

POLICY NOTE

THE PRESCRIPTION (SCOTLAND) ACT 2018 (COMMENCEMENT, SAVING AND TRANSITIONAL PROVISIONS) REGULATIONS 2022

SSI 2022/78 (C. 6)

The above instrument was made in exercise of the powers conferred by section 17(2) and (3) of the Prescription (Scotland) Act 2018.¹ The instrument is laid but not subject to further parliamentary procedure.

Purpose of the instrument.

Policy Objectives

The purpose of the instrument is to commence the substantive provisions of the Prescription (Scotland) Act 2018 (hereafter referred to as “the 2018 Act”). These substantive provisions come into force 3 years from the date these Regulations are made – that is **28 February 2025** - with two exceptions. Sections 5 and 13 of the 2018 Act come into force 3 months from the date these Regulations are made – that is **01 June 2022**.

The doctrine of prescription serves a vital function in the civil justice system. Negative prescription sets time-limits for when obligations (and rights), such as obligations under a contract, are extinguished. The 2018 Act changes the law of negative prescription to address certain issues which have caused - or may cause - difficulty in practice. These changes are designed to increase clarity, certainty and fairness as well as promote a more efficient use of resources, such as pursuers being less likely to have to raise court proceedings to preserve a right, and reduce costs for those involved in litigation and insurance.

A number of provisions in the 2018 Act can, for the purposes of commencement, usefully be divided into two broad categories: those which might in practice *reduce* the amount of time before an obligation prescribes and those which might in practice *increase* the amount of time. The Regulations recognise this and therefore provide that, generally, the substantive provisions of the 2018 Act will come into force after a significant lead-in period. This is because creditors/debtors will need time to understand how the reforms could impact their interests and, accordingly, take steps to set their affairs in order. The lead-in period provided for the majority of provisions is 3 years after the date these Regulations are made.

The Scottish Government, however, recognises that not all the substantive provisions of the 2018 Act will require the same length of lead-in time before coming into force. Two provisions in particular - standstill agreements (section 13) and the amended ‘discoverability test’ (section 5) – will come into force 3 months after the date these Regulations are made. These two provisions do not have the effect of retrospectively shortening any prescriptive period.

¹ Available at <https://www.legislation.gov.uk/asp/2018/15/enacted>

Standstill agreements to extend the 5-year prescription² are only valid if they are made after the appropriate prescriptive period has started to run but before it has been completed. Such agreements can extend the prescriptive period by no more than one year and only one such extension can be made. Being able to stop the prescription clock ticking for a specified period of time may allow parties enough additional time to negotiate an end to their dispute, without the need for a creditor to raise protective court proceedings to preserve their right where the prescriptive period may otherwise have ended. The existence of an agreement does not retrospectively alter whether a claim has prescribed – as mentioned above, it can only validly be entered into within the relevant prescription period. Importantly, all parties to such an agreement must consent to any such extension. This provision could be of benefit to a number of persons and should be available by commencement of section 13 in a short timescale.

The ‘discoverability test’ is concerned with latent damage – a type of damage that is not immediately obvious, such as a defect in property. Any such latent damage will only come to light after the events giving rise to it. For example, housing is built on a former mining site and, on the basis of advice, no steps are taken to prevent gas ingress. Such a failure is likely to be known after the advice is relied on, the property is built and occupied. Where the damage is latent, if the parties involved were given a 3 year lead-in period, it is difficult to see what steps could be taken to set their affairs in order. The Scottish Government therefore does not consider that a 3-year lead-in period is required before the coming into force of this provision.

An outline of the policy of the sections of the 2018 Act which are being commenced by the Regulations is set out below. The Explanatory Notes to the 2018 Act contain further explanation of each section.³

Section 1 - Obligations to pay damages and delictual obligations

This section makes clear that obligations to pay damages fall within the scope of the five-year prescription regardless of their source; examples are obligations arising by virtue of any enactment, the common law, delict, breach of contract or promise.

Section 2 - Obligations related to contract

This section brings within the scope of the five-year prescription two further types of obligation: any obligation relating to the validity of a contract and the obligation to reimburse expenditure incurred as a result of dealings in anticipation of the coming into existence of a contract which does not in fact come into being.

Section 3 - Statutory obligations

This section brings within the scope of the five-year prescription all statutory obligations to make a payment in so far as they neither fall within any other subparagraph of paragraph 1 of schedule 1 of the Prescription and Limitation (Scotland) Act 1973 (“the 1973 Act”), nor are excluded by some exceptions. These exceptions are obligations to pay taxes and duties

² And 2-year prescription in terms of section 8A of the Prescription and Limitation (Scotland) Act 1973.

³ Available at <https://www.legislation.gov.uk/asp/2018/15/notes/contents>

recoverable by the Crown and any interest, penalty or other sum recoverable as if it were an amount of such taxes or duties; obligations to pay sums recoverable under certain social security and tax credit legislation; any obligation to pay child support maintenance under the Child Support Act 1991; and obligations to pay council tax or non-domestic rates and sums recoverable in connection with the enforcement of such obligations.

Section 4 - Effect of fraud or error on computation of prescriptive period

This section clarifies certain matters of ambiguity that have arisen in case law on the effect of fraud or error on determining the prescriptive period.

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

This section focuses the legal test for obligations to pay damages more clearly on matters of fact, and replaces 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.

Section 6 - Obligations: 20-year prescriptive period and extension

This section makes provisions for the 20-year prescriptive period to function as a true long stop, by ensuring that it will no longer be amenable to interruption by a relevant claim or by relevant acknowledgement (which currently has the effect of a full 20-year period starting again). Although the 20-year prescription will no longer be amenable to interruption by a relevant claim or by acknowledgement, it may be extended in certain circumstances.

Section 7 - Property rights: 20-year prescriptive period and extension

In the same way as section 6 of the 2018 Act makes changes to ensure that the 20-year prescriptive period functions as a long stop, so section 7 makes similar changes regarding the extinction of certain rights relating to property by a 20-year prescriptive period.

Section 8 - Start point of prescriptive period for obligations to pay damages

The 20-year prescriptive period for obligations to pay damages currently runs from the date when loss, injury or damage occurred. Where time runs from the date of loss or damage, it is quite possible for a very long period to pass without the prescriptive period even beginning to run. The effect of this section is to introduce a separate start date for the running of the 20-year prescriptive period, but only in relation to claims involving recovery of damages. For such claims, time will run from the date of the act or omission giving rise to the claim or, where there was more than one act or omission or the act or omission is continuing, from the date of the last act or omission or the date when it ceased.

Section 9 - Saving for other statutory provisions about prescription or limitation

This section clarifies the interaction between the five-year and 20-year prescriptive periods provided for in sections 6 and 7 of the 1973 Act and other prescriptive or limitation provisions set out in other enactments. It makes clear that neither the five-year nor 20-year prescriptive periods under the 1973 Act will apply, where an enactment other than the 1973

Act expressly provides either for a specific limitation or prescriptive period or that an obligation is imprescriptible or not subject to any period of limitation.

Section 10 - Definition of “relevant claim”

This section expands the definition of “relevant claim” to include the submission of a claim in an administration or receivership, and the acts that trigger administration or receivership. It also expands definition of “relevant claim” in relation to the 10-year prescription which applies to obligations to make reparation for damage caused wholly or partly by a defect in a product.

Section 11 - Prescriptive periods under sections 6 and 8A: interruption by relevant claim

For periods of prescription which are amenable to interruption, in terms of section 6 or section 8A of the 1973 Act, section 11 clarifies the effect of the making of a relevant claim on the running of prescription. The current law on this matter is uncertain. The effect of the new provision is that the making of a relevant claim for implement or part-implement of an obligation will interrupt the running of the relevant prescription to extinguish obligations or to make contribution between wrongdoers, until the claim is disposed of finally. Only at that point will a fresh prescriptive period begin to run.

Section 12 - Definition of “final disposal” of relevant claim

This section provides a definition of “final disposal” of a relevant claim, making clear that, in the case of an appeal decision, the question whether or not there is an onward right of appeal from that appeal decision must be examined in the circumstances of each case.

Section 13 - Restrictions on contracting out

This section makes clear that agreements to extend the 5-year prescriptive period (and the 2-year prescriptive period) are competent provided that certain conditions are met.

Section 14 - Burden of proof

For clarity, this section, dealing with the onus of proof, provides that where there is any question as to whether or not an obligation or right has been extinguished by prescription, it is for the creditor to prove that the obligation or right has not been extinguished.

Consultation

The policy objectives of the 2018 Act were subject to parliamentary scrutiny as part of the parliamentary process. The Scottish Government has also consulted on proposed commencement Regulations to bring into force the 2018 Act. On 13th July 2020, the Scottish Government published a consultation paper for public response, which was open for twelve weeks.⁴ The analysis of responses, and the Scottish Government’s response were published on 28 February 2022.

⁴ Available at <https://www.gov.scot/publications/prescription-scotland-act-2018-consultation-commencement-regulations/>

A majority of stakeholders agreed with a 3 year lead-in period between the commencement Regulations being made and the substantive provisions of the 2018 Act coming into force. A number of responses mentioned that not all substantive provisions need this length of lead-in. Two provisions were specifically mentioned: standstill agreements and the amended discoverability test. The Regulations laid take into account these comments received as part of the consultation process.

Impact Assessments

No impact assessments have been prepared for these commencement Regulations. The Scottish Government, however, prepared impact assessments when the Prescription (Scotland) Bill was introduced.

Financial Effects

The financial effects of the 2018 Act are detailed in the Business and Regulatory Impact Assessment (BRIA)⁵ and Financial Memorandum⁶ prepared in respect of the Bill that preceded the 2018 Act. No significant financial effects are expected as a consequence of these Regulations.

Scottish Government
Justice Directorate
February 2022

⁵ Available at [Business and Regulatory Impact Assessment - Report on Prescription \(Report No 247\)](https://www.scotlawcom.gov.uk/business-and-regulatory-impact-assessment-report-on-prescription-report-no-247) ([scotlawcom.gov.uk](https://www.scotlawcom.gov.uk))

⁶ Available at <https://www.parliament.scot/-/media/files/legislation/bills/previous-bills/prescription-scotland-bill/introduced/financial-memorandum-prescription-scotland-bill.pdf>