FACULTY OF ADVOCATES

RESPONSE FOR THE FACULTY OF ADVOCATES

ON

DRAFT PRESCRIPTION (SCOTLAND) BILL

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1. The Faculty of Advocates is grateful for the opportunity to comment on the draft Prescription (Scotland) Bill. Many of the clauses of the Bill appear to us to achieve their aims satisfactorily. We offer the following comments on certain clauses of the draft Bill.

<u>Clause 3(2)(a)(ii)</u>

2. We note the deletion of sub-paragraph (ac) of Sch 1, para 1 and its replacement by sub-paragraph (h) ('any obligation to make a payment arising under an enactment').

3. Sub-paragraph (ac) provides that the 5-year prescription applies to the payment of 'a sum of money by way of costs to which section 12 of the Tenements (Scotland) Act 2004 applies'. Section 12 of the 2004 Act applies to any 'relevant costs'. 'Relevant costs' are separately defined in s 11(9) of the 2004 Act as being:

> *(a) the share of any costs for which the owner is liable by virtue of the management scheme which applies as respects the tenement…; and*

(b) any costs for which the owner is liable by virtue of this Act.

Paragraph (b) of this definition relates to statutory obligations to make payment, and so will be covered by the proposed addition of paragraph (h) to Sch 1, para 1. Paragraph (a) of the definition, however, relates to the 'management scheme' which is separately defined as including a management scheme regulated by the 'tenement burdens' (s 27 of the 2004 Act). Paragraph (a), therefore, includes both costs which arise under statute (under the Tenement Management Scheme contained in Sch 1 of the 2004 Act) and costs which do not arise under the statute (because they arise from real burdens). Consequently, the present statutory scheme (in sub-paragraph (ac) of Sch 1, para 1) applies not to a statutory liability to make payment but rather to a species of liability defined in a statute, parts of which arise from statute and parts of which do not.

4. As a result, the effect of the proposed deletion of sub-paragraph (ac) appears to us to be that where a tenement is governed by the Tenement Management Scheme, obligations to pay relevant costs will prescribe after 5 years (as falling within the new sub-paragraph (h)). Where, however, the obligations are contained in real burdens, they will not fall within the new sub-paragraph (h), and so will (or at least may) prescribe negatively after 20 years as obligations relating to land. It may be that this effect is not what was intended by the proposed change.

<u>Clause 3(3)(a)</u>

5. At present, sub-paragraph (e) of Sch 1, para 2 provides that the twenty-year prescription applies to obligations relating to land and obligations to make payment arising out of ss 77 and 94 of the Land Registration (Scotland) Act 2012. The effect of the proposed amendment, in our view, is to make this provision unclear, as sub-paragraph (e) (which applies to a statutory obligation to make payment under the 2012 Act) will be said to apply except as provided in Sch 1, para 1(h) (which provides that statutory obligations to make payment will prescribe after 5 years). The obligation to make payment under the 2012 Act will therefore prescribe after

twenty years, except insofar as it is an obligation to make payment falling within sch 1, para 1(h).

6. This lack of clarity is, we suggest, undesirable. It might be resolved simply by adding a separate paragraph to Sch 1, para 2 stating explicitly that the twenty-year prescription applies to obligations arising from ss 77 and 94 of the 2012 Act.

Clause 5

7. We have two significant concerns regarding the drafting of clause 5 of the Bill.

8. Our first concern relates to the proposed Section 11(3A)(c). As presently framed Section 11(3A)(c) refers to the identity of the debtor 'in the obligation to pay damages' for the loss. We note that a similar formulation is used in Section 11(3B). Section 11(3C) provides that awareness that the act or omission is actionable in law should not be a factor in delaying the commencement of the prescription period. The existence of an obligation to pay damages is a question of law, however. The inclusion of the words 'in the obligation to pay damages' in Section 11(3A)(c) appears to conflict with the policy expressed in Section 11(3C). Our view is that the terms of Section 11(3A)(c) should be reconsidered in order to avoid the suggestion that there is any conflict between these provisions.

9. Our second concern relates to the new Section 11(3B), which proposes that 'a separate prescriptive period is capable of applying in relation to each debtor', by reason of the choices made by a creditor. The question of whether there should be different prescriptive periods for different defenders arising from a single cause of loss was not canvassed in the Discussion Paper on Prescription.

10. As presently framed we can envisage Section 11(3B) resulting in situations arising which would produce uncertainty as to when the prescriptive period expires, most obviously in relation to defenders who are jointly and severally liable. A pursuer may choose not to raise an action against the full range of those who may be jointly and severally liable, leaving those convened as defenders to assert rights of relief

against those parties not convened as defenders. The terms of Section 11(3B) appear to permit a pursuer potentially to defer the prescriptive period against a potential defender whose identity they are aware of by choosing not to 'enforce the obligation' against that party, while pursuing an action against a defender in relation to loss which both have caused. In those circumstances potential defenders against whom an action is not raised are left unsure as to whether an action will be raised and when the prescriptive period relative to them expires. The policy of the law on prescription has been to provide certainty for litigants as to the date when the right to raise an action is extinguished. Section 11(3B) does not appear to be consistent with that approach. Our concerns are most acute in relation to situations where joint and several liability is in issue, but we do not anticipate that difficulties would be limited to those circumstances.

11. Further, with the proposed expansion of the criteria which the pursuer must be aware of before the prescriptive period commences it remains to be seen whether the courts will follow the approach adopted in respect of Section 17(2)(b) in Agnew v Scott Lithgow (No 2) 2003 SC 448, so that the pursuer who becomes aware of one of the facts in Section 11(3A) effectively would have a duty to investigate the other facts. If that approach is adopted, one would anticipate that once a pursuer becomes aware of loss and then commences investigations as to who has caused their loss, ordinarily the identity of the other defender(s) should become known if reasonable diligence is exercised. If Section 11(3A) were to be interpreted in a manner analogous to Section 17(2)(b), it is not obvious why a pursuer who becomes actually or constructively aware of the identity of a range of potential defenders following investigations should then be able to determine that a different, deferred, prescriptive period would run against any of those potential defenders by choosing which parties not to enforce the obligation against.

12. Our view is that S11(3B) should be subject to the explicit qualification that no separate prescriptive period will run against a person of whose identity the creditor was, actually or constructively, aware at the same time at which the creditor was aware, actually or constructively, of the identity of the defender(s) against whom they chose to raise an action. Qualifying Section 11(3B) in this manner would strike

a balance between the need to preserve the rights of pursuers in circumstances where a potential defender cannot be identified by the exercise of reasonable diligence, while providing potential defenders with some certainty as to when their potential liabilities should prescribe.

Clause 6(2)

13. We have some concerns in relation to the proposed new s 7(5). It may not always be easy to tell when proceedings come to an end. The drafting has obviously been done with litigation or arbitration in mind, but there are other ways of making a relevant claim. Of particular concern is a relevant claim made in a liquidation or bankruptcy. When there do the "proceedings" come to an end? Is it when your claim is rejected by the liquidator and the time for appealing against his adjudication runs out? If an adjudication against you is appealed timeously, do the "proceedings" then transfer to that, and if so, do they continue until those proceedings are brought to an end? If they end in success for the appellant, the matter would then return to the liquidator, who may be told by the Court to do the adjudication again. What then?

14. If the idea be that a relevant claim halts prescription until the liquidation ends, the answer would be cleaner, but longer periods of time until the end of a claim can be expected. The example of Lehmann Brothers is not an entirely happy one.

Clause 7

15. We have certain observations to pass on clause 7 of the draft bill. Whist on its face it appears to be innocuous, we are of the view that there are conceptual problems with the clause. This clause is drawn effectively as a mirror of the provisions of the previous clause, but it seems to us that the subject-matter of the two clauses makes it impossible that the two clauses can work satisfactorily in this way.

16. The underlying problem is that clause 6 of the bill deals with the negative prescription of personal rights and makes understandable sense in that context. Clause 7 on the other hand, deals with real rights in property, and in that context, the mirroring of section 6

strikes us as being apt to lead to difficulty. A servitude offers an example of the problem. If on the wording now proposed, one postulates an action raised 19 years after the right was last exercised, it would seem that if the action were to continue for two years and end in success for the pursuer, it would be rendered pointless as prescription of the property right would immediately strike on the coming to an end of the action. There would be a near-Orwellian situation in which success would be failure. We are sure that this is not the intention of the draftsman, but unless we miss something, this would appear to be the result of the present wording. Again, this is a clause which might benefit from further consideration, though perhaps in this case, the reconsideration needs to be more radical than a matter of correction of drafting.

Clause 9(2)

17. We note the wording suggested for the (new) s 7A(1) and, in particular, the statement that sections 6 and 7 do not apply insofar as 'an enactment other than one contained in this Act makes provision'. We suggest that this wording is unclear. It is not clear what enactments are referred to or what the effect of the reference is (whether, for example, time limits in all other enactments are to be preferred to those in the 1973 Act, or whether time limits in enactments in some way mentioned in the 1973 Act are to be disregarded for the purpose of this exercise). We suggest that it is revised to avoid ambiguity.

Clause 13

18. In relation to standstill agreements, we note that the clause provides that extension is possible only once as between the same creditor and debtor. This strikes us as inviting subversion of the rules through the use of assignees and retrocessions. It might be better to stop the last sub-head of the clause at the word "once" in order to avoid this difficulty.

19. We also wonder about the use of the word "purports" in the proposed new subsection (4). It appears to us that this may be circumvented by not stating that the object is to get round the Act, but drafting nevertheless to produce just that result. There is obviously a

contrary argument to that reading of the section, but we consider that it might be more effective if the provision were instead to read "…void if the effect of that provision but for the operation of this sub-section would be".

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