

## **Changes to Prescription Law in Scotland – What Does it Mean for Me?**

On 1 June 2022, two significant sections of the Prescription (Scotland) Act 2018 came into force and modernised the law of prescription in Scotland. As a result of these changes, many claims that were due to prescribe (timebar) on or after 1 June 2022 have been given a new lease of life and, simultaneously, it now becomes harder for a defender to argue that a claim is out of time. The question of whether a claim prescribed prior to 1 June 2022 is likely to become a hot topic in the Scottish Courts. Further information about these changes is set out in the article below.

Scots law, by virtue of the Prescription and Limitation (Scotland) Act 1973, provides that certain obligations prescribe after a period of five years. If prescription applies the right is extinguished.

The Prescription (Scotland) Act 2018 will bring about many changes to the law of prescription. While the majority of these changes will not come into force until February 2025, two significant sections came into force on 1 June 2022. These sections changed sections 11 and 13 of the 1973 Act.

### **The prescriptive clock**

S11 of the 1973 Act provides the legal framework on when a claim becomes enforceable. The general rule is that the clock starts ticking on the date when the loss, injury or damage occurred. The pursuer has 5 years to raise an action from the date of loss, injury or damage. One exception to this arises where the pursuer ‘*was not aware, and could not with reasonable diligence have been aware*’ of the loss, injury or damage. In these circumstances the prescriptive clock is postponed. For around 30 years, until 2014, there was a consistent line of authority regarding this postponement. It was established that in order for the prescriptive clock to start ticking the pursuer must be, or should be, aware that: 1) they had suffered the loss; and 2) the loss must have been caused by fault or negligence. It was not necessary for a pursuer to know who the defender was.

#### *David T Morrison v ICL Plastics*

The case of *David T Morrison v ICL Plastics Ltd & Others* [2014] UKSC 19 caused an upheaval in the law which led to much uncertainty. In 2009, an action was raised for damages by Mr Morrison against ICL for damage that had been caused to Mr Morrison’s shop due to an explosion at ICL’s factory in 2004. In this case the s11(3) caveat was relied upon on the basis that while the loss had occurred more than 5 years ago Mr Morrison had not been able to ascertain that it was due to fault or negligence until much later. The action was defended on the basis that the claim had prescribed, and that any factory explosion should be considered negligent at the time of damage. The Supreme Court was split but, by a majority, it overturned 30 years of practice and it was held that prescription started running from the date of the loss, not at the date Mr Morrison became aware that the damage had been caused by fault or negligence. As a result, any obligation on ICL to make reparation had prescribed.

Lord Hodge, a Scottish Judge, was one of the judges to dissent *David T Morrison v ICL Plastic Ltd & Others*. In the judgement, Lord Hodge, urged that recommendations for reform, which were first presented by the Scottish

Law Commission in 1989, be given fresh consideration. In March 2017, the Scottish Law Commission did just that and prepared a draft Prescription (Scotland) Bill addressing what was seen as an unfair position for pursuers. This led to the 2018 Act and the changes that came into force on 1 June 2022.

### *3 Tiered Test*

Section 5 of the 2018 Act amends section 11 of the 1973 Act. In a short the position now is that the 5 year clock will not start running until the pursuer was aware, or with reasonable diligence should have been aware:

- (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.

This broadly restores the pre *David T Morrison v ICL Plastic Ltd & Others* position and introduces a new layer of protection for the pursuer, as it is now necessary for the pursuer to know the identity of the person who causes the loss, injury or damage.

### *Impact*

There has been much discussion on the impact this may have on prescriptive clocks that are already running. There is generally a presumption against the retrospective effect of legislation. Therefore, if there is an ongoing claim under the old law (pre 1 June 2022) which has prescribed the presumption is that that it will still prescribe. That being said, if there is a matter where the prescriptive clock expires after 1 June 2022, it may be that the prescription period will end later in light of the new law.

The change in law may rebalance the scales between the pursuer and defender and help to address some of the perceived unfairness that stemmed from the post-Morrison case law. As, however, with many legislative changes, we anticipate that this will open the door for more legal arguments, as parties debate whether or not a claim prescribed before 31 May 2022.

### **Extension to the prescriptive clock**

Pre 1 June 2022 under Section 13 there was a complete prohibition on extending the prescription period through agreement.

As of 1 June it will be possible to extend the prescription period where there is agreement from both parties. There are 3 caveats to be aware of: firstly, the prescriptive clock must already be running; secondly, it can only be extended by a year; and thirdly it cannot be extended more than once.

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