OFFICIAL REPORT
AITHISG OIFIGEIL

Delegated Powers and Law Reform Committee

Tuesday 24 April 2018

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 24 April 2018

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DELEGATED POWERS AND LAW REFORM COMMITTEE
13th Meeting 2018, Session 5

CONVENER

*Graham Simpson (Central Scotland) (Con)

DEPUTY CONVENER

*Stuart McMillan (Greenock and Inverclyde) (SNP)

COMMITTEE MEMBERS

*Tom Arthur (Renfrewshire South) (SNP)
*Neil Findlay (Lothian) (Lab)
Alison Harris (Central Scotland) (Con)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Bill Bowman (North East Scotland) (Con) (Committee Substitute)
Mike Dailly (Govan Law Centre)
Mike Holmyard (Citizens Advice Scotland)

CLERK TO THE COMMITTEE

Euan Donald

LOCATION

The Adam Smith Room (CR5)

Scottish Parliament

Delegated Powers and Law Reform Committee

Tuesday 24 April 2018

[The Convener opened the meeting at 10:00]

Interests

The Convener (Graham Simpson): I welcome members to the 13th meeting in 2018 of the Delegated Powers and Law Reform Committee. I welcome Tom Arthur to his first meeting of the committee, and I thank David Torrance for his contribution to the work of the committee. Alison Harris has submitted her apologies.

I will formally welcome Mike Dailly and Mike Holmyard to the meeting in a minute. Before the evidence session begins, there are a couple of pieces of business that we must decide.

The first is a declaration of interests. In accordance with section 3 of the "Code of Conduct for Members of the Scottish Parliament", I invite Tom Arthur to declare any interests that are relevant to the remit of the committee.

Tom Arthur (Renfrewshire South) (SNP): Good morning, and thank you very much, convener. I am delighted to join the committee. I have no relevant interests to declare.

Decision on Taking Business in Private

10:01

The Convener: Item 2 is to make a decision on taking business in private. It is proposed that we take items 6 and 7 in private. Item 6 is on amendment at stage 3 of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill, and item 7 is on relevant recent developments in relation to the European Union (Withdrawal) Bill. Does the committee agree to take those items in private?

Members *indicated agreement.*

Prescription (Scotland) Bill: Stage 1

10:01

The Convener: Item 3 is consideration of the Prescription (Scotland) Bill. This is the fourth of our evidence sessions on the bill. We have with us today Mike Dailly, who is a solicitor advocate and principal solicitor at the Govan Law Centre, and Mike Holmyard, who is a money advice consultant with Citizens Advice Scotland. We have two Mikes, so that could be interesting. I welcome you both to the meeting.

Neil Findlay (Lothian) (Lab): The Scottish Government has suggested that the exceptions for council tax and business rates are likely to be unchanged, which makes those debts subject to 20-year prescription, but it has been suggested that some councils may treat such debts differently and apply a five-year prescription. What is your experience of pursuing such debts?

Mike Dailly (Govan Law Centre): It is unfair to have a 20-year prescription period for council tax. The period is six years in England. If you go back to the Scottish Law Commission's discussion paper, you will see that the idea—which is laudable—was to have clarity, simplicity and certainty, and to have all legal obligations subject to a five-year prescription. That principle is absolutely correct. I say that in an ideal world, it would be five years for council tax—it would be five years for everything. However, Govan Law Centre appreciates that the bill does not make provision for that, and that there are exceptions.

What we suggest as a compromise for the committee to think about, if we are not going to get the ideal period of five years, is that the statutory obligations that have been excepted should be subject to five years' prescription, with a test of whether there have been exceptional circumstances. The exceptional circumstances test that we propose is to establish whether wilful, false or misleading information has been given by the debtor, which has resulted in a material delay in enforcing the debt. That is the situation in Malta for tax, in relation to which there is a six-year prescriptive period that can be extended if wilful or misleading information has been provided. The second scenario is where the creditor can show that there has been a delay in enforcing the obligation that was not a material delay caused by its sitting on the debt.

The ideal situation would be a five-year prescription for everything. If we are not going to have that, it cannot be right to have exceptions for 20 years for all the different categories, because that will not fulfil the Scottish Government's aim of achieving simplicity, fairness and clarity.

Neil Findlay: Did you say that the period is six years in England?

Mike Dailly: Yes, for council tax.

Mike Holmyard (Citizens Advice Scotland): CAS agrees that five years is long enough. Our advisers encounter issues when they talk to clients about council tax debts that are 15 or 18 years old, and the client has no recollection of whether the debt has been paid and cannot get bank statements dating back to that time.

Also, the council, on the other hand, may have changed its systems during that time. The old debt could be on a previous system and the council cannot prove that the debt is owed by producing a statement of account, but sheriff officers are still pursuing the debt. In relation to fairness, as with any other type of debt, it is quite difficult for a consumer to contest whether a debt that carries on for that length of time is still due.

Neil Findlay: Have either of you had discussions with the Government on that issue?

Mike Holmyard: No.

Mike Dailly: No. I completely agree with Mike Holmyard's point about old council tax debts that are still kicking around. How come we have 20 years for that, when the Parliament has had to rectify the old poll tax debts, which kicked around for a very long time? In England and Wales, the liabilities were extinguished. We did not do that in Scotland, which was wrong—we finally got round to doing it not long ago, through the Scottish Parliament. It is incongruous to say that people should not have been subject to a 20-year period for poll tax debt and so on, but that we will extend the period for council tax debt.

Mike Holmyard: We should remember that every payment that is made during the five-year prescriptive period just extends the period, so a council tax debt that starts now could still be being collected in 18 or 19 years, just because payments have been made and the five-year prescriptive period has been renewed. It is good to have a 20-year long stop, but with a five-year prescription a debt can still carry on for a very long time.

Neil Findlay: There must be some basis of truth in the Law Society of Scotland's suggestion that some councils are deliberately not pursuing debts because of the 6 per cent surcharge that is added to the debt, which is a benefit to them. Do you have any experience of that? Is it happening?

Mike Dailly: What I have seen happen in relation to council tax debt is local authorities going for sequestration. If the person is a homeowner, that approach can be pernicious: if

the homeowner has more than £3,000 of debt, the local authority can petition for sequestration. That happens every day in Scotland. When it happens and there is equity in the property—there often is, particularly among people who have exercised the right to buy—the trustee in bankruptcy has a legal obligation to realise the assets on behalf of the creditors, so they end up creating homelessness.

Neil Findlay: If it looks as though we are not going to get this change, why not push as hard as we can to get it? I know Mr Dailly of old—he is a campaigner. I am sure that if we push hard at this stage and campaign hard, we can get it done. I hope that we are not throwing in our hand, at this stage.

Mike Dailly: No. Citizens Advice Scotland and Govan Law Centre are in complete agreement that the Scottish Law Commission is correct in its original premise about the purity of the principle of having five years' prescription. Why not have five years? It seems very peculiar that the period will be six years in England and that, as Mike Holmyard said, when the debtor makes a payment, the debt then continues for another five years, which means that the 20-year prescription is unnecessary for council tax.

If we are not going to get the five-year limitation, as we would prefer, it would be better, rather than the 20-year long stop, to have a compromise and make the fall-back position exceptional.

The Convener: Thank you for that. The role of the Delegated Powers and Law Reform Committee is to scrutinise the bill and to suggest amendments, so you never know what might happen.

The Law Society of Scotland suggests that the exception for council tax and business rates is unfair for other reasons. For example, it refers to unfairness to people who believe, in good faith, that they have paid their council tax, but many years later end up being sued in respect of their own share and the shares of other people, due to there being joint and several liability.

The Law Society of Scotland comments on the difference of approach in Scotland to council tax and business-rate debt from that in England, where—as Mr Dailly has said—a six-year period applies. What are your comments on its views? You have dealt with the six-year period, but what about the difference of approach and the issue of joint and several liability?

Mike Dailly: I agree with the Law Society's point that the complication with council tax is that, if two people are living in a property, whether as tenants or as owner-occupiers, they are jointly and severally liable for the tax.

We know that it is common for relationships to break down and for people to get into other relationships, which creates the uncertainty that the Scottish Government's originally framed request to the Scottish Law Commission was intended to remove. The bill is about clarity, simplicity and fairness; it achieves those things in some respects. Through the process of consultation and lobbying, however, the beautiful butterfly of the bill as a concept in the discussion paper has, perhaps, turned out to be a moth.

The Convener: A butterfly and a moth—let us figure that one out. Perhaps Mr Holmyard can work it out?

Mike Holmyard: No. I am not going to go there.

I agree with the Law Society's point about joint and several liability. It can be difficult in marital and relationship breakdowns when one person seeks advice because, as far as they know, they have paid in good faith towards the council tax, but the other partner has not. That person can be pursued for the other person's share of the council tax for up to 20 years after the last payment. That does not seem to be fair.

Stuart McMillan (Greenock and Inverclyde) (SNP): The effects of section 3 of the Prescription (Scotland) Bill and section 38 of the Social Security (Scotland) Bill is that five-year prescription would apply to overpayments of devolved social security benefits, but a 20-year prescription would apply to overpayments of reserved benefits.

We are considering a prescription bill, so one would presume that prescription is a devolved matter. The Scottish Government could, I presume, therefore decide not to allow the Department of Work and Pensions the exception from five-year prescription that it wants for reserved benefits.

Which approach do you favour in relation to prescription and reserved social security debt? Is it the five-year or the 20-year period? It would be helpful if you could provide examples.

Mike Holmyard: Clearly, for the reasons that we have already outlined in relation to council tax, we want a five-year prescription period, fitted as best it can be in the system. We would like a five-year prescription period for DWP debts. It will not make sense to someone who is claiming a Scottish benefit and a United Kingdom benefit that they can be pursued after five years for one debt but not for another. Consistency is needed; we agree with the Child Poverty Action Group on that point.

In giving advice, we often came across an example of where things go wrong with DWP debts. People who are claiming their state pension

come to see advisers when they get their first payment, which was short of what they had been expecting because there has been a deduction for overpayment of benefit many years previously, or for repayment of a social fund loan. Many people cannot remember having claimed the benefit; they had claimed it for a short time and then got into work and worked all the way to retirement age. In the meantime, the overpayment or social fund loan was festering away and not being dealt with.

Going back to the DWP to ask for evidence is very tricky. Often, it does not have records to show how the situation has come about. Also, claimants have by that point long lost any documents to show that they were making payments towards the overpayment or loan.

10:15

Mike Dailly: To go back to what the Scottish Law Commission said, one of the reasons for having prescription as a matter of public policy is, as Mike Holmyard has illustrated, that evidence and recollections from witnesses deteriorate over time. I agree with Mike Holmyard—we should go back to first principles and the period should be five years.

In response to the specific point that Stuart McMillan raised, we should think about the issue from the point of view of fairness. If somebody who receives social security benefits thinks that they have suffered an injustice or that a mistake has been made, they normally have a month to seek a mandatory reconsideration, although the period can be extended in certain circumstances. In general, people have a month to appeal. The UK social security system is utterly geared towards a fairly restrictive position, whereby people have very little time to challenge anything. However, in the bill we are providing for a 20-year prescription period when it comes to reserved benefits. That is completely unfair and inequitable.

You are right to say that the law of prescription is devolved to the Scottish Parliament. The same applies to pursuing matters through the courts in this country. I hope that the committee seeks to amend the bill, and I encourage it to do so, so that we have a five-year prescription period for all social security benefits, because that would be fair.

Mike Holmyard: I agree.

Stuart McMillan: When it comes to reserved benefits, which we have no control over, are you suggesting that the prescription period should be the same as for the devolved benefits?

Mike Dailly: One of the difficulties that we always have is with the provision in social security legislation that allows for deductions to be made from benefits. I fully accept that the Scottish Parliament cannot legislate in that regard, but we should maximise what we can do with the powers that we have to bring about uniformity in prescription. Otherwise, people who receive a combination of devolved Scottish benefits and reserved UK benefits will be in a right guddle.

Stuart McMillan: Is it not the case that a devolution issue could arise from that, whereby the Scottish Parliament could be considered to be meddling in a reserved area—I see that Mr Dailly is smiling—given that we do not have power over the 85 per cent of social security benefits that remain reserved? Could that give rise to a constitutional argument between the Scottish Government and the UK Government?

Mike Dailly: I think that we have already got one, haven't we?

Stuart McMillan: We have got more than one.

Mike Dailly: It will need to get in the queue.

I take your point, which is fair and proper. What I would say is that we must do everything that is possible and perhaps get the Scottish Government to look at the bill again. The committee should consider what could be done and put that to the minister when she comes to the committee.

Mike Holmyard: I would like to clarify that, under the system that operates in England, the DWP has six years to recover debts through the courts. After that, as Mike Dailly has said, a deduction for overpayment will be taken from on-going benefits. The DWP can do that at any time after six years. In addition, under the Welfare Reform Act 2012, the DWP has the power to do a direct earnings attachment, which means that it can go to the employer of anybody who is working and ask them to make a deduction from the person's wages without a court hearing or anything like that.

In England and Wales, the DWP has six years to recover debts through the courts, so it would make sense for there to be a five-year period in Scotland for the same thing. As I have said, the DWP will still have other powers that it can use to recover money, which would hopefully deal with the UK-wide issue.

The Convener: Neil Findlay has a supplementary.

Neil Findlay: I used to work in housing, but that was a while ago, so I cannot recall all the limits on the backdating of benefits. For reserved benefits, what is the timescale in which someone can receive a backdated payment, whether there has been an official error by the department or another issue? How long is that period, normally?

Mike Holmyard: Sorry, but I do not know off the top of my head.

Mike Dailly: It used to be a year, but I would need to double check.

Neil Findlay: Even if it is a year—given the atmosphere in the benefits system, the period has probably been chopped since then—if the department makes a benefit error, the individual can go back only a year for their entitlement yet, if the individual makes an error, the department can go back for 20 years.

Mike Holmyard: Yes.

Mike Dailly: I think that it is less than a year. As I say, I used to do social security tribunals. As we have said, there is no logical sense in the DWP having 20 years. At the end of the day, in terms of enforcing in Scottish courts, I cannot see how the prescription period is a reserved matter.

Neil Findlay: There is a basic element of justice and equity in the issue. On behalf of the claimant, you can go back only a year, but the department has 20 years. There is something grossly unfair in that.

The Convener: It is probably worth our checking whether the period is a year before our meeting next week.

Neil Findlay: Yes, it would be.

Stuart McMillan: Mr Holmyard touched on the CPAG evidence, and his reply was helpful, but I would like to hear from Mr Dailly on that. CPAG suggested that it does not favour the exception in section 3 for tax credits. Do you agree with that?

Mike Dailly: Absolutely. I come back to the first principle, which is that the period should be five years as a generality. If we are not going to get that concession from the minister, let us look to make the exceptions exceptional. It is ludicrous to have a period of 20 years for all these exceptions. Why do we need 20 years? For example, on defective products, under the EU directive on product liability, the pan-European period is 10 years. Why have we ended up with 20 years? That is a historical legacy that goes back to acts in 1469, 1474 and 1617, and I can see no basis for sticking to that period.

Mike Holmyard: There is also a joint and several liability with tax credits, which we have discussed in regard to council tax. The same issues could arise there.

Stuart McMillan: My final question is on council tax debt and overpayments, and the differential in the periods for those. What practical difficulties do you face in trying to deal with and help clients with their claims?

Mike Dailly: The difficulty is that nobody has any recollection.

One issue that the bill fails to address is the appropriate date for the start point for the five-year prescription period. That is set out in schedule 2 to the Prescription and Limitation (Scotland) Act 1973, and it is quite a complicated formula. For example, for things such as credit card debts or loans, if the agreement makes provision for when the money is due to be paid, that is the period when the five years start to be counted, failing which, it will be when there is a written demand for payment. At Govan Law Centre, we have cases before the sheriff appeal court in Scotland involving big UK and international companies that buy up debt. They do that because, since the financial crisis, the Basel Committee on Banking Supervision and the European Union have been pushing the banks to get rid of what are called non-performing loans, so the mainstream banks sell the loans to companies that then chase them up. That is a massive international industry.

For example, we have a case involving a client in Glasgow in which it is six years since the last payment was paid. However, the company can say, “Hang on, the start point should be from when we made the written demand.” Therefore, under the existing law, a period longer than five years can be created by making a written demand at a later point. We are arguing that the credit card agreement, which in that example was originally with Virgin and then another bank and then another, makes provision for the last payment.

We get into folk hiring advocates to argue how many angels are dancing on the head of a pin. My colleagues at Govan Law Centre and I think that the solution is to say simply that the start point of the five-year period for debts, for example, could be the last payment made. There is already provision in the legislation for acknowledging stuff that can, as Mike Holmyard said, extend the period, so it is not as if the situation is balanced. However, if we are really going to simplify things, we could just say that the last payment that is made by the debtor is the ticking point. That would create the Government’s policy objective of a creditor having five years to get the money and there being prescription if they cannot get it within five years.

Mike Holmyard: Just to add to what Mike Dailly has just said about the credit cards issue, we also face that issue in our citizens advice bureaux when people come in because they are trying to work out what date prescription should be measured from. If people contact the creditor, they find that they have one view, whereas we obviously have another view. That situation makes it very difficult for a debtor to represent themselves, or even for a lay representative to

argue for them, in cases that go to court. We need to get the services of somebody like Mike Dailly who would go and argue on behalf of the client.

On the question of the practical difficulties with council tax debt that goes back 20 years, that money often goes into different accounts for different years because of the way in which it is collected. The debtor might think that the oldest account has been paid when in fact the money went to a more recent account. When the sheriff officer contacts the debtor 10 or 15 years later to say, "You still owe this money," they cannot understand why the oldest account has remained unpaid.

On the issue of sequestration, which Mike Dailly also brought up, our advisers see clients who have built up council tax debts over 10, 11 or 12 years, apparently without the council having taken any previous action to collect those debts. To be honest, those people had probably got to the point where they thought that they were getting away with it, but then they receive a writ out of the blue that says that they are going to be sequestrated. The clients cannot understand how the council apparently goes from inaction to drastic action that will have an impact on any property that they own. A five-year prescriptive period would force all creditors actively to try to enforce their debt, which would perhaps put off the need for things such as sequestration by councils.

Stuart McMillan: That is helpful. Thank you.

The Convener: In a nutshell, councils would not be able to allow debt to build up, because they would have to act within five years.

Mike Holmyard: Yes, and they have the means.

Mike Dailly: That is what happens in housing law. The Scottish Parliament introduced pre-action requirements for both home owners and people in the social rented sector. That requires social landlords, for example, ultimately to raise proceedings for eviction and payment only once they have gone through a process of trying to help the person. The rest of our system is geared towards sorting out and maximising people's incomes through getting advice from CABx or other agencies, so the debt situation that we are discussing seems out of kilter.

With the power of technology, I have checked and found that housing benefit can be backdated only for one month, or for three months if the applicant is of pension age.

Neil Findlay: That is for housing benefit, but we are trying to find out about the other reserved benefits.

Mike Dailly: The nub of the issue is that the backdating periods have been shortened over time.

Neil Findlay: Absolutely.

Bill Bowman (North East Scotland) (Con): Good morning to the panel. I have some questions on the discoverability test. Section 5 sets out the new test associated with the start date for five-year prescription in relation to the obligation to pay damages. The Scottish Law Commission consulted on four options for section 5 before deciding to use option 3. Option 1 was to keep the law on Morrison, option 2 was to go back to the law as understood before Morrison, option 3 was to go back to the old law but to add the requirement that the pursuer must know the identity of the defenders, and option 4 was to leave it to the court's discretion.

As a matter of policy, which option do you favour and why? Are there any drawbacks to the option that is now set out in section 5? If you have any examples to give, please do so.

10:30

Mike Dailly: The UK Supreme Court applied the law as passed and as is. The Scottish Parliament reversed the House of Lords Awua judgment on homelessness with the Housing (Scotland) Act 2001. Because of that House of Lords decision in the 1990s, people were not entitled to a secure home. The Scottish Parliament has often corrected a legal position because it is not seen to be fair.

What the bill does in section 5—option 3—is pure common sense. The Morrison v ICL Plastics Ltd case created an absurdity in that you might not know who was the cause of the negligence but the time is still ticking away. You know that you have suffered an injury, but you do not know who you are supposed to sue.

In theory, you could just decide to sue everybody you think might be responsible, but you could still end up missing the correct defender. From a purely logical point of view, therefore, that case showed that the law needed to be changed. The Scottish Law Commission and the bill have come down on the side of pure common sense. Time should start ticking from when someone suffers an injury or loss through fault or negligence and they know who is responsible.

Remember that all this is in the context of section 11(3) of the 1973 act, so it is not a subjective test of whether the pursuer knows these things; it is an objective legal test of whether they ought to have known them. That provision in the bill is absolutely right.

Mike Holmyard: I agree that it makes sense, but damages are not an area in which we advise people, so I defer to Mike Dailly on that.

Bill Bowman: Last week, we heard some oral evidence to the effect that the third part of the new test in section 5, the requirement that the pursuer know the identity of the defender, might increase the complexity of the law in some situations. For example, when there are multiple potential defenders, different prescriptive periods could run in relation to each defender, depending on when each defender became known to or ought to have become known to the pursuer.

We also discussed how the third part of the test might work when there is joint and several liability for a debt. Is there a risk that the third part of the new test will complicate things? Alternatively, should we support it as something that increases fairness in the law?

Mike Dailly: I agree that it creates fairness. We need to put it in context, because the examples that are given of when it would become complicated are not mainstream scenarios. There has not been a multiplicity of defenders in the personal injury cases that I have done over the years. It is more likely to have been two. Sometimes I have ended up suing both and one drops out when we get it sorted. It is not ideal, but it is workable.

The bill is saying that, if the pursuer is not aware of who is ultimately responsible for the fault, negligence or injury, surely it is right and proper that it is when they become aware, or ought to have become aware, that the time period starts running. I do not think that that can be seen as unfair. It could be argued that it could mean more than one time period would be running, but the only alternative is to have one time period for everything, which means that the person who has suffered loss or injury loses out, and that cannot be right.

Mike Holmyard: I would agree but, as I said, we do not advise on that area.

The Convener: I would like to ask about the start date of 20-year prescription, which is dealt with in section 8. The bill proposes a new start date for 20-year prescription. Do you support that? You have touched on five-year prescription, Mr Dailly, but what about 20-year prescription?

Mike Dailly: I would rather leave it as it is. From reading the policy memorandum and the excellent briefing on the bill from the Scottish Parliament information centre, it seems that the rationale is that, because the pendulum has swung in favour of pursuers in section 5, the pendulum is being swung in the other direction for potential defenders in relation to the 20-year period. That is what seems to emerge from the bill, and it makes sense, but I am not sure that it works like that in real life.

What is the problem with the current position with 20 years? The provision in section 6 of the bill would remove interruptions to the 20-year period, and I am certainly more sympathetic to that, because that could be a fair compromise.

The issue will probably arise only in unusual cases, but if it arises it will be catastrophic. For example, if the law is changed so that there is just a simple 20-year period, in the case of latent defects in buildings that come to light only 20 years down the line it will be game over for the consumer under that provision. I am not suggesting that there are lots of cases like that, but there will be some cases like that. Why do we not just leave the current position as it is? The Govan Law Centre's stance is that there is no need for section 8. By all means, let us have section 6. That would be a much better outcome.

Mike Holmyard: We have no opinion on section 8 either, but section 6, which provides for a long stop on prescription, is certainly something that we would be pushing for.

The Convener: In the case of defects in buildings that could appear after a long time, is it not fair that there would be some sort of cut-off?

Mike Dailly: But maybe there would be, convener. This happens all the time in financial services—although we have created a financial compensation scheme that covers scenarios in which companies go out of business. If we do nothing about the 20-year period under the existing law, what comeback is there if a business is no longer trading? If the business is trading, it will have insurance, one would have thought.

When you drill down, it is about equity. We are not talking about any old mistake; it has to be negligence. Let us say that the negligence of the builder causes a defect in a building, which only comes to light 20 years down the line. Why, in principle, should that builder not be liable? That must be the logical approach, because the alternative is to say, "Well, it's tough luck for the home owner."

The Convener: So, would you have no limit?

Mike Dailly: No, I think that we should just leave the law as it is. What we are suggesting is that you simply delete section 8. We have no difficulty with section 6, which is the compromise, as I said—because the period can be interrupted so that it can be more than 20 years—but if you just keep the law as it is, I think that we will be happy. As I said, the reason for section 8 seems to be a peculiar idea that we need to do something for businesses because of the ICL Plastics case.

The Convener: Some concerns have been expressed by stakeholders, including the Law Society of Scotland and the Faculty of Advocates, about how section 8 would work in relation to omissions to act and on-going breaches. The Scottish Law Commission said in oral evidence to the committee that the language used in section 8 would be familiar to the courts from another part of the 1973 act, so it could not see a difficulty. What is your view on that?

Mike Dailly: I tend to agree with that opinion; "omissions to act" is a term of art.

Neil Findlay: The Parliament has had a petition from a Mr Paterson in relation to a conveyancing case that went badly wrong for him. At this point, I should declare an interest, because I worked with Mike Dailly on a similar conveyancing case, where two home owners suffered greatly for almost 20 years because a conveyancing issue went badly wrong and they could not get remedy through the normal processes. The issue raised here is about the harshness of such cases and how severe the prescription period is in relation to those cases. Can you comment on that?

Mike Dailly: Yes. As Mr Findlay said, we worked together on the Happy Valley Road cases. There were similar cases in Aberdeenshire and *The Herald* ran a campaign. We got a satisfactory result—after some years.

Neil Findlay: The potential is there for the problem to arise again and again.

Mike Dailly: I have read about Mr Paterson's case and he is in a horrendous position—there is no doubt about it. I give this analogy: if you go into a shop to buy a toaster and it does not work, you are entitled to get a new toaster or to get your money back, but if you go into a solicitor's office to buy a house and it turns out that it is defective, you do not actually own it or there is some other horrendous thing, you can end up not owning the house, but you have to pay the bill—the solicitors can get high-and-mighty expert professors of law to say that it is not negligence, and it goes on for ever. How have we created such a situation in this country?

I have to say that it is the fault of the solicitors and the Law Society of Scotland. The solution to Mr Paterson's case is not to be found in prescription: it is for the Law Society to introduce a system of strict liability, so that if someone buys a house through a Scottish solicitor and it turns out that the person does not own the house or there is a defect—for whatever reason, because these things are complicated—then that is put right. We could all pay into an insurance policy that could be there to put things right. Such situations do not happen often, but they happen sometimes and then it is catastrophic. The Law Society could introduce that tomorrow if it wanted to. I have suggested that it should do that.

The Scottish Government has commissioned a review of the legal profession. Strict liability is long overdue. It cannot be right that you can buy property in Scotland and spend 20 or 30 years not owning it and becoming ill arguing that the solicitor was negligent because they got it wrong. That is wrong. There should be strict liability.

Neil Findlay: Not just the solicitors but the insurance companies are refusing to take a role. If you buy a toaster, at least you are unlikely to be taken to court by someone wanting to get the toaster back off you.

Mike Dailly: I am a solicitor and I am ashamed that that is our position. It is wrong and I have spoken out about it. I have spoken to the former president of the Law Society and the chief executive and told them that they should do something about it. If the Law Society does not do something, the Scottish Parliament should.

Neil Findlay: We have a draft member's bill, which could potentially do something.

Mike Dailly: I have probably not won any friends with those comments.

Neil Findlay: What's new? [*Laughter*.]

The Convener: You are not here to win friends, Mr Dailly.

Mike Dailly: Apparently not.

The Convener: Do you have anything to add, Mr Holmyard?

Mike Holmyard: I agree. From a consumer point of view, it is totally unsatisfactory that someone does not end up owning a house after paying for a service. Mike Dailly's solution is probably the best way to deal with it, because there will always be bad cases that arise outwith whatever time limit is set.

10:45

Tom Arthur: Much of what I wanted to touch on has already been covered. On a point of clarification, Mr Dailly, with regard to 20-year prescription, what are your views on ending the possibility of interruption?

Mike Dailly: I think that we are quite relaxed about it. The legal position at present is that if you acknowledge the existence of the obligation, the 20 years continue. Mike Holmyard talked earlier about how that works for council tax and how five-year prescription in that context would therefore not be such a big thing. I think that we are reasonably relaxed about section 6.

What is much more important is section 8, which we have talked about and which is potentially much more fundamental because, in effect, it extinguishes the right completely.

Tom Arthur: There is one further point of clarification, for the benefit of the committee. What are your views on interruption taking the form of a pause, with the period recommencing, taking into account the time that has already elapsed? There has been some suggestion that that is an option.

Mike Dailly: I think that that is section 13 of the bill. I feel very uneasy and unhappy about that. We can think about it from this perspective: people often do not come to the free law centres, citizens advice bureaux and money advice agencies in Scotland but instead negotiate directly with the creditor. The danger is that if the creditor says, "I am going to do you a favour here—let's have this pause; let's have this period of a year," they will probably agree to that. They will probably say, "Well, I have all these other things going on in my life and I am under stress and under pressure—delay it another year; what do I care?" Our preference would be to not have section 13 but I can see that there is an intellectual argument that in certain circumstances, it could be useful, if parties have equality of arms—I get that.

If we are going to have section 13, I would be happy with that as long as we protected the vulnerable consumer. We could easily do that by requiring, for example, that the consumer must have gone to a solicitor or accredited money adviser who can certify that they have been given advice. We already do that with employment law. If somebody settles with an employer, they cannot just do it themselves; they have to get somebody to give them independent advice. I mentioned accredited money advisers because the consumer does not have to pay for that advice. They could go to a law centre solicitor or accredited money adviser and be given free advice, to make sure that they were not being pushed into accepting the pause.

Tom Arthur: So, to characterise your position, you have concerns but you think that they could be mitigated by having those safeguards in place?

Mike Dailly: Yes.

Tom Arthur: Thank you very much.

The Convener: So that is really about having a way of getting round the danger of the weaker party being abused.

Mike Dailly: Yes.

Mike Holmyard: I agree that there should be a safeguard in place for the consumer, because most consumers are not aware of their rights and can easily sign them away if somebody presents the situation to them in a certain way, as Mike Dailly said.

With debt cases, which is what we primarily deal with, the whole point is whether the debt has been extinguished. Therefore, to ask for the debtor to have the period extended by another year just does not make any sense.

The Convener: Members have no more questions—is there anything that the panel members wish to add that we have not covered?

Mike Dailly: The discussion has been very comprehensive, convener, and I think that the Govan Law Centre and Citizens Advice Scotland are very much in agreement on everything, as we are looking at it very much from the consumer perspective.

The bill is welcome and I think that it does good things but it could do a lot more good things if only the committee could suggest some amendments.

The Convener: We have had some useful suggestions for amendments. I thank you both very much for coming in. It has been a short but useful session—we have covered a lot. I will suspend the meeting briefly to allow you to leave.

10:49

Meeting suspended.

10:52

On resuming—

Document subject to Approval

Code of Conduct for Councillors (SG/2018/65)

The Convener: Agenda item 4 is consideration of a document subject to approval. There are no issues to raise on document SG/2018/65. Is the committee content with that document?

Members *indicated agreement.*

Instrument subject to Negative Procedure

Plant Health (Scotland) Amendment Order 2018 (SSI 2018/112)

10:52

The Convener: Agenda item 5 is consideration of an instrument that is subject to negative procedure. No points have been raised on Scottish statutory instrument 2018/112. Is the committee content with this instrument?

Members *indicated agreement.*

The Convener: I now move the meeting into private.

10:53

Meeting continued in private until 11:09.

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