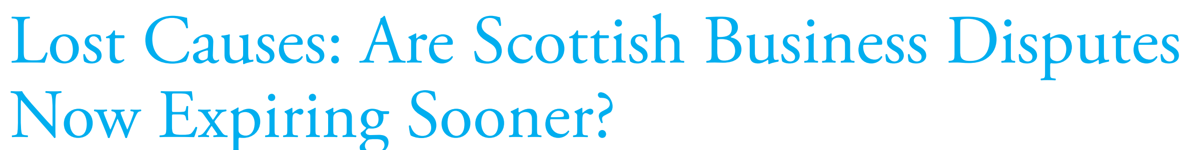

Lost Causes: Are Scottish Business Disputes Now Expiring Sooner?

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As with most legal systems around the world, Scots law imposes time limits for pursuing claims, balancing the right to sue against the uncertainty of litigation arising from old contracts or obligations. Although the 3 year limit for bringing personal injury claims is perhaps most widely known, here we focus on the 5 year time limit which applies to the enforcement of a broad range of other rights and obligations, including those at the heart of breach of contract and professional negligence disputes.

WHAT DO BUSINESSES NEED TO KNOW?

A seemingly minor problem, such as a perceived failure to meet a job spec or to advise on suitable technical requirements, can rapidly turn into a complex court action. Understanding the period for exposure to such disputes and any time limits for involving other parties will help businesses to mitigate against the risks and plan for the worst case scenario. This is particularly important where the stakes are high: large projects carry a much higher risk because the parties could stand to lose significant sums if anything goes wrong.

WHAT ARE THE CURRENT RULES ON THE TIME LIMITS FOR DISPUTES?

A claim for damages for breach of contract or negligence can sometimes survive for many years, but there are two key periods which overlap. There is a 5 year time limit which runs either from the date a loss was suffered or, if the loss lay undiscovered, the date the claimant was (or should reasonably have been) aware of the loss. In the background there is an additional 20 year "longstop" which kicks in from the date of loss, even if the loss remains hidden. For example if a construction defect was latent for 18 years, then there would only be 2 years to bring a claim as in that scenario, the 20 year period would expire first.

5 YEARS
from date of loss **OR** from actual or reasonable awareness of loss

20 YEARS
from date of loss

TRIGGERING THE 5 YEAR PERIOD

Whether and when loss is known determines when the 5 year period starts running. "Loss" has a broad definition and includes "wasted expenditure", which could be any payment made due to a deal, or based on professional advice. This means that the clock could start running almost as soon as there has been a failure to meet relevant standards, whether under a contract or in the course of performing a professional role. For example, in April 2019, the Court of Session confirmed[1] that sums spent by a developer on constructing social housing could amount to "wasted expenditure" if it could be proved that negligent advice meant that the building ultimately had to be demolished. The developer's knowledge that it had incurred construction costs was sufficient to trigger the 5 year time limit, even if it had no idea until much later that those costs were wasted. The court action had been raised late and the right to sue had been lost.

The current law means that if any sums have been incurred by parties to a contract or a professional relationship, time might already be running out for any claims against any wrongdoers. Wasted expenditure that triggers the time limit could be paying a contractor for works; paying a price due under a contract or based on advice from a professional valuer; or perhaps even meeting associated costs. Typically though the payee will not be the wrongdoer (and the payee may not even be involved in the deal or advice). The party making the payment needn't be aware that the cost will later turn out to be wasted; but incurring that cost could mean they ultimately lose any right to raise court proceedings against a wrongdoer.

[1] *Midlothian Council v Blyth & Blyth Consulting Engineers Ltd [2019] CSOH 29*

It is worth noting that there are some other exceptions which can delay the five year period. Perhaps the most common is where the wrongdoer has done something to induce the claimant to refrain from pursuing a claim, although this only operates in certain circumstances. Or if a breach of duty continues over a period of time, the time limit will only start when the breach stops, even if there has been a clear loss.

THE CONTRACT GIVES A DIFFERENT PERIOD – WHICH ONE APPLIES?

Often contracts will include collateral warranties whereby parties will have a right of recourse against others in the event of any defects with a certain period of time limit– typically 12 years from practical completion in a construction context. However the legislation is clear: extending the 5 (or 20) year period is simply not allowed in Scotland (unlike in England, where it is generally possible to agree alternative time limits and 'standstill agreements' suspending the running of limitation periods are common). Therefore even if the contract suggests a longer period, where it is governed by Scots law it will be difficult to argue that has any effect, at least as the law presently stands. Parties can agree not to bring proceedings against one another after a certain period of time, effectively shortening the time limit; but in practice this is usually only used to reduce the 20 year longstop.

COULD THE RULES CHANGE?

The Prescription (Scotland) Act 2018 is set to bring in new rules in order to avoid "harsh results". These include a new three part test for "discoverability" of loss, which would mean that the running of the 5 year time limit can also be delayed where the cause of loss or identity of the wrongdoer is unknown – not just where a loss has not been identified. It is not clear whether this will produce substantially different results as each case will turn on its facts and we don't know how the new test might be interpreted by the courts.

The Act will also eventually offer some opportunity for agreeing to extend the 5 year period, but only once, while the time limit is running and for no more than one year. In addition the 20 year "longstop" will run from the date of breach of duty, even if no loss has been suffered. For example, an architect or engineer will only have liability for a design fault until the 20 year anniversary of their advice– even if a loss only arises thereafter, for example if the building were to fail the very next week. It is not yet known when these rules might come into force or the degree to which they could impact upon past rights and obligations.

WHAT LESSONS CAN BE LEARNED?

The key takeaway is that the 5 year period in Scotland for many civil claims, including breach of contract or professional negligence, is now likely to start running sooner rather than later. Therefore where Scots law applies, there are greater opportunities for arguing that court actions have been raised out of time.

The potential upside for those doing business in Scotland is clear: if Scots law applies, their exposure to a risk of claims will likely be far shorter and in some cases, possibly no more than around five years from when parties start meeting costs arising from a deal.

On the downside, some "expenditure" may not count towards the 5 year period (for example fees paid in exchange for professional advice which later turns out to be negligent). Businesses looking to recover sums from other parties might also find their prospects of doing so have weakened. In addition, the legal arguments remain finely balanced; no outcome at litigation can be guaranteed; and the law in this area has developed significantly in recent years and is currently subject to legislative reform.

BUSINESSES OPERATING IN SCOTLAND SHOULD:

- engage solicitors early to consider recoverability of any material out of pocket sums
- seek advice immediately on receipt of a claim or threat of llitigation
- watch out for non-Scots governing law provisions which may remove opportunities to later argue for a strict five year time limit if things go wrong
- take care where time limits are expressly discussed in contracts and engage a solicitor to check whether the provisions are likely to be effective under the current (or prospective) law

APPLYING THE 5 YEAR TIME LIMIT FOR SCOTTISH CLAIMS

Loss may include expenditure which is "wasted" due to the breach

Constructive awareness is where the claimant ought, with reasonable diligence, to have been aware of loss

Relationship between parties

Actionable breach of a duty or obligation

Loss occurs

Does the claimant have actual or constructive knowledge of loss?

N

Y

+20 years

Claimant becomes, or with reasonable diligence should be, aware of loss

+5 years

Time Limit for Claim Expires

DISCLAIMER: The law on prescription of claims in Scotland is complex and evolving. The purpose of this article is to provide a summary of the current law on prescription of claims in Scotland and recent changes to legislation affecting this. It does not contain a full analysis of the law nor does it constitute a legal opinion or advice by Lockton Companies LLP on the law discussed. The contents of this article should not be relied upon and Lockton Companies LLP accepts no responsibility for loss occasioned to any person acting or refraining from acting as a result of the material contained in this article. Specialist legal advice should always be sought on the specific circumstances of a claim.

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