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Guide to Prescription in Contract and Breach of Duty Cases

Introduction

This guide is intended to provide a general framework of time-bar issues to keep in mind when dealing with new or existing clients who seek advice relating to civil damages claims for reparation for breach of contract and duty, but not personal injury. It is intended for use as a general but not exhaustive guide and does not represent advice. Individual cases have to be considered on their own facts.

The types of claim which should engage consideration of this guide will include (but are not restricted to) damages claims concerning damage to property, in relation to defective building works and against professional advisers such as accountants, architects, engineers, solicitors and surveyors.

There are many forms of prescription but this guide is concerned with the most relevant prescriptive period for reparation claims which is the ‘short negative prescription’ of five years (sometimes referred to as the ‘quinquennium’). When “prescription” is used in what follows it should be taken to mean the short-negative prescription of five years, which is applicable to claims for reparation in non-personal injury situations.

Legislation

The relevant legislation which provides for and regulates the beginning and end of the quinquennium is the Prescription & Limitation (Scotland) Act 1973 (as amended).

Section 6 and Schedule 2 (d) apply the quinquennium to reparation claims.

Sections 6 and 11 set out the key rules which deal with how the quinquennium starts; when it ends and how it can be interrupted (i.e. the steps which must be taken to ensure that prescription does not operate to extinguish the client’s claim).

The final section of this guide addresses recent changes to the 1973 Act which took effect from 1 June 2022.

The key points on short negative prescription

1. Prescription extinguishes the claim for all time.
2. Only service of a court action or an arbitration notice (in an appropriate case) will be effective in interrupting prescription.
3. The five-year period initially commences when a breach causes loss.
4. The commencement of prescription is not postponed until such time as the client becomes aware of having suffered an actionable loss or that they have become poorer or disadvantaged.

1. Prescription extinguishes the claim for all time.

Prescription operates in a different way to other forms of time-bar. It operates to extinguish the obligation(s) to make reparation altogether and for all time coming.

The court has no equitable discretion to excuse a failure to interrupt prescription. It cannot by itself extend the prescriptive period.

This is to be contrasted with how the distinct concept of limitation works in relation to personal injury claims. Limitation simply presents a procedural bar to an action proceeding. The court can, if it considers it equitable to do so, excuse a failure to bring a personal injury claim on time. The underlying obligation to make reparation is unaffected by this.

But prescription does not operate in this way and is, therefore, very different to limitation.

Prescription attacks the obligation and, in the absence of appropriate steps being taken on time, will destroy the obligation and leave the client without any rights to enforce.

The key points on short negative prescription

2. Only service of a court action or an arbitration notice will be effective in interrupting prescription.

Intimating a claim in correspondence; warranting a writ; signeting a summons; bringing an adjudication; making a formal complaint to a regulatory body - none of these steps will have any effect insofar as prescription is concerned.

What is the safest course to take when dealing with a prospective reparation claim in a non personal injury context?

- In a situation where you are concerned about prescription it will usually be the case that the client should be advised to give you instructions to serve court proceedings on the defender(s) without delay.
- At the very least you should always ensure that you have explained to the client the importance of five-year prescription and the need to serve an action.
- It will be for the client, not the solicitor, to decide between the competing risks and costs of initiating an action against failing to interrupt prescription.
- The client will need to be told about the effect which a failure to interrupt prescription will have, i.e. that the right to reparation will be lost forever.
- In cases where it appears that the client is required to go to arbitration (if that is provided for in the relevant contract) you should still consider whether it is safest to serve a court action notwithstanding.

Comfort here can be taken from the decision of the Inner House in *Fraserburgh Harbour Commissioners v McLaughlin & Harvey Ltd* 2022 SLT 1487 where it was held that the courts will, in most cases, receive a court action as competent even if it is clear that the parties require to go to arbitration or some other means of dispute resolution in the meantime.

In practical terms what all of this means is that service of a writ or summons should be viewed as the clearest and most effective means by which prescription can be seen to have been effectively interrupted.

The key points on short negative prescription

3. The five-year period commences when the breach causes loss.

By virtue of s.11 (1) of the 1973 Act and the case-law which has interpreted the same it is clear that the prescriptive period starts on the date when two elements come together: (1) the breach of contract/duty and (2) the loss caused by the breach.

The clock starts to tick on the date of concurrence of these two elements and, strictly speaking, the client has five years from then to serve proceedings on the defender(s).

A number of sub-issues need to be considered as part of this deceptively simple formula.

- It is critical that the breach(es) which the client is concerned to complain about be clearly identified.
  - A client may in fact have a multitude of breaches which all give rise to a claim e.g. one or more breaches of provisions in a contract together with a breach of delictual or statutory duty.
  - This is important to remember as it cannot be assumed that asserting a breach of clause 1 of a contract in an action will mean that prescription will be interrupted in relation to a breach of clause 2.
  - In fact, the working assumption should be that unless a particular breach of a particular clause or duty is expressly mentioned prescription in relation to the same will not be interrupted.
  - In a situation where you are concerned about prescription, care should be taken to mention as many relevant breaches of obligation in the writ or summons as possible.
- It is critical to understand that the court will take a strict approach to determining what represents loss caused by the breach and when the same first occurred.
- The date of loss will be assessed entirely objectively, i.e. the court will simply ask whether a set of circumstances represented loss to the client regardless of how those circumstances would have been viewed at the time and regardless of how the client viewed matters at the time.
- Loss should be thought of as the state of detriment into which the client has fallen because of the breach. It is unhelpful to think about loss in purely financial terms. Loss does not have to be capable of precise or even general quantification before it is regarded as loss. Loss is a state of fact and not a set of numbers.
- Loss will likely have been sustained if a client can now be seen to have been made ‘worse off’ even if they did not know it at the time of the events in question.

The key points on short negative prescription

- Loss will likely have been sustained if the client can be seen to have received less than they bargained for in a given situation even if they did not know it at the time.
- Some examples taken from the relevant case law might assist in demonstrating what should be regarded as loss:
  - Loss is sustained when the client's property is physically damaged.
  - Loss is sustained when a person pays for defective goods even if they did not know that the goods were defective at the time.
  - Loss is sustained when a person enters into a defective contract which has been negligently drafted on their behalf even if they did not know that the contract was defective or negligently drafted at the time.
  - Loss is sustained when a person spends money on building works using a negligent design even if they did not know that the design was defective at the time when the money was spent.
  - Loss is sustained when a person settles the purchase of a house if the house is affected by issues which a surveyor has failed to pick up and warn them about.
  - Loss is sustained when a person completes the purchase of a flat if they have relied on the certification of an architect that the flat has been properly designed and built even if the client did not know about the defects at the time of the purchase.
  - Loss is sustained when a party incurs expenditure which can now be said to have been wasted even if the client did not regard the expenditure in that way at the time when it was incurred.
- Reported cases which illustrate the foregoing points include:
  - *Gordon's Trustees v Campbell Riddell Breeze Paterson* 2017 SLT 1287 (pursuers suffered loss when their lawyers served a defective notice to quit on their behalf)
  - *WPH Developments v Young & Gault* 2022 SC 28 (pursuer suffered loss when it built on and then sold parcels of land which it did not in fact own)
  - *Kennedy v Royal Bank of Scotland* 2019 SC 168 (pursuer suffered loss when the bank cancelled his loan facility)
  - *Beard v Beveridge, Herd & Sandilands WS* 1990 SLT 609 (pursuer suffered loss when he entered into a lease with a negligently drafted rent review clause)
  - *David T Morrison & Co Ltd v ICL Plastics Ltd* 2014 SC (UKSC) 222 (pursuer suffered loss when its shop was damaged by debris from a gas explosion).
  - *Franks & others v Inglis* [2021] SC PER 41 (pursuers suffered loss when they completed the purchase of their flats even though they did not know that the flats were riddled with construction defects).

The key points on short negative prescription

4. The commencement of prescription is not postponed until such time as the client becomes aware of having suffered an actionable loss or that they have become poorer or disadvantaged.

S.11(3) of the 1973 Act operates to postpone the commencement of prescription if a pursuer is unaware or could not with reasonable diligence have become aware that they had suffered loss.

Confusion over what amounts to "knowledge of loss" for the purposes of s.11(3) has caused a considerable amount of difficulty for unwary pursuers.

It is essential to appreciate that the courts have consistently made clear that the client does not have to be aware that they are worse off physically or financially in order to have knowledge of loss for the purpose of s11(3).

Rather, all a client needs to know is the existence of the bare facts themselves which they now realise and say represents their loss.

A number of the cases noted above serve to illustrate this important point as to what counts as knowledge of loss for the purpose of s.11(3):

- In *Gordon's Trustees* the fact that the pursuers knew that the notices to quit had been served and that the tenant had not quit was sufficient knowledge of loss for the purposes of s.11(3). The clock did not wait until the pursuers knew that there was in fact something wrong with the notices.
- In *WPH Developments* the fact that the pursuer knew that it had spent money building its development; the fact that the pursuer knew that it had actually erected the buildings; and the fact that the pursuer knew that it had sold the plots was sufficient knowledge of loss for the purposes of s.11(3). That was so even though the pursuer did not know that it did not own the land and therefore had no idea that there was any problem with the plans which it had used at the time when these things were done. The clock did not wait until the pursuer knew that it had a problem with having built where it did and sold what it sold. The fact of the building and the sale and the pursuer's knowledge of the same was sufficient knowledge of loss to start the clock.
- In *David T. Morrison* the fact that the pursuer knew that the explosion had happened and damaged its property was sufficient knowledge of loss for the purposes of s.11(3). The clock did not wait for knowledge to be acquired as to the cause of the explosion or the identity of the wrongdoers.
- In *Franks* the fact that the pursuers knew that they had purchased their flats was sufficient knowledge of loss for the purposes of s.11(3). The clock did not wait for them to discover the defects in the flats. Knowledge that the pursuers had purchased and therefore taken on the flats was enough even if they did not know when the money was spent that the flats were defective.

Relief mechanisms and extension - prescriptive period

Whilst the scope for s.11(3) to provide a client with relief from a strict five-year period has been substantially limited by case law it is not the only relief mechanism available.

Other relief mechanisms are available in the 1973 Act which can operate to interrupt prescription; postpone the commencement of prescription; or stop the clock after it has started.

These relief mechanisms are found in sections 10, 11(2) and 6(4) of the 1973 Act.

There are particular and complicated rules drawn from case-law which deal with how these mechanisms work and the circumstances in which they can – and cannot – be relied upon to assist a pursuer. This note does not address these rules but they should be considered carefully in cases of concern and specialist advice obtained if you are unsure.

Generally speaking, it would be imprudent to advise a client that they can certainly rely on the relief provisions and hold off on bringing proceedings as a result. This risks the claim being lost to prescription if the court is ultimately not persuaded that it can extend the prescriptive period by virtue of these provisions.

Generally speaking, the safest course from the perspective of addressing a concern over prescription is likely to be the service of proceedings as "Plan A" with the relief mechanisms being regarded as "Plan B". There may be a justification for not doing that in the particular circumstances of a given case. But the need to serve proceedings should always form part of your active considerations.

There may of course be cases where the four key points noted above reveal that time has likely already run with the result that Plan B is all the client has. But it will still be necessary to bring the action in order to stop the clock in the hope that the relief mechanisms will ultimately assist.

At the very least the client should be made to appreciate the importance of serving an action and the consequences of not doing so. If the client elects to refrain from bringing proceedings you should carefully note the details of those instructions and keep a record of them together with a clear record of the recommendations you have made.

Amended legislation

Because of the effect of some of the cases mentioned in this guide, the 1973 Act has been amended by the Scottish Parliament in terms of the Prescription (Scotland) Act 2018.

There are two key changes worth noting here (albeit you should familiarise yourself with all of the changes if considering a prescription problem).

First, the amendments effected to s.11 of the 1973 Act. These seek to alter the way in which s.11(3) operates by setting a cumulative set of factors about which a pursuer has to be aware before the clock starts to tick. It is still too early to tell but arguments are likely to remain as to how material a change this represents.

Second, the amendments effected to s.13 where it is replaced with a new set of provisions which allow parties to agree to extend a prescriptive period. This tends to be referred to as a 'stand-still agreement' and is familiar to English lawyers. Previously such agreements were incompetent and unenforceable in Scotland in prescription cases. The new s.13 will change that. However, real caution will have to be exercised in relation to the preparation of any such agreements. It may be that many practitioners will continue to take the view that serving and then sisting an action provides more certainty than the untested provisions in the new s.13.

There is a final important point to note in relation to the extent to which the amended Act can provide assistance in relation to existing cases. The transitional provisions between the old and new versions of the 1973 Act are provided for in the Prescription (Scotland) Act 2018 (Commencement, Saving and Transitional Provisions) Regulations 2022.

In terms of regulation 3 of the 2022 Regulations, it is provided that the amended Act will have no effect on rights and obligations which were extinguished by 1 June 2022.

What this means is that if a claim has prescribed and cannot be saved by any of the relief mechanisms in the older version of the Act as at 1 June 2022, then the amended version of the Act cannot assist in rescuing that claim.

Seek specialist advice

Prescription is a complex area of Scots law. Whilst it is important always to make clients aware of the key points, the risks and the steps they might have to consider taking, specialist advice should be sought thereafter if you are uncertain.

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