

PRESCRIPTION (SCOTLAND) ACT 2018

EXPLANATORY NOTES

THE ACT – COMMENTARY ON SECTIONS

The structure of the Act

Section 5 - Start point of prescriptive period for obligations to pay damages

19. Subsections (2) and (3) provide for the replacement of the words “act, neglect or default” with the words “act or omission” in section 11(1) and (2) of the 1973 Act respectively. This serves two purposes: it minimises fragmentation by establishing consistency with the language in section 17 of the 1973 Act; also, by focussing the test more clearly on matters of fact, it reflects that knowledge of the debtor’s liability in law is of no relevance in relation to the discoverability formula. This latter point is put beyond doubt by new subsection (3B).
20. Subsections (4) and (5) replace the existing discoverability formula for determining the knowledge which a pursuer must have before the prescriptive period begins to run where damages are sought for loss or damage which was initially latent. This is currently set out in section 11(3) of the 1973 Act. This addresses concerns that the decision of the Supreme Court in *David T Morrison & Co Ltd v ICL Plastics Ltd* [2014] UKSC 48 has brought forward the start of the five-year prescriptive period under section 11(3), in a manner that has been perceived to be detrimental to a fair balancing of the interests of creditor and debtor. In terms of the new formula, the five-year prescription does not begin to run until the date when the creditor became aware, or could reasonably have been expected to become aware, of the facts set out in new subsection (3A) of section 11 of the 1973 Act:
 - (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.
21. Under new subsection (3A), in a case where there is more than one debtor in an obligation but the creditor gains knowledge about the identity of one co-debtor earlier than that of another co-debtor, the starting point for the running of the prescriptive period for each of the debtors will be different.
22. New subsection (3B), for the avoidance of doubt, expressly states the current position which is that knowledge that any act or omission is or is not actionable as a matter of law is irrelevant for the purposes of the discoverability formula.