the regulation-making powers at sections 8 and 9 to expire three years after the bill receives royal assent.

Does the committee wish to note the Government's commitment to lodging amendments at stage 2?

Members *indicated agreement.*

The Convener: We now move into private session.

11:43

Meeting continued in private until 12:08.

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