



Informing Progress - Shaping the Future

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All change, again - Commencement of the Prescription (Scotland) Act 2018

The Scots law of Prescription, or timebar, has provided many opportunities for articles over the last decade with the starting point for the five-year timebar period moving steadily back to the benefit of defenders. Now a rebalancing is to be introduced alongside a number of other steps.

After a long wait, the commencement and transitional regulations for the Prescription (Scotland) Act 2018 (the 2018 Act) have been published. These regulations set out when various parts of the new 2018 Act will come into force to amend the Prescription and Limitation (Scotland) Act 1973 (the 1973 Act)

The new act will come into force on the following dates:

- The new s.11(3)/(3A) knowledge test will come into force on 1 June 2022 (s.5 of the 2018 Act).
- The new s.13 will also come into force on 1 June 2022 enabling parties to enter into agreements to extend a 5-year prescriptive period by up to one year (s.13 of the 2018 Act).
- All other provisions of the 2018 Act will come into force from 28 February 2025.

We will focus on the impact of the changes to s11 and 13 of the 1973 Act coming into force on 1 June 2022.

IN BRIEF

This article summarises the changes to the law of Prescription in Scotland, resulting from the implementation of parts of the Prescription (Scotland) Act 2018.

These provisions come into effect on various dates between 1st June 2022 and 28th February 2025.

Timebar for contract and delict (tort) claims

S11 of the 1973 Act deals with the starting point for claims arising from breach of contract and delict, which includes negligence.

The section first defines the losses which the section applies to with losses arising from "act, neglect or default" being replaced by "act or omission". We do not see that alteration as likely to be significant in practice.

The main change being introduced in June is the alteration of s11(3) and insertion of new subsections 11(3A) and 11(3B) as set out below.

The perceived mischief they are being introduced to deal with, is the commencement of the 5-year prescriptive period when the person is unaware that they have even incurred a loss. The existing s11(3) delays the start of the 5-year period where "the [pursuer] was not aware, and could not with reasonable diligence have been aware, that loss, injury or damage caused as aforesaid had occurred"

In a slew of cases over the last few years, Scottish courts have interpreted this wording as meaning that all someone needs to know to start the clock ticking is that they paid an invoice or were aware walls were constructed on land. Crucially, they do not need to know that that invoice was actually a "loss" or that the wall was in fact on a neighbour's land and would require action to be taken at a later date to remove the wall or buy the land!

The amended wording with the new text highlighted in bold and the deleted text struck through is:

*"11(3) In relation to a case where on the date referred to in subsection (1) above (or, as the case may be, that subsection as modified by subsection (2) above) the creditor was not aware, and could not with reasonable diligence have been aware, ~~that loss, injury or damage caused as aforesaid had occurred~~ of **each of the facts mentioned in subsection (3A)**, the said subsection (1) shall have effect as if for the reference therein to that date there were substituted a reference to the date when the creditor first became, or could with reasonable diligence have become, so aware.*

(3A) The facts referred to in subsection (3) are—

(a) that loss, injury or damage has occurred,

(b) that the loss, injury or damage was caused by a person's act or omission, and

(c) the identity of that person.

(3B) It does not matter for the purposes of subsections (3) and (3A) whether the creditor is aware that the act or omission that caused the loss, injury or damage is actionable in law."

The effect of this is likely to be a later date for the start of the five-year period in the case of a latent defect as is usual in a professional negligence case. It will likely mean that someone will need to know the invoice referred to above, for example, was not incurred in the normal run of things and instead due to someone making a mistake of some sort.

However, each part of the test and how it applies overall is likely to be the subject of litigation in years to come.

Why is 1st June 2022 important?

In very broad terms if a claim prescribes (becomes timebarred) on or before 31 May 2022 due to the existing s11, the changes make no difference. The right to claim is lost. If, however, a claim was due to prescribe on 1 June 2022 onwards, it will benefit from the new provision and may gain many year's additional life!

Therefore, we expect the question of whether a claim prescribed on or before 31 May 2022 to be a live issue in many proceedings for a number of years yet.

Standstill Agreements now legal!

The current s13 of the 1973 Act forbids parties contracting out of the prescriptive periods. Therefore, much to the surprise of people familiar with claims elsewhere, standstill agreements had no effect unless it could be argued they created a new obligation.

From 1 June 2022, standstill agreements will be possible though only:

- after the prescriptive period has commenced and before it would ordinarily expire;
- by a maximum of 1 year, and
- once in relation to the same obligation.

Detailed comment is beyond the remit of this article, but it certainly strikes us that it remains safer to raise protective proceedings rather than deal with the complexities of such agreements. However, some detailed thought will now have to be given as to how these agreements might be framed to ensure they are effective.

Conclusions

The new rules on the trigger point for the start of the prescriptive period will be more favourable to those pursuing a claim but to what degree precisely is yet to be seen. Standstill agreements will be welcomed by both sides of a claim in Scotland, avoiding unnecessary expense and litigation while providing space for commercial discussion.

There are other provisions but we will have plenty of time to write on their effect before 28th February 2025!

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