OFFICIAL REPORT
AITHISG OIFIGEIL

Delegated Powers and Law Reform Committee

Tuesday 17 April 2018

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 17 April 2018

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DELEGATED POWERS AND LAW REFORM COMMITTEE

12th 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:

Bill Bowman (North East Scotland) (Con) (Committee Substitute)
Dr Eleanor Russell (Glasgow Caledonian University)
Dr Andrew Simpson (University of Aberdeen)
David Wedderburn OBE (Royal Incorporation of Architects in Scotland)

CLERK TO THE COMMITTEE

Euan Donald

LOCATION

The Adam Smith Room (CR5)

Scottish Parliament

Delegated Powers and Law Reform Committee

Tuesday 17 April 2018

[The Convener opened the meeting at 10:00]

Decision on Taking Business in Private

The Convener (Graham Simpson): I welcome members to the 12th meeting in 2018 of the Delegated Powers and Law Reform Committee. I have received apologies from Alison Harris—Bill Bowman is substituting for her—and from Neil Findlay.

I welcome Dr Andrew Simpson, Dr Eleanor Russell and David Wedderburn to the meeting.

Before the evidence session begins, there is one piece of business that the committee must decide. It is proposed that we take items 5, 6, 7 and 8 in private. Items 5 and 6 concern the delegated powers provisions in the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill and the Social Security (Scotland) Bill, both as amended at stage 2. Item 7 is on the relevant recent developments in relation to the European Union (Withdrawal) Bill. Item 8 is on the third quarterly report on instruments considered this parliamentary year. It has already been agreed that we will take in private item 9, which is consideration of the evidence that we are about to hear. Does the committee agree to take those items in private?

Members *indicated agreement.*

Prescription (Scotland) Bill: Stage 1

10:01

The Convener: Item 2 is stage 1 evidence on the Prescription (Scotland) Bill. This is the third of our evidence sessions on the bill, and we have before us today Dr Andrew Simpson, a senior lecturer in the school of law at the University of Aberdeen, Dr Eleanor Russell, a senior lecturer in law at Glasgow Caledonian University, and David Wedderburn, who is described as a forensic architect. I would like to know what a forensic architect is.

David Wedderburn OBE (Royal Incorporation of Architects in Scotland): I am dual qualified. I have a degree in architecture from the University of Aberdeen, a law degree from the University of Edinburgh and a masters in construction law from the University of Strathclyde.

The Convener: Thank you. Today, you are representing the Royal Incorporation of Architects in Scotland.

Welcome to you all. We have a number of questions to get through. I will start off with a question that is probably for Dr Simpson and Dr Russell. Do not feel that you all have to answer all the questions. If you want to say something, just indicate that you do.

Under the Prescription and Limitation (Scotland) Act 1973, five-year prescription applies to those obligations on one statutory list and not to those obligations on the second statutory list. Sections 1 to 3 of the bill would extend the scope of the obligations covered by five-year prescription. In particular, section 3 would extend five-year prescription to all statutory obligations to pay money. Do you agree with the general rule in section 3 that applies five-year prescription to statutory obligations to pay money, and do you agree with the exceptions to that general rule that are also set out in section 3?

Dr Eleanor Russell (Glasgow Caledonian University): As you have just explained, the short negative prescription applies only to obligations that are set out in paragraph 1 of schedule 1 to the 1973 act, and that list is exhaustive. If a particular obligation is not stated on that list, the short negative prescription of five years—the quinquennium, as it is known—does not apply to the obligation. There are many statutory obligations to pay money that are not included in that list, and many of those are discussed in the Scottish Law Commission's discussion paper and report.

I will give some examples. The recipient of legal aid will come under an obligation to the Scottish Legal Aid Board if he or she is successful in legal proceedings. That is clearly a statutory obligation to make payment, but it is not included in paragraph 1 of schedule 1 to the 1973 act.

Under the Insolvency Act 1986, a director who has engaged in wrongful trading comes under an obligation to contribute to the company's assets. That is another statutory obligation that is not included in paragraph 1 of schedule 1 to the 1973 act.

The 1973 act as it is currently drafted has obvious omissions, and there is no principled reason for excluding some such obligations. Paragraph 1 of schedule 1 to the act sets out particular statutory obligations to make payment that are subject to the short negative prescription, but there is no general catch-all provision for statutory obligations to make payment.

Section 3 of the bill will, therefore, plug a lot of gaps. It also represents a considerable rationalisation of the law. Schedule 1 to the 1973 act includes statutory obligations under particular legislation that it will be possible to repeal if the general default position is put into legislation. A catch-all for all statutory obligations to make payment will also obviate the need for repeated updating of legislation as new schemes appear on the statute book, so it is very much to be welcomed.

As for the proposed exceptions in paragraph 2 of schedule 1 to the 1973 act, the reasons for exempting some obligations from five-year prescription and making them subject instead to 20-year prescription are a political matter. I have no problem with any of the exceptions that are in the bill, but they involve political decisions for the committee and the Parliament.

Dr Andrew Simpson (University of Aberdeen): I agree and have little to add. The Scottish Law Commission was correct to talk about limiting the provision to statutory obligations to make payment because of the risk of catching a range of other obligations that public bodies might owe and that we would not want to be caught by quinquennial prescription.

The distinction that the commission drew in its report is broadly right. It said that it was aiming to capture private law obligations to make payment that are laid down in statute, as opposed to public law obligations. The commission is also right in saying that it would be difficult to state such a test in legislation. It is fundamentally a political matter to determine, case by case, whether further obligations should be included in paragraph 2 of schedule 1 to the 1973 act.

David Wedderburn: I do not have anything to add. The question did not exercise the RIAS.

The Convener: That is fine.

Stuart McMillan (Greenock and Inverclyde) (SNP): The SLC consulted on four options for section 5 of the bill before deciding to use option 3. As a matter of policy, which option do you favour and why? Are there any drawbacks to the option that is set out in section 5? If you wanted to provide examples of specific types of cases to illustrate your points, that would be helpful.

Dr Russell: I am happy to endorse the commission's proposal to go for option 3 and the approach that the bill adopts. I am sure that everyone is aware of this, but I say for the benefit of all who are present that option 3 proposed to return the law to the pre-Morrison v ICL Plastics position but to add a requirement for awareness or constructive awareness of the defender's identity.

I whole-heartedly endorse that approach for a number of reasons. First, there is the logical argument. David Johnston, who was one of the commissioners behind the bill, is undoubtedly the leading authority on prescription and limitation in Scotland. In his book, he rightly points out that there is something odd about saying that an obligation is enforceable before one knows against whom it can be enforced.

Secondly, there is a comparative argument. Many jurisdictions around the world have adopted option 3—it has been adopted down south, in England and Wales, and in France, Germany, New Zealand and South Africa. Although we need not blindly follow what is happening in other jurisdictions, we can learn from it and must ask why so many of them are adopting option 3. In essence, it is on grounds of fairness.

That leads me to my third point, which is that it is not fair that time should run when one does not know who was responsible for the act or omission. The decision in Morrison v ICL Plastics is undoubtedly harsh on creditors, as is the more recent decision in Gordon v Campbell Riddell Breeze Paterson LLP.

Another reason for my preference for option 3 is that it will reduce expense and administrative costs. At present, creditors or pursuers are often forced to litigate against a multiplicity of defenders simply because they do not know which one is at fault. That problem is particularly acute in the construction industry, where it might not be clear whether the root of the problem is a construction defect or a design defect. Actions might well be raised against a panoply of defenders—the main contractor, various subcontractors, the designer, the architect, the engineer and the surveyor—all of whom are put to the trouble, time and expense of having to investigate the claim against them and

intimate the claim to their insurers. An awful lot of resource is wasted in that way. Therefore, option 3 is preferable on that ground, too.

A further point relates to the matter of symmetry. Under the limitation provisions in the 1973 act, which apply to personal injury actions, the identity of the defender is one of the things of which the pursuer must be aware before time runs against him. For example, time will not run against the victim of a hit-and-run accident until he knows who was driving the car. To introduce a requirement of awareness for the prescription provisions will introduce an element of symmetry so that a solicitor who advises a client will know that, regardless of whether he or she is dealing with the short negative prescription provisions or the limitation provisions, actual or constructive awareness of the defender's identity will be required.

That is a fairer approach. It certainly favours pursuers but, in addition, it will benefit all those people who could be sued at the moment although there is no merit in the claim against them. As is happening in the construction disputes that I mentioned, many people are being sued needlessly and option 3 will avoid that happening.

As far as drawbacks are concerned, the obvious drawback is that the actual wrongdoer will be exposed to the risk of liability for a longer period. However, that must be considered in the round. Option 3 will favour pursuers or creditors, but other proposals in the bill will favour defenders. We must look at the overall balance of fairness in the scheme as a whole.

For all those reasons, I support option 3.

The Convener: Mr Wedderburn, you must have something to say on the matter.

David Wedderburn: Yes. The RIAS is in favour of option 3, as it will give certainty to the people who are likely to be in the frame. That will not only allow people to make provision but will mean that professional indemnity insurance—PII—cover is a little more certain for the insurance industry. At the moment, the risks for insurance companies that are associated with a potential claim are much broader and indeterminate. Especially once an action has commenced and people have discovered the identity of the relevant people, option 3 will allow other parts of the team to get on with their lives and the relevant people to notify their insurers, which is a benefit.

10:15

Dr Simpson: I agree with option 3. Dr Russell is right to draw attention to the fact that it provides fairness within the scheme of the bill as a whole. What we see in section 11(3) of the 1973 act as it is proposed to be amended is an exception to the general principle that an obligation to pay damages becomes enforceable on the date when the loss, injury or damage occurred. Section 11(3) is an exception that says that knowledge is relevant when the three-limbed test that the Scottish Law Commission proposes is satisfied.

It is worth emphasising that creditors have to exercise reasonable diligence in trying to acquire knowledge. We are not asking simply whether the creditor would have known

"(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";

we are asking whether the creditor exercised reasonable diligence. Would someone who had exercised reasonable diligence have known those things? That is what causes the prescription to run in relation to obligations to pay damages.

In some ways, it is quite a limited exception to a general rule. Knowledge is not relevant across the board to start prescription running; it provides an exception that respects fairness.

Stuart McMillan: That takes me to my next question. The Faculty of Advocates has expressed concerns, including that the new wording might increase litigation over the meaning of the words. Do you have any thoughts on that point?

The Convener: Should we say what wording we are referring to?

Stuart McMillan: It is in sections 5(2) and 5(3) of the bill, which introduce drafting changes to the 1973 act. It specifically changes reference to an "act, neglect or default" of the defender to an "act or omission" of the defender.

Dr Russell: I am aware that the Faculty of Advocates has expressed concern about the proposed change of terminology from "act, neglect or default" to "act or omission" and that there has been some concern about how "omission" might be interpreted.

It is useful to point out that the term "act or omission" is found elsewhere in the 1973 act. It appears in relation to the limitation provisions, where—in relation to personal injury, which I have referred to already—time runs from the date of injury or, in the case of a continuing act or omission, from

"the date on which it ceased".

The change is not going to create any new problem, as the courts are familiar with dealing with acts or omissions. There have been cases such as Kennedy v Steinberg, which was a medical negligence case in which the issue was a

doctor's on-going omission to take a patient off a drug. The term "act or omission" is nothing new—the courts are familiar with it—and it would introduce a degree of symmetry and consistency across the prescription and limitation provisions, which can only be a good thing.

The Convener: The panel are all nodding.

David Wedderburn: Yes.

The Convener: Let me take Dr Russell's example of cases in the construction industry. If foundations are not put in properly and, some years later, they start to sink or it all goes wrong, it could be argued that that was neglect but it might not have been an omission, which, in layman's terms is forgetting to do something or just not doing it. Doing something wrong is different from an omission, is it not?

Dr Russell: The courts would have to address that on a case-by-case basis. The other panellists may have a view on the matter.

David Wedderburn: An inspecting architect missing something is regarded as neglect, but it is also an omission and would be picked up by the new wording.

Dr Simpson: The wording might also be slightly broader than the phrase "act, neglect or default", as it would catch what the convener is describing as an omission to observe proper standards.

The Convener: It is not an issue legally?

Dr Simpson: I do not think so.

Stuart McMillan: Dr Simpson, in your earlier comments you mentioned the "loss, injury or damage" that has occurred. The Law Society picked up on that issue in its submission.

The first requirement in the test that is set out in section 5 is that "loss, injury or damage" has occurred. In its written submission, the Law Society identifies a potential uncertainty in relation to that requirement, saying that it is unclear whether the requirement would be treated as satisfied when there has been expenditure on professional fees but not at the same time an awareness that that constituted a loss. It refers to the case of Gordon v Campbell in that regard.

Do you agree with the Law Society that that is a potential issue? Is there a need for greater clarity in the bill?

Dr Simpson: I am not convinced that there is a need for greater clarity in the bill, to be honest. The Scottish Law Commission has looked at the Gordon case. It did that before the decision was handed down by the United Kingdom Supreme Court on the appeal, and the commission's report expressly mentions that it could not take that decision into account.

The appeal upheld the decision of the extra division of the Court of Session for broadly the same reasons and so, on one level, it looks likely that the problem will be dealt with, as the Scottish Law Commission thought, by the insertion of that wording.

I would add only one caveat. Obviously we preserved the test that was used in Gordon v Campbell of loss, injury or damage having occurred; that is preserved in the revised wording of subsection (3A). The key question, if the case were going to be decided today, would be whether the trustees—the pursuers who were making the claim—also had sufficient awareness that

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

in late 2005, when the claim started to run.

I am not sure how familiar committee members are with the details of the case. If it would be helpful, I can say a bit about it.

The Convener: If you can do so briefly, that would be useful.

Dr Simpson: In essence, a defective notice to quit certain agricultural land had been served on tenants. The notice was served, I believe, in November 2004, and in November 2005 the tenants refused to get out. It was argued that the trustees—the pursuers in this case; the trustees who owned the land that was tenanted—had knowledge of the loss when they knew that the tenants would not voluntarily hand over the fields.

What happened next is an important part of the case. Using different solicitors, the trustees—the pursuers—raised an action in the Scottish Land Court to try to get the tenants removed on the basis of the notices, which, as it turned out, were defective. In 2008, the Land Court held that the notices could not be used and were indeed defective. Court proceedings then commenced in May 2012.

You can see the importance of the question. If prescription started to run when the tenants refused to get out, in November 2005, the five-year period would have elapsed by 2012. However, if prescription started to run only in 2008, when the Land Court handed down its decision that the notices were indeed defective, there was still an opportunity to enforce the claim in 2012. That was the nub of the issue.

The problem was, when did the trustees become aware that there was loss on the law as reformulated in the earlier decision? It was held at all levels of the decision—at first instance, by the extra division of the inner house of the Court of Session, then by the UK Supreme Court—that the trustees became aware of the loss in 2005, which meant that it followed that the claim had

prescribed. It was felt that that was potentially rather harsh, because they argued that they became aware of the loss only when the Scottish Land Court handed down its decision and that they had actually sustained loss when the court handed down its decision to the effect that the tenants could not be removed on the basis of the defective notices.

The question for the court then was when did they become aware of loss, but the questions for the court now would be when did they become aware of loss, when did they become aware that the loss, injury or damage was caused by a person's act or omission and when did they become aware of the identity of the person, so there are extra barriers put in.

On the facts of the case, the Scottish Law Commission believes, and has good reason to believe, that the trustees would not have become aware that the loss, injury or damage was caused by a person's act or omission until 2008, or at least until a later period. Lord Hodge, who delivered the judgment in the Supreme Court, was a little careful in his comments on that and he just said that reform was being considered by the Scottish Parliament.

There is an argument to the effect that the second limb would have saved the trustees in Gordon v Campbell Riddell, but it is just an argument. One has to be conscious that other evidence was led in the case and it might be argued on some of that evidence that the pursuers could have been aware that the loss, injury or damage was caused by a person's act or omission, and that they were not just aware from 2005 of that loss but aware that it was caused by someone whom they could identify.

It is possible that the pursuer might not have been saved in the Gordon case, but the extra tests improve the fairness of the law, overall, so I would still defend it. I would be a little bit careful in saying wholesale that the pursuer would have been saved. As the SLC said, he probably would have been, but I caveat that a little bit.

The Convener: Does anyone else want to comment? Dr Simpson has covered the issue comprehensively.

Stuart McMillan: My final area of questioning has been touched on earlier, in part.

In its written submission, the Law Society comments on the third part of the new test that is set out in section 5, namely that the pursuer must know the identity of the defender or defenders. The Law Society makes two points on that. First, it says that, with complex contractual or corporate structures, it can sometimes be difficult to identify the correct defender and mistakes can be made. It questions whether the prescriptive period would start to run only from the point at which the correct defender is identified.

Secondly, the Law Society raises the possibility that different prescriptive periods might run for different defenders if the pursuer becomes aware of the identity of one defender before another. Will you comment on those points? Is there a need for greater clarity about those issues in the bill?

Dr Russell: If there is more than one defender or, in effect, co-debtors, a natural consequence of the reformulated wording in section 5 is that there is a possibility of separate prescriptive periods against debtor 1, debtor 2 and debtor 3, according to when the awareness of the identity of those people becomes known, actually or constructively, to the creditor. There is a clear possibility of a different terminus or starting date in respect of the different obligations owed by each debtor.

As far as identifying the wrong defender is concerned, time will not run in relation to the obligation owed by the right defender unless the constructive awareness provision can be engaged; reference was made to that earlier. If the creditor ought to have become aware of the correct defender or debtor, time will start to run, because awareness includes both actual awareness and constructive awareness. If the correct defender ought to have been identified, time will run, as long as the awareness could have been acquired by the use of reasonable diligence, to which Dr Simpson referred.

10:30

David Wedderburn: In the construction industry, where a multiplicity of subcontractors do different things at different times, there is a great likelihood of different prescriptive periods and of people becoming aware only later of particular actions of a particular sub-sub-subcontractor.

Bill Bowman (North East Scotland) (Con): If people were jointly and severally liable, how would the provisions work? Could they be identified at different periods but end up being jointly liable?

Dr Simpson: I presume that, if someone identified a defender who was jointly and severally liable, they would sue that defender. If the committee would like me to check this further, I would be happy to do so, but I imagine that the rights in relation to the people who could have been co-defenders, such as rights of recovery against the defender, would start to operate and they would be subject to the same rules of prescription.

Bill Bowman: Would that apply even if such people were not involved in the neglect and if they were liable just because of a financial link?

Dr Simpson: I would need to think about the basis of liability. If people were not liable because of their neglect, we would need to think further about the basis of the neglect in each case.

The point about joint and several liability is extremely interesting. It does not undermine any provisions in the bill, but it would be interesting to see the exact effects. I do not want to speculate too much on that, but I would be happy to look at the issue further.

The Convener: If you want to write to us after the meeting with further thoughts, feel free to do so.

David Torrance (Kirkcaldy) (SNP): All my questions are on section 8 of the bill and 20-year prescription. For the obligation to pay damages, section 8 proposes a new start date for 20-year prescription. Do you support the policy behind section 8? What are the reasons for your position?

The Convener: Who wants to go first? Shall I pick on someone?

Dr Russell: I am happy to support section 8. The purpose of the long negative prescription is to produce a long stop. It is designed to secure certainty and finality so that, at a certain stage, a potential defender can dispose of his files, dispense with his records and rest assured that he is no longer at risk of civil litigation.

Our current rules on the long negative prescription, which set the starting date at the date of loss, are quite unusual. It is quite unusual for the starting date—the terminus—for the long negative prescription to be the same as that for the short negative prescription; it is more usual to find a difference. The bill takes the starting date for the long negative prescription back to the date of the act or omission, which will in most cases be earlier and, particularly in construction matters, will be significantly earlier.

In a previous evidence session, a witness spoke about a defective design leading to loss many years later—maybe 16 years later. Under the current law, the 20-year prescriptive period does not start to run until the date of loss, which would be 16 years after the date of the act or omission in such a case. The bill takes the starting date for the long negative prescription back to the date of the act or omission, which means that the designer in that hypothetical example would be free of the obligation sooner. That might be considered to be harsh to the creditor, but one has to consider the overall scheme, fairness to all parties and the basic rationale for the long negative prescription, which is to secure certainty and finality. There must be a final cut-off point so that people are not being sued 36, 37 or 38 years down the line.

David Wedderburn: The RIAS is particularly pleased with this proposal. I know of two or three examples; one of them concerns a building that was constructed in about 1981, and either the architect or contractor—we do not know which—omitted some tanking. The building was well drained round about and the water table was never raised. In 2015, in terrible weather, it was finally raised and the building flooded. Trying to track down those involved was difficult. The contractor had gone out of business and everyone had died; the architect was the same. The owner had a right but it could not be vindicated, so it was pointless.

Having a real long stop, with a starting point and a clear end point, is good. The idea of not having interruptions is also good. Protecting people who have commenced proceedings before the end of the period provides a good balance.

Dr Simpson: I have little to add other than to say that I agree with my colleagues. The underlying policy, both for section 8 and for section 7, which we may go on to talk about, is that we need to have certainty and we need to deal with the situation in which there is destruction of evidence, which necessarily happens after a certain period of time. It is important to have a long-stop date, and it is better to have a clear long stop in the legislation. I think that the balance in the proposals is right.

David Torrance: Concerns have been expressed by stakeholders, including the Law Society of Scotland and the Faculty of Advocates, about how section 8 will work, in relation to “act or omission” and on-going breaches. The Scottish Law Commission, however, said in oral evidence that the language that is used in section 8 will be familiar to the courts from part of the Prescription and Limitation (Scotland) Act 1973 and so it could not see a difficulty. Do you wish to offer a view on that?

The Convener: Does anyone want to offer a view? If you do not want to, you do not have to.

Dr Russell: I will repeat what I said earlier. The term “act or omission” is familiar to the courts already. It appears in section 17 of the 1973 act in relation to the limitation provisions—the triennium for personal injury actions. It is nothing new and nothing with which the courts have not previously grappled. I am sure that they will be able to deal with it adequately under the bill.

David Torrance: The committee is aware of a parliamentary petition that provides an example of a situation in which 20-year prescription has operated harshly. The petitioner tried to sue his solicitor for defective conveyancing work only to discover that the obligation to pay damages had been extinguished by the 20-year prescription.

The new start date that is proposed in section 8 will be earlier in some cases than under the current law and will never be later. Is there a risk that we will, through section 8, see more harsh cases like that one? If so, should that affect the policy that underpins section 8?

Dr Simpson: There are dangers around a long prescription period. I say at the outset that I am not familiar with the case that you mention. In the interests of certainty, which has to be the underlying policy of any regime of prescription, there has to be a cut-off point.

I think that the issue that David Torrance has raised is about an error that was made in conveyancing at a very early stage, having not been detected for 20 or more years. David Torrance is nodding. That is therefore one of the genuinely hard cases that have been generated by the doctrine of prescription. It is regrettable, but in order to provide certainty—which is a valid concern for the legal system, too—there has to be a long stop.

The Convener: The case that we are referring to is the case of Mr Hugh Paterson. Does that ring any bells with you?

Dr Simpson: I am afraid that it does not.

The Convener: Dr Russell is nodding.

Dr Russell: Yes—I have heard about Mr Paterson's petition. I do not know a great deal about the details, but I think that the essential problem was with the conveyancing. Mr Paterson did not discover the error until more than 20 years later and, because the issue of awareness is not relevant to the running of the long negative prescription, he has found himself on the wrong side of the prescription provisions. Undoubtedly, we all have sympathy for Mr Paterson, but that example simply has to be categorised as a hard case. As we know, hard cases make bad law.

The thinking behind long negative prescription is that it should not be subject to personal matters affecting a particular creditor. That is why matters of fraud and error do not apply in relation to long negative prescription and why matters of legal disability do not stop long negative prescription running. It is designed to be a long stop.

Irrespective of where we draw the line, there will be hard cases. It is conceivable that people would still fall foul of prescription, even if we were to return to the days of the 40-year-long negative prescription. In those circumstances, a person who had bought a house when they were aged 25 and there was a problem with the conveyancing, and who did not sell that house until they were 70, would still find themselves on the wrong side of the line. The interests of certainty and finality have to prevail. That is the underlying rationale of long negative prescription—it represents a final determinate cut-off. Sadly, some people will find themselves on the wrong side of that line.

The Convener: I guess the point is that you either have no cut-off or you have a cut-off and have to decide what it is.

Dr Russell: Yes—exactly. It is considered to be in the wider public interest that we have finality in relation to the existence of obligations, and that the courts are not clogged up by trying to deal with antiquated claims in which all the evidence has been lost and the witnesses have died or have forgotten what had gone on.

Dr Simpson: We have had this discussion before in the Scottish legal system—although that should not constrain this debate in any way, of course. Fundamentally, what motivated the introduction of ever-wider doctrines of extinctive prescription was the issue of destruction of evidence over time. I am pretty sure of that from my own work. Destruction of evidence is key and, given that evidence is often lost over long periods of time, the period—which was originally set at 40 years, as Dr Russell rightly said—was reduced some time ago to 20 years. Again, there is some arbitrariness in respect of what period one sets—it could be set at 21 years or 19 years. I am not at all suggesting that the period should be changed, but the idea of a firm cut-off point is extremely important.

Bill Bowman: I have two questions on interruptions and extensions to the 20-year prescription under section 6, which says that 20-year prescription can no longer be interrupted and can be extended only to allow on-going litigation or other proceedings to finish. For the *Official Report*, what are your views on that section of the bill?

Dr Russell: I whole-heartedly support the proposals in the bill. I share the view of the Law Society of Scotland and the Faculty of Advocates that interruptions to the long negative prescription by way of relevant claim or acknowledgement should not be permissible. They are simply inconsistent with the concept of a long-stop prescription.

The possibility of extension makes sense if someone were to raise proceedings 19 years down the line. Clearly, that person has not abandoned their rights. Prescription is often referred to as abandonment of rights: someone who is currently in the process of litigation is clearly not abandoning or sleeping on his rights, so it is only correct that the proceedings should be allowed to finish.

10:45

Dr Simpson: I agree with Dr Russell about the need for introduction of the extension provision. It is a long stop in order to be consistent with the underlying policy, which is to bring about certainty. I think that that is sound.

David Wedderburn: I, too, agree and will add a further point in relation to professional indemnity insurance. As a retiring architect, there will be a period during which I will know which contracts are at risk and when they will expire, so I can therefore arrange run-off cover.

Bill Bowman: Thank you. In its response to the SLC discussion paper, Brodies said that it should still be possible to interrupt the 20-year period, and that the period should restart not from the beginning but from where it left off. As it is the only alternative to section 6 of the bill that is mentioned by stakeholders, other than the current law, do witnesses have any comments on that suggestion?

Dr Russell: Yes. I believe that Brodies' concern was that rights might prescribe during litigation. That has obviously been dealt with by the extension provision, under which the long negative prescription can be extended only to allow existing proceedings to come to a conclusion. My understanding is that Brodies is now content with what is in the bill.

Dr Simpson: My view is the same.

The Convener: Section 7 says that it will no longer be possible for the 20-year prescription that applies to certain property rights to be interrupted and that it can be extended only to allow on-going litigation to finish. Although that mirrors the approach in section 6 for personal rights, the Faculty of Advocates has suggested that the approach in section 7 would not work well for property rights such as servitudes. Does the panel agree with that and, if so, are there any alternative approaches that might work better? Dr Simpson is thinking about that one.

Dr Simpson: I am. I have not read all of the faculty's commentary, so what I say is not informed by that commentary. However, I am very happy with that provision. I am aware that servitude rights, such as rights of access that are constituted by one property in favour of another, are subject to the long extinctive prescription. I cannot see a problem with that under the provisions in the bill. I am happy that such rights should be subject to that long stop, for the sake of certainty. If the committee wants me to look at joint and several liability, I will be happy to comment in an email, if that would help, given that I am not familiar with the faculty's commentary.

The Convener: That is fair enough. Does Mr Wedderburn have any thoughts on that?

David Wedderburn: No—I have nothing to add.

The Convener: No? I thought that you might have.

Dr Russell: I have read what the Faculty of Advocates said and what Mr Howie said in his evidence to the committee, and I agree with what was said, particularly in the faculty's written submission. It seems anomalous that, if a person litigates about a right of servitude that they have not actually exercised for 19 years, it should prescribe after the 20-year period has elapsed on conclusion of the proceedings. That is something that could usefully be revisited.

The Convener: Thank you. I have questions on standstill agreements. When the Scottish Law Commission proposed the general possibility of being able to contract out of prescription, it got a mixed response. Section 13 of the bill contains a narrower proposal that would allow a single extension to the five-year period via a one-year standstill agreement. Section 13 also says that a contract to remove or shorten a statutory period of prescription would be invalid. Do you support the proposals in section 13, including permitting one-year standstill agreements? It would be helpful if you could explain the reasons for your views.

Dr Russell: I am happy to support the proposal that standstill agreements be permitted. They will help to facilitate investigation and settlement of claims. It is in everyone's best interests to avoid the need for adversarial litigation. There is the fear that such agreements could be abused and, in essence, used as a delaying tactic. That is why the very important safeguards in the bill should be there.

A standstill agreement, or an agreement to delay the running of the prescriptive period, should not be entered into in advance and should be entered into only once the prescriptive period has started to run—in other words, once a dispute has arisen. Such agreements should be subject to a time limit; a one-year limit is proposed in the bill, which I support because it seems reasonable. It should also be possible to utilise the provision only once. I agree with the Faculty of Advocates that there should be a requirement that such agreements be entered into in writing. That is a very sensible proposal that I endorse. There is a place for standstill agreements, but we need to be careful that they are not abused. I think that the safeguards in the bill will prevent that.

The Convener: It would be an agreement, so both sides would need to agree.

Dr Russell: Absolutely.

Dr Simpson: I agree with the caveat that such agreements should be in writing, which makes a lot of sense. I have no problem with standstill agreements. It is quite clear from the Scottish Law Commission's report that there is the possibility that people might in practice try to achieve that end through various devices, anyway. Standstill agreements provide a mechanism whereby the process is definitely possible, and therefore they promote legal certainty. I endorse that approach happily.

David Wedderburn: So do I. In the construction industry, in particular, there are often contracts of unequal power. I like the safeguards, because if they were not there the powerful part of the contract would set in and start extending the prescriptive period without restrictions. The safeguards will lead to fairness.

The Convener: Can you explain that point a bit further?

David Wedderburn: Yes. One could consider entering into such an agreement only once there was a dispute, so it could not be set up in the original contract. Due to the one-year limit and the fact that it will be possible to enter into such an agreement only once, the length of time cannot be extended, which would be another temptation for the more powerful contracting party.

The Convener: Section 14 would introduce an explicit statement in legislation that, when there is a question about whether a right or obligation has been extinguished by prescription, the burden of proof lies with the pursuer. What are your views on that proposed change?

Dr Russell: I am very happy to endorse the proposal. The current law is uncertain and there are conflicting dicta as to whether the pursuer or defender bears the burden of proof. For example, in the case of Strathclyde Regional Council v W A Fairhurst & Partners, the court said that the defender bears the burden or onus of proof. Whereas there are other cases, such as Pelagic Freezing (Scotland) Ltd v Lovie Construction Ltd and Grontmij Group Ltd, and Timothy R Richardson v Quercus Ltd, in which the court took a different view and said that the pursuer bears the burden of proof. Therefore, there is some uncertainty. It is perhaps surprising that the 1973 act did not address that issue and make specific provision on it—I think that the Court of Session judges have said that not providing for that was a somewhat surprising omission.

Sometimes, it is said the person who makes an affirmative statement bears the onus of proof, but that is problematic because it would depend on how pleadings were framed. A pursuer could say, "My right subsists," which is obviously an affirmative statement, but they could equally say, "Your obligation to me has not prescribed," which is a negative statement. Therefore, that proposition takes us no further forward and we need statutory clarification of where the burden rests.

The proposal in the bill is to place the burden on the creditor. It is important that the terminology that is used is "creditor" rather than "pursuer", because the question of the onus of proof could arise in a counter-claim, in which the creditor will obviously be the defender in the main action. That is why the bill says that the burden of proof should rest on the creditor. I endorse that proposal. It makes perfect sense. I would not suggest, or endorse any suggestion, that the burden should vary depending on whether we are dealing with a two-year, five-year, 10-year or 20-year prescriptive period. A uniform approach should be taken and the approach that is taken in the bill is eminently sensible.

Dr Simpson: I completely agree that it is very important that we have some clarity on the matter. The Scottish Law Commission set out options 1, 2 and 3—that the burden should be on the creditor, that it should be on the debtor or that it should switch. In the first instance, we definitely need some clarity and this is an excellent opportunity to provide that. As to where the burden of proof should lie, although I respect the view that there should be a switch and can see some merit to it, for the reasons that Dr Russell gave I am not convinced of it.

To be honest, when I saw the options, I was originally unsure as to whether the burden should be on the pursuer or on the defender. I found some of the reasoning that Morton Fraser gave in its response to the Scottish Law Commission discussion paper interesting in that regard. It commented:

> "It seems unfair that a defender should be allowed to assert a defence that an action has prescribed and then sit back and leave the pursuer to prove that this is not the case."

Of course, the language of "creditor" and "debtor" helps to address that to some extent.

The matter has clearly become a bit of a moot point in the courts. The senators of the College of Justice came to the view that option 1, 2 or 3 needs to be implemented. On balance, I am not terribly sure whether I would go with option 1 or 2, but there is a preponderance of opinion in favour of option 1 now.

David Wedderburn: I have little to add, other than to say that it is essential to have some clarity, which the bill provides, and it is appropriate to choose the creditor as the person on whom the burden of proof lies.

The Convener: If members have no other questions, do any other witnesses have anything to add that we have not covered?

Dr Russell: I point out that the bill proposes a reformulation of the fraud and error provision in section 6(4)(a) of the 1973 act. It might have been appropriate for it also to address section 6(4)(b) of the 1973 act, which relates to legal disability.

Legal disability has the effect of stopping the short negative prescription from running but has no impact on the running of the long negative prescription. It is defined in section 15(1) as

"legal disability by reason of nonage or unsoundness of mind".

You are probably aware that the Scottish Law Commission produced a discussion paper in 2006 on personal injury actions: limitation and prescribed claims, which was followed by a report in 2007. At that time, the commission was highly critical of the terminology of "unsoundness of mind" and took the view that it was outdated language. The Scottish Government then conducted a consultation and agreed with what the Scottish Law Commission had said about the terminology being outdated and about the term "unsoundness of mind" being potentially insulting.

11:00

I would endorse that and I think that the opportunity could have been taken here to update the language along the lines that have been proposed by the SLC to the effect that legal disability be defined as referring to somebody who is incapable within the terms of the Adults with Incapacity (Scotland) Act 2000. I think that in Scotland in 2018, we should not have language such as "unsoundness of mind" appearing in statutory provisions. The opportunity could have been taken here to tidy that up, given that we are seeing slight changes to other definitions, such as changes to the term "relevant claim" so that it includes claims in receivership and administration. Updating the language would also have been appropriate.

Dr Simpson: I certainly agree that it is worth revisiting the language.

Bill Bowman: Would changing the language change the meaning or the impact of that section?

Dr Russell: The term "unsoundness of mind" is considered to be insulting and offensive and I do not think that it has any place in this day and age.

Bill Bowman: But it would work in the other way that you said.

Dr Russell: Yes. Section 1(6) of the Adults with Incapacity (Scotland) Act 2000 would be a much more useful test to use.

Bill Bowman: But is it a different test? That is what I am getting at. Would it change the impact?

Dr Russell: No—it is really about a change of language. The language that is currently employed is frankly insulting and offensive. It certainly has the potential to cause offence.

The Convener: What is the new wording that you are suggesting?

Dr Russell: Somebody who is incapable within the terms of section 1(6) of the 2000 act. That proposal appears in the SLC's 2007 report. It is a matter of terminology rather than a matter of substance, to take up Mr Bowman's point. The terminology is just not appropriate in the modern world.

The Convener: That is very useful. We are here to consider potential amendments—that is our job, and you are here to help us with that.

I thank you all for your time. It has been a very interesting session. I also thank you for the language that you have used, which has been easy to follow, and some of the examples that you have used have been very useful as well.

I will suspend the meeting to allow the panel to leave.

11:02

Meeting suspended.

11:04

On resuming—

Instruments subject to Negative Procedure

The Convener: No points have been raised on the following three instruments.

Loch Carron Urgent Marine Conservation (No 2) Order 2017 (Urgent Continuation) Order 2018 (SSI 2018/100)

Town and Country Planning (Fees for Applications and Deemed Applications) (Scotland) Amendment Regulations 2018 (SSI 2018/110)

Letting Agents (Notice Requiring Information) (Scotland) Regulations 2018 (SSI 2018/115)

The Convener: Is the committee content with the instruments?

Members *indicated agreement.*

Instruments not subject to Parliamentary Procedure

11:04

The Convener: No points have been raised on the following two instruments.

Land Reform (Scotland) Act 2016 (Commencement No 7) Regulations 2018 (SSI 2018/99 (C9))

Criminal Justice and Licensing (Scotland) Act 2010 (Commencement No 15 and Saving Provision) and the Air Weapons and Licensing (Scotland) Act 2015 (Commencement No 8) Order 2018 (SSI 2018/102 (C10))

The Convener: Is the committee content with the instruments?

Members *indicated agreement.*

11:05

Meeting continued in private until 13:02.

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