Scottish Law Commission
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RESPONSE FORM

DISCUSSION PAPER ON PRESCRIPTION

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Summary of questions

1. Do you agree that the 1973 Act should provide that its provisions on prescription are not to apply to rights and obligations for which another statute establishes a prescriptive or limitation period?

(Paragraph 2.14)

Comments on Question 1

Yes. We consider that provision would be particularly important if the decision is taken to subject all statutory obligations to the five-year prescription (question 2, below).

2. Do you agree that the 1973 Act should provide generally for rights and obligations arising under statute to prescribe under the five-year prescription?

(Paragraph 2.46)

Comments on Question 2

We note the reasons given for the proposed change. Further we agree that, in certain circumstances, the present structure of the law produces anomalous results, where obligations arising under statute are imprescriptible. We consider, however, that the question of whether general provision should be made for statutory obligations is essentially one of policy.

In the event that a decision is taken to include statutory obligations within Sch 1 para 1, we agree with the observations made in para 2.45 of the report in relation to exclusions from the five-year prescription and statutory obligations subject to their own time limits.

3. If the 1973 Act were to provide generally for rights and obligations arising under statute to prescribe under the five-year prescription, are there rights and obligations which ought to be excepted from this regime?

(Paragraph 2.46)

Comments on Question 3

We consider that this is a matter of legislative policy and have no further comments.

4. Do you agree that Schedule 1 paragraph 1(d) should refer not to obligations arising from liability to make reparation but to obligations arising from delict?

(Paragraph 2.59)

Comments on Question 4

We agree with the policy underlying this change: that obligations arising from delict (other than the obligation to make reparation) should be subject to the short negative prescription. We consider, however, that the drafting of Sch 1 should not be altered without good reason and that any alteration should be made with care. At present, an obligation to make 'reparation', whatever its source, will prescribe negatively. We acknowledge that such obligations have typically been delictual obligations and that attempts to widen the category have been unsuccessful (for example, *Hobday v Kirkpatrick's Trustees* 1985 SLT 197). Nevertheless, it appears to us, in principle, that the category of obligations to make reparation is capable of encompassing non-delictual obligations (as, for example, with obligations to make reparation arising from a breach of trust: *Ross v Davy* 1996 SCLR 369 at 384). There seems to be no reason why such non-delictual obligations should be excluded from the short negative prescription. Accordingly, we consider that it would be more appropriate for para 1(d) of Sch 1 to remain unchanged. Instead, a further provision might be inserted to encompass delictual obligations other than the obligation to make reparation (as is the case for contractual obligations under para 1(g)).

We also note the views expressed at para 2.58 in relation to continuing wrongs. We note the proposal that the relevant provision of s 11 (s 11(2)) should be extended from obligations to make reparation to obligations arising from delict, and that similar provision should be made to extend s 11(3) (or its replacement). We understand the policy underlying such a proposal. To extend it in such a way, however, seems inconsistent: an obligation (other than one to make reparation) will remain unaffected by the discoverability and continuing wrong provisions if its source is contractual or in unjustified enrichment. The proposed alteration would be a major change to the framework of the 1973 Act, and we agree with the remarks made at paras 9.21-9.22 in this regard. Moreover, we consider that the proposed change would introduce particular complexity in cases where an obligation can be located in both contract and delict, leading to the unsatisfactory situation where very similar obligations would have entirely different prescriptive periods.

5. Do you agree that Schedule 1 paragraph 1 should include obligations arising from pre-contractual liability?

(Paragraph 2.77)

Comments on Question 5

We agree, in principle, with the policy which underlies this proposal. A claim based on Melville Monument liability does not at present fall within Sch 1 and we agree that, for reasons of consistency with contractual liability, such claims should be subject to the five-year prescription.

We note, however, that the existence and scope of Melville Monument liability has recently been doubted by the Inner House (*Khaliq v Londis (Holdings)* 2010 SC 432), and that its principles might now be found in the developed Scots law of contract and delict. Commentary on the decision has suggested that the Inner House in Khaliq was incorrect to suggest that the scope of Melville Monument liability should be restricted in such a way and

that it would, in fact, be fruitful if the doctrine were extended in Scots law, consonant with a greater emphasis of principles of good faith in contract (Hogg and MacQueen, 'Melville Monument liability: some doubtful dicta' (2010) Edin LR 451). Given that the scope of the modern law is, as a result, unclear, and its future development uncertain, it may not be appropriate, at present, for legislation to be passed on it in the field of prescription. We suggest that it would be more appropriate for the law to be developed either by the courts or by primary legislation, following consideration of the issues raised in Khaliq.

6. Do you agree that Schedule 1 paragraph 1 should include rights and obligations relating to the validity of a contract?

(Paragraph 2.77)

Comments on Question 6

No. We are concerned about the practical implications of the change proposed. We consider that reform in this area would create considerable additional complexities and the possibility of unjust results. We are of the opinion that these disadvantages outweigh the advantage of greater certainty in a limited number of cases which a change would provide.

We consider that the proposed change has the potential to produce undesirable results in certain circumstances, and that these undesirable results outweigh the benefits of a change. We consider that it is useful to distinguish two situations:

(i) Situations in which a party seeks to set aside a contract concluded more than five years previously, where that party's obligations arising from the contract have not yet been completed. In many cases, outstanding obligations will be subject to the five-year prescription and therefore the availability (or non-availability) of reduction will not create difficulties. In other cases, however, this will not be so. In such a situation, a party bound to complete an obligation as a result of the contract would lose the right to challenge the contract. This might arise, for example, where the contract contains obligations relating to land, which will prescribe after twenty years. On the face of the reform suggested, it would appear that these obligations would subsist, whilst a potential defence to any action based on them would have prescribed. More complex issues might also arise where the outstanding obligations under the contract fell under one of the provisions of the Act which postpone the five-year time period. S 11(3), for example, as presently drafted (and, as we understand the reform proposed, as will be in future) applies only to obligations to make reparation. If a pursuer was able to rely on this provision, a defender, who had entered the contract as a result of error or innocent misrepresentation, might be unable to rely on this defence. Similar issues would arise in relation to s 11(2). More broadly, it seems to us that any reform would have to take account of the potential mismatch between the start date for the prescriptive period in relation to enforcing a contractual obligation (which will often be the date performance is due or the date on which loss arises) and the start date for an action of reduction under the

proposed reform (which might be the date of the misrepresentation). Such a mismatch would, in our view, have the effect of adding considerable and undesirable complexity to this area of the law.

(ii) Situations in which a party seeks to set aside a contract concluded more than five years previously, where the obligations under the contract have all been completed. This is, in essence, the example given at para 2.75 under reference to *Peco Arts v Hazlitt*. In such situations, we agree that a five-year period would provide increased certainty. In view of the other difficulties which the introduction of such a period might cause, however, we consider that the present law provides sufficient protection. These features are referred to at para 2.76 and include the requirement for restitutio in integrum and the inherently equitable nature of reduction as a remedy. Equally, the practical effect of such a change might well be limited, as a party seeking reduction would often be able to rely on the terms of s 6(4).

For the reasons given above, we consider that the potential benefit in situation (ii) is outweighed by the difficulties which situation (i) would create. Accordingly, we do not support the proposed change.

7. Are there other obligations to which Schedule 1 paragraph 1 ought to be extended?

(Paragraph 2.77)

Comments on Question 7

We are not aware of any such obligations.

8. Do you agree that it is appropriate to revisit the discoverability test of section 11(3)? If so, which option do you favour?

(Paragraph 4.24)

Comments on Question 8

We agree that it is appropriate to revisit the discoverability test contained in section 11(3). Our view is that there are merits to both Option 2 and Option 3, each of which represent an improvement on the state of the law following *David T Morrison & Co Ltd v ICL Plastics Ltd*. Option 2 has the advantage that it was widely understood to represent the law prior to the Supreme Court's decision in that appeal. Further, the five year prescriptive period should afford ample time to the pursuer who is aware of both his loss and the cause of his loss to identify the person who has caused the loss and raise an action. There is considerable logic to the reformulation proposed in option 3 which defines the date from which prescription runs by reference not only to the awareness of loss, but also the act which has caused the loss and the identity of the person who has caused it. The addition of a third fact which the pursuer must be aware of inevitably raises the prospect of the date from which prescription

commences being delayed further, however.

While our view is that either option 2 or option 3 will represent an improvement on the current state of the law, disputes on the commencement of the prescriptive period are likely to be of a different character than under the current interpretation of section 11(3). In particular we have reservations regarding how option 3 would interact with the test of reasonable diligence. We accept that the proposed revision of Section 11(3) represented by option 3 requires the pursuer to be aware of three facts in order for prescription to start running, and that in most cases it will be the appearance of loss which will alert the pursuer to the possibility that another has caused them loss. There will be other instances, however, where negligence or breach of contract becomes apparent, but loss is not necessarily discernible at that point. Our view is that the broad similarity of the option 3 to the provisions of section 17(2)(b) regarding the limitation of actions for personal injury raises questions regarding how the pursuer who becomes aware of one of the facts must act thereafter. A pursuer who becomes aware of one of the material facts set out in section 17(2)(b) must then take all reasonably practicable steps to inform himself of the other material facts: *Agnew v Scott Lithgow (No2)* 2003 SC 448. Although the test in section 11(3) is one of reasonable diligence rather than reasonable practicability, the expansion of the range of facts which the pursuer must be aware of in order to commence the running of the prescriptive period raises the obvious prospect of the courts having to resolve disputes as to whether the pursuer who is aware of one of the criteria in option 3 is under a duty to investigate the other facts on account of the similarity of this option to section 17(2)(b).

The situations in which this might arise potentially are significant, and are not necessarily a rare occurrence. In one obvious example, it could become apparent that a professional advisor's conduct or advice is negligent, but, because of the nature of the transaction, loss is not apparent. We agree that the start of the prescriptive period ultimately should be postponed until the pursuer becomes aware of loss. However, it may be considered anomalous for the pursuer to become aware of professional misconduct on the part of an advisor, for example, but not to exercise reasonable diligence in order to investigate whether there has been loss. This situation may be compounded if the test in section 11(3) is also reformulated in order to require the loss to be material. In that scenario the pursuer would be aware of an element of loss, the event causing it, and the person responsible, but the question will arise as to whether he has to continuously review his loss to determine whether it has become material.

In the situation which is truly the emergence of latent damage, where the loss is the first thing the pursuer becomes aware of, our view is that the reformulation of the test in section 11(3) will present no prejudice to either pursuer or defender. It will also be for the courts to determine whether a similar test to that in *Agnew* will apply if option 3 is adopted. If the proposed revision of the test in section 11(3) represented by option 3 is adopted, it is not apparent at this point how disputes as to what is required of a pursuer can be avoided by legislative drafting.

9. Do you agree that the 1973 Act should provide that loss or damage must be material before time starts to run under section 11(1)?

(Paragraph 5.17)

Comments on Question 9

Yes. The situation where any loss, however minor, can commence the running of the prescriptive period can produce harsh results for pursuers. We agree that the inclusion of a reference in section 11(1) to the need for the loss to be material would represent an improvement from the current position, although it may present a different set of problems for pursuers and defenders compared with those encountered at present. We note the test proposed at para 5.13 is an objective one of the damage being of such significance that a reasonable person would have thought it worth pursuing. In a simple case where there is only one head of loss or damage the assessment of what a reasonable person would see as sufficiently significant to warrant raising an action might be relatively straightforward. In the more complex case where there are various heads of damage, involving possibly significant consequential loss, the application of the proposed test is likely to be more difficult. We therefore have reservations that the proposed test is sufficiently precise to curtail or forestall arguments regarding what the view of the reasonable person would be.

The proposed test inevitably raises the question of whether a reasonable person would consider the loss to be worth pursuing simply because it is beyond that which is trivial or de minimis, a concept which in turn is necessarily ill-defined: see *Fish & Fish Ltd v Sea Shepherd* UK [2015] AC 1229 per Lord Sumption at para 50. Our reservation is whether the proposed test in practice would require the material loss to be something which is not de minimis, or something which is significantly beyond that which is de minimis.

Our view is that it would be more straightforward simply to define material loss as loss which is not trivial, de minimis, or 'insignificant'. Defining materiality in this manner would import a well-known concept which is sufficiently flexible in its application to allow the significance of the loss to be considered in the factual context of each case. Adopting a test for materiality of loss by reference to that which is not trivial or de minimis is not without precedent, with at least one significant case on prescription already referring to materiality of loss by reference to the loss in question being 'more than insignificant': *ANM Group Ltd v Gilcomston North Ltd* 2008 SLT 835.

We are further of the view that, whether the test set out in the proposals, or the test which we suggest, is adopted, there would be considerable benefit in excluding from the test any consideration of the resources of the pursuer or defender. The reason for this is that, in our view, consideration of the relative resources of the parties is not only a matter which is unrelated to the nature of the loss, but is also an issue which raises considerations which are subjective rather than objective.

10. Do you agree that the discoverability formula in section 11(3) should refer, for time to start running, to the need for the pursuer to be aware that he or she has sustained material loss or damage?

(Paragraph 5.17)

Comments on Question 10

Yes. If section 11(1) is to reflect the need for loss or damage to be material, the test in

section 11(3) should adopt a formulation consistent with that in section 11(1). It is our view that a reformulation which refers to the materiality of loss would be of benefit to both pursuers and defenders. For pursuers, the need for loss to be material would remove the potentially harsh effect of the law at present. For defenders, the objective nature of the proposed test for materiality of loss ought to remove the prospect of a pursuer turning a blind eye to material loss in order to delay the commencement of the prescriptive period.

11. Do you agree that the discoverability formula in section 11(3) should provide that the assessment of the materiality of the loss or damage is unaffected by any consideration of the pursuer's prospects of recovery from the defender?

(Paragraph 5.17)

Comments on Question 11

No. In our view it would be unnecessary to do so if the test for materiality of loss expressly excluded reference to the resources of the parties. In any event, irrespective of whether option 2 or option 3 were to be adopted, the terms of any legislative provision reflecting either option would be sufficiently clear as to the facts which must be focussed on to exclude consideration of the prospects of recovery as a factor in determining whether prescription has started to run.

12. Do you agree that the present formulation of the test of "reasonable diligence" is satisfactory?

(Paragraph 5.23)

Comments on Question 12

We agree that the present test of reasonable diligence is satisfactory. As noted above in our response to question 8, it has to be acknowledged, however, that the test will be applied to a new set of criteria if section 11(3) is reformulated. The test remains satisfactory, but its application to a new set of criteria will raise additional questions as to what the pursuer has to do in practical terms in order to comply with section 11(3). The addition of the criterion that loss must be material will also raise issues of how the pursuer must exercise reasonable diligence in order to ascertain whether his loss is trivial or has become material.

13. Do you agree that the starting date for the long-stop prescriptive period under section 7 should be the date of the defender's (last) act or omission?

(Paragraph 6.20)

Comments on Question 13

Yes. When it is the long negative prescriptive period which is under consideration, the more

important matters in the balance between the interests of pursuers and defenders are certainty and the need to allow potential defenders to proceed upon the footing that a possible source of liability can henceforth be ignored. The central problem, as it seems to us is that the occurrence of loss may be long delayed and that if it happen at all, it may happen at a date quite unknown to the defender. Erroneous advice to a trust may only be productive of loss a generation later. If, therefore, the *terminus a quo* for the running of prescription is taken to be the date on which loss in fact eventuated, certainty for the defender is lost. We are therefore of the view that time should count from a date which can more readily be identified by the defender and his insurers. We accordingly agree with the general thrust of this proposal, though we wonder if sins of omission can be treated in the same way. When, to take an example, would a failure to comply with a continuing duty to review the building's design or to warn of a dangerous design flaw prescribe?

14. Do you agree that the long-stop prescriptive period under section 7 should not be capable of interruption by a relevant claim or relevant acknowledgment?

(Paragraph 6.25)

Comments on Question 14

Yes. This follows from our view that the most important consideration when looking at the long negative prescriptive period is to achieve a certain end to the prospect of litigation about some alleged ground of liability at a reasonable date. To permit either a relevant claim or a relevant acknowledgement to re-start the prescription clock is to lose that certainty and to extend potential liability for an undesirably long period of time. In theory, to allow the prescription clock to be re-started by a relevant claim is to make potential liability indefinite at the whim of the pursuer and so defeat the object of prescription altogether. To permit that clock to be re-started by relevant acknowledgement is to invite litigation about the existence or otherwise of an acknowledgement in the requisite terms as a precursor to litigation about the actual failure complained of in the substantive part of the action. We doubt whether this is of advantage.

15. Where a relevant claim is made during the long-stop period, do you agree that the prescriptive period should be extended until such time as the claim is disposed of?

(Paragraph 6.25)

Comments on Question 15

Yes. This strikes us as being both fair and sensible. A defender should not be able to defeat a claim against him by the deployment of Fabian tactics in litigation.

16. Do you agree that construction contracts should not be subject to any special regime in relation to the running of the long-stop prescriptive period?

(Paragraph 6.31)

Comments on Question 16

We do not support the creation of a special rule about long negative prescription in building contracts. We note that examples of long negative prescription becoming the subject of dispute in such cases are rare, especially when compared to the wealth of cases in which the deferment or suspension of the short negative prescriptive period is contended over. We are inclined to doubt whether the creation of a new rule would be of benefit in sufficiently great a number of cases to justify the fragmenting of the law which the creation of the special rule would entail. This would be so even if the special rule would be otherwise merited and practical. We are not inclined to think that that is so. We would agree with commentators in the past who have argued that the special rule's existence would generate new areas of dispute over whether the contract in hand attracted the new rule or not. We do not believe that the Commission's suggestion of overcoming that objection by the adoption of the definition of "construction contract" in the Housing Grants, Construction and Regeneration etc., Act 1996 would succeed in achieving the desired aim of obviating dispute, not least because of the size of the jurisprudence which has been built up in the twenty or so years of that Act's existence as a result of disputes about the ambit of the statutory definition.

17. (a) Do you regard 20 years as the appropriate length for the prescriptive period under section 7?

(b) If not, would you favour reducing the length of that period?

(Paragraph 6.34)

Comments on Question 17

We take the view that the issues raised in these two questions are policy matters on which the Faculty ought not to express an opinion.

18. Do you favour permitting agreements to shorten the statutory prescriptive periods? Should there be a lower limit on the period which can be fixed by such agreements?

(Paragraph 7.23)

Comments on Question 18

We would not favour permitting contractual agreements to shorten the prescriptive period. If it is appropriate as a matter of Parliamentarily determined policy that in order to achieve a fair balance between the interests of pursuers and defenders a given period of time (say, five years from the date of loss, subject to certain extensions in case of latent defect) should be allowed to pursuers to bring actions on pain of the extinction of their rights if they do not, it would appear to us to be inconsistent with, and subversive of, that policy to allow parties (or, in reality, the commercially stronger party) to contract out of that period and substitute a different one which they conceive to be more in their – or its – interests. Such boilerplate

clauses in standard or semi-standard contracts are frequently overlooked by parties and their advisers prior to litigation, and we would have limited confidence in the usefulness of the unfair contract terms legislation adequately to counter the problem. Not all obligations lengthened or shortened by contract would fall within the purview of that legislation. At the very least, because that tract of legislation employs a test of reasonableness in the circumstances, its use is apt to lead to litigation entailing proof with the concomitant delay and expense which that entails. It would seem preferable to have a straight-forward rule which protects the statutorily determined balance by simply outlawing agreements which would in some degree contract out of, or seek to circumvent, the substantive provisions on prescription. One might, indeed, consider extending the ban to contractual limitation clauses, as they often have in practice much the same effect as clauses altering the prescriptive period.

We would make a limited exception from our general view, however, in the case of the "standstill" agreement reached after a dispute has arisen and with a view to delaying the point at which an action has to be served on the defender. Subject to the important proviso that such agreements should by statute be limited to a reasonably short maximum duration (we should have thought that something of the order of six months or a year would be appropriate), we would not see them as being objectionable as alterations of the short negative prescriptive period. They would have little more effect than does the present undertaking of limited duration not to take a prescription point, and if, for reasons of convenience, a party is willing to subject himself to a time-barred action provided that it is raised before a specified date, that is his choice.

We think that some clear limits to the availability of "standstill" agreements should be laid down. We would not favour the agreement being able to be entered prior to the dispute to which it relates coming into existence or covering more than the competently raised subject-matter of one summons. In the interests of maintaining the certainty about the long negative prescription which we think to be important, we do not support the introduction of "standstill" agreements which would have the effect of extending the long negative prescriptive period.

19. Do you favour permitting agreements to lengthen the statutory prescriptive periods? Should there be an upper limit on the period which can be fixed by such agreements?

(Paragraph 7.23)

Comments on Question 19

For the same reasons as we canvassed in answer to the last question, we would not favour this proposal either. It is as apt to prove subversive of statutory policy as the last one.

20. Do you favour statutory provision on the incidence of the burden of proof?

(Paragraph 8.10)

Comments on Question 20

Yes. We favour statutory provision on the incidence of the burden of proof. The Consultation paper notes the disparity of views of judges in various Outer House proceedings. We consider that in order to reduce uncertainty about where the burden of proof lies, and to avoid court time being taken up by argument on the point, it is appropriate to take the opportunity of clarifying that matter by amendment of the 1973 Act.

21. If you do favour statutory provision on the incidence of the burden of proof, do you favour provision to the effect:

    (i) that it should rest on the pursuer; or

    (ii) that it should rest on the defender; or

    (iii) that for the 5-year prescription it should rest on the pursuer, and for the 20-year prescription on the defender?

(Paragraph 8.10)

Comments on Question 21

We consider that the burden of proof should rest on the pursuer for both the 5-year prescriptive period and for the 20-year prescriptive period. There should be no obligation on a pursuer to plead that his or her claim has not prescribed, unless and until that matter is raised by the defender in the usual way. Once the defender has put the matter of prescription in issue – by averring why the claim has prescribed and inserting a plea-in-law to that effect – it should then be for the pursuer to aver and prove why that is not the case. We consider that it is appropriate that the burden should rest on the pursuer because it is he or she who has come to court asserting that he or she has a right to which the court should give effect. If the obligation which is the correlative of that right has ceased to exist, there is no right to be enforced, and hence no right of action: *Dunlop v McGowans* 1979 SC 22 per the Lord Justice Clerk at 34. As has been observed, the general rule (with respect to both evidential and persuasive burdens of proof) is that the 'burdens rest with the party who will lose on that issue if no other evidence is led': Dickson, *Evidence*, para 25.

We agree with Lord Menzies' observation in *Pelagic Freezing (Scotland) Ltd v Lovie Construction Ltd* there is no innate unfairness in requiring the pursuer to satisfy the court that he or she has a legal right of action: [2010] CSOH 145 at para 95. Indeed, a pursuer is likely to know more about when he or she first suffered loss, and therefore when there was a concurrence between loss and the breach of duty which is founded upon.

We see no reason in principle why a different approach should be taken as between the 5-year and 20-year prescriptive periods.

22. Do you agree that no discoverability test should be introduced in relation to obligations arising from unjustified enrichment?

(Paragraph 9.23)

Comments on Question 22

Yes. We agree that no discoverability test should be introduced in relation to obligations arising from unjustified enrichment. We agree with the reasons for not doing so which are set out in the Consultation paper at paras 9.18 to 9.22.

23. Do you agree that section 6(4) should be reformulated to the effect that the prescriptive period should not run against a creditor who has been caused by the debtor, innocently or otherwise, not to raise proceedings?

(Paragraph 10.10)

Comments on Question 23

We agree that section 6(4) should be reformulated. The Consultation paper identifies some instances where the wording has caused some difficulty. We also agree that the reformulation should be to the effect that the prescriptive period should not run against a creditor who has been caused by the debtor, innocently or otherwise, not to raise proceedings. The reformulated version of section 6(4) should continue to include the proviso regarding reasonable diligence and discoverability (viz, 'Provided that any period such as is mentioned in paragraph (a) of this subsection shall not include any time occurring after the creditor could with reasonable diligence have discovered the fraud or error, as the case may be, referred to in that paragraph').

In addition, we consider that there would be some justification for requiring the creditor to establish that his or her actings in not raising proceedings (because of the fraud or error) were reasonable. The test of reasonableness should be objectively judged. In other words, would the reasonable person in the position of the pursuer have considered the conduct of the debtor a basis for not raising proceedings? This would strike a balance between the rights of the creditor and those of the debtor, particularly where the debtor has acted entirely innocently. We do not consider this aspect would (at least, not always) be covered by the existing proviso in section 6(4).

24. (a) Do you agree that "relevant claim" should extend to the submission of a claim in an administration?

(b) Do you agree that "relevant claim" should extend to the submission of a claim in a receivership?

(Paragraph 10.16)

Comments on Question 24

We agree that the definition of 'relevant claim' should extend to the submission of a claim in administration or in a receivership. These would appear to be logical extensions to the

existing definitions.

25. Do you agree that the words “act, neglect or default”, currently used in the formula for identifying the date when an obligation to make reparation becomes enforceable, should be replaced by the words “act or omission”?

(Paragraph 10.20)

Comments on Question 25

No. Our view is that the meaning of ‘act, neglect or default’ is well settled and presents no difficulties. The substitution of the term ‘act or omission’ in its place is likely to lead to litigation on a matter which is clearly settled and presents no difficulties in practice.

26. Do you agree that the discoverability formula should incorporate a proviso to the effect that knowledge that any act or omission is or is not as a matter of law actionable, is irrelevant?

(Paragraph 10.24)

Comments on Question 26

No. The interpretation of Section 11 is well settled on this point, and it was accepted in *David T Morrison & Co Ltd v ICL Plastics Ltd* that knowledge of actionability is not relevant to the question of when a prescriptive period commences. In our view such a proviso is therefore unnecessary.

27. Do you have any observations on the costs or benefits of any of the issues discussed in this paper?

Comments on Question 27

We have no observations.

General Comments

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Thank you for taking the time to respond to this Discussion Paper. Your comments are appreciated and will be taken into consideration when preparing a report containing our final recommendations.