



# BRIEFING NOTE

STAGE 1 REPORT ON THE PRESCRIPTION (SCOTLAND) BILL  
IMPLICATIONS FOR LENDER PROFESSIONAL NEGLIGENCE CLAIMS





# Stage 1 Report on the Prescription (Scotland) Bill

## Implications for Lender Professional Negligence Claims

Following a full consultation period the Delegated Powers and Law Reform Committee has published the Prescription (Scotland) Bill: Stage 1 Report on 14 June 2018. The Bill aims to amend the law relating to the extinction of civil rights and obligations by the passage of time. It concerns negative prescription only.

The Bill makes a number of changes, the most significant are explained below, which may have implications for lenders and their claim

### Current Law - Discoverability

Changes to the previous legislation, the Prescription and Limitations (Scotland) Act 1973, have become necessary following the Supreme Court decisions in *David T Morrison & Co Ltd v ICL Plastics Ltd* [2014] and its interpretation in *Gordon and others v Campbell Riddell Breeze Paterson LLP* [2017].

Prior to the *Morrison* decision, it was thought that section 11(3) of the 1973 Act meant that the five year prescription period was postponed until the pursuer knew that:

- he or she had suffered loss, injury or damage; and
- that loss injury or damage had been caused by fault or negligence.

In *Morrison*, it was determined that practitioners had for year been misinterpreting the wording of section 11(3) and that the sole trigger for commencement of prescriptive period was knowledge of loss. It was later confirmed by the *Gordon's Trustees*, that it did not matter whether the creditor even knew that the loss was in fact a loss. That case, the incurring of legal fees for enforcement of notices drafted by the previous solicitors were sufficient to commence the prescription clock, even though those fees would absent of knowledge of the breach be considered normal business costs. It was widely acknowledged that this approach to prescription would produce "hard cases" where claims could prescribe before the creditor was ever aware of a potential claim.

### New Discoverability Test

In Section 5 of the Report a new approach to the 'discoverability test' is considered. This test relates to five year prescription and the obligation to pay damages. It sets out the knowledge that a pursuer must have before the prescriptive period starts to run. This is of particular significance where damages are sought for loss or damage which was initially latent.

The proposed new test will have three strands. The creditor must be aware (or could reasonably have been expected to become aware):

- that loss, injury or damage has occurred;
- that the loss, injury or damage was caused by a person's act or omission, and
- the identity of the person who caused the loss, injury or damage.

This is a potentially important change for lenders professional negligence claims.

The typical stage at which a lender will consider pursuit of a professional negligence claim in respect of residential lending will be after the property has been repossessed and sold resulting in a crystallised shortfall loss.

There is ample case law which documents that loss may occur and with reasonable diligence be evident to the lender prior to a final crystallised loss. In particular, in the situation where the borrowers covenant is no longer of value, legal fees have been incurred and the field agents report suggests negative equity. It may also be apparent to the lender that a loss has been suffered despite the fact that no negligence on the part of the completing solicitor or surveyor has yet been identified. The problem could be compounded in situations where possession has been delayed for a considerable period. Under the current law, it is even possible that a claim may prescribe prior to the property being taken into possession.

If as now proposed, the prescriptive period does not commencement until the lender is aware that "*the loss, injury or damage was caused by a person's act or omission*", this may delay commencement of the prescriptive period until such time as investigations had been conducted into the conduct of the professionals.

The advantage of standstill agreements is that parties would not have to raise court proceedings to prevent prescription from extinguishing their rights.

If the Bill is passed in this format, this a substantial change and is reflective of the pre Morrison position.

The Committee noted in the report the impact of the Supreme Court and that the proposed changes “*contributes the overall objective of the Bill to provide legal certainty*”. This will be a clear benefit to the insurance industry and legal practitioners.

## Standstill Agreements

Section 13 of the 1973 Act currently prohibits agreements in a contract to lengthen, or entirely remove, one of the statutory periods of prescription. Accordingly it was impossible for parties to a dispute even by agreement to extend the five year prescriptive period.

Section 13 of the proposed Bill would substitute the current section 13 and would allow contracts that extend the five year period to be competent where certain conditions are met.

These conditions are:

- it should only be possible to enter into such an agreement after a dispute has arisen;
- people and organisations should only be able to extend

the five year period once; and

- the extension should be limited to one year, with no further extensions allowed.

The advantage of standstill agreements is that parties would not have to raise court proceedings to prevent prescription from extinguishing their rights. This would provide greater scope for greater pre litigation engagement in claims and may result in more pre litigation settlements.

Significant concerns were identified by contributing parties that the proposed standstill agreements would be open to abuse by economically stronger parties and that the certainty of the legal position would be undermined by such measures. The provision of the standstill position may also compromise freedom of contract between commercial parties.

Despite these comments the Committee did remain on balance supportive of the standstill agreements though aspects remain under consideration.

In terms of cost savings, we consider that the ability to enter into standstill agreements would be of benefit in the pursuit of claims.



**Myra Scott**

Partner,

0141 225 5432

[mscott@acandco.com](mailto:mscott@acandco.com)



**Paul McIntosh**

Partner

0131 221 2425

[pmcintosh@acandco.com](mailto:pmcintosh@acandco.com)

