HFW

PRESCRIPTION:

TIME FLIES...WHEN IT COMES TO LIMITATION FOR CONSTRUCTION CLAIMS IN SCOTLAND

In this article, we look at the rules in Scotland relating to time bar/ limitation and how these differ from the rules in England. We discuss the new Prescription (Scotland) Act 2018 and outline some practical tips for parties contracting in Scotland.

Summary

1. Contractors and employers should be aware of the rules on statutory time bar as it sets a deadline, after which rights cannot be enforced.
2. The rules in Scotland and England relating to time bar have some very significant differences.
3. Parties need to be especially alive to time bar in Scotland. Under the current interpretation of the rules, the five-year period to bring a claim before it is time barred starts to run as soon as the potential claimant is aware of the facts giving rise to the loss as "an objective fact".
4. It is irrelevant for the purposes of statutory time bar whether or not the claimant knew – or even could have known – that those facts provided the basis for a claim.
5. For example, to start the five-year clock, it is enough to know that money was paid to contractors to build, what later transpires to be, a defective design, even if the employer could not have known that the design was defective when the money is paid.
6. This is especially problematic in construction cases where defects may be latent and/or on complex infrastructure projects where the construction phase itself may last several years.
7. The Scottish courts' interpretation has been heavily criticised.
8. To address this, new rules came into force with effect from 1 June 2022.
9. However, the new rules do not have retrospective effect. If your claim was time barred under the old regime before June 2022, it remains time barred. Parties need to be aware of both regimes.
10. It also remains to be seen whether the new rules will address the problem.

"Contractors and employers operating across the UK should be aware that different regimes apply"

Introduction

Most legal systems impose a time limit on when parties can bring claims. Regardless of the merit of the claim, the legal system will not allow it to succeed if it is brought too late. This is sometimes referred to as "time bar" and is also known as limitation (in England) and prescription (in Scotland). There are good reasons to have a statutory time bar, but it presents a problem for claimants, who may lose their entitlement if they don't act quickly enough.

Construction claims are particularly susceptible to time bar issues. There are many reasons for this, including:

- the emergence of latent defects complicates the calculation of the relevant dates and can compress the time available in which to make a claim;
- the complex nature of construction contracts means it might not be clear when a breach has occurred, particularly where works may have been performed initially under a separate agreement (e.g. early contractor involvement or pre-construction services agreement); and
- commercial pressure to progress a project sometimes means that potential claims are put off until after completion.

All these factors (and others) elevate the risk of a deadline being missed, and a claim becoming time barred.

Scottish and English law are often very similar, but time bar operates very differently between the two jurisdictions. In fact, in Scotland, the position had become particularly restrictive against potential claimants, particularly those involved in large engineering and infrastructure projects. Legislation came into force on 1 June 2022 to try to address this, but it remains to be seen whether it will have the desired effect.

Contractors and employers operating across the UK should be aware that different regimes apply. In this article we look at some of the key differences in the time limits applicable to construction claims in England and Scotland and provide some practical tips for those seeking to avoid the Scottish pitfalls.

What are the relevant time limits?

The most relevant differences between the time bar rules in Scotland and England are summarised in Table 1.

Note the reference in Table 1 to the "pre-1 June 2022" and "post-1 June 2022" positions in Scotland. There are, effectively, two different regimes operating in Scotland at present. The first regime is set out in the Prescription and Limitation (Scotland) Act 1973 and applies before 1 June 2022 (the "1973 Act"). The position was amended by the Prescription (Scotland) Act 2018 ("2018 Act"), with effect from 1 June 2022.

Both regimes remain relevant for the time being.

If a claim would have been time barred under the 1973 Act **before** 1 June 2022, it remains time barred and is not revived by the new legislation. The changes do not have retrospective effect. There will be many cases where defenders will take a prescription point based on the 1973 Act regime. The 2018 Act only governs the applicable time limits if the claim was not time barred before 1 June 2022.

Table 1

Issue	Scotland	England
Time limit for claims based on breach of contract	5 years from the date loss has been suffered following the breach.	6 years from the breach (which, in cases involving a design and build contract, is usually deemed to be the date of take over).
Time limit for claims based on breach of a contract executed as a deed	Scots Law does not recognise deeds as a separate category of contracts. The usual 5 year time limit will apply.	12 years from the breach (which, in cases involving a design and build contract, is usually deemed to be the date of take over).
Time limit for claims in tort (in England) or delict (in Scotland) – for example, negligence	5 years from the date loss has been suffered following the wrongful act.	6 years from the date loss has been suffered following the wrongful act.
How to 'stop the clock' and avoid a time bar argument	Commence litigation[1] or relevant arbitration proceedings. An acknowledgment[2] of the claim may also suffice but is rare in practice.	Commence litigation or arbitration.[3]
Can parties agree a longer period	No, but note the limited ability to 'stop the clock' using a standstill agreement (see below).	Yes, subject to a reasonableness test preventing unfair contract terms (which is unlikely to apply to sophisticated commercial entities of equal bargaining strength).
Standstill agreements	**Pre-1 June 2022** – Not possible. **1 June 2022 onwards** – Parties may agree to extend the five year prescriptive period by up to one year.	Parties can agree to 'stop the clock', in theory on an unlimited number of occasions and/ or for an unlimited period of time.

1 For time bar purposes, litigation is commenced in Scotland when the Summons is served on the defender and, in England, when the claim form is received by the court. Note, however, in both cases a further step is required, otherwise the summons or claim form is of no effect: in Scotland, the summons must call within one year and one day of the end of the notice period; in England, the claim form must be served on the defendant within its four month validity period.

2 As defined in S10 of the 1973 Act

3 In England, when the arbitration is commenced depends on whether an arbitrator is named or designated in the parties' arbitration agreement. If named/designated, the arbitration commences when the claimant serves its notice of arbitration. If not, the arbitration commences when the claimant serves a notice on the other party asking them to appoint an arbitrator or agree an appointment.

Seem straightforward?

On the face of it, it is – but we mentioned above that the emergence of latent defects can compress the time available to bring a claim. That is especially true in Scotland.

In a construction context, the issue generally arises when damage comes to light sometime after the completion of works. So, when does the clock start running in cases involving a latent defect?

In England, this issue is neatly dealt with by the Limitation Act 1980 (as amended by the Latent Damage Act 1986). For claims based in negligence, the limitation period is the later of: (a) six years from the date the damage was caused; and (b) three years from the date the damage could reasonably be discovered (up to a longstop date of 15 years after the initial loss).

In Scotland, however, this has become a fraught issue. The rules were set out in the 1973 Act which provides a 'carve out' for latent damage – delaying the commencement of the five year clock while the claimant *"was not aware and could not with reasonable diligence have been aware, that loss, injury or damage...had occurred"*.[4]

Unfortunately for potential claimants, the Scottish courts have taken a liberal view of what it means to be *"aware"* of loss. Their approach is that the five year clock starts when the claimant is aware of *"the objective facts which amounted to 'loss, injury or damage'...as and when they occurred"*[5] – even if the claimant had no reason to think that those objective facts amounted to a loss. This has led to some bizarre results. Here are two examples:

4 In both Scotland and England, there is an overall long stop date, even when these exceptions apply

5 *WPH Developments Ltd v Young & Gault LLP (In Liquidation)* [2021] CSIH 39 at para 41

“The potential pitfalls are clear: in Scotland, a claim might be time barred long before the potential claimant had any reason to think that anything had gone wrong.”

- A local authority tried to sue a geotechnical engineer, who had provided a negligent report.[6] The consequence of the report was that the local authority constructed a housing scheme without a gas defence system, residents became unwell, and the scheme had to be demolished. **The court said the local authority’s claim was time barred.** The five-year period began as soon as the local authority spent money in reliance on the negligent report, i.e. as soon as it started spending money to build the housing scheme without the gas defence system. The local authority was held to have been aware of the *“loss”* at that time because it knew it had spent the money. It did not matter that it did not know the report was negligent and that the money would ultimately be wasted.
- In another case, a housing developer was not able to sue an architect for negligently prepared drawings that led to the construction of a wall on land the developer did not own.[7] **Again, the court concluded that the developer’s right was time barred.** The five-year period began as soon as it started to construct the wall. Again, it did not matter that the developer did not know, at the point of starting construction of the wall, that the wall was being built in the wrong location.

The potential pitfalls are clear: in Scotland, a claim might be time barred long before the potential claimant had any reason to think that anything had gone wrong. This is widely thought to be problematic, with the man who literally wrote the book on time bar in Scotland describing the first decision as *“odd”* and *“harsh”* on claimants.[8] It also means that the latent damage exception seems to have very limited (if any) application.

The courts themselves accept that this approach can lead to *“harsh”* results but say the certainty it provides is preferable.[9] In responding to a consultation by the Scottish Law Commission (a law reform organisation), a selection of Scottish judges also acknowledged that the position *“may unduly favour the interests of potential defenders…”*[10] At no point, however, have they expressly grappled with the particular practical issues this poses for those in the construction sector.

Rectifying the Scottish position? The Prescription (Scotland) Act 2018

As noted, the 2018 Act was brought into force to try to address those problems.

The 2018 Act provides that, from 1 June 2022, the five-year clock will not start to run until the potential claimant is aware of three facts:

1. that loss, injury or damage has occurred;
2. that the loss, injury or damage was caused by a person’s act or omission; and
3. the identity of that person.

It is hoped this might solve the problem of claims becoming time barred before (or shortly after) the damage could be discovered.

A word of caution

The 2018 Act does not directly address what it means for a claimant to be *“aware”* of a loss. If the courts take the same approach they have in recent years (and focus on the objective facts known by the claimant) the 2018 Act might solve nothing at all.

Table 2 considers the examples above in the context of the 2018 Act. In both cases, it is arguable that the claimants were aware – *as an objective fact* – that they met all the criteria to start the clock.

Table 2

Criterion	Midlothian	WPH Developments
Loss, injury or damage had occurred	The courts decided this in the original decisions.	
The loss was caused by a person's act or omission	The local authority knew it was constructing the housing scheme in the way it was because of the geotechnical report.	The housing developer knew they were building where they were because the architect had identified that location in their drawings.
The identity of that person	The local authority knew who prepared the geotechnical report.	The housing developer knew who prepared the drawings.

6 *Midlothian Council v Raeburn Drilling and Geotechnical Ltd* [2019] CSOH 29

7 *WPH Developments Ltd v Young & Gault LLP (In Liquidation)* [2021] CSIH 39

8 David Johnston QC, *“No time to lose”*, Journal of the Law Society of Scotland, May 2020

9 *Gordon’s Trustees v Campbell Riddell Breeze Paterson* [2017] UKSC 75, para 22

10 Scottish Law Commission Report on Prescription, Scot Law Com No 247, Para 3.8

Indeed, the words of the Scottish Law Commission, who recommended this new approach seem to suggest that the *"objective knowledge"* issue may be here to stay. In a July 2017 report, while explaining why they were recommending this test, they stated that:

> *In terms of the recommended discoverability test, the intention is that the [potential claimant] must be aware (actually or constructively) of both (i) the fact of loss, injury or damage and (ii) its factual cause by an act or omission. These are matters of fact not law, and the* ***[potential claimant's] awareness or otherwise of the legal significance of these facts is not relevant to the application of the test.*** *In the same way, knowledge of the identity of the person whose act or omission has caused the loss, injury or damage is knowledge of a fact;* ***it does not matter whether the creditor is aware that the act or omission that caused the loss, injury or damage is actionable in law.***[11]
>
> [Emphasis added]

However, in discussing a case then before the courts and how that would be decided under the new rules, the Commission concluded that the requirement to have *"awareness of the factual cause of loss by an act or omission"* meant that merely knowing that one had incurred expenditure would be insufficient to start the clock.[12] This is encouraging. However, it must be emphasised that this seems difficult to reconcile with the *"knowledge of the objective facts"* language used by the courts more recently. Further, while that analysis may be correct in relation to that specific case, other scenarios are more ambiguous, as discussed above.

The effectiveness of the 2018 Act is likely only to be known once the courts have been called on to interpret it.

Practical tips

While we wait for some further guidance from the courts, parties should remember the following points:

1. **Different regimes** apply in Scotland and in England – often with far stricter time limits in Scotland.
2. If parties wish to bring a claim, they **must act quickly and obtain legal advice** on the possibility that the claim may be time barred.
3. Conversely, parties on the receiving end of claims would be well advised to **consider the possibility of a time bar defence.**
4. Much will depend on when parties can be said to have suffered loss. Parties should **maintain detailed and accurate records** about matters such as when expenditure was incurred, when delivery of plant was made, when designs were received, when construction commenced.
5. Employers and contractors should carefully **inspect the works** of their contractors and subcontractors regularly and particularly at take over to identify any defects or possible defects.
6. If defects are identified, **parties should act promptly to decide how these should be addressed** and whether legal proceedings will be needed to determine financial responsibility.
7. Parties should **familiarise themselves with the dispute resolution provisions in their contracts.** Are there any mandatory steps prior to commencing litigation or arbitration (e.g. adjudication)? There is case law that confirms that, in some scenarios, the courts may still permit a party to start litigation to avoid time bar without first adjudicating,[13] but this may not apply in all cases.
8. **Consider whether a standstill agreement may be beneficial.** Defenders/defendants can also benefit from standstill agreements, as it allows parties further opportunity to resolve disputes amicably, avoiding the risk of a party commencing litigation to protect its position.

11 Scottish Law Commission Report on Prescription, para 3.19

12 SLC Report on Prescription, para 3.20

13 *The Fraserburgh Harbour Commissioners v McLaughlin & Harvey Limited* [2021] CSIH 58

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