Good news for pursuers on prescription: s.6(4) finds success in the Outer House

The recent case of *Tilbury Douglas Construction Limited v Ove Arup & Partners Scotland Limited* CA117/21 [2023] CSOH 53 saw the issue of prescription come before Lord Harrower in the Outer House. In what will be seen by many as a welcome decision in the epic tale of prescription in Scots law, the Outer House recently found in favour of the pursuer in repelling the defender's preliminary pleas on prescription at a preliminary proof before answer.

Background

At the heart of this case is a complex multi-faceted construction dispute. This action, which will now proceed to proof, concerns the development of a former railway yard located to the east of Edinburgh's Haymarket station. Before the development could begin, the ground level of the development site needed to be lowered, by removing up to 6m of soil. The required certain enabling works to be carried out, to ensure that the material could be safely unloaded without compromising the integrity of the neighbouring tunnels and in order that piling could take place in their vicinity. The design also required that any movement of the neighbouring tunnels would be acceptable to Network Rail.

One of the key dates in this dispute is November 2013 when the pursuer was employed to carry out the enabling works. Shortly thereafter, the defender was appointed to provide related engineering services. The pursuer contends that the defender, in preparing the design for the enabling works, was in breach of its contractual and delictual obligations to exercise the relevant standard of care and skill. The pursuer alleged a number of breaches on the part of the defender which, as a result, required the defender's design to be resubmitted at considerable expense to the pursuer. The hearing before Lord Harrower was restricted to the question of prescription.

The pursuer's argument

The pursuer conceded that it had suffered loss and damage, for the purposes of section 11 (1) of the Prescription and Limitation (Scotland) Act 1973 (the **"Act"**) as at 27 November 2013 when it entered into the enabling works contract in reliance on the defender's design. However, the pursuer argued that as at that date it had already unknowingly suffered loss because materially more work was required in order to deliver the enabling works. The pursuer argued that objectively the pursuer's contract was already worth less to it than it would have been but for the defender's alleged breaches of duty.

The summons was served on the defender on 30 July 2019 by which time the pursuer's rights would ordinarily have prescribed under the usual five-year prescriptive period. The sole issue for proof was whether the start of that period should be postponed. The pursuer argued it should be postponed until November 2014, at the earliest, since that was the date when it first became aware, or could with reasonable diligence have become aware, that it had suffered loss per section 11(3) of the Act.

The pursuer conceded that the need for additional brickwork repairs going beyond what had been anticipated in the design submitted by the defender had been identified between January and April 2014 and that the pursuer had incurred associated additional costs that would not be recoverable. However, the need for those works to be carried out, together with their associated costs, was not caused or otherwise related to the defender's breach of duty. The pursuer's claim related to the design for the fixed rather than the ad hoc aspects of the enabling works. The pursuer accepted that some elements of additional would have been required even if the defender had specified them on the design form.

Alternatively, the pursuer argued that the whole of the period between November 2013 and November 2014 should be discounted from the prescriptive period, since it was throughout induced to refrain from making a claim by reason of error, induced by words or conduct of the defender, which the pursuer could not itself have discovered by exercising reasonable diligence, thus relying on section 6(4) of the Act. The inducing words or conduct by the defender were that they had produced a competent design. The pursuer relied on the defender's presentation of its design and its associated invoices as well as its ongoing assurance from August 2013 until around September 2014. It was only in late November that the defender advised that full grouting would be required.

The defender's argument

The defender proceeded upon the basis that loss did not occur until March / April 2014 when the pursuer incurred costs and/or delays on the project. The pursuer accepted prime facie that

prescription had started to run in November 2013 when it relied upon the defender's design. The defender argued that the pursuer's claim as it related to lining stiffness had prescribed in December 2019. Accordingly, since the whole of the sum sued for related to additional works prompted by the stiffness issues, the pursuer's case had no merit. Secondly, the defender argued that the pursuer's case hinged upon a single allegation of the fault being the provision of a defective design and the pursuer had knowledge of costs/delays pertaining to that design in March/April 2014 – the summons having been served in July 2019 more than five years later, the pursuer's right of action in respect of all such losses had prescribed.

The defender argued that the pursuer could not be rescued by s6(4) of the Act because the defender's design was always liable to change as a result of any demands made by Network Rail. In any event, any error could have been discovered by the pursuer by the application of reasonable diligence. The pursuer could not be relived of the obligation to exercise reasonable diligence merely by virtue of the fact that the defender continues to endorse the validity of its own design.

The approach to prescription

Under the Act, professional negligence claims generally prescribe five years from the date that an obligation to make reparation arises (section 11). In short, a claim prescribes five years from when both the negligence and the loss resulting from the negligence have occurred.

The start of the five-year period can be postponed if a pursuer is not aware of the loss (section 11(3)). However, case law in recent years has interpreted this to not require that the pursuer is aware the loss has arisen from a negligent act. This has caused difficulties in cases such as *Midlothian Council* v *Raeburn Drilling and Geotechnical Ltd* 2019 SLT 1327, where the negligence was not discovered until many years later.

Legislation has been brought in to try and tackle the perceived unfairness that can sometimes arise from this approach, amending the Act to include that, where a pursuer is not aware that the loss arises from a defender's actions, the prescriptive clock may be delayed. However, transitional provisions mean claims that would have expired before these changes came into force on 1 June 2022 are not affected (and the same is true for some other changes to the Act where a claim would have expired before 28 February 2025). There are therefore still many claims which will fall to the 1973 Act – the *Tilbury* action is one such case.

In light of the difficulties presented by section 11(3) the only option for many litigants looking to postpone the start of the prescriptive period is section 6(4). There are remarkably few decisions on the interpretation of this section, which makes the Tilbury action particularly interesting.

The court's decision

In setting out its judgment, the court started in determining the date from which the prescriptive clock began to run (under s11(1)). The court agreed with the pursuer that the primary component of its loss (the need for the redesign of the enabling works) occurred as soon as the pursuer had relied on the defender's design. Having considered the extensive factual evidence led, the court found this to be August 2013.

Having concluded that the clock started in August 2013, the court then considered the two arguments before it under s11(3) and s6(4) of the Act: was the pursuer aware of the loss and/or was the pursuer induced by the conduct of the defender into not making a claim?

The court explicitly disregarded submissions from the pursuer regarding its lack of awareness of the defender's negligence. It was highlighted that a pursuer didn't need to be aware of the negligence or that the negligence had caused a loss for the clock to be started. This is an interpretation of s11(3) which is well established in case law following *Midlothian*. The pursuer advanced submissions that all the issues that had arisen fell under deficient design, but the court preferred an approach that, whilst identifying the general duty breached (deficient design), also specified the particular respects in which that duty had allegedly been breached. This required more detailed consideration and characterisation of the issues with the design.

The court went on to make a distinction between costs arising as a "risk of the contractual arrangements" and costs arising as a breach of duty. Costs and delays are not therefore inevitably losses which arise from a breach of duty – there may be a distinction between them (costs can be losses, but not all costs are losses). Some earlier costs incurred by the pursuer were concluded by the court to fall under the former category as anticipated variations to the construction, and thus did not constitute loss for the purposes of s11 of the Act.

Consequently, the court held that for the purposes of s11(3) the commencement date for prescription should be postponed to a time until when enabling works were delayed due to core results (particularly in the north tunnel) in May/June 2014. The court found that the delays had been in part caused by discovery of soft bricks, which had in turn indicated that more tests were needed, which in turn indicated that insufficient tests had been carried out by the defender and that the enabling works may need to be amended. This made May/June 2014 the date for which the Court found the pursuer to have been actually (and constructively) aware of loss that arose from breach of duty alleged, the delays constituting changes to the enabling works that arose from the defender's alleged breach of duty rather than costs incurred under contractual risk.

Even though the court concluded s11(3) had operated, as this had only delayed the clock until May/June 2014, the summons having been served on 30 July 2019 the claim may still have been made out of time. However, the court also had the operation of s6(4) of the Act to determine: had the pursuer been induced by the defender into error and refraining from bringing a claim?

The court held that the defender had given reassurances as to its design and that there was not the need for any extensive redesign, and as such the pursuer had, for a period, no cause to believe it had any remedy against the defender in respect of the need for extensive redesign of the enabling works (and resulting delay and costs).

The court did note that on s6(4), the pursuer had to establish a period of inducement and no account would be taken of any period where the pursuer could have, with reasonable diligence, have discovered the error. However, it rejected the defender's argument that the pursuer could not rely alone on the defender's continued assurances that there was no need for extensive redesign. It was held that it was not a simple bare assertion that the design was not deficient that had been made, but that the pursuer had continued to rely upon the defender's services in relation to the design of the enabling works: "In effect, the defender's reassurances operated as a renewal and a restatement of its design, one on which the pursuer relied".

Interestingly, in response to some of the defender's arguments, the court commented that the error need not be solely at the inducement of the defender, but it would be sufficient for the defender's inducement to have contributed to the error.

Ultimately, the court found that found that the pursuer was entitled to rely on s6(4) in relation to all its pleaded breaches, and as a result the period up to November 2014 was discounted for the purposes of the prescriptive clock. The summons was therefore served within time, and the case was appointed to proceed to a proof.

A more promising outlook for pursuers?

There are several takeaways from this judgment. It offers a careful consideration on how s11(3) and s6(4) operate in circumstances where the claim is complex and multifaceted. In particular, the court's interpretation of the legislation provides a slightly more flexible position for pursuers who pursue claims under the interim prescription provisions. In this regard, the court's comments on the potential distinction between costs and losses are potentially helpful if costs paid to defenders for unexpected delays or changes can be categorised as anticipated contractual risk. Such circumstances are, of course, more likely to arise in commercial relations in certain sectors, such as construction.

The decision regarding the operation of s6(4) is also potentially helpful to pursuers, again providing a more flexible position. The continued reliance on services from the allegedly negligent professional may be the case in many professional negligence claims, although it's important to remember here that continued reliance on a defender's services alone is not sufficient. A professional simply continuing to provide services and asserting that there has been no previous negligence will likely not be enough to meet the test of inducing error, and will be a matter of fact that will vary in each case.

A denial of liability for a claim will not be enough either, but in those cases where, as a matter of fact, a professional has been found to reassert its advice and provide reassurance which goes beyond a denial of liability, this judgment provides a potential route to postpone the start of the prescriptive period. In a post-Midlothian era, when s.11(3) is effectively not available to many litigants, this judgment will be a welcome development for many pursuers and, perhaps, a cause for concern for those defending professional negligence claims.

The decision in *Tilbury* illustrates that the analysis of prescription issues still involves complicated legal analysis of the (often extensive) factual evidence. In claims where prescription may be an issue, parties will need to remain prepared to address this at an early stage in their case.

Given the importance of the issues which are discussed in this judgement, we are keeping a keen eye on whether or not this will be the final word on matters.

Our specialist professional negligence team have experience dealing with all aspects of pursuing and defending professional negligence claims, including complex prescription issues. Please get in touch if you would like to discuss how we can help.