PART I
INTRODUCTION

1. WHY DOES THE PRESENT LAW NEED REFORM?

1.1 Our Sixth Programme of Law Reform[1] recommended that "there should be a comprehensive review of the law on limitation periods with a view to its simplification and rationalisation." We noted that the law is "uneven, uncertain and unnecessarily complex" as demonstrated by the following examples:

(1) Adrian is injured when operating an unsafe electric mower. He seeks compensation for his injuries. If he sues the manufacturer in the tort of negligence, or the seller of the mower for breach of contract, he has three years from the date of the injury to bring his claim, subject to the courts' discretion to extend time. If he sues the manufacturer under the Consumer Protection Act 1987 (so as to avoid having to prove negligence) he has three years from the date of the injury to bring an action, subject to the court's discretion to disapply the period; but his right of action under the 1987 Act is extinguished entirely if he does not sue within 10 years from when the mower was first bought.

(2) Barbara was sexually abused by her uncle, Colin, from a young age until she was 14 years old. She is now 25 and suffers from a depressive illness and personality disorder. She has recently come to realise that her illness and disorder can be attributed to Colin's abuse. But her action against Colin for trespass to the person will be time-barred (the limitation period being six years after she was 18). In contrast, if she sues her mother, Dorothea, in the tort of negligence for failing to take reasonable steps to stop the abuse, which she knew about, Barbara will have three years from when (after the age of 18) she knew that her illness and disorder could be attributed to the abuse; and that period could be disapplied at the discretion of the courts.

(3) Fred has an extension built to his home. Several years later, it starts to crack because some of the materials used were inadequate. If he sues his builder for breach of contract in using inadequate materials, his action is barred six years[2] after the house was built, even though he could not reasonably have known of the breach of contract by then.

(4) Gillian is a name at Lloyd's. Her underwriting agent has negligently exposed her to unacceptable risks so that she has suffered economic loss. She is allowed six years from the date of the loss, or three years from when she knew of the negligence or the loss, if later, to sue for negligence, subject to a long-stop of 15 years from the date of the negligence. If her agent has deliberately concealed facts from her, the running of time will be postponed. The House of Lords has recently decided what happens when

[1] Law Com No 234.

[2] If the contract was made by deed, the limitation period would be twelve years.

the facts were concealed by the defendant after the loss has been caused rather than before.[3] One of the majority, Lord Nicholls, accepted that the decision produced absurdity (although, in his view, less absurdity than the alternative favoured by the dissenting Law Lords and by the majority in the Court of Appeal!).

1.2 The present law on limitation therefore lacks coherence. This reflects its development in an ad hoc way over a long period of time. The limitation period applicable to actions for personal injury will depend on whether that injury is inflicted deliberately or negligently.[4] The traditional rule for actions in tort now applies to only a minority of tort actions because so many exceptions have been grafted on to it: actions for personal injuries, defamation, and consumer protection among others, are all governed by separate and different regimes.[5] And deliberate concealment can stop a period running but cannot suspend it once it has started to run.[6] Closely linked to the law's 'unevenness' is its needless complexity. At a general level, to have so many different regimes can present a trap for the unwary and renders the law largely unintelligible to lay people. More specifically the provisions on, for example, breach of trust[7] and on the meaning of "knowledge" in personal injury and latent damage and under the Consumer Protection Act 1987[8] are very complicated. Simplification is both necessary and achievable. In some areas, the law also lacks certainty. For example, the scope of certain causes of action which are provided for in the Limitation Act 1980, such as actions for sums due under an enactment,[9] is unclear. The correct interpretation of the provisions on conversion and on breach of trust is open to argument.[10] One can also argue - although this is an issue on which we shall be seeking consultees' views - that the reliance on a judicial discretion to override a limitation period (as in an action for personal injuries and defamation or malicious falsehood)[11] renders the law too uncertain. The existence of this discretion means that the defendant in such cases is exposed to the risk of legal proceedings for an indefinite period.

1.3 In addition to its being 'uneven, uncertain and unnecessarily complex' the present law on limitation can be criticised for at least three other reasons. First, it is unfair. While there has been a move towards protecting plaintiffs who have suffered 'latent damage' from losing their cause of action before they could reasonably have known of it, the latent damage provisions are confined, outside the sphere of non-deliberate personal injuries, to the tort of negligence and to claims under the

[3] *Sheldon v RHM Outhwaite (Underwriting Agencies) Ltd* [1996] AC 102. See paras 8.17 - 8.20 below.

[4] See paras 3.30 - 3.36 below.

[5] See paras 3.12 - 3.117 below.

[6] See paras 8.17 - 8.20 below.

[7] See Part IV below.

[8] See paras 3.38 - 3.65, 3.94 - 3.98, 3.102 below.

[9] Section 9 of the 1980 Act; see paras 7.10 - 7.21 below.

[10] See paras 3.110 - 3.115 and Part IV below.

[11] Sections 33 and 32A of the Limitation Act 1980; see paras 3.66 - 3.76; 3.105 - 3.107 below.

Consumer Protection Act 1987.[12] They do not extend to other torts or to breach of contract. In contrast, the lack of a long-stop in personal injury actions may be regarded as unfair to defendants, who can never be sure that they are free of claims. Secondly, the law is in some respects outdated. Some of the periods laid down may be thought to reflect assumptions about what time limits were reasonable from an age before computers, when methods of communication and retrieval of information were slow and cumbersome. The most familiar limitation period of six years originated in the Limitation Act 1623. The Limitation Act 1980 does not naturally apply to the newly-recognised law of restitution founded on unjust enrichment.[13] Moreover, the law has perpetuated traditional distinctions which have lost any relevance they once had. Examples include the restriction of the concept of acknowledgements to liquidated claims,[14] and that actions on a contract executed by deed have a twelve year limitation period, while actions on a simple contract have a six year period.[15] Thirdly, the present law wastes costs. Complex and uncertain law necessitates expensive legal advice and encourages litigation. Giving the courts discretion to disapply limitation periods in personal injury cases has engendered a huge number of cases; and yet that costly approach has recently been re-enacted in respect of defamation and malicious falsehood.[16] To give defendants no long-stop means that in respect of some potential claims, for example, personal injury claims, they must retain records for many years, for fear that they may be exposed to claims many years after the act or omission in question.

1.4 Not surprisingly, therefore, the present law has been subjected to criticism[17] and there have been calls by the senior judiciary for us to look at particular problems. For example, Sir Ralph Gibson has suggested that we should examine the interrelation of the limitation provisions for intentional and non-intentional injury, and the absence of any long-stop provision for personal injury claims and disabled plaintiffs.[18] In the same case Millett LJ said that the differing limitation regimes applicable to intentional and non-intentional personal injury claims, and particularly the fact that the latter can be extended indefinitely (rather than for the

[12] See paras 3.87 - 3.92, 3.101 - 3.104 below.

[13] See Part V below.

[14] See para 8.32 below.

[15] See para 3.1 below.

[16] See paras 3.105 - 3.107 below.

[17] See, eg, PJ Davies, "Limitations of the Law of Limitation" (1982) 98 LQR 249; D Morgan, "Limitation and Discretion: Procedural Reform and Substantive Effect" [1982] CJQ 109; MA Jones, "Latent Damage - Squaring the Circle" (1985) 48 MLR 564; A McGee, "Negligent Advice by solicitor: the limitation problem" [1988] PN 116; A McGee, "A Critical Analysis of the English law of Limitation Periods" [1990] CJQ 366; NJ Mullany, "Reform of the Law of Latent Damage" (1991) 54 MLR 349; A McGee "Trespass and Limitation" [1993] 109 LQR 356; WVH Rogers, "Limitation and Intentional Torts" (1993) 143 NLJ 258;" MA Jones, "Accidental Harm, Intentional Harm and Limitation" [1994] 110 LQR 31; MA Jones, "Limitation Periods and Plaintiffs Under a Disability - A Zealous Protection?" [1995] CJQ 258; JRJ Allison, "Limitation of Actions in Child Abuse Cases" [1996] JPIL 19.

[18] *S v W* [1995] 1 FLR 862, 867. See also *Headford v Bristol & District Health Authority* [1995] PIQR P180, P185.

six years proposed by the Tucker Committee)[19] is "a matter deserving of the attention of the Law Commission for the law cannot be described as satisfactory".[20] And Brooke LJ has suggested that we should examine the problems of interpretation caused by the definition of the date of knowledge which starts the limitation period running for personal injury claims.[21]

1.5 Although part of the purpose of this paper is to seek consultees' views on the extent to which reforms are needed, we can say at the outset that, at this stage in our thinking, the case for a wide-ranging reform looks compelling. It would seem that only a comprehensive reform can produce a law of limitations that is coherent, certain, clear, just, modern and cost-effective.

2. THE BACKGROUND TO THE PRESENT LAW

1.6 The first "limitation periods" applied to various land-related actions. Before 1237 plaintiffs could not claim land on the basis of a seisin before the day in 1135 when Henry I died.[22] Thereafter more recent dates were set for land-related claims with effect from 1237,[23] and 1275.[24] These dates were not changed until 1540, when for the first time limitation periods were set by reference to a fixed period of time rather than a fixed date.[25] Under the 1540 Act of Limitation, limitation periods of sixty,[26] fifty[27] and thirty years[28] were prescribed for land-related claims. The Limitation Act 1623 then provided that the period for writs of formedon should be limited to twenty years, and that no person should make entry into any lands later than twenty years after his right of entry accrued.

1.7 The limitation periods for land-related actions were reviewed by the Real Property Commissioners reporting to the House of Commons in 1829. Noting the multiplicity of remedies for land-related claims, and the equal variety of limitation

[19] See para 1.13 below.

[20] [1995] 1 FLR 862, 866.

[21] *Spargo v North Essex District Health Authority* [1997] PIQR P235, P245.

[22] Sir F Pollock and FW Maitland, *The History of English Law before the time of Edward I* (2nd ed 1968), p 81.

[23] Under the Statute of Merton, 20 Hen III, c 8 (1235) a Writ of Right could not refer back to any time before Henry II's coronation (1154); Writs of Mort d'auncestor, or Nativis and Entry could not refer to any time before "the last return of King John from Ireland into England", and Writs of Novel Disseisin could not refer to time before Henry III's first voyage to Gascony.

[24] Under the Statute of Westminster, 3 Ed I c 39 (1275), the earliest date which could be cited in a Writ of Right was moved forward to the coronation of Richard I (1189); for Writs of Mort d'auncestor, of Cousinage, of Aiel, of Entry and of Nativis the relevant date was changed to the coronation of Henry III (1216).

[25] See the Act of Limitation, with a proviso, 32 Hen VIII, c 2 (1540).

[26] For a Writ of Right.

[27] For Writs of Mort d'auncestor, Cousinage, Aiel, Writs of Entry or other possessory actions and avowries for rents or services, formedons in remainder and reverter and scire facias on fines.

[28] For claims based on the possession of the claimant.

periods applicable to them,[29] they recommended that the law be simplified "by giving all persons alleging that they are unjustly deprived of their estates the same time for enforcing their claims, with a certain indulgence to claimants under disabilities". With respect to the length of the limitation period, they said:

> Notwithstanding the anomalies to which we have adverted, the period of twenty years is the limitation which in this country is generally acted upon, and which, being established in some cases by statute, and found to suit the convenience of society, has been made the foundation of legal presumption, and the rule for affording or refusing equitable relief. We think that this should be retained, and with a few exceptions and qualifications made universal.[30]

These recommendations were implemented in the Real Property Limitation Act 1833. The 20-year period was then reduced to 12 years by the Real Property Limitation Act 1874. This remains the relevant limitation period for most land-related claims.

1.8 Until the Limitation Act 1623 there were no limitation periods for other (that is, non-land-related) claims. This Act provided that a limitation period of two years should apply to actions on the case for words, a period of four years should apply to actions of assault and false imprisonment and for most other actions a limitation period of six years should apply. We have been unable to trace any information on the reason why the six year period was thought appropriate. No limitation period applied to contracts under seal (that is, specialties), actions of account between merchants, their servants or factors, actions brought for debt under a special statute, nor to actions brought on a record.[31] These limitation periods were supplemented by the Civil Procedure Act 1833, which prescribed a limitation period of twenty years for actions on a bond or other specialty, a period of two years for actions to recover penalties, and extended the application of the six year period to actions of debt upon an award.

1.9 These limitation periods were reviewed by the Law Revision Committee, chaired by Lord Wright MR, in 1936.[32] The report of that Committee noted that considerable problems were caused by different periods being laid down for different actions (not least because some limitation periods were set by reference to forms of action which had ceased to exist following the reforms made by the Common Law Procedure Act 1854 and the Judicature Acts 1873-75). The Committee noted that

[29] In some cases no limitation periods applied, as with claims for dower, escheat, waste - or any other action for which seisin did not need to be alleged. Further no statute of limitation applied to actions by the Church.

[30] First Report of the Real Property Commissioners, Parliamentary Papers, 1829, vol X, p 1, 40.

[31] See 21 Jac 1, c 16, s 3; Sir W Holdsworth, *A History of English Law* (7th ed 1956), vol 4, p 533.

[32] Law Revision Committee, *Fifth Interim Report (Statutes of Limitation)* (1936) Cmd 5334.

> these difficulties would vanish if the differences in the periods of limitation prescribed for the different classes of common law actions, were abolished. Moreover, apart from the difficulties, it appears to us desirable, for the sake of simplicity, that a single period should, if possible, apply to all such actions.[33]

1.10 With this in mind, the Committee recommended that a single limitation period should apply to actions in simple contract, and actions in tort. This period was set at six years: "the period which at present applies to the majority of such actions and is familiar to the general public." This abolished the separate periods prescribed for actions for trespass to the person and for slander by the Limitation Act 1623.[34] The only distinct limitation period the Committee thought it advisable to retain (apart from land-related claims) was a limitation period for actions on a speciality. This was justified on the basis that

> there ought, we think, to be a method by which rights can be protected from the operation of the statutes of limitation for a considerable period. Money is frequently advanced on bonds or debentures or similar instruments, which is not expected or intended to be repaid for a long period and on which payment of interest is waived or suspended.[35]

However, the Committee thought that the existing period of twenty years was too long, and recommended its reduction to twelve years. The Committee did not recommend any revision of the twelve month limitation period applying under the Public Authority Protection Act 1893 for claims against public authorities, deeming it inadvisable to challenge the policy of that Act.

1.11 The Limitation Act 1939, which implemented the recommendations of the Law Revision Committee, therefore enshrined the principles that limitation periods applied to identified causes of action,[36] were for fixed periods and that they were triggered when the cause of action accrued.

1.12 The limitation period of six years applicable to most claims under the Limitation Act 1939 was reconsidered by the Law Reform Committee in 1977.[37] The Committee acknowledged that the selection of a particular period was to some extent an arbitrary decision, and noted evidence that the six year period was "unnecessarily long" particularly in the field of commerce. They considered

[33] *Ibid*, para 5.

[34] The Law Revision Committee felt that a shorter limitation period might be justified for particular forms of action: "the desirability of a speedy trial is probably more obvious in cases of actions for personal injuries and actions for slander than in other actions." (*ibid*, p 9). However, in the Committee's opinion, the need for more uniformity took precedence.

[35] *Ibid*, p 9. The Committee also noted that "difficulties of evidence are less likely to arise where the action is upon a contract under seal than where it is upon a simple contract, which may not even be in writing."

[36] Though using a far simpler classification of causes of action than that adopted by the earlier statutes of limitation which preceded the reforms made to civil procedure in the nineteeth century.

[37] Law Reform Committee, *Twenty-First Report (Final Report on Limitation of Actions)* (1977) Cmnd 6923.

whether a period of four or five years should be adopted instead.[38] No shorter period was considered because, as the Law Reform Committee noted, "Adoption of a substantially shorter period might ... cause difficulty unless English law were to abandon, as the normal terminus quo, accrual of the plaintiff's cause of action."[39] The Committee agreed that for most claims the six year limitation period was unnecessarily long - but felt that the rule had become familiar to the general public as well as to lawyers, and should not be changed unless it could be shown that there was a substantial advantage in doing so.

1.13 A shorter limitation period was introduced for personal injury claims in 1954. The Law Reform (Limitation of Actions, etc) Act 1954 reduced the limitation period for personal injury claims to three years from the accrual of the cause of action.[40] This followed the recommendations of the Report of the Committee on the Limitation of Actions (although without fully implementing them - the Committee preferred a limitation period of two years, extendible at the discretion of the court to six years).[41] The Committee justified the reduction on the grounds that such actions "ought generally to be brought within two years from the accrual of the cause of action, whilst evidence is fresh in the minds of the parties and witnesses."[42]

1.14 The limitation period for personal injury claims was examined again after the Court of Appeal's decision in *Cartledge v E Jopling & Sons Ltd*[43] demonstrated the injustice of the limitation period for such claims expiring before the plaintiff was aware of his or her injury. The Committee on the Limitation of Actions in Cases of Personal Injury[44] proposed that the limitation period for such claims should end on the later of the day three years after the cause of action accrued, or twelve months after the plaintiff knew the material facts. This recommendation was implemented in the Limitation Act 1963. The twelve month limitation period was recommended after consultation with the Trades Union Congress and the British Employers' Confederation - both bodies considered it acceptable.[45] Seven years later, the Law Commission noted that there was no evidence to suggest that twelve months was insufficient for the plaintiff to institute proceedings (even taking into account the fact that under the Limitation Act 1963 the plaintiff could not merely

[38] *Ibid*, para 2.52. The Law Reform Committee noted that the five year period had been accepted in Scotland, and that a four year period had a measure of international support (being the limitation period prescribed by the UNCITRAL Convention on Limitation in the International Sale of Goods).

[39] *Ibid,* para 2.52.

[40] This applied to claims against all defendants - the special protection for public authorities was abolished.

[41] *Report of the Committee on The Limitation of Actions* (1949) Cmd 7740, para 22 (chaired by Tucker LJ).

[42] *Ibid.*

[43] [1962] 1 QB 189 (CA) This decision was affirmed, after the *Report of the Committee on Limitation of Actions in cases of Personal Injury* (1962) Cmnd 1829, by the House of Lords: [1963] AC 758.

[44] *Report of the Committee on Limitation of Actions in Cases of Personal Injury* (1962) Cmnd 1829.

[45] *Ibid*, para 35.

issue a generally endorsed writ, but was obliged to prepare an affidavit setting out when the plaintiff acquired the relevant knowledge, and exhibiting a draft statement of claim).[46] However, because of concern that courts might be unable to deal with a very large number of plaintiffs discovering that they had a reasonable prospect of success in a justified claim for damages, and to bring English law into line with the position in Scotland, the Law Commission recommended that the limitation period be extended to three years from the time the plaintiff had knowledge of the material facts.[47] This change was implemented in the Law Reform (Miscellaneous Provisions) Act 1971. The Limitation Act 1975 (which followed a further investigation by the Law Reform Committee)[48] amended the definition of the plaintiff's date of knowledge, and introduced a judicial discretion to disapply the limitation period in personal injury cases where the court found it equitable to do so. This scheme for personal injuries - three years from discoverability with a judicial discretion to disapply the period - was consolidated in the Limitation Act 1980 and remains the law today.

1.15 It took longer for a separate limitation period to be introduced for actions for defamation. The limitation period for all defamation actions was six years under the Limitation Act 1939. Previously actions for slander actionable per se were subject to a limitation period of two years under the Limitation Act 1623.[49] Although the Law Revision Committee,[50] which recommended the uniform six year period for defamation actions, appreciated that the desirability of a speedy trial was more obvious in the case of actions for defamation than other tort actions, it gave a higher priority to achieving, as far as possible, a single uniform period for all actions. This six-year period was reviewed by the Faulks Committee on Defamation.[51] This committee recommended that the period should be reduced to three years from the date of publication. It was noted in particular that a libel might give rise to causes of action on several separate occasions as it was published through the distribution of the offending book or article.[52] Further the Committee laid stress on the injustice to defendants "who have the anxiety, expense and inconvenience of a possible defamation action hanging over them for many years after the publication of the matter complained of."[53] It was also felt that the plaintiff should be ready to bring legal proceedings far sooner than six years after publication if sincere in the desire to vindicate the reputation alleged to

[46] Though it appears that the Law Society had represented that this period was insufficient - see Limitation Act 1963, Law Com No 35 (1970) Cmnd 4532, para 22.

[47] Limitation Act 1963, Law Com No 35 (1970) Cmnd 4532.

[48] *Twentieth Report (Interim Report on Limitation of Actions: in Personal Injury Claims)* (1974) Cmnd 5630.

[49] Actions for slander not actionable without proof of special damage were treated as actions on the case, and subject to the six year limitation period. See Preston & Newsom, *Limitation of Actions* (1st ed 1940).

[50] Law Revision Committee, *Fifth Interim Report (Statutes of Limitation)* (1936) Cmnd 5334.

[51] See Report of the Committee on Defamation (1975) Cmnd 5909, chaired by Faulks LJ, ch 18.

[52] *Ibid*, p 148.

[53] *Ibid*, p 149.

have been damaged.[54] The Committee recommended that where the plaintiff was ignorant of the relevant facts for some time after publication the period should be capable of extension to a time twelve months after the plaintiff became aware of the relevant facts. This led to the Administration of Justice Act 1985, amending section 4 of the Limitation Act 1980 accordingly.[55]

1.16 By the Defamation Act 1996, following the recommendations of the Supreme Court Procedure Committee,[56] chaired by Lord Justice Neill, the limitation period for actions for defamation and malicious falsehood has been reduced to one year, subject to a general judicial discretion to disapply the period where equitable to do so. The Committee laid stress on the evidentiary problems likely to afflict the defendants if actions were brought after this time.[57] It was also noted that experience had shown that only in exceptional circumstances was the plaintiff justified in delaying for more than a year in bringing proceedings. These circumstances included the plaintiff's failure to discover the facts, or improved financial circumstances allowing the plaintiff to bring proceedings after a certain period. The Committee felt that the plaintiff could be adequately safeguarded by the existence of the court's discretion.

1.17 The applicable limitation period for contribution claims by one tortfeasor against another was reduced from six years to three years by section 4(2) of the Limitation Act 1963. In 1975, concern was voiced by the Law Commission that this period might still be too long, noting that the defendant to the contribution action might not hear of a claim against him for several years after the accident, after which time "he may have forgotten what really happened and may be unable to trace vital witnesses".[58] However, when the Law Reform Committee reviewed the limitation period for contribution actions in 1977,[59] it noted that this caused few problems in practice, and indeed that the limitation period was rarely in issue "because well-advised plaintiffs in practice sue all likely defendants, and if only one is sued, he is quick to suggest that others are really to blame."[60]

1.18 A limitation period of three years running from the plaintiff's date of knowledge, or six years from accrual, (with a long-stop of 15 years) for non-personal injury latent damage in the tort of negligence, was introduced by the Latent Damage Act 1986. The Law Reform Committee recommending this reform recognised the benefit of having a period which was familiar as a substantial argument for adopting the six year period for latent damage cases.[61] However, it also

[54] *Ibid*, p 149.

[55] The limitation period for malicious falsehood, however, remained fixed at six years.

[56] *Report on Practice and Procedure in Defamation*, July 1991.

[57] "Memories fade. Journalists and their sources scatter and become, not infrequently, untraceable. Notes and other records are retained only for short periods, not least because of limitations on storage." *Ibid*, para VIII 2.

[58] Contribution, Law Com Working Paper No 59 (1975).

[59] *Twenty-First Report (Final Report on Limitation of Actions)* (1977) Cmnd 6923.

[60] *Ibid*, para 3.34.

[61] Law Reform Committee, *Twenty-Fourth Report (Latent Damage)* (1984) Cmnd 9390.

acknowledged that where the plaintiff knows - or ought to know of his cause of action - it was not unreasonable to impose a more stringent time limit on him.

1.19 A limitation period of three years running from the later of the plaintiff's date of knowledge or the date the cause of action accrued (with a long-stop of 10 years) was introduced for claims under the Consumer Protection Act 1987 claims by Schedule 1 of that Act.[62]

1.20 The law on limitation is now largely contained in the Limitation Act 1980. This consolidated the Limitation Act 1939, the Limitation Act 1975 and the Limitation Amendment Act 1980 (which was a 'paving' Act and made a number of miscellaneous amendments to the limitation provisions on, for example, certain loans, theft and land-related claims). The 1980 Act has itself subsequently been amended to take account of reforms, mentioned above, on latent damage in the tort of negligence, on defamation and malicious falsehood, and on claims under the Consumer Protection Act 1987. The scheme of the 1980 Act is as follows. Part I of the 1980 Act sets out the basic periods of limitation. Essentially these are categorised according to the cause of action which is under consideration; they vary from one year in the case of defamation actions to sixty years in the case of certain actions by the Crown for the recovery of land. Part II of the 1980 Act deals with situations in which the periods provided by Part I may be excluded or the running of time may be postponed. As regards exclusion, sections 32A and 33 of the Act confer upon the court a discretion to exclude the normal time limits in the respect of personal injuries or death, defamation or malicious falsehood. Acknowledgement, part payment, disability, fraud, concealment and mistake automatically postpone the running of time. Part III contains a number of supplementary provisions, of which section 35, relating to new claims in existing actions, is perhaps the most important.

1.21 Three points of significance for our project may be drawn from this brief history of limitation periods. First, the law of limitations has been subjected to a wide range of ad hoc reforms, following the recommendations of reform bodies charged with recommending reforms of particular pockets of law. This accounts for much of the law's incoherence and complexity. Secondly, the traditional approach of limitation periods running from accrual of a cause of action has led to problems, which the Legislature has tried to solve either by moving to a discoverability starting date (as in the Latent Damage Act 1986) or by relying on a judicial discretion to disapply the limitation period (as in the Defamation Act 1996), or by using both approaches (as in the regime for personal injuries). Thirdly, in so far as the length of limitation periods has been changed, the trend has been to shorter periods. For example, land-related claims are subject to a twelve-year period rather than the twenty-year period that once applied. And a period shorter than six years applies to claims for personal injuries (three years), defamation and malicious falsehood (one year), and contribution claims (two years). Having said that, the six year period has proved remarkably durable. Although we have been unable to trace any specific reason why it was adopted in the Limitation Act 1623,

[62] In compliance with the United Kingdom's obligations under the Product Liability Directive 85/374 of 25 July 1985.

it is fair to assume that it reflected conditions that are no longer applicable (not least because of far more rapid methods of communication). Perhaps its durability reflects nothing more than lawyers' familiarity with it.

3. WHAT SHOULD BE THE GENERAL POLICY AIMS OF THE LAW OF LIMITATIONS?

1.22 It seems appropriate to identify at the outset the purposes which the law of limitations should serve and the conflicting interests which it must balance. In general terms, limitation of actions is necessary in the interests of defendants and of the state. In formulating a limitation regime one must also ensure that it works fairly for plaintiffs.

(1) The Interests of Defendants.

(a) Evidentiary Reasons

1.23 It has long been recognised that evidence deteriorates over time, and that this might put the defendant under a disadvantage:

> The legislature thought it right ... by enacting the Statute of Limitations [1623] to presume the payment of that which had remained so long unclaimed, because the payment might have taken place and the evidence of it might be lost by reason of the persons not pursuing their rights.[63]

1.24 A key concern was that the defendant would have lost relevant evidence, and be unable to defend the case adequately. Due to the loss of vouchers or other written evidence, and the death or disappearance of witnesses it might be very difficult, if not impossible, for a defendant to meet a claim made after several years had gone by. Even where witnesses were still available they might have no memory - or an inaccurate memory - of the events in question.[64]

1.25 This continues to be an important justification for limitation periods. Although written records may be more durable than the memory of a witness, they may still be lost, or deteriorate in quality over time. The improvement in our capacity to record and store information in retrievable form has increased the amount of documentary information available, but in order to keep the amount of

[63] *Thomson v Eastwood* (1877) 2 App Cas 215, 248 per Lord Hatherley. See also *Mountstephen v Brooke* 3 B & Ald 147, 106 ER 614, where Abbott CJ noted that "the statute was passed to protect persons who were supposed to have paid the debt, but to have lost evidence of such payment". This presumption has been alternatively described by Best CJ in *A'Court v Cross* (1825) 3 Bing 329, 130 ER 540, 542: "The legislature thought that if a demand was not attempted to be enforced for six years, some good excuse for the non-payment might be presumed."

[64] See Law Revision Committee, *Fifth Interim Report (Statutes of Limitation)* (1936) Cmnd 5334, pp 8 - 9. The significance of delay is reflected in some of the authorities on applications to dismiss the plaintiff's cause of action for want of prosecution. As Lord Salmon noted in *Birkett v James* [1978] AC 297, 327 "When cases (as they often do) depend predominantly on the recollection of witnesses, delay can be most prejudicial to defendants and to plaintiffs also. Witnesses' recollections grow dim with the passage of time and the evidence of honest men differs sharply on the relevant facts. In some cases it is impossible for justice to be done because of the extreme difficulty in deciding which version of the facts is to be preferred."

information handled to manageable levels, and to reduce storage costs, many institutions have implemented document destruction policies, whereby documents not required for immediate needs are destroyed after a set interval.

> Experience teaches us, that owing to the perishable nature of all evidence, the truth cannot be ascertained on any contested question of fact after a considerable lapse of time.[65]

1.26 It may be argued that this disadvantage affects both parties to the litigation equally and that, as the plaintiff will be unable to prove his or her case if the evidence has deteriorated beyond a certain point, the defendant does not need the protection of the limitation period to counter the deterioration of evidence. In reality, the defendant may be at a substantial disadvantage. The events giving rise to the plaintiff's claim may be one of a series of similar transactions (for example, where the defendant is being sued for the negligent supply of services), and the defendant may have no particular reason to recall them or to preserve any related evidence. The defendant may also in many cases be unaware that the plaintiff had any grounds for making a claim against him or her.

(b) Certainty for the defendant

1.27 The Statutes of Limitation[66] were intended to protect defendants who had changed their position in the belief that no claim would be made.

> There is another ground which may be referred to as a sound reason for imposing a limit, and requiring that parties should pursue their rights with diligence, namely, the change of position between the parties who are sought to be affected by any such stale demands as this.[67]

1.28 This function led to the Statutes of Limitation being described as "acts of peace",[68] or "statutes of repose".[69] After a certain period of time, the defendants ought to be able to feel with confidence that they can treat as closed an incident which might have given grounds for a claim against them. It has been said that "long dormant claims have more of cruelty than of justice in them."[70] If there is a claim against the defendant, he or she is entitled to have that claim resolved without undue delay. Where defendants are subject to potential claims for an indefinite period, they may suffer uncertainty and stress. They may also incur considerable costs,

65 First Report of the Real Property Commissioners, Parliamentary Papers, 1829, Vol X, p 1, 39

66 That is, the Limitation Act 1623 and its successors (both the Real Property Limitation Acts 1833 and 1874 and the Civil Procedure Limitation Act 1833).

67 *Thomson v Eastwood* (1877) 2 App Cas 215, 248 - 249. See also *A'Court v Cross* (1825) 3 Bing 329, 130 ER 540; *Battley v Faulkner* (1820) 3 B & Ald 288, 106 ER 668; *Rhodes v Smethurst* (1840) 6 M&W 351, 356, 151 ER 447; *Adnam v Sandwich* (1877) 2 QBD 485, 489.

68 See *A'Court v Cross* (1825) 3 Bing 329, 130 ER 540; *Cholmondeley v Clinton* (1820) 2 Jac & W 1, affirmed 4 Bligh 1 (HL), 37 ER 527; *East India Co v Oditchurn Paul* (1850) 7 Moo (PC) 85, 13 ER 811; *Coburn v Colledge* [1897] 1 QB 702, 710, CA.

69 *Doe d Duroure v Jones* (1791) 4 TR 300, 308, 100 ER 1031.

70 *A'Court v Cross* (1825) 3 Bing 329, 332 per Best CJ, 130 ER 540, 541.

particularly where a defendant is obliged to maintain liability insurance for years after the events in question (and even after retirement).[71] In some cases, liability insurance may only be available for a limited period after the events in question. As we have already noted, defendants may also incur additional storage costs in maintaining relevant records for an indefinite period.

(2) The Interests of the State

1.29 One of the earliest justifications for limitation periods was concern that after several years it would not be possible to give a fair trial to disputes. The preamble to the Act of Limitation, with a Proviso[72] opened:

> Forasmuch as the time of limitation appointed ... extend and be of so far and long time past, that it is above the remembrance of any living man, truly to try and know the perfect certainty of such things, as hath or shall come in trial, or do extend unto the time and times limited by the said laws and statutes, to the great danger of mens' consciences that have or shall be impanelled in any jury for the trial of the same ....

1.30 It has been recognised that the state has an interest in a term being set on possible litigation:[73]

> *Interest reipublicae ut sit finis litium*, is a favourite and universal maxim. The public have a great interest, in having a known limit fixed by law to litigation, for the quiet of the community, and that there may be a certain fixed period, after which the possessor may know that his title and right cannot be called into question.[74]

1.31 It is desirable that claims which are brought should be brought at a time when documentary evidence is still available and the recollections of witnesses are still reasonably fresh. This is the best way to ensure a fair trial and thus to maximise the chance of doing justice. It also ensures that public money is not wasted in the hearing of claims that cannot be dealt with properly. Apart from this, the state has an interest in promoting legal certainty. Not only potential defendants, but third parties need to have confidence that rights are not going to disturbed by a long-forgotten claim. Financial institutions giving credit to businesses, for example, have an interest in knowing that a borrower's affairs will not be damaged by the revival of years old litigation. Buyers who want to purchase land or goods held by a potential seller want to know that their title cannot be disturbed by a third party to the deal.

1.32 On the other hand, the interests of society will not be served if plaintiffs are obliged to bring proceedings before they have had an opportunity to explore the

[71] As is frequently the case with professional indemnity insurance.

[72] (1540) 32 Hen VIII c 2.

[73] Recognised in the preamble to the Limitation Act 1623: "an act for the limitation of actions and for avoiding suits in law".

[74] *Cholmonderley v Clinton* (1820) 2 Jac & W 139, 37 ER 527, 577.

possibility of settlement, which could equally waste judicial resources. As the Committee on Limitation of Actions in Cases of Personal Injury noted:

> We have not, however, forgotten the very pertinent observation of Sellers, LJ in *Cartledge v E Jopling & Sons Ltd.*[75] 'The courts have discouraged delay in seeking redress and so has legislation; but on the other hand, there has been no encouragement for precipitate litigation. It is undesirable for workmen to be encouraged to keep their eyes on the courts'.[76]

1.33 The possible consequences of setting a limitation period which is too short should also be considered. At least in the short term, this will increase the number of plaintiffs whose claims are time-barred. In a number of cases, the plaintiff may in consequence have a claim for negligence against his or her solicitor. The trial of that negligence action will require the court to examine, at second hand, the plaintiff's chance of success in the original action. A significant increase in the number of such actions would strain judicial resources.

1.34 In the case of land-related claims, there are additional specific reasons, in the interests of society generally, for barring claims after a certain time limit has passed. It has been suggested that imposing a limitation period on claims to recover land helps to encourage the productive use of land, by rewarding the person who takes possession of unused land which would otherwise lie abandoned or under-exploited for years.[77] It also assists, in the case of unregistered land, in creating a marketable title to the land, as the squatter who has been in adverse possession of the land for the prescribed number of years is then granted rights in the land by the operation of the Limitation Act 1980, which can be sold. The statutes of limitation have also served to facilitate conveyancing in unregistered land, reducing the amount of time for which title has to be proved by the purchaser.[78] By extinguishing the plaintiff's title where no claim has been made before the expiry of the limitation period, the statutes act as a form of guarantee of security of title. They promote legal certainty, serving the interests of third parties, who, after the passage of a certain period of time, can rely on the apparent title of the possessor.[79]

(3) The Interests of Plaintiffs

1.35 The statutes of limitation have often been seen as a means of encouraging plaintiffs to act swiftly to protect their rights.

[75] [1962] 1 QB 189, 195.

[76] *Report of the Committee on Limitation of Actions in Cases of Personal Injury* (1962) Cmnd 1829, p 9.

[77] See M Dockray, "Why do we need Adverse Possession" [1985] Conv 272, 276.

[78] Ibid, and see First Report of the Real Property Commissioners, Parliamentary Papers, 1829, vol X, pp 1, 39 - 41. This justification for limitation periods has decreased in importance as more land has been registered.

[79] This factor is as important when title to goods rather than real property in question.

> We apprehend that the law of limitation is designed to encourage plaintiffs not to go to sleep on their rights, but to institute proceedings as soon as it is reasonably practicable for them to do so.[80]

But it has been recognised that the limitation period must also afford to the plaintiff a reasonable opportunity to pursue his or her claim:

> But if the law of limitation is principally designed for the benefit of defendants, it would nevertheless be a mistake to lose sight of the interests of injured persons. A plaintiff who has lost the right to claim damages before he can know of the existence of that right must, in our view, inevitably feel that he has suffered injustice.[81]

1.36 Plaintiffs naturally wish to have as long a time as possible in which to bring an action. The limitation period should be sufficiently long to allow plaintiffs to recognise and consider their cause of action, to take legal advice on their case, and to attempt to negotiate a settlement with defendants. The plaintiff should also have sufficient time to prepare his or her case (though this element should not be exaggerated - it could be argued that it is unfair to the defendant if the limitation period is to be designed to allow the plaintiff enough time to prepare his or her case fully, before defendants need hear that there is a possible claim against them). A limitation period which leads to the plaintiff's claim becoming time-barred before the plaintiff is, or could reasonably be, aware of the existence of a claim is unjust to the plaintiff. In certain circumstances, where the plaintiff is disabled, or the cause of action has been deliberately concealed by the defendant, the limitation system should be capable of affording the plaintiff additional protection.

1.37 It should also be remembered that it is in the interests of the plaintiff as well as the defendant that the limitation period should be certain, so that the plaintiff knows how much time is available before his or her claim must be brought against the defendant if it is not to be lost. If a plaintiff does not know when the limitation period will expire, the plaintiff will feel obliged to bring the claim as soon as possible to avoid becoming time-barred. Though this may appear to be a desirable result[82] this could also lead to the plaintiff's case being weakened because there has been insufficient time to prepare it, or to the plaintiff being obliged to bring proceedings where the case could have been settled if the plaintiff had had more time for negotiations with the plaintiff.

[80] *Report of the Committee on Limitation of Actions in Cases of Personal Injury* (1962) Cmnd 1829, para 17, a statement endorsed by the Law Reform Committee in their *Twentieth Report (Interim Report on Limitation of Actions: in Personal Injury Claims)* (1974) Cmnd 5630. The courts have recognised the value of the maxim "*Vigilantibus et non dormientibus succurrit lex*" in connection with limitation periods. See *Cholmonderley v Clinton* (1820) 2 Jac & W 1, 139 - 141, 37 ER 527, 577 - 8, *R B Policies at Lloyd's v Butler* [1950] 1 KB 76, 81 - 2.

[81] *Report of the Committee on Limitation of Actions in Cases of Personal Injury* (1962) Cmnd 1829, para 17.

[82] One of the functions of the limitation period, mentioned above, is to encourage the plaintiff to bring an action within a reasonable time, and the plaintiff should certainly not be encouraged to delay right to the last posssible moment before the limitation period expires when the claim could have been brought earlier.

1.38 Though limitation periods have been presented over the ages as being necessary to protect the defendant and as being in the interests of the state, it would be more accurate to say that any limitation system must balance the interests of the defendant, the state and the plaintiff. It is essential to have a limitations system, for the reasons set out above. However, it must be recognised that any limitation system will involve some injustice either to the plaintiff who does not have sufficient time to bring a claim, or to the defendant, who is asked to defend a claim after several years of the plaintiff's inaction. Any limitation system must attempt to minimise this injustice, and reconcile, as far as possible, the conflicting interests involved. The need to achieve a balance between the interests of plaintiffs, defendants, and the state must constantly be borne in mind when considering how the present law should be reformed.

4. THE SCOPE OF OUR REVIEW

1.39 This review will examine the law on limitation periods for civil actions. The prosecution of criminal offences is outside our remit. We also do not consider in this paper limitation periods for public law remedies - that is, time limits for judicial review applications - because we recently reviewed that area, and made recommendations accordingly, in our Report on Administrative Law: Judicial Review and Statutory Appeals.[83] Nor do we deal with time limits for appeals.[84]

1.40 We should emphasise that, although intended to be wide-ranging, we have not sought, with one major exception explained below, to deal with what may loosely be termed "purely procedural" aspects of the law.[85] That is, we have not sought to deal with areas that are dealt with by Rules of Court or under the courts' inherent jurisdiction to determine matters of practice and procedure. We therefore do not deal with applications to extend the period for which a writ is valid;[86] matters which must be specifically pleaded;[87] the general rules governing the amendment of pleadings;[88] dismissal for want of prosecution;[89] and applications to strike out an action for abuse of process.[90]

[83] (1994) Law Com No 226, paras 5.23 - 5.30.

[84] We considered time limits for statutory appeals in (1994) Law Com No 226, paras 12.20 - 12.22.

[85] The label "procedural" is not a straightforward one to use in the context of limitation periods because, on one view, all the law relating to limitation periods is a matter of procedure. This is why we have used the term "*purely* procedural".

[86] RSC O 6 r 8. It will be especially difficult for a plaintiff to establish that there is good reason to extend the validity of a writ where the effect of the extension will be to deprive a defendant of an accrued limitation period. See, eg, *Chappell v Cooper* [1980] 1 WLR 309; *Kleinwort Benson Ltd v Barbrak Ltd* [1987] AC 547; *Waddon v Whitecroft Scovill Ltd* [1988] 1 WLR 309.

[87] RSC O 18 r. 8.

[88] RSC O 20.

[89] See, eg, O 25 r 1(4). Prima facie an action will not be dismissed for want of prosecution if the limitation period applicable to that action has not expired, except in exceptional circumstances *(Birkett v James* [1978] AC 297, *Department of Transport v Chris Smaller (Transport) Ltd* [1989] AC 1197 *James Lazenby & Co v McNicholas Construction Ltd* [1995] 1 WLR 615) as the plaintiff would then be able to issue a fresh writ in respect of the same

1.41 Although, plainly, there are aspects of these procedural rules that are directly relevant to limitation issues, we consider that any reform of such procedural rules should be considered in a wider context than limitation. We are also conscious that Rules of Court are presently being rewritten in line with Lord Woolf's review of civil procedure.[91]

1.42 The one major exception, or quasi-exception, is that we shall be considering, albeit briefly, the rules governing new claims in existing actions. We make this exception for two reasons. First, this area is largely governed by section 35 of the Limitation Act 1980 and cannot be reformed without legislation. Secondly, we are aware that difficulties have been, and continue to be caused, by section 35 and its accompanying Rules of Court.[92]

5. THE STRUCTURE OF THIS PAPER

1.43 This Consultation Paper is hereinafter divided into three main sections, which examine the current law on limitations, the law on limitations in other jurisdictions, and the options for reform.

1.44 In Section A, we examine the current law on limitation by dividing the main issues into three. First, and most importantly, we consider (in Parts II - VII) the four linked issues of: the starting date of a limitation period; the length of the limitation period; whether there is a judicial discretion to disapply the limitation period (as there is in actions for, for example, personal injuries, death, defamation and malicious falsehood); and whether, in addition to a (primary or initial) limitation period, there is an overriding long-stop (as there is, for example, in the case of latent damage in the tort of negligence and actions under the Consumer Protection Act 1987). We also include reference here to situations where there is no limitation period (most importantly, certain actions for, or relating to, a breach of trust). Secondly, in Part VIII, we examine the factors which postpone the running of time; for example, disability, acknowledgement and deliberate concealment. Thirdly, in Part IX, we consider a number of additional issues, such as the effect of the expiry of a limitation period, the burden of proof, the equitable doctrine of laches, and new claims in existing actions.

1.45 In Section B (Part X), we review comparative law on limitation periods by reference to the jurisdictions of Scotland, Ireland, Australia, New Zealand, Canada, the United States, France and Germany.

1.46 In Section C of the Paper we review the options for reform of the current regime. In Part XI, we discuss the problems with present law in detail, and summarise our main provisional recommendations. In Part XII we provisionally propose a new "core" regime. Part XIII examines the range of this regime. Part XIV reviews the

action. See also *Halls v O'Dell* [1992] 1 QB 393; *Rath v C S Lawrence & Partners* [1991] 1 WLR 399; *Trill v Sacher* [1993] 1 WLR 1379.

[90] RSC O 18 r 19.

[91] Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996); *Access to Justice: Draft Civil Proceedings Rules* (1996).

[92] RSC O 15 r 6(5) - 6 (and O 20 r 5(3) and 5(5)).

options for reform in respect of a number of additional issues. The final Part summarises our provisional recommendations and consultation issues. The Appendix contains the Limitation Act 1980, as amended.

6. AN OUTLINE OF OUR MAIN PROVISIONAL PROPOSALS

(1) A Core Regime[93]

1.47 We provisionally propose a core regime. The central features of the core regime would be as follows:-

(1) There would be an initial limitation period of three years that would run from when the plaintiff knows, or ought reasonably to know, that he or she has a cause of action. (But on this most fundamental of questions, we should stress at the outset that we seek consultees' views on whether they would prefer one of four other main options for reform).

(2) There would be a long-stop limitation period of 10 years, or in personal injury claims of 30 years, that would run from the date of the act or omission which gives rise to the claim.

(3) The plaintiff's disability (including supervening disability) would extend the initial limitation period (unless, possibly, there is a representative adult other than the defendant). Adult disability would not extend the long-stop limitation period (and we seek views as to whether minority should do so). Deliberate concealment (initial and subsequent) would extend the long-stop. Acknowledgements and part payments should start time running again but not once the initial or long-stop limitation period has expired.

(4) The courts would *not* have a discretion to disapply a limitation period.

(2) The Range of the Core Regime[94]

1.48 We provisionally propose that the above core regime would apply (without any qualification) to the following actions:

(1) The majority of tort actions (including negligence claims, trespass to the person (including sexual abuse), defamation and malicious falsehood);

(2) contract claims (on both simple contracts and specialties);[95]

(3) restitutionary actions;[96]

(4) breach of trust and related actions, including actions in respect of the personal estate of a deceased person;

[93] See Part XII below.

[94] See Part XIII below.

[95] But for actions for a contractual indemnity or contribution see paras 13.93 - 13.98 below.

[96] But for actions for a restitutionary contribution or indemnity, see paras 13.84 - 13.92 below.

(5) actions on a judgment or arbitration award; and

(6) actions on a statute.

1.49 We also provisionally propose that the core regime would extend, but with some qualifications, to the following actions:

(1) Actions under the Law Reform (Miscellaneous Provisions) Act 1934 and the Fatal Accidents Act 1976;

(2) Conversion;

(3) Actions by a subsequent owner of damaged property;

(4) Actions for a contribution or an indemnity;

(5) Actions to recover land and related claims (a fundamental qualification here being that the initial limitation period would not apply to actions to recover land).

1.50 We further provisionally propose that actions against public authorities should not be subject to special (shorter) limitation periods; that the core regime should apply to applications under section 459 of the Companies Act 1985; that where the core regime applies to common law remedies for a cause of action, it should also apply to equitable remedies for that cause of action; and we set out a number of options for the treatment of the doctrine of laches. Subject to a few exceptions, we do not propose to alter specific limitation periods laid down in enactments other than the Limitation Act 1980. We provisionally propose to include a "sweeping-up" provision, under which the core regime would apply to all actions unless excluded by another provision of the proposed Bill (or any other enactment).

(3) Additional Issues[97]

1.51 We provisionally propose that:

(1) Subject to the normal rules on the validity of contractual terms, parties would be free to alter the length or the starting date of initial limitation period by contract. (We seek consultees' views as to whether they should be able to extend the long-stop or change the long-stop starting date).

(2) As under the present law, the limitation period would stop running when proceedings were issued by the plaintiff.

(3) Plaintiffs would be able to add new claims in existing actions where they were sufficiently related to the original cause of action, even where the limitation period had expired since the proceedings were started.

(4) With one exception relating to conversion, no change should be made to the present law on the effect of the expiry of the limitation period.

[97] See Part XIV below.

(5) Where the plaintiff's right to sue is subject to a restriction, the running of time for the purpose of the initial limitation period and the long-stop, should be suspended from the date the plaintiff has done all that he or she could do to lift that restriction.

(6) In general, the burden of proof on limitation should continue to be on the plaintiff.

(7) Our provisionally proposed legislation should apply to causes of action accruing before the legislation commences, except where the cause of action has been barred by the expiry of a limitation period by the provisions of a previous Act, or proceedings have been instituted in respect of a cause of action before the commencement of the provisionally proposed Act.

7. ACKNOWLEDGEMENTS

1.52 The law on limitations has been the subject of considerable investigation by law reform bodies in other jurisdictions. The high quality, and wide-ranging scope, of the reports of these bodies has been of great assistance to us in formulating our own proposals.[98] We are grateful to Professor Andrew McGee, Professor of Business Law at the University of Leeds for preparatory work done in relation to this Consultation Paper; and to Donald Bishop, Tony Blackler, Professor Phillip Capper, Frances Paterson, Jennie Price and the Construction Industry Council for giving us their views on the limitation problems encountered in the construction industry.[99] We are also grateful to the following for their help: Sir Brian Neill; Michael Brindle QC, Peter Goldsmith QC, Lord Goodhart QC, Michael Lerego QC, Kim Lewison QC, Peter Scott QC, Andrew Smith QC, Nicholas Underhill QC, Stephen Moriarty, Marcus Smith; the Civil Litigation Committee of the Law Society, Tim Archer of Richards Butler, Lindsay Marr of Freshfields, David Natali of Herbert Smith, Anthony Pugh Thomas and Haydn Puleston Jones of the City of London Law Society; Morys Davies, Legal Adviser and Solicitor to the Crown Estates Commissioners, Gisela Davis, Ministry of Agriculture, Fisheries and Food, James Furber, Solicitor to the Duchy of Cornwall, SM Jones, Deputy Solicitor to the Church Commissioners, Gwyneth Hughes, Ministry of Defence, MK Ridley, Duchy of Lancaster Office, and the Treasury Solicitor's Department.

[98] See in particular Alberta Law Reform Institute, *Limitations,* Report No 55 (1989) (the recommendations of which have now been enacted in Alberta's Limitation Act 1996 c L-15.1 (yet to be proclaimed)); New Zealand Law Commission, *Report No 6, Limitation Defences in Civil Proceedings*, NZLC R6 (1988); Law Reform Commission of British Columbia, *Report on the Ultimate Limitation Period: Limitation Act, Section 8* (1990); Ontario Limitations Act Consultations Group, *Recommendations for a New Limitations Act, Report of the Limitations Act Consultation Group* (1991); and Law Reform Commission of Western Australia, *Report on Limitation and Notice of Actions,* Project No 36 - Part II (1997).

[99] See especially paras 12.17, 12.106, 12.151 - 12.153, 13.84 - 13.98 below.

SECTION A: THE CURRENT LAW

PART II
STARTING DATE, LENGTH OF PERIOD, DISCRETION TO DISAPPLY AND LONG-STOP: INTRODUCTION

2.1 In Parts III-VII we examine the present law on the four linked issues of: the starting date of a limitation period; the length of the limitation period; whether there is a judicial discretion to disapply the limitation period; and whether there is an overriding long-stop. We also include reference to where there is no limitation period.

2.2 The four issues of starting date, length, discretion to disapply and long-stop are linked in the sense that the law's approach to one of those issues can have a "knock-on" effect on its approach to the other issues. For example, a rule that time does not start to run until the cause of action is first reasonably discoverable will tend to delay the running of time as opposed to a rule that time starts to run on the accrual of the cause of action. But this may be offset to some extent by the imposition of a shorter limitation period. Again, a shorter limitation period may be supplemented by a judicial discretion to disapply the limitation period. Alternatively the impact of a discoverability starting point may be softened by imposing a long-stop running from the date of the defendant's conduct which will bar the action after a much longer period than the (initial) limitation period.

2.3 The law's approach to these four main issues requires a careful balancing of the interests of plaintiffs and defendants and the state. It constitutes the central policy "battle-ground" in formulating our proposals for reform.

2.4 Most (initial) limitation periods run either from the date when the cause of action accrues or from the date when the existence of the cause of action is first reasonably discoverable by the plaintiff, though some have their own *sui generis* starting date.

2.5 The lengths of the various periods are to a large extent a matter of historical accident.[1] They largely vary between one and twelve years. The six year periods were found originally in the Limitation Act 1623 and have remained unchanged ever since. Most of the twelve-year periods were originally greater, mostly twenty years, and have been reduced as part of the general trend towards shorter time periods in land law.[2] The three-year period for personal injuries dates from 1954.[3]

[1] See, generally paras 1.6 - 1.21 above.

[2] See M Dockray "Why do we need Adverse Possession" [1985] Conv 272. A comparison may be drawn with the gradual reduction in the period for which a vendor must show title from sixty years to the present fifteen years: Law of Property Act 1925, s 44(1), as amended by the Law of Property Act 1969, s 23.

[3] The Law Reform (Limitations of Actions, etc) Act 1954, s 2.

The judicial discretion to exclude the limitation period in cases of personal injuries followed in 1975.[4] The Limitation Act 1963 reduced the limitation period for contribution to two years.[5] The period for defamation was reduced from six years to three in 1985 subject to a discretion to extend the period,[6] and the period has been further reduced to one year by the Defamation Act 1996.[7]

2.6 A judicial discretion to exclude (or, as it is often termed, to "disapply") a limitation period has been conferred in various specialised contexts (for example, under the Maritime Conventions Act 1911[8] and the Sex Discrimination Act 1975). Reliance on judicial discretion was first introduced into *mainstream* limitation law in 1975 in respect of actions for personal injury and death. That discretion is now contained in section 33 of the Limitation Act 1980. Subsequently, section 33 has been used as a model for the conferral of a judicial discretion to disapply a limitation period in actions for defamation and malicious falsehood (under the Defamation Act 1996).[9]

2.7 Long-stops are rare in English law. Examples include the fifteen-year long-stop running from the relevant act or omission of the defendant under the Latent Damage Act 1986;[10] and the ten-year long-stop from the time when the product is supplied in actions under the Consumer Protection Act 1987.[11]

2.8 We have structured our examination of the four linked issues of starting date, length, discretion to disapply and long-stop according to the causes of action in question: Part III examines contract and tort; Part IV considers breach of trust; Part V looks at restitutionary claims; Part VI examines actions to recover land and related actions; and Part VII considers various miscellaneous actions (for example, actions on a judgment and actions for contribution).

2.9 A useful guide to Parts III-VII may be found in Table 1 below. This table summarises the law on the starting date, length of period, discretion to exclude and long-stop for the major causes of action (which are all dealt with in the Limitation Act 1980). We deal with specialist limitation periods in statutes other than the 1980 Act in paragraphs 7.26 - 7.39 below (including Table 2 at pages 125 - 141).

4 Limitation Act 1975. This had been recommended by the Law Reform Committee, *Twentieth Report (Interim Report on Limitation of Actions: in Personal Injury Claims)* (1974) Cmnd 5630.

5 The period having previously depended on the nature of the original cause of action in respect of which contribution was sought.

6 Administration of Justice Act 1985 s 57.

7 Defamation Act 1996, s 5 inserting new section 4A into the Limitation Act 1980.

8 See now the Merchant Shipping Act 1995. See paras 7.36 - 7.39 below.

9 Defamation Act 1996, s 5, inserting new section 32A into the Limitation Act 1980.

10 Latent Damage Act 1986, s 1, inserting new section 14B into the Limitation Act 1980.

11 Consumer Protection Act 1987, s 6(6), Schedule 1, para 1, inserting new section 11A into the Limitation Act 1980.

TABLE 1

Limitation Periods under the Limitation Act 1980

Nature of Action	Starting Point	Length of Period	Long-stop	Discretionary Exclusion?
Action founded on simple contract (section 5)	Accrual of cause of action	Six years	No	No
Action on informal loan contracts (section 6)	Deemed accrual of cause of action, that is, the date of written demand	Six years	No	No
Action on a specialty (section 8)	Accrual of cause of action	Twelve years	No	No
Action for sum recoverable by statute (section 9)	Accrual of cause of action	Six years	No	No
Action founded on tort (other than for personal injuries; under the Consumer Protection Act 1987; for latent damage; or for defamation) (section 2)	Accrual of cause of action	Six years	No	No
Action for personal injuries or death (sections 11, 12)	Later of accrual of cause of action or date of knowledge	Three years	No	Yes

Nature of Action	Starting Point	Length of Period	Long-stop	Discretionary Exclusion?
Action for defamation or malicious prosecution (section 4A)	Accrual of cause of action	One year	No	Yes
Action for latent damage (in the tort of negligence) (section 14A)	Later of		Fifteen years	No
	(a) accrual of cause of action or	Six years		
	(b) date of knowledge	Three years		
Action under the Consumer Protection Act 1987 (section 11A)	Later of accrual of cause of action or date of knowledge	Three years	Ten years	No
Action for contribution (section 10)	Date of judgment or settlement	Two years	No	No
Action to recover land, proceeds of sale of land, or money secured by a mortgage or charge (sections 15, 20)	Accrual of cause of action, (that is, dispossession or discontinuance of possession)	Twelve years	No	No
Action to recover rent (section 19)	Accrual of cause of action (that is, the date rent arrears become due)	Six years	No	No
Action for non-fraudulent breach of trust (section 21(3))	Accrual of cause of action	Six years	No	No

Nature of Action	Starting Point	Length of Period	Long-stop	Discretionary Exclusion?
Action for fraudulent breach of trust, to recover trust property / proceeds from the trustee (section 21(1))		Unlimited		
Action claiming personal estate of a deceased person (section 22)	Accrual of cause of action (i.e. accrual of right to share in the estate)	Twelve years	No	No
Action to enforce judgment (section 24)	Date judgment becomes enforceable	Six years	No	No

PART III
STARTING DATE, LENGTH OF PERIOD, DISCRETION TO DISAPPLY AND LONG-STOP: CONTRACT AND TORT

1. BREACH OF CONTRACT

3.1 In general[1] the limitation period for an action founded on a contract starts on the date when the cause of action for breach of contract accrues. In an action based on a simple contract section 5 of the 1980 Act provides that no action shall be brought "after the expiration of six years from the date on which the cause of action accrued". In an action upon a specialty section 8 provides that (subject to a shorter period being prescribed by another provision)[2] no action shall be brought "after the expiration of twelve years from the date on which the cause of action accrued". Actions on specialties include causes of action brought in respect of contracts executed as deeds.[3]

3.2 A cause of action for breach of contract accrues as soon as the breach occurs.[4] The commencement of the limitation period is therefore independent of when damage arises. This may be justified on the basis that the plaintiff is entitled to sue immediately on the happening of the breach. However, coupled with the absence of any general provision for the extension of time in contract cases where the breach is not immediately discoverable, it tends to make actions in contract become time-barred rather earlier than actions in the tort of negligence based on the same facts.

3.3 When breach occurs depends on the structure of the contractual obligations. It is important to distinguish "once and for all" and "continuing" breaches. An obligation can require once and for all performance on a particular date, or within a period. Once and for all breach will thus occur on that date or at the end of that period if the obligation is not performed.[5] In contrast, some obligations (such as a covenant to keep in repair) continue to require performance until they are

[1] In personal injury claims founded on contract the limitation period runs from accrual of the cause of action or the plaintiff's date of knowledge, whichever is the later: see paras 3.29 - 3.65 below.

[2] Examples of shorter limitation periods include s 9 (actions to recover any sum recoverable by virtue of any enactment), s 19 (actions to recover rent) and s 20 (actions to recover money secured by a mortgage).

[3] The requirement of a seal for valid execution of a deed by an individual was abolished by the Law of Property Act (Miscellaneous Provisions) Act 1989, s 1(1)(b). However, sealing is still necessary in the case of corporations sole and aggregate. For a recent discussion see *Aiken v Stewart Wrightson Members Agency Ltd* [1995] 1 WLR 1281, affirmed [1996] 2 Lloyd's Rep 117. See para 7.11 below.

[4] See *Gibbs v Guild* (1882) 9 QBD 59.

[5] See generally *Chitty on Contracts: General Principles* (27th ed 1994) para 28-022; J W Carter, *Breach of Contract* (2nd ed 1991) pp 425 - 432.

performed even after they are first breached by non-performance.[6] There is, therefore, a continuing breach: a fresh breach occurs at each moment the contract remains unperformed.[7]

3.4 In the Australian case of *Larking v Great Western (Nepean) Gravel Ltd*[8] Dixon J helpfully described the distinction between a once and for all breach and a continuing breach as follows:[9]

> If the covenantor undertakes that he will do a definite act and omits to do it within the time allowed for the purpose, he has broken his covenant finally and his continued failure to do the act is nothing but a failure to remedy his past breach and not the commission of any further breach of his covenant. His duty is not considered as persisting and, so to speak, being for ever renewed until he actually does that which he promised. On the other hand, if his covenant is to maintain a building in repair, keeping the insurance of a life on foot, or affording a particular kind of lateral or vertical support to a tenement, then a further breach arises in every successive moment of time during which the state or condition is not as promised, during which, to pursue the examples, the building is out of repair, the life uninsured, or the particular support unprovided.

3.5 In the case of a continuing breach, the plaintiff can bring an action on that breach so long as the last moment of that breach is within the limitation period. If that requirement is made out the plaintiff will be able to recover so much of the loss which occurred within the full limitation period.[10] That is, if a plaintiff commenced an action in 1992 in respect of a continuing breach which commenced in 1980 and was not put right until 1990 then the action is not time-barred as the breach continued up till 1990 and the action was commenced with 2 years of that time. Moreover the plaintiff may recover for any loss occurring within the full limitation period, that is, the date the action was commenced less 6 years for a simple contract.[11]

3.6 A continuing breach should be distinguished from recurring or successive breaches of contract. If a contract requires recurring performance on a series of dates (for example, a contract to pay a recurring hire charge) it is best analysed as producing

[6] The obligation can continue forever, or up to the end of a relevant period. See *Midland Bank Trust Co v Hett, Stubbs & Kemp* [1979] Ch 384, 438.

[7] *Spoon v Green* (1874) LR 9 Ex 99, 111.

[8] (1940) 64 CLR 221. See *National Coal Board v Galley* [1958] 1 WLR 16, 27 - 28 (CA). See further, J W Carter, *Breach of Contract* (2nd ed 1991) pp 425 - 432.

[9] (1940) 64 CLR 221, 236.

[10] See *Chitty on Contracts: General Principles* (27th ed 1994), para 28-022.

[11] See *Coventry v Apsley* (1691) 2 Salk 420; 91 ER 366. Note that it has been held in a tort case that if it is not possible to determine which loss occurred within the limitation period and which loss occurred outside the limitation period the plaintiff may recover for the total loss. *Clarkson v Modern Foundries* [1957] 1 WLR 1210. The correctness of this approach has been doubted. See the discussion in *McGregor on Damages* (16th ed 1997), paras 405 - 409, but see also paras 3.26 - 3.28 below.

successive and separate "once and for all" breaches of each obligation in turn on each occasion that performance is not made.[12]

3.7 In the case of anticipatory breach (or anticipatory repudiation) time runs from the time of the anticipatory breach, that is, when the innocent party elects to terminate the contract. Until such an election is made there is no breach.[13]

3.8 The time of the breach, in the sense of the time when the creditor first had the right to bring an action on the contract, is less clear cut in the case of contracts of loan. Where a date is set for repayment of the loan, the cause of action will accrue on that date. If, instead, the principal is repayable on demand - and demand is a condition precedent to repayment - the cause of action will accrue when the demand has been made.[14] The debtor will have a very short time after the making of the demand in order to effect the mechanics of payment before being in default.[15] Where, however, there is no date laid down for repayment, and repayment is not conditional on demand, the cause of action will accrue, at common law, when the loan is made.[16] But section 6 of the 1980 Act[17] amends this common law rule so that, where there is a written demand for repayment, the cause of action to recover the debt will be deemed to have accrued on the date of the demand, and section 5 will apply accordingly.[18]

3.9 There may also be problems in determining when the cause of action accrues in relation to contracts of guarantee, or contracts of indemnity. Generally, with respect to contracts of guarantee, the cause of action against the guarantor will accrue at the same time as the accrual of the creditor's cause of action against the debtor.[19] This will usually be the case where the guarantee is in the form of a

[12] See *National Coal Board v Galley* [1958] 1 WLR 16, 27 - 28 (CA); J W Carter, *Breach of Contract* (2nd ed, 1991) p 426, para 1140.

[13] See *Chitty on Contracts: General Principles* (27th ed 1994) para 28-022; J W Carter, *Breach of Contract* (2nd ed 1991) pp 216 - 220 and 237 - 240. There appears to be no case in which this principle has been considered in relation to limitation periods.

[14] *Lloyds Bank Ltd v Margolis* [1954] 1 WLR 644, 659.

[15] *Bank of Baroda v Panessar* [1987] Ch 335. It has been suggested that it may be about an hour: T Prime and G Scanlan, *The Modern Law of Limitation* (1993) p 84. An hour was held to be sufficient in *Bank of Baroda v Panessar*.

[16] See *Re Brown's Estate* [1893] 2 Ch 300, 304. And where the principal is repayable (without demand) when interest is overdue by a given period, the cause of action will accrue on the expiry of that period : *Reeves v Butcher* [1891] 2 QB 509.

[17] Enacted on the recommendation of the Law Reform Committee *Twenty-First Report (Final Report on Limitation of Actions)* (1977) Cmnd 6923, pp 36 - 39. The Law Reform Committee recommended the enactment of the provisions contained in s 6 because of the perceived unfairness of the operation of s 5, in conjunction with the common law rules as to the date of repayment of debts, in non-commercial transactions.

[18] For a recent application of the section see *Boot v Boot* (1997) 73 P & CR 137. Section 6 will not apply, however, where the debtor enters into a collateral obligation to pay the debt (such as a promissory note) on terms that would exclude the application of the section if they applied directly to the repayment of the debt: s 6(2).

[19] Where the guarantor takes an assignment of the debtor's cause of action against a third party, time will run from the moment when the debtor could have commenced an action against that third party: see, *Tabarrok v E D C Lord & Co (a firm)*, *The Times,* February 14 1997 (CA).

promise by the guarantor that the debtor will perform the principal contract. The general rule however is subject to the express terms of the guarantee. For example, if the promise made by the guarantor is to pay instalments upon default by the debtor the guarantee will usually state that the guarantor need not make those payments until a demand is made on the guarantor. In that case the cause of action does not accrue until demand is made.[20]

3.10 Contracts of indemnity, the most important being insurance contracts, are more problematic. When the cause of action accrues turns on the construction of the particular contract. In contracts to insure against loss suffered by the assured, the usual rule is that the cause of action accrues when the loss was incurred.[21] Where the indemnity is against liability to third parties, the general rule today is that the indemnified party may commence proceedings against the indemnifier when the extent of his or her liability is established by judicial decision, arbitration, or binding settlement.[22] However that rule is subject to the construction of the contract of indemnity. Sometimes that will mean that the indemnifier will become liable as soon as the indemnified party becomes liable, that is, even before the quantum of that liability is determined.[23] In other cases the contract of indemnity may only provide an indemnity for amounts paid by the indemnified party. In that case no liability arises as against the indemnifier until an amount has been paid by the indemnified party.[24]

3.11 There is no discretion to disapply or extend the period and no long-stop in relation to standard actions for breach of contract.

[20] See *Bank of Baroda v Patel* [1996] 1 Lloyd's Rep 391; J Phillips and J O'Donovan, *The Modern Contract of Guarantee* (3rd ed 1996), pp 495 - 503; A McGee, *Limitation Periods* (2nd ed 1994), p 180; R Redmond-Cooper, *Limitation of Actions* (1992), p 39; T Prime and G Scanlan, *The Modern Law of Limitation* (1993), pp 84 - 86.

[21] *Firma C-Trades SA v Newcastle Protection and Indemnity Association, The Fanti and the Padre Island* [1991] 2 AC 1, 35 - 36.; *Ventouris v Mountain, The Italia Express* [1992] 2 Lloyd's Rep 281, 285, 291 - 292; *Callaghan v Dominion Trust Insurance Co* [1997] 2 Lloyd's Rep 541. See Colinvaux, *Law of Insurance* (7th ed 1997), para 9.15.

[22] See *Re Richardson ex parte Governors of St Thomas's Hospital* [1911] 2 KB 705, 709 - 710, *Post Office v Norwich Union Fire Insurance Society Ltd* [1967] 2 QB 363; *County and District Properties Ltd v C Jenner & Son Ltd* [1976] 2 Lloyd's Rep 728; *Telfair Shipping Corp v Inersea Carriers SA, The Caroline P* [1985] 1 All ER 243; *Bradley v Eagle Star Insurance Co Ltd* [1989] AC 957. Cf *Collinge v Heywood* (1839) 9 A & E 633, 112 ER 1352; *Bosma v Larsen* [1966] 1 Lloyd's Rep 22. See also R Redmond-Cooper, *Limitation of Actions* (1992), pp 39 - 40.

[23] See eg, *Bosma v Larsen* [1966] 1 Lloyd's Rep 22.

[24] In *Firma C-Trades SA v Newcastle Protection and Indemnity Association, the Fanti and the Padre Island* [1991] 2 AC 1, the House of Lords held that the general rule would be ousted by a "pay to be paid" clause. See A McGee, *Limitation Periods* (2nd ed 1994), pp 175 - 178; J Phillips and J O'Donovan, *The Modern Contract of Guarantee* (3rd ed 1996), pp 502 - 503; Redmond-Cooper, *Limitation of Actions* (1992), pp 39 - 41; T Prime and G Scanlan, *The Modern Law of Limitation* (1993), pp 89 - 91.

2. TORTS

(1) Actions Founded on Tort[25]

3.12 Section 2 of the Limitation Act 1980 provides that an action founded on tort cannot be brought "after the expiration of six years from the date on which the cause of action accrued". In the case of torts actionable *per se* the date of the accrual of the cause of action will be when the defendant's wrongful act is committed. For torts actionable only on proof of damage, such as negligence, the cause of action will accrue upon the damage occurring. In this section we concentrate on the issue of when does relevant damage occur, especially in the context of claims for the tort of negligence.

(a) Torts actionable on proof of damage: accrual of cause of action

(i) Personal injuries

3.13 As we shall see below, in actions for damages for personal injuries the limitation period is three years from the date on which the cause of action accrues or three years from the date of knowledge (if later) of the plaintiff.[26] In practice the focus of attention has been on the date of knowledge, but the concept of accrual remains important since this marks the earliest possible date at which time can start to run. In this section we are only concerned with the accrual of the cause of action.

3.14 The leading case on the concept of accrual in a personal injuries context is *Cartledge v E Jopling & Sons Ltd.*[27] In this case the plaintiff suffered from pneumoconiosis caused by inhaling dust at his place of work over a long period of time. Although the actual damage to the plaintiff could not be detected for a long time, the House of Lords held that a cause of action for personal injury accrued as soon as the plaintiff suffered some injury which was not merely trivial, even though he or she was quite unaware of it at the time.

(ii) Physical damage

3.15 The cause of action for negligent physical damage accrues when the relevant property is damaged. *Pirelli General Cable Works Ltd v Oscar Faber & Partners,*[28] contains the leading authoritative statement on the accrual of a cause of action for physical damage. The case concerned cracks in a chimney which occurred not later than 1970. The chimney was built in 1969. The cracks were not discoverable until 1972 and had not actually been discovered until 1977. The writ was issued in 1978. Relying on *Cartledge v E Jopling & Sons Ltd* and drawing a distinction between defects in property and damage to property, the House of Lords held that the cause of action for physical damage accrued when the cracks first occurred.

[25] The general rules on limitation for actions founded on tort are now subject to significant exceptions in the case of actions for personal injuries and death (s 11), cases of latent damage (ss 14A and 14B), actions under the Consumer Protection Act 1987 (s 11A) and actions for defamation (ss 4A and 32A, inserted by Defamation Act 1996, s 5). These are considered in separate sections below.

[26] Section 11(4). See further below paras 3.29 - 3.65.

[27] [1963] AC 758.

[28] [1983] 2 AC 1 (HL).

The fact that the damage was not at that time reasonably discoverable was irrelevant.[29] The action was therefore time-barred. The case remains authority for this point even though today the facts in question would be dealt with as raising an action for pure economic loss.[30]

3.16 A useful illustration of the application of *Pirelli* to physical damage, and of the difficult interplay with irrecoverable pure economic loss is provided by *Nitrigin Eireann Terota v Inco Alloys Ltd.*[31] Here the plaintiffs owned and operated a chemical production plant. In March 1981 they bought tubing from the defendants for use in this plant. In July 1983 they discovered a fault in the tubing which they attempted to repair. In June 1984 the tube ruptured causing serious physical damage to the surrounding property. The plaintiffs' action against the defendants was started in June 1990, just less than six years after the date of the rupture which caused the physical damage. As the action in contract was clearly time-barred, the claim was framed in tort. The question was whether the cause of action accrued in 1983 when the cracks were discovered or in 1984 when the tube ruptured. May J held that the loss in 1983 was pure economic loss and not recoverable in tort, whereas the physical damage occurring in 1984 clearly was recoverable in tort. Consequently, the cause of action accrued in June 1984 and the action was not time-barred. May J also held that the time of the accrual of the cause of action was not affected by the fact that the plaintiffs were aware of the damage to the pipe and continued to use it. He also held that the time of the accrual of the cause of action would not be affected even if the plaintiff knew, or ought reasonably to have known the cause of the defect, although the continued use of the product with such knowledge might affect the damages award. May J thought this was in line with the reasoning of the House of Lords in *Murphy v Brentwood District Council.*[32]

(iii) Pure economic loss

3.17 Loss arising from defects in property is today viewed as pure economic loss rather than physical damage.[33] Such loss appears to be irrecoverable in the tort of negligence unless the plaintiff is able to bring the case within the principle of *Hedley Byrne & Co Ltd v Heller & Partners Ltd*[34] (that is, generally, where the relationship between the parties is such that the defendant can be held to have 'assumed responsibility' to the plaintiff for the making of a statement or, possibly,

[29] The House of Lords overruled the Court of Appeal in *Sparham-Souter v Town and Country Developments (Essex) Ltd* [1976] QB 858 which advocated a reasonable discoverability starting date. The injustice the House of Lords' decision could cause in the case of latent damage was addressed in the Latent Damage Act 1986, discussed below at paras 3.87 - 3.100.

[30] In *Murphy v Brentwood District Council* [1991] 1 AC 398, 466, Lord Keith of Kinkel thought *Pirelli* would fall within the principle of *Hedley Byrne & Co v Heller & Partners Ltd* [1964] AC 465.

[31] [1992] 1 WLR 498.

[32] [1991] 1 AC 398.

[33] See *D & F Estates Ltd v Church Commissioners for England* [1989] AC 177 and *Murphy v Brentwood District Council* [1991] 1 AC 398.

[34] [1964] AC 465.

the careful provision of services to the plaintiff; the duty of care that is imposed on the defendant in this situation extends to a duty not to cause economic loss to the plaintiff). Assuming *Hedley Byrne* is applicable the limitation period will start to run when the pure economic loss is suffered.

3.18 The issue then is at what point in time is pure economic loss suffered and in particular is the suffering of the economic loss distinguishable from its reasonable discoverability in the same way as physical damage. So for example, does a person suffer economic loss on acquiring a defective structure or when the defect was reasonably discoverable? On one view, reasonable discoverability is the only proper date to choose because, until the defect is discoverable, the structure can be sold for the full price. On another view, there is an economic loss as soon as the defect exists in the sense that the structure is worth less than it should be (or alternatively the plaintiff has paid more for it than it was worth).

3.19 The approach in *Pirelli,* albeit that the reasoning that the "damage" was physical rather than economic can no longer stand, tends to support the latter view. But some commentators have preferred the former view[35] which has now been supported by the Privy Council (albeit as New Zealand law only) in *Invercargill City Council v Hamlin,*[36] where the New Zealand courts had held that the cause of action did not accrue until the defects in the building were reasonably discoverable.[37] The Privy Council declined to disturb the decisions of the New Zealand courts, observing that *Pirelli* cannot be regarded as good law in that country. The case concerned economic loss suffered due to faulty building foundations. The Council had inspected the foundations when the building was being constructed and passed them as complying with building regulations when it was clear that they did not so comply. Cracks appeared in the finished building, but the home owner did not appreciate that the foundations were faulty until he called in another builder to examine the property in 1989. It was held that the cause of action accrued when the reasonably prudent homeowner would have discovered the latent defect, which on the facts of the case was not until the plaintiff had been informed by the builder of the problem in 1989, rather than when the cracks first appeared. It was at this point that economic loss was suffered because by then the defects were obvious to a potential buyer or his expert. Lord Lloyd of Berwick, giving the judgment of the Privy Council, said:

> [T]he cause of action accrues when the cracks become so bad, or the defects so obvious, that any reasonable homeowner would call in an expert. Since the defects would then be obvious to a potential buyer, or his expert, that marks the moment when the market value of the building is depreciated, and therefore the moment when the economic loss occurs ... [Our] advice on the limitation point is confined to the problem created by latent defects in buildings. [We] abstain, as did Cooke P, from considering

[35] Eg N Mullany, "Limitation of Actions - Where Are We Now?" [1993] LMCLQ 34.

[36] [1996] AC 624.

[37] See also paras 10.74 - 10.75 (New Zealand) below.

whether the 'reasonable discoverability' test should be of more general application in the law of tort.[38]

3.20 An analogous problem has arisen outside the negligent building sphere in relation to negligent advice or negligent failure to advise. The rule is still that the cause of action accrues when the plaintiff suffers damage. This is a question of fact in each case. In many cases of negligent advice, damage will be suffered and a cause of action will accrue when reliance is placed on that advice. This in turn may occur when the relevant document (if there is one) is executed but there is no general rule that it must occur at that point or at the point of reliance unless that coincides with the damage suffered by the plaintiff.[39] Where, for example it is alleged that the negligent advice caused the plaintiff to enter into a transaction which he or she would otherwise have rejected, the transaction may initially be potentially profitable, so that the plaintiff has not at that point suffered any damage.

3.21 The different points at which the plaintiff may suffer damage in cases of negligent advice are illustrated by *Forster v Outred*[40] and *UBAF Ltd v European American Banking Corporation.*[41] In *Forster v Outred,*[42] the plaintiff brought proceedings against her solicitors for negligently failing to advise her that the security she was providing was a mortgage over her farm to secure all present and future debts owed by her son and not, as she thought, a temporary security to secure bridging finance provided to her son. Even though no demand was made under the mortgage for two years after its execution, the crucial question was when she suffered damage (rather than when the loss was reasonably discoverable) and this was held to be when she executed the mortgage, thereby encumbering her freehold interest and reducing the value of her property. The limitation period therefore started when she executed the mortgage and her action was time barred.[43]

[38] [1996] AC 624 , 648

[39] See *Baker v Ollard and Bentley* (1982) 126 SJ 593 (CA); *Forster v Outred & Co* [1982] 1 WLR 86, 99 (CA); *D W Moore & Co Ltd v Ferrier* [1988] 1 WLR 267, 278; *Bell v Peter Browne & Co* [1990] 2 QB 495 (CA). See also A McGee *Limitation Periods* (2nd ed 1994), pp 76 - 80 and T Prime and G Scanlan *The Modern Law of Limitation* (1993), pp 104 - 107.

[40] [1982] 1 WLR 86 (CA). See also *Secretary of State for the Environment v Essex Goodman and Suggitt* [1986] 1 WLR 1432; *Kitney v Jones Lang Wootton* [1988] 1 EGLR 145; *D W Moore & Co Ltd v Ferrier* [1988] 1 WLR 267; *Lee v Thompson,* [1989] 2 EGLR 151 (CA); *Iron Trades Mutual Insurance Co Ltd v J K Buckenham Ltd* [1990] 1 All ER 808; *Islander Trucking Ltd v Hogg Robinson & Gardner Mountain (Marine) Ltd* [1990] 1 All ER 826; *Bell v Peter Browne & Co* [1990] 2 QB 495;; *Sullivan v Layton Lougher & Co* [1995] 2 EGLR 111 (CA); *Knapp v Ecclesiastical Insurance Group plc, The Times,* 30 October 1997.

[41] [1984] QB 713.

[42] [1982] 1 WLR 86 (CA).

[43] It has been argued that this result follows from a misplaced reliance on *Howell v Young* (1826) 5 B & C 259, 108 ER 97, which concerned an action against a solicitor in relation to advice given on a mortgage and which was decided at a time when the action was founded on assumpsit to which the contract limitation period was applied and time ran from the breach. See A McGee, *Limitation Periods* (2nd ed 1994), p 76.

3.22 In contrast, in *UBAF Ltd v European American Banking Corporation*,[44] it was suggested by the Court of Appeal that damage might have occurred at a date later than when a plaintiff enters into a transaction in reliance on negligent advice. The case concerned a negligent inducement to the plaintiff to lend money under loans on which the borrowers defaulted. At that date the value of the plaintiff's chose in action might have been higher than the sum paid. Consequently, the Court of Appeal (though leaving the question when the cause of action accrued on the facts for decision at trial) held that the cause of action did not necessarily arise when the plaintiffs entered into the loans but, rather, might have accrued when the borrower's financial position was such that the loans were worth less than their face value. Only at that point did they suffer loss.[45]

3.23 These cases show that economic loss may arise in a variety of different factual circumstances and take a variety of forms.[46] Applying the accrual test, the courts have been concerned to identify the point at which recoverable loss is actually suffered by the plaintiff as the point at which time begins to run for limitation purposes.[47]

(b) Continuing torts

3.24 Certain torts may be continuous in character and therefore a fresh cause of action arises on a day to day basis as long as the tort continues. The main examples of such torts are continuing trespass and continuing nuisance.[48] The right of action can never become barred so long as the breach continues. As long as the plaintiff can show that the action for a later commission of the tort is brought within the

[44] [1984] QB 713.

[45] See also *First National Commercial Bank plc v Humberts* [1995] 2 All ER 673, a case concerning a negligent valuation, the Court of Appeal held that the loss suffered by the financier did not necessarily occur at the time the advance was made but at the point when the bank's outlay, costs or the notional profit which could have been obtained elsewhere in the market were more than the security held for the advance. Saville LJ also noted that the plaintiffs could have been said to have suffered loss when they entered into the transaction if it had been demonstrated that the investment value of the transaction was less than the value of other transactions which the plaintiffs would have made if they had not entered into that particular loan. However this was not pleaded, and there was no evidence on the matter before the court. See further *Mathew v Maughold Life Assurance Co, The Times*, January 23, 1985 (overruled on another point: *The Times*, February 19, 1987 (CA)). See also *Wardley Australia Ltd v State of Western Australia* (1992) 109 ALR 247, 254.

[46] *First National Commercial Bank plc v Humberts* [1995] 2 All ER 673, 680, citing *Wardley Australia Ltd v State of Western Australia* (1992) 109 ALR 247, 254.

[47] Many of these cases would now be governed by s 14A of the 1980 Act (inserted by the Latent Damage Act 1986). See paras 3.87 - 3.100 below.

[48] See *Konskier v B Goodman Ltd* [1928] 1 KB 421, an example of a continuing trespass committed where rubbish was dumped on the plaintiff's property and left there. In *Coventry v Apsley* (1691) 2 Salk 240, false imprisonment created a continuing cause of action for as long as the imprisonment continued. Continuing torts should be distinguished from cases where a single act creates two or more separate causes of action, such as *Darley Main Colliery Co v Mitchell* (1886) 11 App Cas 127, where excavations by the defendant on land adjacent to the plaintiff's property caused subsidence to that property in breach of the plaintiff's right to support for his land. The subsidence continued after the excavations had ceased, and the House of Lords held that a fresh cause of action arose with each successive fresh subsidence.

limitation period that commission, it is irrelevant that an action in respect of an earlier commission of the tort would be time-barred.[49]

3.25 A continuing tort may also occur in cases where the tort consists of an omission to do something, as happens in some cases of professional negligence. Here a fresh cause of action accrues every day until it becomes impossible to rectify the omission, as where a solicitor should have registered a Land Charge and the land is sold, thereby making subsequent registration useless for the purpose of protecting the charge.[50] In these circumstances the action will become time-barred six years from the last date on which effective registration would have been possible.[51]

3.26 One important issue in relation to continuing torts concerns what damages are recoverable. This issue is highlighted where the wrong consists of an act rather than an omission. Continuing nuisances offer an illuminating example. Though a fresh cause of action will accrue each day the nuisance is continued,[52] if an action for damages is not brought until the nuisance has continued for some time (or perhaps not until some time after it has stopped) it may be that the last act of nuisance is within the limitation period, but that some part of the nuisance is outside the limitation period. In such circumstances the crucial question is to decide whether the plaintiff may recover all the damage caused by the nuisance or only the damage suffered within the limitation period. In *Cartwright v GKN Sankey Ltd,*[53] Latey J held that only damage suffered within the limitation period could be recovered. Where the damage was caused by a continuous process which overlapped the limitation period, a reasonable apportionment would have to be made.[54]

3.27 In contrast, in *Clarkson v Modern Foundries,*[55] it was held that where it was not possible to determine what loss was caused within and what loss was caused outside the period, the whole loss could be recovered. However, the correctness of this decision was doubted by Latey J in *Cartwright v GKN Sankey Ltd* and it is

[49] See further, A McGee *Limitation Periods* (2nd ed 1994), p 64 and T Prime and G Scanlan *The Modern Law of Limitation* (1993), p 95.

[50] *Midland Bank v Hett, Stubbs & Kemp* [1978] Ch 384 provides a good example.

[51] Though see *Bell v Peter Browne & Co* [1990] 3 All ER 124 (CA). Here the plaintiff had agreed with his ex-wife, as part of the financial settlement on their divorce, that he would receive one sixth of the proceeds of sale of their matrimonial home when it was eventually sold. The solicitors acting for him however did nothing to protect his interest in the proceeds of sale. Though this could have been remedied by the registration of a caution up to the time when the property was sold, the Court of Appeal held that the cause of action accrued when the financial settlement was entered into, since damage was immediately suffered. *Midland Bank v Hett, Stubbs & Kemp* was distinguished on the ground that the solicitors in that case did not treat themselves as functi officio and so could be said to owe a continuing duty to the plaintiff. The Court of Appeal found that Mr Bell's solicitors had no further contact with him after the divorce, and so owed him no continuing duty to protect his interest. It is suggested by McGee that this decision is wrong in principle: see McGee, *Limitation Periods* (2nd ed 1994), p 80.

[52] *Darley Collieries Co v Mitchell* (1886) 11 App Cas 127.

[53] [1972] 2 Lloyd's Rep 242.

[54] Eg *Berry v Stone Manganese & Marine Ltd* [1972] 1 Lloyd's Rep 182.

[55] [1957] 1 WLR 1210.

inconsistent with the approach taken in *Cartledge v E Jopling & Sons Ltd.*[56] It is submitted that the proper rule is that only damage suffered within the limitation period can be recovered, and that it is a question of fact in each case to decide how much of the damage was suffered within that time. [57]

3.28 Personal injury cases involving continuing torts are most likely to be employers' liability cases concerning failure to provide proper safe systems of work.[58] The question as to how the law of limitations affects the quantum of damages must here take account of the fact that the limitation period for personal injury effectively runs from the plaintiff's date of knowledge (rather than from accrual of the cause of action). We examine below the limitation regime for personal injury.[59] But it is convenient to illustrate here how that regime affects the quantum of damages for a continuing tort. Say, for example, a plaintiff working on grinding wheels is exposed to excessive vibration through his employer's failure to use a safe working system between the years 1981 to 1990. In consequence he suffers gradually increasing circulation problems characteristic of 'vibration induced white-finger'. He discovers in 1985 that his condition is due to work, but only issues proceedings against his employer in 1990. He has a fresh cause of action against his employer accruing each day the employer is in breach of his duty. Under section 11 of the 1980 Act, he is time-barred (subject to a court exercising its discretion to disapply the limitation period under section 33) as respects those causes of action of which he had knowledge over three years before initiating proceedings. Subject to the court exercising its discretion under section 33, therefore, he will not be able to recover damages for any injury suffered before 1987. Had he only discovered the cause of his condition in 1988 (and had that been the earliest date at which he ought to have had the relevant knowledge) he would have been able to recover for the totality of his injury.

(2) Personal Injuries

3.29 Section 11 of the 1980 Act lays down that in actions for personal injury, the limitation period is three years from the later of the date when the cause of action accrued and the plaintiff's date of knowledge as defined in section 14. The accrual of the cause of action for torts actionable on proof of damage has already been dealt with.[60] In this section we first discuss what actions fall within section 11 and, then, the law in respect to the plaintiff's date of knowledge. We note in passing that

[56] [1963] AC 758 (HL), affirming [1962] 1 QB 189 (CA), where Pearson LJ said at 207: "In a case where there is a continuing breach of duty by the defendant continually causing damage to the plaintiff there is a fresh cause of action arising every day, and if the breach and resulting damage have continued for more than the period of limitation, the Limitation Act, if relied upon by the defendant, will bar the plaintiff's action for the damage occurring before the critical date but not for the damage occurring after it". Note also the approach to apportionment taken in *Thompson v Smith Shiprepairers (North Shields)* [1984] QB 405, 437 - 444.

[57] *Hardy v Ryle* (1829) 9 B & C 603, 109 ER 224.

[58] See, eg, *Berry v Stone Manganese & Marine Ltd* [1972] 1 Lloyd's Rep 182.

[59] See paras 3.29 - 3.80 below.

[60] See para 3.13 - 3.28. For personal injury actions for breach of contract or torts actionable per se the cause of action could accrue before the injury, that is, at the date of the breach of contract or the wrongful conduct. But such personal injury actions will be rare.

the starting of time running from the date of knowledge effectively constitutes a "discoverability" test albeit that that term is not used in the statute. We go on to discuss the judicial discretion under section 33 to "disapply" the limitation period. Finally we consider limitation periods for personal injuries where the injured person dies and the claim is being brought on behalf of the deceased's estate under the Law Reform (Miscellaneous Provisions) Act 1934.

(a) Actions within section 11

3.30 The section 11 definition limits the application of the section to actions for damages in respect of personal injuries caused by "negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under a statute or independently of any contract or any such provision)". It has been held that an action against insurance brokers for damages for breach of duty (failing to carry out the plaintiff's instructions to arrange passenger liability insurance so that the plaintiff was unable to recover against his insurers in respect of his own personal injuries) is not itself an action for personal injuries.[61]

3.31 In relation to trespass to the person, *Letang v Cooper*[62] held that in cases of so-called "unintentional trespass to the person" the only cause of action in the modern law is for the tort of negligence. Hence an action for damages for personal injuries caused by unintentional trespass to the person came within section 2(1) of the Law Reform (Limitation of Actions, etc.) Act 1954,[63] which prescribed a three year limitation period for negligently caused personal injuries. The plaintiff, who had been run over by a car, had argued that the cause of action was in trespass and hence fell within the general tort limitation period of six years. Her argument was rejected.

3.32 The leading case on the limitation period for intentional trespass is *Stubbings v Webb.*[64] Here the plaintiff alleged that during her childhood she had been sexually abused by her stepfather and stepbrother. The alleged assaults commenced over 28 years before the proceedings and ceased over 15 years before the proceedings. She claimed damages for the mental and psychological damage caused by this, but the writ was not issued until she was over thirty years old. She submitted that her cause of action fell within section 11(1), as an action for breach of duty claiming damages for personal injury, and that the relevant limitation period was that prescribed under section 11(4)(b), namely three years from her date of knowledge. In the event that the court should find that she had had the relevant knowledge earlier than three years before the proceedings were issued, she submitted that the court should allow the action to proceed under the provisions of section 33.

3.33 The House of Lords held that the case did not fall within section 11 because actions for intentional trespass to the person did not arise from "negligence, nuisance or breach of duty" within the meaning of the section. Therefore the

[61] *Ackbar v Green* [1975] QB 582. Cf *Howe v David Brown Tractors (Retail) Ltd* [1991] 4 All ER 30.

[62] [1965] 1 QB 232 (CA).

[63] The predecessor of s 11 of the 1980 Act.

[64] [1993] AC 498.

relevant limitation period was that given by section 2 of the 1980 Act, namely six years from the accrual of the cause of action. Even though this period did not start to run until the plaintiff attained her majority, it had expired several years before the proceedings were issued, and the action was therefore time-barred.

3.34 The House of Lords justified this conclusion by reference to the Report of the Committee on the Limitation of Actions ("the Tucker Committee").[65] One important reason this Committee had been set up was to inquire into section 21 of the Limitation Act 1939 which gave special protection to public authorities by providing for a 12 month limitation period in respect of actions brought against public authorities for personal injuries arising out of accidents. The Committee recommended that there should be a two-year limitation period for all personal injury actions, whether they were against a public authority or not but that this category should not include trespass to the person, false imprisonment, malicious prosecution, or defamation. The recommendations of the Tucker Committee were largely given effect to by the Law Reform (Limitation of Actions, etc.) Act 1954 but the recommended two-year limitation period for personal injuries was extended to three years.[66] Thus the proviso (in section 2(1) of the 1954 Act) to the normal six-year limitation period read, "Provided that, in the case of actions for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under a statute or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to any person, this subsection shall have effect as if for the reference to six years there were substituted a reference to three years". As the plaintiff's action in *Stubbings* was for trespass to the person and given that the relevant parts of section 11 of the 1980 Act are identical to the 1954 Act, the House of Lords held that the six-year limitation period should apply. This view was fortified by reference to Hansard in respect to the 1954 Act which evidenced Parliament's intention to enact the Tucker Committee's recommendations on this point.[67]

3.35 An application by the plaintiff in *Stubbings v Webb* was made to the European Court of Human Rights claiming that there had been a breach of Articles 6, 8 and 14 of the European Convention on Human Rights.[68] The Court held that there

[65] *Report of the Committee on the Limitation of Actions* (1949) Cmd 7740. See para 1.13 above.

[66] The Tucker Committee had also recommended that the courts should have a discretion to extend the period (for non-intentional injuries) for up to six years but this was not implemented.

[67] The Court's reliance on the Tucker Committee's report has been criticised on the grounds that the Committee wished to put victims of an intentional trespass in a more favourable position than the victim of an unintentional trespass, a rationale which has been weakened by the introduction in 1975 of a discretionary power to disapply the limitation period. "Reliance on the recommendations of a 1949 Committee and the words of a Member of Parliament nearly 40 years ago scarcely seems the most rational way to develop a very tricky and technical area of English law." See A McGee, "Trespass and Limitation" (1993) 109 LQR 356, 358. See also WVH Rogers, "Limitation and Intentional Torts" (1993) 143 NLJ 258; J Allinson, "Limitation of Actions in Child Abuse Cases" [1996] JPIL 19.

[68] Article 6(1) provides that "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". Article 8

had been no violation of the Convention.[69] With regard to Article 6 of the European Convention, the Court found that the limitation period of six years from the age of majority of the plaintiff was not unduly short (indeed it was longer than the period observed in some contracting states). It decided that the limitation rules applied were proportionate to the aims of securing finality and legal certainty, protecting defendants from stale claims and preventing the injustice which might arise if the court were required to make decisions about long past events on the basis of unreliable evidence.[70] The court also rejected the plaintiff's argument that she had suffered a failure to respect her private life contrary to Article 8, and discrimination contrary to Article 14 because the short limitation period did not provide sufficient protection to minors, and discriminated between victims of intentional and non-intentional injury. The Court found that the criminal sanctions applied in the United Kingdom provided adequate protection to victims of child abuse, and that there were sufficient differences between the victims of deliberately inflicted injury and victims of unintentional injury to justify the different treatment afforded to them for limitation purposes.

3.36 *Stubbings v Webb* was considered and distinguished in *S v W*.[71] In that case P had been sexually abused during childhood (her father was imprisoned for the abuse in 1985). She sued her mother in the tort of negligence for failing to protect her from the abuse. It was held that this was not an action for trespass to the person, since no trespass was alleged against the mother. However, it clearly was an action for damages for personal injuries, so that the three-year limitation period from the date of knowledge, of section 11 of the 1980 Act applied. *Stubbings v Webb* was therefore distinguishable. The Court of Appeal suggested that the obvious anomaly revealed by these two cases merited the attention of the Law Commission.[72]

3.37 Claims for wrongful birth have also give risen to difficulties of classification for limitation purposes. In *Walkin v South Manchester Health Authority*[73] it was held

provides that "Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." Article 14 provides that "The enjoyment of the rights and freedoms set forth on this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

[69] See *Stubbings v United Kingdom* (1997) 23 EHRR 213.

[70] The Court also noted that "There has been a developing awareness in recent years of the range of problems caused by child abuse and its psychological effects on victims, and it is possible that the rules on limitation of actions applying in Member States of the Council of Europe may have to be amended to make special provision for this group of claimants in the near future." Para 54 of the judgment.

[71] [1995] 1 FLR 862.

[72] See para 1.4 above. Note also the anomalies caused by *Stubbings v Webb* [1993] AC 498 where the victim of an assault dies from the injuries: see para 3.85 below.

[73] [1995] 1 WLR 1543.

that a woman who after a failed sterilisation operation becomes pregnant, and then gives birth to a child, can by reason of those events be said to have suffered "personal injuries". Therefore the resulting claim for damages for the costs of rearing the child (as distinct from any claim for pain and suffering during pregnancy) was a claim for damages for personal injuries within section 11 of the 1980 Act. However, some members of the Court of Appeal were troubled by the idea that conception, normal pregnancy and birth of a healthy child can properly be described as personal injury. They thought that the position would be even more difficult if the pregnancy was not unwanted from the woman's point of view but was the result of intercourse with a man who had had an unsuccessful vasectomy. All members of the court were agreed on the desirability of having a uniform limitation period for all cases of this type, irrespective of whether the action is brought by the father or the mother and irrespective of whether the damages claimed include pain and suffering during the pregnancy.

(b) The date of knowledge[74]

(i) Introduction

3.38 The date of knowledge for the purposes of a personal injuries action is defined in section 14(1) of the 1980 Act as the date on which the plaintiff first knew the following facts:

> (a) that the injury in question was significant; and
>
> (b) that the injury was attributable in whole or in part to the act or omission which is alleged to constitute nuisance, negligence or breach of duty; and
>
> (c) the identity of the defendant; and
>
> (d) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant.

Section 14(3) provides that the plaintiff's knowledge includes:

> knowledge which he might reasonably have been expected to acquire -
>
> > (a) from facts observable or ascertainable by him; or
> >
> > (b) from facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek;
>
> but a person shall not be fixed under this subsection with knowledge of a fact ascertainable only with the help of expert advice so long as he

[74] See further, A McGee *Limitation Periods* (2nd ed 1994), Ch 8; M A Jones *Limitation Periods in Personal Injury Actions* (1995), Ch 2; R Redmond-Cooper *Limitation of Actions* (1992), Ch 6; T Prime and G Scanlan *The Modern Law of Limitation* (1993), Ch 10. The expressions "constructive knowledge" and "actual knowledge" are not used in the 1980 Act but the courts almost invariably use them to refer respectively to knowledge under s 14(3) of the Act, and to knowledge under s 14(1) other than constructive knowledge.

has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice.

3.39 Leaving aside knowledge of the law, which by the proviso to section 14(1) is irrelevant,[75] there are therefore three aspects of knowledge to consider. First, what are the relevant facts, actual or constructive knowledge of which starts time running (that is, what is the correct interpretation of the four subsections of section 14(1))? Secondly, what is meant by actual knowledge of a fact? Thirdly, what is meant by constructive knowledge of a fact? We shall consider each of these three aspects in turn.

(ii) What are the relevant facts?

Section 14(1)(a) "That the injury in question was significant"

3.40 By section 14(2) an injury is "significant" for these purposes if the plaintiff "would reasonably have considered it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment". On the face of it, this wording seems to incorporate both subjective and objective elements, and this was confirmed in *McCafferty v Metropolitan Police Receiver.*[76] In that case it was held that the court should apply both the subjective test, "would *this* plaintiff have considered the injury sufficiently serious?" and the objective test "would the plaintiff have been reasonable if he did not regard it as sufficiently serious?"[77] The fact that the plaintiff in *McCafferty* considered his injury to be merely an "irritating nuisance" apparently did not preclude its being sufficiently serious under section 14, and it was not relevant, in the plaintiff's favour, that he felt inhibited from commencing litigation because of the likely adverse effect which that might have on relations with his employer, the defendant.[78]

3.41 The relationship between the plaintiff's knowledge of a significant injury and the plaintiff's knowledge of the causes to which the injury may be attributed can be problematic. For example, in the context of medical treatment the plaintiff may be in a position where he or she expects to experience some physical ill-effects, perhaps side-effects from drugs or discomfort following an operation. If the treatment has been carried out negligently, then it may be some time before the plaintiff realises that something is wrong, and that the side-effects and the discomfort are not part of the expected result of the treatment. If section 14(2) is construed so that significance is purely a matter of the quantum of the injury, and should be viewed in isolation from the plaintiff's perception of the possible causes of the injury, it should follow that the plaintiff's knowledge that "the injury in question was significant" will occur when the plaintiff is aware of significant harm, regardless of when the plaintiff realises that the treatment has been unsuccessful.

[75] The proviso to s 14(1) provides that "knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant."

[76] [1977] 1 WLR 1073 (CA).

[77] [1977] 1 WLR 1073, 1081, *per* Geoffrey Lane LJ.

[78] This was, however, relevant to the exercise of the court's discretion under the provision now found in s 33 of the 1980 Act. See also *Buck v English Electric Co Ltd* [1977] 1 WLR 806 (Kilner Brown J).

The courts have not, however, consistently taken this position. In *Nash v Eli Lilly & Co*,[79] which concerned side-effects caused by a drug, plaintiffs were held to know that the injury was significant only when they were aware that their symptoms were "completely outside" those experienced with normal, acceptable side-effects.[80]

3.42 But in two more recent cases the Court of Appeal has taken a different approach. First, in *Dobbie v Medway Health Authority*,[81] where the plaintiff's breast was removed after an allegedly negligent diagnosis of a malignant tumour, the Court of Appeal held that the plaintiff had knowledge of a significant injury immediately after the operation, not when the plaintiff realised that the injury was the result of a mishap. Sir Thomas Bingham MR said:

> The requirement that the injury of which a plaintiff has knowledge should be "significant" is, in my view, directed solely to the quantum of the injury and not to the plaintiff's evaluation of its cause, nature or usualness. Time does not run against a plaintiff, even if he is aware of the injury, if he would reasonably have accepted it as a fact of life or not worth bothering about. It is otherwise if the injury is reasonably to be considered as sufficiently serious within the statutory definition: time then runs (subject to the requirements of attributability) even if the plaintiff believes the injury to be normal or properly caused.[82]

The same reasoning was applied in *Forbes v Wandsworth Health Authority*[83] where the Court of Appeal held that a plaintiff, whose leg had been amputated as a result of an allegedly negligent delay in treatment, was aware of a significant injury immediately after the amputation. Following *Dobbie* and *Forbes* it appears that the fact that the plaintiff considers the injury to be a normal or expected occurrence will not delay the plaintiff's knowledge of its significance.

3.43 There are likely to be few injuries where a plaintiff can reasonably consider that it is not worth suing on the basis that the hypothetical defendant posited by section 14(2) both admits liability and has the means to satisfy the judgment. The threshold set by the subsection is, therefore, extremely low. Provided that the gravity of the injury exceeds this low threshold,[84] time will run against the plaintiff even though it is subsequently discovered that the injury is far more serious than first thought.[85]

79 [1993] 1 WLR 782 (CA).

80 *Ibid*, 790 - 792, *per* Purchas LJ. Cf the passage at p 799 where it appears to be recognised that the attributability of the injury is relevant to s 14(1)(b), not to s 14(1)(a).

81 [1994] 1 WLR 1234.

82 *Ibid*, 1241 - 2.

83 [1997] QB 402, 207 - 408, *per* Stuart-Smith LJ (with whom Evans and Roch LJJ agreed on this issue).

84 And provided that the plaintiff has knowledge of the other s 14(1) facts.

85 *Miller v London Electrical Manufacturing Co Ltd* [1976] 2 Lloyd's Rep 284 (CA). See also *Goodchild v Greatness Timber Co Ltd* [1968] 2 QB 372.

3.44 The operation of section 14(2) may put pressure on plaintiffs to commence proceedings before their injuries have developed fully. A plaintiff may be awarded damages or (more likely) settle a claim before the full extent of the injury is known which, conceivably, could result in under-compensation since damages may only be claimed once in respect of the same cause of action.[86] This problem is illustrated by *Bristow v Grout.*[87] Here the plaintiff suffered an injury to his leg and some facial scarring in a road traffic accident. He brought a claim for damages which was settled by the defendant's insurers. However, he later developed more serious problems in his hip which he claimed were a result of the accident. Proceedings were instituted four years after the accident, but it was held that the original settlement amounted to satisfaction of the entire claim.[88]

Section 14(1)(b) "That the injury was attributable in whole or in part to the act or omission which is alleged to constitute nuisance, negligence or breach of duty"

3.45 In order to satisfy section 14(1)(b) it is not necessary for the plaintiff to have detailed knowledge of the process that brought about the injury, but merely to have knowledge of "the essence of the act or omission to which the injury is attributable."[89] The detail of the plaintiff's knowledge need not be sufficient to enable him or her to draft a statement of claim,[90] although it will not be sufficient if the putative knowledge is so vague and general that the plaintiff cannot fairly be expected to know what he or she should investigate, or if what the plaintiff supposes to be true is completely misconceived.[91]

3.46 To establish knowledge of attributability for these purposes requires no more than establishing that the plaintiff knew that the injury was capable of being attributed

[86] It may be open to the plaintiff to bring a claim for provisional damages, although to do so he or she would need to be aware that more serious injury was at least possible.

[87] *The Times*, 3 November 1986 (QBD); affirmed, *The Times,* 9 November 1987(CA).

[88] Jupp J also considered at first instance what the position would have been if the settlement had not fully satisfied the claim. He noted that the "injury in question" in s 14(1)(a) means the injury which first makes the bringing of proceedings worthwhile. Noting that the plaintiff had thought it worth threatening proceedings immediately after the accident, before he became aware of his hip injury, he thought that head injury and facial scarring would amount to the "injury in question", and time started to run against the plaintiff in respect of all the injuries he suffered as soon as he became aware of the relevant facts about his head injury. The Court of Appeal did not find it necessary to consider Jupp J's judgment on the question of limitation, as they upheld his finding that the plaintiff had only one cause of action which had been finally satisfied by the original settlement.

[89] *Nash v Eli Lilly & Co* [1993] 1 WLR 782, 799, *per* Purchas LJ. See also, eg, *Broadley v Guy Clapham & Co* [1994] 4 All ER 439, 449 - 450, *per* Hoffmann LJ; *Hallam-Eames v Merrett Syndicate Ltd* [1996] 7 Med LR 122, 126, *per* Hoffmann LJ. It has, however, been suggested that some later decisions, especially *Forbes v Wandsworth Health Authority* [1997] QB 402, may have increased the detail of knowledge which is needed to satisfy s 14(1)(b): see A Bijlani, "Limitation in medical negligence cases: When is the plaintiff fixed with knowledge - recent case law" [1997] JPIL 108, 114 - 117.

[90] *Wilkinson v Ancliff (BLT) Ltd* [1986] 1 WLR 1352, 1365, *per* Slade LJ.

[91] *Broadley v Guy Clapham & Co* [1994] 4 All ER 439, 449, *per* Hoffmann LJ.

to the act or omission, which is clearly less onerous than establishing actual causation.[92]

3.47 The question arises whether knowledge of attributability, for the purpose of section 14(1)(b), entails any knowledge of fault on the plaintiff's part. Section 14(1) provides that "knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant." The courts have, as a general rule, rejected the suggestion that knowledge of the act or omission need involve some knowledge of fault. In *Broadley v Guy Clapham & Co*[93] it was held that the reference to "negligence, nuisance or breach of duty" served merely to identify the act or omission to which the paragraph referred, without adding any connotations of fault.[94] And in *Dobbie v Medway Health Authority,*[95] the Court of Appeal held that the plaintiff's knowledge of attributability was not postponed until she became aware that there was no malignant tumour and that her breast had been removed unnecessarily. Sir Thomas Bingham MR said that if an element of fault were imported into section 14(1)(b) it would "stultify" the proviso to section 14(1).[96]

3.48 If, however, the principle laid down in *Broadley* and *Dobbie* were to be applied rigorously to all personal injury claims, so that fault were to be completely irrelevant to the question of attributability, it could produce anomalies in cases where the injuries were caused by an omission on the defendant's part. This is illustrated by the Court of Appeal's decision in *Smith v West Lancashire Health Authority.*[97] In that case, the plaintiff suffered injury as a result of the defendant's alleged failure to operate on a hand condition. It was held that the plaintiff could not be regarded as having knowledge that his injuries were attributable to the defendant's omission until he actually knew that the defendant had failed to do something: in other words, "[o]ne cannot know of an omission without knowing what it is that is omitted."[98]

3.49 In *Forbes v Wandsworth Health Authority*[99] the plaintiff's injury (that is, the loss of his leg) had also been caused by an alleged negligent omission (that is, the failure of the surgeon to operate early enough) although, in contrast to *Smith v West Lancashire Health Authority,* the immediate cause of the injury was a positive action

[92] *Davis v Ministry of Defence, The Times,* 7 August 1985; *Wilkinson v Ancliff (BLT) Ltd* [1986] 1 WLR 1352. See also *Dobbie v Medway Health Authority* [1994] 1 WLR 1234, 1240, *per* Sir Thomas Bingham MR; *Spargo v North Essex District Health Authority* [1997] PIQR P235, P242, *per* Brooke LJ.

[93] [1994] 4 All ER 439, overruling *Bentley v Bristol and Weston Health Authority* [1991] 2 Med LR 359.

[94] *Ibid*, 448, *per* Hoffmann LJ.

[95] [1994] 1 WLR 1234 (CA). For facts, see para 3.42 above.

[96] *Ibid*, 1243. For the proviso, see para 3.39, n 75, above. See also *Saxby v Morgan,* [1997] PIQR P531.

[97] [1995] PIQR P514. See also *Hallam-Eames v Merrett Syndicates Ltd* [1996] 7 Med LR 112 (CA).

[98] [1995]` PIQR P514 at P517, *per* Russell LJ.

[99] [1997] QB 402 (see para 3.42 above for facts)

(that is, the amputation). The Court of Appeal held that the "act or omission which is alleged to constitute negligence, nuisance or breach of duty" should be construed in this case as the alleged failure of the defendant to operate at a time when doing so might have saved the leg, or the alleged loss of the opportunity to prevent the plaintiff's injury.[100] The plaintiff did not acquire actual knowledge of this alleged failure until he received expert advice nearly ten years later.[101] It was recognised that to take this approach to negligent omissions may well mean that in some cases the plaintiff might not acquire knowledge of attributability until he or she knew that there had been negligence, but this did not undermine the crucial distinction, posed by section 14(1), between causation, which was relevant, and negligence, which was not.[102]

Section 14(1)(c): "The identity of the defendant"

3.50 The most obvious instance of section 14(1)(c) being a relevant factor would be where the plaintiff was the victim of a "hit-and-run driver".[103] However, the rule can also be applied where the plaintiff discovers only at a late stage the identity of a second defendant.[104] It is also relevant where the defendant is part of a group of companies. In *Simpson v Norwest Holst Southern Ltd,*[105] the plaintiff was under a reasonable misapprehension as to which company in a group of companies was actually his employer. Time did not start to run until he was able to identify accurately which one employed him. On the other hand, once the identity of the defendant is known, it is not relevant that he or she cannot be located.

Section 14(1)(d) "If it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant"

3.51 This applies in cases of vicarious liability where the plaintiff does not immediately discover that there is someone who is vicariously liable for the acts of the tortfeasor. Time will, of course, run against the actual tortfeasor independently of any delay in starting the limitation period against the employer.

[100] *Ibid*, 408 - 411, *per* Stuart-Smith LJ (with whom Roch LJ concurred); 421, *per* Evans LJ. It has been suggested that the test applied by Stuart-Smith and Roch LJ differs from that applied by Evans LJ in that the former regards it as necessary that the operation "should have been carried out sooner than it was", whereas the latter does not regard as necessary anything more than the knowledge of a lost opportunity: A Bijlani, "Limitation in medical negligence cases: When is the plaintiff fixed with knowledge - recent case law" [1997] JPIL 108, 116 - 117. But we are doubtful whether the crucial sentence of Stuart-Smith LJ's judgment - "Did the [plaintiff] know prior to receipt of [expert advice] that the loss of his leg was attributable ... to the omission to operate sooner than 11.45 am on the second day?" (p 408) adds anything further to the degree of knowledge required by Evans LJ.

[101] Although the court held (Roch LJ dissenting) that the plaintiff had constructive knowledge: see para 3.59 below.

[102] [1997] QB 402, 411, *per* Stuart-Smith LJ. See also [1997] QB 404, 421, *per* Evans LJ.

[103] Although in practice there is a high likelihood that it would not be worthwhile to claim against such a driver.

[104] *Walford v Richards* [1976] 1 Lloyd's Rep 526 (CA).

[105] [1980] 1 WLR 968.

(iii) What is meant by actual knowledge of a fact?

3.52 The concept of actual knowledge is probably the same for all the section 14(1) facts.[106] The plaintiff may progress from a state of complete unawareness, via suspicion, and belief of facts, to certain knowledge. The plaintiff will almost always make this progress at least partly with the assistance of legal, medical and other experts. Sometimes this is not a "straight-line" progression: for example, the plaintiff may change his or her mind on receiving advice, only to change it back again when further information or advice comes to light.

3.53 In some cases, the courts have regarded there as being a sharp distinction between knowledge, on the one hand, and mere belief or suspicion on the other, which does not amount to knowledge, even if reasonable and strongly held.[107] But in *Halford v Brooks*[108] Lord Donaldson MR said that "reasonable belief," as opposed to suspicion that was "vague and unsupported", would normally constitute knowledge. In *Nash v Eli Lilly & Co*[109] the Court of Appeal rejected the distinction between knowledge and belief as "a false antithesis."[110] Purchas LJ,[111] whilst insisting that he was not attempting a precise definition, said that the court would

> proceed on the basis that knowledge [for the purpose of section 14(1)] is a condition of mind which imports a degree of certainty and ... the degree of certainty which is appropriate ... is that which, for the particular plaintiff, may reasonably be regarded as sufficient to justify embarking upon the preliminaries to the making of a claim for compensation such as the taking of legal or other advice.[112]

He then said that whether or not the plaintiff's state of mind could be treated as knowledge depended on two factors, which could be viewed as stages in a process. The first factor or stage was the nature of the information received by the plaintiff; the second factor was the plaintiff's evaluation of the information. The court would then:

[106] *Parry v Clwyd Health Authority* [1997] PIQR P1, P6, *per* Colman J.

[107] *Davis v Ministry of Defence, The Times*, 7 August 1985 (CA); *Stephen v Riverside Health Authority* [1990] 1 Med LR 261 (Auld J).

[108] [1991] 1 WLR 428, 443.

[109] [1993] 1 WLR 782.

[110] *Ibid*, 796, *per* Purchas LJ. See also *O'Driscoll v Dudley Health Authority*, in which the plaintiff was held not to have acquired knowledge pending expert medical advice, although some time previously letters had been sent on her behalf to the defendant claiming compensation, and saying (inter alia) that the anoxia resulting from the alleged negligence was "why she is like she is" and that "In our opinion and that of others [the plaintiff's] condition was caused through incompetence": [1996] 7 Med LR 408, 412, *per* Poole J. Further, in *Whitfield v North Durham Health Authority* [1995] 6 Med LR 32, 37, Waite LJ said that even the issue of an earlier writ in respect of the same cause of action did not necessarily mean that the plaintiff had knowledge at the time when the earlier writ was issued although since, in that case, the plaintiff was held to have acquired actual knowledge two years before the first writ was issued, this should be treated as obiter.

[111] Giving the judgment of the court.

[112] [1993] 1 WLR 782, 792.

> assess the intelligence of the plaintiff; consider and assess his assertions as to how he regarded such information as he had; and determine whether he had knowledge of the facts by reason of his understanding of the information.[113]

3.54 So the court will attempt to ascertain what the particular plaintiff knew, by reference to the information received by the plaintiff, and the extent to which that plaintiff would have evaluated the information, and compare it against the yardstick of the knowledge which that plaintiff would reasonably have needed before embarking on the preliminaries to litigation. The test as to whether the plaintiff has actual knowledge is therefore not a wholly subjective one because it depends on a "yardstick" which is partly objective.[114]

3.55 On the other hand, the Court of Appeal in *Spargo v North Essex District Health Authority*[115] appeared to regard the test to be adopted as a subjective one. Brooke LJ, giving the judgment of the court, said:

> A plaintiff has the requisite knowledge when she knows enough to make it reasonable for her to begin to investigate whether or not she has a case against the defendant. Another way of putting this is to say that she will have such knowledge if she so firmly believes that her condition is capable of being attributed to an act or omission which she can identify (in broad terms) that she goes to a solicitor to seek advice about making a claim for compensation... On the other hand she will not have the requisite knowledge if she thinks she knows the acts or omissions she should investigate but in fact is barking up the wrong tree: or if her knowledge of what the defendant did or did not do is so vague or general that she cannot fairly be expected to know what she should investigate; or if her state of mind is such that she thinks her condition is capable of being attributed to the act or omission alleged to constitute negligence, but she is not sure about this, and would need to check with an expert before she could be properly said to know that it was.

3.56 This subjective approach appears to mean, therefore, that the 'impetuous plaintiff', who considers himself or herself to know the relevant facts, on the basis of less information than would be sufficient to convince a reasonable plaintiff, is regarded as having actual knowledge. Conversely, the 'cautious plaintiff', who refuses to consider himself or herself as having the relevant facts until he or she has confirmation from four experts (when one or two experts ought to have been sufficient), is not regarded as having actual knowledge.

3.57 As we have mentioned, the position may be complicated by the existence of expert advice which indicates that the plaintiff may not have a claim. If, at the time when the plaintiff receives such advice, he or she has already acquired actual knowledge for the purposes of section 14(1), the limitation period will already have begun and

[113] *Ibid.*

[114] That is, it depends on the question of what the plaintiff would have needed to know before it would be reasonable for him or her to take advice or take any other pre-litigation steps.

[115] [1997] PIQR P235, P242.

the negative advice will not be sufficient to stop it: but if the plaintiff has not already acquired knowledge the existence of the negative advice will be a factor to be taken into account in deciding whether, from that time on, the plaintiff does so.[116] So, for example, one could conceive of a situation where a plaintiff, unsure of whether his or her injury might be attributable to the plaintiff's acts, obtained one positive but very tentative medical opinion, followed by a firmly negative one. The second opinion would be likely to prevent time from starting to run, as far as actual knowledge was concerned, until the plaintiff received more positive information.[117]

(iv) What is meant by constructive knowledge of a fact?

3.58 Section 14(3) assumes that the plaintiff can reasonably be expected to discover relevant facts via two possible routes. First, he or she can observe or ascertain relevant facts himself or herself. This may be done by way of active investigation on the plaintiff's part,[118] or it may occur through the plaintiff's observation of the media.[119] Secondly, he or she may discover facts through the advice of experts. The position in relation to legal advice is different from that in relation to advice from other experts, and we discuss it separately below.[120]

3.59 Section 14(3) obviously lays down an objective test, but it must be asked whether the test is purely objective, or whether it contains an element of subjectivity in taking into account some (or all) of the attributes of the individual plaintiff. Before the provision that is now subsection 14(3) was enacted in its present form,[121] the courts construed its differently worded predecessor[122] so that the particular plaintiff's qualities were taken into account.[123] This approach continued in construing subsection 14(3). For example, in *Nash v Eli Lilly & Co*,[124] Purchas LJ, giving the judgment of the Court of Appeal, said that "the situation, character and intelligence of the plaintiff must be relevant" in deciding whether there was constructive knowledge.[125] But in *Forbes v Wandsworth Health Authority*[126] all three members of a differently constituted Court of Appeal expressed doubts that an objective test such as the one in section 14(3) could be properly combined with an

[116] *Nash v Eli Lilly & Co* [1993] 1 WLR 782, 796, *per* Purchas LJ .

[117] Delay in seeking a further opinion could result in the plaintiff acquiring constructive knowledge: see para 3.62 below.

[118] See, eg, *Common v Crofts* (unreported, 15 Feb 1980) CA.

[119] See, eg, *Nash v Eli Lilly & Co* [1993] 1 WLR 782, 800, *per* Purchas LJ.

[120] See paras 3.63 - 3.65 below.

[121] By the Limitation Act 1975.

[122] Limitation Act 1963, s 7(5).

[123] See, eg, *Central Asbestos Co Ltd v Dodd* [1973] AC 518, 530, where Lord Reid said that "[l]ess is expected of a stupid or uneducated man than of a man of intelligence and wide experience". See also, eg, *Newton v Cammell Laird & Co Ltd* [1969] 1 WLR 415, 419 - 420, *per* Lord Denning MR.

[124] [1993] 1 WLR 782.

[125] *Ibid*, 799.

[126] [1997] QB 402.

approach taking into account an individual plaintiff's characteristics,[127] and a majority held[128] that the correct construction was a rigorously objective one.[129]

3.60 There has been no consistency of approach to the interpretation of section 14(3) since the decision in *Forbes*. In *Parry v Clwyd Health Authority*[130] Colman J took the view that *Nash* and *Forbes* could not be reconciled and he would have to choose between them. In preferring the approach in *Forbes*[131] he said:

> If the purpose of section 14(3) is to create deemed or constructive knowledge in circumstances where there is no actual knowledge, it is highly improbable that Parliament intended that the application of that subsection should be qualified by taking into account the very characteristic of the plaintiff by reason of which he failed to appreciate the subsection (1) facts known to him and therefore to acquire *actual* knowledge. For these reasons it would seem that, as a matter of principle, the criteria relevant for the purpose of applying the reasonableness test under subsection (3) should be exclusively objective. If it were otherwise, a plaintiff of less than average intelligence who on that account had no *actual* knowledge of a real possibility that the subsection (1) facts existed might also then not have *constructive* knowledge of such facts because a person of his limited intelligence could not reasonably have been expected to acquire that knowledge from facts which were observable or ascertainable by such a person or from facts ascertainable with the help of expert advice which it was reasonable for a person of such limited intelligence to seek. It is for these reasons that the analysis of section 14(3) by the majority in *Forbes* in my judgment represents a construction of this provision which accords with the purpose of section 14, whereas that propounded by the Court of Appeal in *Nash* does not.[132]

3.61 A different approach was taken by Poole J in *O'Driscoll v Dudley Health Authority*,[133] whereby the Court of Appeal's decision in *Forbes* should not be viewed as precluding the consideration of *all* individual circumstances in all cases. He said that the judgment of Stuart-Smith LJ should be seen merely as "a sharp reminder

[127] *Ibid*, 414, *per* Stuart-Smith LJ; 423, *per* Evans LJ; 424 - 425, *per* Roch LJ.

[128] Evans LJ held that the judgment in *Nash v Eli Lilly & Co* [1993] 1 WLR 782, properly interpreted, did not entail a qualification on the objective test; Stuart-Smith LJ appeared to take the same view, although he did not expressly say why he was not following *Nash*. Roch LJ, however, regarded himself as being bound by *Nash* and obliged to apply a qualified objective test, despite his misgivings.

[129] Cf *Coban v Allen*, *The Times*, 14 October 1996, in which the Court of Appeal (Nourse and Auld LJJ; Sir Patrick Russell) applied the test in *Nash* to the similar wording of s 14A(10) of the 1980 Act.

[130] [1997] PIQR P1, P10.

[131] Although he was critical of Evans LJ's refusal to treat *Nash* as binding authority on the question: *ibid*, P9.

[132] *Ibid*, P10.

[133] [1996] 7 Med LR 408. There was no reference in the judgment to the earlier decision in *Parry*.

that an objective test should not be undermined,"[134] and emphasised the apparent distinction in the judgment of Evans LJ between "situation" on the one hand, and "character and intelligence" on the other.[135] It was held that the plaintiff's particular circumstances, where she was cared for by her parents and lived an unusually sheltered life, could properly be taken into account in setting the standard of the test in section 14(3).

3.62 Although the plaintiff takes reasonable steps to obtain expert advice, it may be that the expert fails to discover the facts relevant to the plaintiff's claim. It must then be asked whether the plaintiff has constructive knowledge of the facts which the expert could have discovered and passed on to the plaintiff. Because of the proviso to section 14(3),[136] the plaintiff will, as a general rule, not be fixed with constructive knowledge of the facts in these circumstances,[137] even where the plaintiff apparently suspects that those facts may be true.[138] But where the proviso is capable of applying, it will do so only where the plaintiff could not have ascertained the facts without the help of an expert, and the onus placed on the plaintiff, in terms of enquiries which can be expected to be made by a plaintiff on his or her own behalf, is a heavy one.[139]

3.63 The actions expected of a plaintiff under section 14(3) will generally include the obtaining of legal advice, and doing so reasonably promptly.[140] This is because, although section 14(1) specifies as irrelevant the knowledge that acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty, instructing a solicitor will be expected to give the plaintiff fuller knowledge of the relevant facts, especially as to the attributability of the plaintiff's injury to the defendant's acts or omissions,[141] not only of the legal implications of those facts.[142]

[134] *Ibid*, 414.

[135] *Ibid.*

[136] See para 3.38 above.

[137] See, eg, *Marston v British Railways Board* [1976] ICR 124. The proviso will also, conversely, protect the plaintiff if he or she reasonably fails to instruct an expert, but in fact there are relevant facts which are ascertainable only by experts (see T Prime and G P Scanlan, *The Modern Law of Limitation* (1993), p 160) and possibly if, after being instructed, the expert discovers relevant facts but reasonably refrains from disclosing them to the plaintiff (see T Prime and G P Scanlan, *op cit*, p 161).

[138] See, eg, *Davis v Ministry of Defence, The Times*, 7 August 1985; *Stephen v Riverside Health Authority* [1990] 1 Med LR 261. Cf *Baig v City and Hackney Health Authority* [1994] 5 Med LR 221.

[139] In *Leadbitter v Hodge Finance Ltd* [1982] 2 All ER 167, 174 - 175, it was held that no expert advice was necessary to obtain a police report of a road accident, make enquiries of the fire brigade or local residents and interview potential witnesses.

[140] There is authority for the view that the time within which a plaintiff may be expected to instruct solicitors will be affected by the plaintiff's resources and position in relation to legal aid: *Khan v Ainslie* [1993] 4 Med LR 319. Cf *Jones v Bennett* [1976] 1 Lloyd's Rep 484. But it would appear that the plaintiff's financial position would now not be relevant under the 'objective' approach adopted in *Forbes v Wandsworth Health Authority* [1996] 3 WLR 1108.

[141] Limitation Act 1980, s 14(1)(b).

[142] *Hills v Potter* [1983] 3 All ER 716 (Hirst J); *Newton v Cammell Laird & Co Ltd* [1969] 1 WLR 415.

But there is a lack of solid and binding authority as to the exact status, for the purposes of section 14(3), of knowledge of facts which a solicitor has or may be expected to have.

3.64 It appears that a solicitor's actual knowledge of facts, will be treated as the plaintiff's knowledge.[143] But it seems that knowledge imputed to the plaintiff on this basis will, generally speaking, be treated as knowledge acquired directly under section 14(3)(a) rather than acquired via expert advice under section 14(3)(b),[144] so that the plaintiff is deprived of the benefit of the proviso to section 14(3)(b).[145] This is because the expression "expert" in the subsection is regarded as applying only to the sort of experts who might be expert witnesses,[146] and because the advice given by a solicitor relates wholly or largely to the question of legal liability, knowledge of which is deemed to be irrelevant in deciding whether the plaintiff has knowledge for the purposes of section 14(1).[147] It is not altogether clear, however, whether legal advice on some issues, for example those going to the identification of potential defendants, may fall outside this general rule.[148]

3.65 If, then, plaintiffs are fixed with knowledge which a solicitor might be expected to acquire, but the proviso to section 14(3) does not apply, there may be a hard result in a situation where:

> a blameless plaintiff has a painstaking solicitor who does not seek quick expert advice on the question 'Is my client's injury capable of being attributed to the omission which she or I have identified' - but takes a

[143] See, eg, *Fowell v National Coal Board, The Times* 28 May 1986; see also *Heathcote v David Marks & Co* [1996] 1 EGLR 123 (Buckley J) relating to the similarly worded s 14A. It has also been suggested that knowledge which a solicitor might be expected to have will be treated as the plaintiff's knowledge: *Simpson v Norwest Holst Southern Ltd* [1980] 1 WLR 968; *Fowell v National Coal Board, The Times,* 28 May 1986 (CA); *Nash v Eli Lilly & Co* [1991] 2 Med LR 169, 181 - 182 (Hidden J: on appeal the Court of Appeal approved of the general approach which the judge took in relation to knowledge of solicitors); *Khan v Ainslie* [1993] 4 Med LR 319, 324 - 325 (Waterhouse J). Cf the first instance decision in *Spargo v North Essex District Health Authority*[1996] 7 Med LR 219, 226 - 229, where Collins J took the view that as long as the plaintiff took all reasonable action himself or herself (eg in the choice of solicitor and acting where he or she had notice that the solicitor was incompetent), the plaintiff should not suffer because of the solicitor's failure. The defendant's appeal in *Spargo* was allowed by the Court of Appeal, but since the plaintiff was held to have had actual knowledge at the requisite time the Court of Appeal declined to comment substantively on the question of constructive knowledge.

[144] *Nash v Eli Lilly & Co* [1991] 2 Med LR 169, 181 *per* Hidden J; *Khan v Ainslie* [1993] 4 Med LR 319, 325 *per* Waterhouse J; *Spargo v North Essex District Health Authority* [1996] 7 Med LR 219, 226 - 229, *per* Collins J.

[145] Alternatively, where the facts are within the actual knowledge of the solicitor, the knowledge may be viewed as being within the actual knowledge of the plaintiff, by virtue of the general law of agency, which is not excluded by s 14(3). See *Fowell v National Coal Board, The Times*, 28 May 1986, *per* Parker LJ; *Heathcote v David Marks & Co* [1996] 1 EGLR 123. The proviso to s 14(3) is irrelevant to such knowledge because, being actual knowledge, it falls wholly outside the scope of s 14(3).

[146] *Fowell v National Coal Board, The Times* 21 May 1986, *per* Parker LJ.

[147] *Spargo v North Essex District Health Authority* [1996] 7 Med LR 219, 226 - 227, *per* Collins J.

[148] *Nash v Eli Lilly & Co* [1991] 2 Med LR 169, 181 - 182, *per* Hidden J.

> very long time before asking the expert an infinitely more complicated list of questions which in turn take a very long time to answer.[149]

In those circumstances it appears that the plaintiff would have constructive knowledge, but might not necessarily have an action in negligence against the solicitor.

(c) Discretionary disapplication of the limitation period

3.66 Section 33 of the 1980 Act is one of the most important and most heavily used provisions in the law of limitations.[150] Under this section the court has a discretion to allow an action for personal injuries to be brought, notwithstanding that the limitation period has expired. Subsection (1) provides that if it appears to the court to be equitable to allow an action to proceed it may direct that section 11 shall not apply. In making this decision the court must have regard to the degree to which section 11 prejudices the plaintiff and the degree to which allowing the action to proceed would prejudice the defendant.[151] The court shall have regard to all the circumstances of the case but the list of factors which the court must take into account, as laid down in section 33(3), is as follows:

"The length of, and the reasons for, the delay on the part of the plaintiff"

3.67 It is possible for delay to have occurred in one or both of two time periods, that before the expiry of the limitation period and that after the expiry of the limitation period. Section 33(3)(a) has been construed as referring only to delay *after* the expiry of the limitation period,[152] but the House of Lords held in *Donovan v Gwentoys Ltd*[153] that delay *before* the end of the limitation period, though falling outside the paragraph, could nevertheless be taken into account as one of the "circumstances of the case".[154]

3.68 The test applied here is subjective, so that there is no requirement that the plaintiff's reasons for delay are reasonable.[155] Where the delay is very short the

[149] *Spargo v North Essex District Health Authority* 1997 PIQR P235, 245, *per* Brooke LJ. See para 3.64, n 143, above. Brooke LJ drew attention to our review of the law and invited the parties to acquaint us with the problems experienced in relation to constructive knowledge in that case to enable us to consult properly on this issue. He added that "[o]nce the recommended policy is identified it would be helpful if [we] found ways of expressing it in statutory language less opaque than that contained in s 14(3) of the present Act."

[150] See generally A Bijlani, "Limitation in medical negligence cases Part II: how the court's discretion is exercised under s 33 of the Limitation Act 1980." [1997] JPIL 159.

[151] Section 33(1)(a) and (b).

[152] *Eastman v London County Bus Services Ltd, The Times*, 21 November, 1985; *Thompson v Brown* [1981] 1 WLR 744, 751; *Donovan v Gwentoys Ltd* [1990] 1 WLR 472.

[153] [1990] 1 WLR 472. Cf *Platt v Quaker Oats Ltd* (unreported, 12 July 1991).

[154] It has however been suggested that this case is only authority for considering delay before the end of the limitation period "in exceptional circumstances where the limitation period is greatly extended or delayed": see T Prime and G Scanlan *The Modern Law of Limitation* (1993), p 167, n 70.

[155] *Coad v Cornwall & Isles of Scilly Health Authority* [1997] 1 WLR 189. The court has, in considering this factor, taken account of the plaintiff's lack of knowledge of his or her legal

court will naturally be more inclined to exercise its discretion in favour of the plaintiff, but even very short delays must be adequately explained in order for the court to do so.[156] To hold otherwise would create a risk that the limitation period would nearly always in practice be longer than the three years allowed by the statute.

"The extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 11..."

3.69 This paragraph encompasses a number of possibilities. Oral evidence may have become less reliable because witnesses' memories have faded. Documentary evidence may have been destroyed. In this latter case the court may take into account which party has destroyed the evidence, and whether that destruction was reasonable. However, the ultimate question must be whether in all the circumstances it is still possible to have a fair trial of the action. This inevitably creates a risk that defendants will be able to escape liability by destroying relevant evidence.[157]

"The conduct of the defendant after the cause of action arose, including the extent (if any) to which he or she responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant"

3.70 A defendant who deliberately resorts to delaying tactics in order to delay either the issue or the service of the writ may find this paragraph invoked against him or her, as may a defendant who is obstructive to the plaintiff's efforts to discover the facts.[158] But the conduct which potentially falls within the paragraph is limited to procedural matters in the conduct of the litigation.[159]

3.71 The obligations imposed on the defendant by this paragraph extend also to his or her insurers and solicitors.[160] It has also been held that the making of an interim payment may be taken into account under this paragraph, this being a relevant factor about a defendant's conduct because it is evidence that the plaintiff probably has a strong case.[161]

"The duration of any disability of the plaintiff arising after the date of the accrual of the cause of action"

rights to explain the delay in bringing proceedings. See *Halford v Brookes* [1991] 1 WLR 428 and *Coad v Cornwall and Isles of Scilly Health Authority* [1997] 1 WLR 189.

156 *Ramsden v Lee* [1992] 2 All ER 204; *Hartley v Birmingham DC* [1992] 1 WLR 968.

157 *Conry v Simpson* [1983] 3 All ER 369 (CA).

158 See, eg, *Marston v British Railways Board* [1976] ICR 126, 136 - 137, *per* Croom-Johnson J. Apart from s 33 it may be possible to infer an agreement to defer either issue or service of proceedings, perhaps giving rise to an estoppel against relying on limitation or the time limit for serving the writ: see *Hare v Personal Representatives of Malik* (1980) 124 SJ 328.

159 *Halford v Brookes* [1991] 1 WLR 428, 436G, *per* Russell LJ.

160 *Thompson v Brown* [1981] 1 WLR 744, 751.

161 *Marshall v Martin* (unreported, 10 June 1987) (CA).

3.72 If the plaintiff is under disability when the cause of action accrues, then time does not run until that disability ceases.[162] However, once time has started to run, it is not automatically suspended by supervening (or recurring) disability. Such disability however, may be taken into account under section 33. "Disability", for these purposes, has the same meaning as under section 28 of the Act, which is limited to infancy and incapacity, due to mental disorder, to manage and administer one's property and affairs.[163]

"The extent to which the plaintiff acted promptly and reasonably once he or she knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages"

3.73 For the purposes of this paragraph the plaintiff's conduct is assessed from the time when he or she *actually* knew of the cause of action rather than from the time when the plaintiff should have known. [164] The conduct of the plaintiff's advisers can also be taken into account under this paragraph.[165]

"The steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received"

3.74 This paragraph has to be read in conjunction with those parts of section 14 which make the date of knowledge dependent in part on expert advice received by the plaintiff. The plaintiff cannot escape the operation of sections 11 and 14 by showing that he or she received defective legal advice, but this is a matter which can be taken into account under section 33.[166]

3.75 The list in section 33(3) of factors to be taken into account is not exhaustive and the court must consider all the circumstances of the case.[167] Other factors taken into account by the court include the fact that the plaintiff may have an alternative remedy, namely that of suing his or her solicitor for negligence in allowing the limitation period to expire without issuing proceedings.[168] Also, the strength of the plaintiff's case is itself a relevant factor - the stronger the case, the more likely it is

[162] See further below paras 8.2 - 8.5 below.

[163] Section 38(2) to (4): *Thomas v Plaistow,* [1997] PIQR P540 (CA); *Yates v Thakeham Tiles Ltd* [1995] PIQR P135. But physical disability can be taken into account as a general factor under s 33: *Pilmore v Northern Trawlers Ltd* [1985] 1 Lloyd's Rep 552; *Dawson v Spain-Gower* (unreported, 18 October 1988) (CA).

[164] In *Obembe v City of Hackney Health Authority* (unreported, 9 June 1989) Drake J, it was held that it is not reasonable under this paragraph for the parents of a child injured at birth through the alleged negligence of the defendant to delay bringing an action for damages in respect of the injuries they suffered themselves through their child's disability until the child's majority merely because they know that time will not run until then for an action on behalf of their child.

[165] *Thompson v Brown* [1981] 1 WLR 744.

[166] *Waghorn v Lewisham Health Authority* (unreported, 23 June 1987).

[167] See, eg, *Taylor v Taylor, The Times*, 14 April, 1984 (CA).

[168] The courts have consistently held that this is a factor to be taken into account, though it cannot be conclusive. See *Thompson v Brown* [1981] 2 All ER 296 (HL); *Browes v Jones & Middleton* (1979) 123 SJ 489 (CA).

that the court will wish to exercise discretion in favour of the plaintiff.[169] Provided that the factors listed in section 33(3) are considered, and subject to the qualification explained in the next paragraph, the court exercises an unfettered discretion[170] which will only be interfered with by a higher court if the decision is plainly wrong.[171]

3.76 In *Walkley v Precision Forgings Ltd*[172] the House of Lords held that, if a plaintiff issues a valid writ within the limitation period but does not proceed with the action before the end of the limitation period, the plaintiff cannot take advantage of section 33 unless there are exceptional circumstances. In this situation the prejudice is regarded as being caused not by the primary limitation period contained in section 11 but rather by the plaintiff's own omission.[173]

(d) Action for personal injury surviving under the Law Reform (Miscellaneous Provisions) Act 1934

3.77 The Law Reform (Miscellaneous Provisions) Act 1934 (the "1934 Act") provides for the survival of causes of action vested in the deceased (other than a cause of action for defamation or for bereavement damages under the Fatal Accidents Act 1976) for the benefit of the deceased's estate. If the deceased did not commence an action before death[174] the 1934 Act allows the personal representative to commence one on behalf of the estate.[175] Although not confined to actions for personal injury, the bulk of survival claims are for the deceased's personal injury and that is what we focus on here.[176]

3.78 Section 11(5) of the 1980 Act provides that if an injured person dies before the expiration of the three-year limitation period, then the period applicable to the cause of action for the personal injuries, surviving for the benefit of the estate under section 1 of the 1934 Act, shall be 3 years from the date of death or three

[169] See *Beer v Waltham Forest* (unreported, 16 December 1987), Hodgson J and *Forbes v Wandsworth Health Authority* [1997] QB 402, *per* Stuart-Smith LJ at 423.

[170] *Thompson v Brown* [1981] 1 WLR 744; *Conry v Simpson* [1983] 3 All ER 369, 370; *Donovan v Gwentoys Ltd* [1990] 1 WLR 472; and *Halford v Brookes* [1991] 1 WLR 428, 435.

[171] See *Bradley v Hanseatic Shipping Co Ltd* [1986] 2 Lloyd's Rep 34 (CA); *Conry v Simpson* [1983] 3 All ER 369 (CA); *Halford v Brookes* [1991] 1 WLR 428, 435.

[172] [1979] 1 WLR 606.

[173] See also *Thompson v Brown* [1981] 1 WLR 744; *Deerness v John R Keeble & Son (Brantham) Ltd* [1983] 2 Lloyd's Rep 260; *Whitfield v North Durham Health Authority* [1995] 6 Med LR 32. MA Jones, *Limitation Periods in Personal Injury Actions* (1995), p 102.

[174] Although not raising distinct limitation issues a personal representative will, of course, become a party to an action started by the deceased before he or she died.

[175] Where a cause of action accrues after death, the limitation period cannot accrue until there is a competent plaintiff. This will be either when an executor appointed under the will of the deceased commences to act as the executor or (except where the action is for the recovery of land under s 26 of the 1980 Act) when formal letters of administration are granted. See further the discussion in T Prime and G Scanlan, *The Modern Law of Limitation* (1993), pp 227 - 228.

[176] Other actions surviving under the 1934 Act are generally governed by the standard limitation period applicable to the deceased's action (eg 6 years from the accrual of the cause of action).

years from the date of the personal representative's knowledge, whichever is the later.[177] This therefore represents a different and fresh limitation period from that which would otherwise apply to the deceased's action. It is possible in a case where there is more than one personal representative for the dates of knowledge to differ. If that is the case time will run from the earliest date.[178]

3.79 Section 33 of the 1980 Act applies to claims under section 11(5) so that, if the period set by section 11(5) expires, the court may disapply the limitation period under section 33. The criteria set out in section 33(3)[179] "shall have effect with appropriate modifications, and shall have effect in particular as if references to the plaintiff included references to any person whose date of knowledge is or was relevant in determining a time limit".[180]

3.80 If the deceased dies after the limitation period for his or her action has expired then the limitation period laid down in section 11(5) does not operate. The personal representatives may apply to the court for a declaration under section 33 that the limitation period is excluded. However, in exercising that discretion the court must have regard in particular to the length of, and reasons for, the delay on the part of the deceased.[181] Thus when applying the criteria in section 33(3) the most relevant knowledge will be that of the deceased.[182] Although not expressly required to do so, the court will also consider the prejudice to the defendant caused by any further delay on the part of the personal representatives.[183]

(3) Actions under the Fatal Accidents Act 1976

3.81 The Fatal Accidents Act 1976 allows an action to be brought for the benefit of the dependants of the deceased where the death was caused by any wrongful act, neglect or default, which would have entitled the injured person to maintain an action to recover damages. That is, it creates a statutory cause of action distinct from any claim made on behalf of the estate under the Law Reform (Miscellaneous Provisions) Act 1934. Such actions are brought by the executor or administrator, but there are exceptions so that in certain circumstances the action may be commenced by the dependants.

[177] Note s 11(6) provides that regard shall be had "to any knowledge acquired by any such person while a personal representative or previously".

[178] Section 11(7). In the case of injuries caused by a defective product the estate may bring a cause of action under Part I of the Consumer Protection Act 1987 by relying on the 1934 Act. In this case however the relevant limitation provisions are contained in s 11A(5) - 11A(7) of the 1980 Act. These are similar to s 11(5) - 11(7) and the same principles apply.

[179] See further above paras 3.66 - 3.75 above.

[180] Section 33(5).

[181] Section 33(4).

[182] See s 33(5).

[183] The rule in *Walkley v Precision Forgings Ltd* [1979] 1 WLR 606 - see para 3.76 above - is also relevant here if the deceased issued a writ within the limitation period but did not commence an action within the limitation period. See *Papworth v Yorkshire Chemicals Ltd* (unreported, 13 March 1984) (CA) as an example of the effect of this rule in the case of death.

3.82 The basic provision is section 12 of the Limitation Act 1980 which is largely analogous to the provisions for actions for personal injuries of section 11. By section 12(2) no action under the Fatal Accidents Act can be brought after the expiration of three years from the date of death or the date of knowledge of the person for whose benefit the action is brought, whichever is the later. Knowledge here has the same meaning as it has when applied to an action for personal injury by the injured plaintiff.[184] If there is more than one dependant then the issue of the date of knowledge under section 12 is applied separately to each of them.[185] Thus it is possible for a number of different limitation periods to be operating.

3.83 Under section 12(3) of the 1980 Act, sections 28 (extension of limitation period in the case of disability), 33 (exclusion of limitation period), 35 (new claims in pending actions) and 39 (if another limitation period is set by another enactment the limitation period under section 12(2) will not apply) apply to actions under the 1976 Act. Where a dependant applies to the court for the period set by section 12(2) to be excluded under section 33, section 33(5) provides that the criteria set out in section 33(3)[186] "shall have effect with appropriate modifications, and shall have effect in particular as if references to the plaintiff included references to any person whose date of knowledge is or was relevant in determining a time limit".

3.84 Section 12(1) of the 1980 Act provides that an action under the Fatal Accidents Act 1976 "shall not be brought if the death occurred when the person injured could no longer maintain an action and recover damages in respect of the injury (whether because of a time limit in this Act or any other Act, or for any other reason)." When deciding whether the deceased could still maintain an action it is not permissible to take into account the possibility that the limitation period could have been excluded under section 33. But although no account can be taken of the possibility that the deceased may have made a successful section 33 claim, section 33(6) provides that the court may exclude the operation of section 12(1) of the 1980 Act and section 1 of the Fatal Accidents Act 1976. In exercising that discretion the court, pursuant to section 33(4), must have regard in particular to the length of, and reasons for, the delay on the part of the deceased. Although not specifically required to do so, the court will also consider the prejudice to the defendant caused by any further delay on the part of the dependants.

3.85 It is worthwhile pointing out here that the decision in *Stubbings v Webb*,[187] which we have discussed in detail above, can also lead to odd inconsistency where the

[184] See s 14 and the discussion above at paras 3.38 - 3.65.

[185] Section 13(1). Section 13(2) provides that, if the effect of subsection 1 is that the action would be outside the limitation period for some dependants but not all, the court shall direct that any person as regards whom the action would be outside that limit shall be excluded from those for whom the action is brought. The Court will not give that direction, however, if it is shown that, if the action were brought exclusively for the benefit of the person in question, it would not be defeated by a defence of limitation (whether in consequence of s 28 of the Act or an agreement between the parties not to raise the defence, or otherwise): s 13(3). Arguably the court should not give a direction under s 13(2) unless it has also decided it will not exclude the limitation period under s 33. See MA Jones, *Limitation Periods in Personal Injury Actions* (1995), p 176.

[186] See further paras 3.66 - 3.75 above.

[187] [1993] AC 498. See paras 3.32 - 3.35 above.

victim of the assault dies from the injuries. The dependant's claim under the 1976 Act will accrue (pursuant to section 12 of the 1980 Act) either on the date of death or the date of knowledge of the person for whose benefit the action is brought, whichever is the later, and will have a three year limitation period with a possibility of the limitation period being excluded under section 33. In contrast, an action on behalf of the estate under the Law Reform (Miscellaneous Provisions) Act 1934 will not fall within section 11(5) of the 1980 Act, because of the intentional nature of the assault, and there would therefore be a six year limitation period running from the accrual of the cause of action under section 2.

3.86 In many cases, claims under the Law Reform (Miscellaneous Provisions) Act 1934 and the 1976 Act are combined. This can give rise to some complexity and it is necessary to keep carefully in mind the relevant dates for each action. When there is, in addition, a section 33 issue to be resolved in relation to one of the claims the problems can become acute. For example, in *Taylor v Taylor*[188] solicitors took out a writ in respect of a Fatal Accidents Act claim but did not serve it. Two years later they took out a fresh writ which included not only the Fatal Accidents Act claim but a claim under the 1934 Act as well. The claim under the 1976 Act could not proceed because the first writ had been issued within the limitation period but had not been served, thus the rule in *Walkley v Precision Forgings Ltd*[189] operated to prevent the court exercising its discretion under section 33 in respect of that claim. No such problem arose with the 1934 Act claim as no writ had been issued in respect of that claim and discretion was exercised under section 33 to exclude the limitation period from applying to this claim. The defendant appealed arguing that if the 1934 Act matter went ahead the quantum of the plaintiff's claim under the 1976 Act would be levelled against her solicitors in a negligence action and the 1934 Act matter would be tried before a different judge. The assessment of damages under the 1976 Act depended upon how damages were assessed under the 1934 Act claim which, at that time, would have included damages for lost earnings during the lost years. These were deductible from the 1976 Act claim. The Court of Appeal, allowing the defendant's appeal, held that the judge, although considering each of the matters in section 33(3), had failed to consider "all the circumstances of the case" when deciding to exercise his discretion under section 33 in allowing the 1934 claim to go ahead.[190]

(4) Latent Damage (other than Personal Injury) caused by the Tort of Negligence

3.87 After the decision in *Pirelli General Cable Works Ltd v Oscar Faber & Partners*[191] the Law Reform Committee was asked to consider the general issue of latent damage, that is, damage which is not reasonably discoverable as soon as it happens. The recommendations contained in the Committee's Twenty-Fourth Report[192] were

[188] *The Times*, 14 April 1984.

[189] [1979] 1 WLR 606. See para 3.76 above.

[190] See also *Straw v Hicks* (unreported, 13 October 1983) (CA) and *Ward v Foss*, *The Times*, 29 November 1993 (CA). See further MA Jones *Limitation Periods in Personal Injury Actions* (1995), pp 181 - 184.

[191] [1983] 2 AC 1. See para 3.15 above.

[192] Law Reform Committee *Twenty-Fourth Report (Latent Damage)* (1984) Cmnd 9390.

enacted in the Latent Damage Act 1986 (LDA 1986), which added sections 14A and 14B to the Limitation Act 1980. Section 3 of the LDA 1986 stands on its own.

3.88 In general terms, the LDA 1986 overlays the normal tort period of six years from accrual of the cause of action with a three year period running from discoverability, and subject to an overall long-stop of 15 years from the negligent act or omission. In contrast to the regime for personal injuries and death there is no judicial discretion to disapply the time limits.

(a) The scope of the Latent Damage Act 1986

3.89 Section 14A of the 1980 Act applies to any action for damages for negligence, other than one to which section 11 or section 12 of the 1980 Act applies, that is, an action for personal injuries or death. A number of points need to be made about this definition. First, section 14A has no application to an action based on contract. This was established in *Iron Trades Mutual Insurance and others v J K Buckenham.*[193] Section 14A speaks only of "negligence"; this may be contrasted with section 11 of the 1980 Act which creates a similar regime for personal injuries, but which speaks of "negligence, nuisance or breach of duty". The plaintiffs in the *J K Buckenham* case were driven to contend that the omission of any reference to breach of duty was an oversight on the part of the draftsman, but this argument was rejected. The same conclusion was reached in *Islander Trucking Ltd v Hogg Robinson & Gardner Mountain (Marine) Ltd.*[194] These decisions were approved by the Court of Appeal in *Société Commerciale de Reassurance v ERAS International Ltd.*[195] The reasoning behind these decisions is convincing, even though the result is that a plaintiff who derives rights against the defendant from contract is unable to rely on the LDA 1986. It is far from clear that there is any justification in principle for the differing treatment of contract claims and tort claims.

3.90 The fact that the 1986 Act does not extend to contract is of less importance since the decision of the House of Lords in *Henderson v Merrett Syndicates Ltd*[196] which authoritatively confirmed that there can be concurrent actions in contract and tort arising out of the same facts. This means that a victim of a negligent breach of contract can always, or almost always, bring an action in the tort of negligence (and hence claim the benefit of the Latent Damage Act). But this, of course, does not obviate the possibility of injustice where latent damage has been caused by the breach of a strict contractual (or even tortious) duty.

3.91 It would seem that the LDA 1986 is not available to a plaintiff whose action is based on nuisance. Negligence and nuisance have a substantial overlap but there may still be cases where the action must be framed in nuisance because the plaintiff cannot otherwise show the necessary breach of duty. In such a case it would seem that section 14A has no application.

[193] [1990] 1 All ER 808.

[194] [1990] 1 All ER 826, *per* Evans J.

[195] [1992] 2 All ER 82.

[196] [1995] 2 AC 145.

3.92 The wording of the 1986 Act does not extend to any case where the liability is strict and to any case of breach of statutory duty where the duty requires something more than the taking of reasonable care. Nor, apparently, does it extend to actions for deliberately caused injury or damage. The decision of the House of Lords in *Stubbings v Webb*[197] establishes that an action for intentional trespass to the person is not within section 11 of the 1980 Act because it is not an action for negligence, nuisance or breach of duty. For the same reason it is not within the LDA 1986, nor is an action for deliberately caused damage to property.

(b) Limitation periods and "starting date"

3.93 The limitation period under section 14A is either six years from the date on which the cause of action accrued[198] or three years from the "starting date" if that period expires later than the six year period.[199] The "starting date" is the "earliest date on which the plaintiff or any person in whom the cause of action was vested before him first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action".[200] The reference to the right to bring such an action is apparently an allusion to the possibility that the plaintiff may acquire the knowledge before acquiring an interest in the damaged property. In such a case time will not start to run until the plaintiff acquires that interest.

(c) "Knowledge"

3.94 The date of knowledge is the date when the plaintiff first knew of such "material facts about the damage"[201] "as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment",[202] together with the following facts:

(1) that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence: and

[197] [1993] AC 498. See paras 3.32 - 3.36 above.

[198] We have discussed "accrual" in property damage tort cases at paras 3.15 - 3.19 above.

[199] Section 14A(4).

[200] Section 14A(5).

[201] Sections 14A(5) and 14A(6)(a).

[202] Section 14A(7). The reference to a "reasonable person" as opposed to what the plaintiff would reasonably have thought indicates that s 14A(7) is more objective than s 14(2): see paras 3.40 - 3.44 above. See *Higgins v Hatch & Fielding* [1996] 1 EGLR 133 (CA). In that case the plaintiffs were suing surveyors for a negligent valuation. They did not bring the proceedings for several years after receiving a structural engineering report, which showed that the valuers' report was wrong, because they did not appreciate that they had a remedy against the valuers. Judge Bernstein held that the limitation period ran from the date the plaintiffs received the report. She said (cited by the CA at p 136), "I am bound to consider what a reasonable person would have done armed with that knowledge, *not what the plaintiffs did but what a reasonable person would have done.* In the face of the evidence that what had occurred was contrary to what the valuer considered likely to occur, I have come to the conclusion that a reasonable person would take advice as to where he could look for a remedy" (emphasis added). The Court of Appeal, in upholding this judgment, rejected the plaintiffs' contention that the judge had been relying on constructive knowledge.

(2) the identity of the defendant; and

(3) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant.[203]

3.95 Knowledge of the law is irrelevant.[204] Constructive, as well as actual, knowledge of a fact counts.[205] Although set out in a slightly different way the definition of the starting date (including the four key types of fact) is very similar to the date of knowledge for the purposes of personal injuries actions, as provided in section 14 of the 1980 Act, and reference can be made to the personal injury section above for a full discussion of the ingredients of the definition.[206]

3.96 Under section 14A(7) the damage must be sufficiently serious to justify legal action. There have been conflicting decisions on the meaning, in this context, of "the damage". In *Horbury v Craig Hall & Rutley*[207] the plaintiff brought a property in 1980 in reliance on a surveyor's report. The report negligently failed to reveal a number of defects in the property. The plaintiff became aware of some of the defects including an unsafe chimney (which could have been corrected for £132) in 1982. In 1985 she became aware of further defects (requiring extensive rebuilding of the house). In 1988 she sued the surveyors. It was held that the plaintiff had a single cause of action in respect of the report and that "the damage", as referred to in section 14A, meant all the damage suffered by the plaintiff in consequence of her reliance on that report. The discovery of the unsafe chimney was sufficiently serious to cause a reasonable person to issue proceedings (given the hypothetical defendant who did not dispute liability and was able to satisfy a judgment), and that time started to run against the plaintiff from that point. In consequence the plaintiff's cause of action was time-barred.

3.97 In contrast, in *Felton v Gaskill Osbourne & Co*[208] it was held that "damage" in section 14A(7) meant the particular head of damages in respect of which the plaintiff was seeking to claim damages, not damages in general. These proceedings also concerned a negligent surveyor's report, which failed to refer to four defects in the property. The fact that the plaintiff had been aware of two of the minor defects not referred to and had decided that they were tolerable where another person might have instituted proceedings against the surveyors for negligence in respect of those failures did not mean that the plaintiff was precluded from suing the surveyors in respect of the more serious defects when they came to his attention. Time did not start to run in respect of all the damage suffered by the plaintiff when he was aware of the first damage he suffered.

[203] See sections 14A(8) and 14A(6)(b).

[204] Section 14A(9).

[205] Section 14A(10).

[206] See paras 3.38 - 3.65 above. Note, however, that the judicial interpretation of s 14 may be influenced by the discretion to disapply the basic time-limits, whereas there is no such discretion in relation to s 14A.

[207] [1991] CIIL 692 (Judge Bowsher QC, sitting as official referee).

[208] [1993] 2 EGLR 176.

3.98 The Court of Appeal has resolved this conflict in favour of the construction in *Horbury v Craig Hall & Rutley*. In *Hamlin v Edwin Evans*[209] the plaintiffs purchased a house, relying on a structural survey report provided by the defendant. The survey had failed to reveal dry rot and structural defects. The dry rot was diagnosed relatively early, and a claim made against the defendant and settled. The structural defects, which were much more serious, were not discovered until later, and by the time the plaintiffs commenced proceedings, about two years after discovering the structural defects, six years had elapsed since the discovery of the dry rot. The Court of Appeal held that there was only one cause of action, which rested on the negligent making of the report. The date of knowledge was the date on which the plaintiffs first had actual or constructive knowledge of damage resulting from that negligence, which meant, here, the date on which they had discovered the dry rot. Their claim was therefore barred.

(d) The long-stop provision

3.99 Under section 14B of the 1980 Act, no action may be brought in respect of latent damage more than 15 years from the date of an act or omission alleged both to constitute negligence and to be the cause of damage in respect of which the plaintiff claims damages (where there is more than one date, time runs for the purpose of this section from the last date). The fact that the plaintiff still does not know of his cause of action at the expiry of this period is irrelevant. Once the 'long stop' period has expired, the plaintiff's cause of action is barred.

(e) Successive owners and latent damage

3.100 Where a purchaser of an interest in a property[210] has a claim for negligence in respect of the property, the limitation periods will be those set out in sections 14A and 14B of the 1980 Act, but the position is modified by section 3 of the LDA 1986, which was introduced to deal with the problem revealed by *Perry v Tendring District Council*.[211] In that case Judge Newey QC, following *Pirelli General Cable Works Limited v Oscar Faber & Partners*,[212] held that where the plaintiff purchased the property after the damage occurred, it would, quite apart from any question of limitation, not have any action in negligence against the defendant because the plaintiff did not have any interest in the property at the time when the cause of action accrued.[213] Section 3 of the LDA 1986 deals with the problem by providing that where a cause of action has already accrued, and another person acquires an interest in the property after the original cause of action has accrued, but before the material facts[214] about the damage are known to anyone who, at the time he

[209] [1996] 2 EGLR 106.

[210] Including both real and personal property, although the examples in this section will deal with real property.

[211] [1985] 1 EGLR 260.

[212] [1983] 2 AC 1. See para 3.15 above.

[213] That is, the date of damage.

[214] Defined by LDA 1986, s 3(5) as:

> such facts about the damage as would lead a reasonable person who has an interest in the damaged property at the time when those facts become known to him to consider it sufficiently serious to justify his instituting proceedings for

first has knowledge of those facts,[215] has any interest in the property, a fresh cause of action accrues to the person acquiring the interest at the date of acquisition.[216] But for limitation purposes[217] the cause of action is deemed to have accrued when the original cause of action accrued.[218] So, where D negligently constructs a building for X in 1990, damage occurs in 1991 which is, and remains, entirely undiscoverable, and the property is sold to P1 in 1992, then to P2 in 1994, any cause of action which P1 and P2 have will, for limitation purposes, be deemed to have accrued in 1991, and the six-year limitation period in section 14A(4)(a) of the 1980 Act expires in 1997.

(5) Consumer Protection Act 1987

3.101 Part I of this statute, in compliance with the United Kingdom's obligations under the Product Liability Directive 85/374 of 25 July 1985, creates a right of action where damage to person or to consumer property is caused by a defective product. Liability is strict, albeit that there is a development risk defence.[219] Schedule 1 to the Act introduces a new section 11A and new subsections 14(1A) and 33(1A)[220] into the Limitation Act 1980. Time runs from the later of the date of accrual of the cause of action and the date of the plaintiff's knowledge (or if the cause of action concerns loss of or damage to property, the date of knowledge of the plaintiff of, if earlier, of any person in whom the plaintiff's cause of action was previously vested). The limitation period is 3 years.

3.102 The provisions are clearly modelled closely on the personal injuries provisions in sections 11 and 14 of the 1980 Act. The "date of knowledge" in section 14(1A) in particular is defined as knowledge of facts which would cause a reasonable person suffering such damage to consider it sufficiently serious to institute proceedings for damages against a defendant not disputing liability and with means to satisfy a judgment. Similarly, the fact that the plaintiff does not know that particular facts or circumstances do not constitute a defect at law which would give him a right of action is irrelevant. However, where section 14(1) refers to knowledge of facts about the "injury in question", and section 14A refers to knowledge of facts about "the relevant damage", section 14(1A) refers to knowledge of facts about "the damage caused by the defect". This difference may affect the extent to which a plaintiff who has suffered a comparatively minor injury but later becomes aware of far more serious damage caused by the defect can argue that time should run from his awareness of the more serious damage.

damages against a defendant who did not dispute liability and was able to satisfy a judgment.

See also Limitation Act 1980, ss 14A(7), 14(2), and paras 3.40 - 3.44; 3.94 - 3.98 above.

[215] A person's knowledge is defined to include constructive knowledge in LDA 1986, s 3(6).

[216] LDA 1986, s 3(1).

[217] That is, for the purposes of Limitation Act 1980, s 14A(4)(a).

[218] LDA 1986, s 3(2)(b).

[219] Consumer Protection Act 1987, s 4(1)(e).

[220] See also s 28(7) of the 1980 Act: see para 8.3 below.

3.103 In addition, it is important to stress that section 11A(3) provides for a 10 year long-stop. This time runs from when the defective product is supplied by the producer of the product (which for the purposes of an action under the Consumer Protection Act 1987 includes a person who has held himself out as producer of the product by putting a name, trade mark or other brand mark on the product) or by the person who imported the product into a Member State of the European Union.[221] If the court is called upon to exercise its discretion under section 33 it cannot disapply the long-stop provision contained in section 11A(3).[222]

3.104 In the case of injuries caused by a defective product where the injured person has died, the estate may bring a cause of action under Part I of the Consumer Protection Act 1987 by relying on the Law Reform (Miscellaneous Provisions) Act 1934.[223] The relevant limitation provisions are contained in sections 11A(5) - 11A(7) of the 1980 Act. These are similar to sections 11(5) - 11(7)[224] and the same principles apply. Where a claim in relation to Part I of the Consumer Protection Act 1987 is brought under the Fatal Accidents Act 1976, then section 12 of the 1980 Act applies.[225]

(6) Actions for Defamation and Malicious Falsehood

3.105 Section 5 of the Defamation Act 1996 inserted new sections 4A and 32A into the 1980 Act, which lay down a short limitation period for an action for libel, slander or malicious falsehood while giving the courts a discretion to exclude that period. By section 4A a limitation period of one year applies to an action for libel, slander, or malicious falsehood and this time starts from the accrual of the cause of action. A cause of action for defamation will accrue at the date of publication of the defamatory material,[226] and a new cause of action will accrue upon each publication.[227]

3.106 Under the new section 32A, the court is given the power to direct that section 4A shall not apply to an action if it considers that it is equitable for the action to proceed having regard to the degree to which the limitation period prescribed by section 4A prejudices the plaintiff, and a decision to allow the action to proceed would prejudice the defendant. The court is directed to have regard to the factors set out in section 32A(2). These are

(1) The length of, and the reasons for the delay on the part of the plaintiff.[228]

(2) The date on which the plaintiff became aware of the facts relevant to the cause of action and the extent to which he acted promptly and reasonably

[221] Section 4(2) and 2(2) Consumer Protection Act 1987.

[222] Section 33(1A).

[223] See paras 3.77 - 3.80 and, in particular, n 178, above.

[224] See paras 3.78 - 3.80 above.

[225] See paras 3.81 - 3.86 above.

[226] See *Clerk & Lindsell on Torts* (17th ed 1995), para 31-05.

[227] *Duke of Brunswick v Harmer* (1849) 14 QB 185.

[228] Section 32A(2)(a).

"once he knew whether or not the facts in question might be capable of giving rise to an action". This factor only applies where the plaintiff's lack of knowledge of such facts is one of the reasons for the delay.[229]

(3) The extent to which relevant evidence is likely to be unavailable or less cogent than would have been the case if the action had been brought within the limitation period set by section 4A.[230]

3.107 These three factors correspond to sections 33(3)(a), (b) and (e). The factors in sections 33(3)(c), (d) and (f) were presumably thought irrelevant or insufficiently important to defamation cases as opposed to personal injury actions.

(7) Conversion

3.108 In respect of conversion - and for reasons that will become apparent - it would be artificial to separate out the starting date and length of the limitation period from the effect of the expiry of the period. We shall therefore consider expiry in this section.[231] There is no discretion to exclude the limitation period and no long-stop in relation to conversion.

(a) The general rule

3.109 The limitation period prescribed generally for the tort of conversion is the limitation period prescribed for torts generally under section 2 of the 1980 Act, that is, six years from the date of the accrual of the cause of action. Damage is not a necessary ingredient of the tort, and the cause of action will accrue when the goods are wrongfully interfered with, regardless of when the plaintiff discovered the interference.[232] Failure to bring an action within the limitation period will generally result in the extinction of the plaintiff's title to the goods in question.[233] This is an exception to the rule, generally applicable in English law, that expiry of a limitation period will bar the plaintiff's remedy, but not extinguish his or her right.[234]

Example 1 In 1985 D takes P's clock, honestly believing it to be his own, and keeps it. P will have until 1991 to commence proceedings against D for conversion and, once that time expires, P will lose his title to the clock.

The general rule is modified for successive conversions[235] and for conversions constituting, or relating to, theft.[236]

[229] Section 32A(2)(b).

[230] Section 32A(2)(c).

[231] The general law on expiry of a limitation period is considered in paras 9.1 - 9.5 below.

[232] *Granger v George* (1826) 5 B & C 149; 108 ER 56. See also *RB Policies at Lloyds v Butler* [1950] 1 KB 76.

[233] Section 3(2).

[234] See paras 9.1 - 9.5 below.

[235] Section 3.

[236] Section 4.

(b) Successive conversions

3.110 Section 3(1) of the 1980 Act provides for successive conversions in the following terms:

> Where any cause of action in respect of the conversion of a chattel has accrued to any person and, before he recovers possession of the chattel, a further conversion takes place, no action shall be brought in respect of the further conversion after the expiration of six years from the accrual of the cause of action in respect of the original conversion.

3.111 So, where there is a second honest conversion,[237] and the plaintiff has not recovered the goods, time does not re-start, in respect of the second converter, from the date of the second conversion, but runs from the date of the original conversion. This will be the case although the owner may not know the identity of the first converter,[238] or indeed that the first conversion has taken place. It is even possible that, by the time the second conversion takes place, the six-year period from the first conversion may have expired and so there is no possible claim in respect of the second conversion.

Example 2 In 1985 D1 takes P's clock, honestly believing it to be his own. In 1992 D1 sells it to D2. The limitation period in respect of an action for conversion against D1 will expire in 1991. Any action in respect of further conversions will be impossible after that date, and so P will have no right against D2.

(c) Theft[239]

3.112 Where there is a theft of a chattel from a plaintiff, section 4 applies. "Theft" is not exhaustively defined, but it is specified[240] to include any conduct outside England and Wales which would be theft if committed in England and Wales, obtaining chattels by deception[241] and blackmail. Apart from these expressly included types of conduct, "theft" probably means, and is limited to, theft as it is defined in sections 1 - 6 of the Theft Act 1968.

[237] For the sake of brevity we will use the expression "honest conversion" to refer to a conversion which does not constitute a theft. This will include, for instance, a bona fide purchase of converted goods (See *Hollins v Fowler* (1875) LR 7 HL 757), but also conversions which are dishonest but do not amount to theft, as when a person borrows property such as a car without the owner's permission but intending to return it after use (and thus not coming within Theft Act 1968, s 6). See *Clerk & Lindsell on Torts* (17th ed 1995), para 13.16. The situation where an honest conversion is followed by a theft is dealt within para 3.115 below.

[238] *RB Policies at Lloyds v Butler* [1950] 1 KB 76. The first conversion in that case was a theft and, following the introduction of the theft provisions in s 4 of the 1980 Act, similar facts would now produce a different result (see para 3.114 below).

[239] See J C Smith, *The Law of Theft* (8th ed 1997) for further background on the criminal law of theft.

[240] Section 4(5) of the Limitation Act 1980.

[241] As per Theft Act 1968, s 15(1), but in England and Wales or elsewhere.

3.113 The drafting of section 4 has been criticised for its obscurity.[242] We set out section 4(1) to 4(4) here in full:

> (1) The right of any person from whom a chattel is stolen to bring an action in respect of the theft shall not be subject to the time limits under section 2 and 3(1) of this Act, but if his title to the chattel is extinguished under section 3(2) of this Act[243] he may not bring an action in respect of a theft preceding the loss of his title, unless the theft in question preceded the conversion from which time began to run for the purposes of section 3(2).
>
> (2) Subsection (1) above shall apply to any conversion related to the theft of a chattel as it applies to the theft of a chattel; and, except as provided below, every conversion following the theft of a chattel before the person from whom it is stolen recovers possession of it shall be regarded for the purposes of this section as related to the theft.
>
> If anyone purchases the stolen chattel in good faith neither the purchase nor any conversion following it shall be regarded as related to the theft.
>
> (3) Any cause of action accruing in respect of the theft or any conversion related to the theft of a chattel to any person from whom the chattel is stolen shall be disregarded for the purpose of applying section 3(1) or (2) of this Act to his case.
>
> (4) Where in any action brought in respect of the conversion of a chattel it is proved that the chattel was stolen from the plaintiff or anyone through whom he claims it shall be presumed that any conversion following the theft is related to the theft unless the contrary is shown.

3.114 Although there are problems of interpretation,[244] generally, for our purposes it can be stated that the general effect of the section is that a thief and persons taking the goods from the thief may not take advantage of a limitation period. However, a purchaser taking the goods from the thief in good faith and persons taking the goods from that purchaser may take advantage of the limitation period. When a bona fide purchaser purchases the goods from the thief, or from someone who has received the goods as a result of a conversion related to the theft, the limitation period in respect of an action by the original owner against the bona fide purchaser, and in respect of an action by the original owner against anyone else

[242] See, eg, the notes by D Morgan in *Current Law Statutes Annotated*, which state that "[a]s drafted, the section is a paradigm example of all that the Renton Committee on 'The Preparation of Legislation' (1975 Cmnd 6053) found to be wrong with domestic legislative drafting ... This is a tiresome section to construe."

[243] See para 3.109 above.

[244] See A McGee, *Limitation Periods* (2nd ed 1994), pp 195 - 196; Redmond-Cooper, *Limitation of Actions* (1992), p 60; T Prime and G Scanlan, *The Modern Law of Limitation* (1993), pp 115 - 117.

coming into possession before the original owner recovers the goods, will be six years from the date of the bona fide purchase.[245]

Example 3 D steals P's car in 1985. P finds the car in D's possession in 1992. However, the limitation period provided by section 2 is inapplicable by reason of section 4(1). So P can commence proceedings against D for conversion now or at any time in the future.

Example 4 D1 steals P's car in 1985. In 1986 D1 sells the car to D2, who knows that it is stolen. The conversion by D2 taking place on the purchase from D1 is "related to" the theft and so the limitation period in respect of a claim against D2 is inapplicable.[246]

Example 5 D1 steals P's car in 1985. In 1986 D1 gives the car to D2, who does not know that it is stolen. The conversion by D2 taking place on receiving the gift from D1 is "related to" the theft and so the limitation period in respect of a claim against D2 is inapplicable.[247]

Example 6 D1 steals P's car in 1985. In 1986 D2 purchases the car from D1 in good faith. Section 4(1) will not apply to protect P against D2's limitation period, because D2's purchase is not related to the theft.[248] Therefore, in respect of P's claim against D2, there will be a six-year limitation period under section 3(1), from 1986, expiring in 1992. If D3 buys the car from D2 in 1989, the limitation period under section 3(1) for P's claim against D3 will also expire in 1992.[249]

3.115 The general rule that a thief cannot take advantage of limitation periods does not apply where the goods are stolen *after* an honest conversion. In other words, once the limitation period starts to run against all potential defendants after an honest conversion, a theft will not restart it, even in relation to the thief.

Example 7 In 1985 D1 takes P's clock, honestly believing it to be his own. In 1990 D2 steals it from D1. P's title becomes extinguished in 1991.[250] P is barred from bringing an action in conversion, not only against D1, but also against D2; because the theft did not precede the honest conversion, time began to run for the purposes of section 3(2), that is, from D1's conversion in 1985.[251]

[245] For an illustration of the operation of s 4, see *De Preval v Adrian Alan Ltd* (unreported, 24 January 1997) (Arden J).

[246] Sections 4(1) and (2).

[247] *Ibid.*

[248] By virtue of the proviso to s 4(2).

[249] See paras 3.110 - 3.111 above. The wording of the proviso to s 4(2) - "*any* conversion following [the bona fide purchase]" (emphasis added) - seems to mean that D3 will benefit from a short limitation period even if he knows that the car is stolen. If D3 buys the car in 1992, he could even be doing so in the knowledge that the car was stolen in 1985 and that P's claim is statute-barred.

[250] Section 3(2).

[251] Section 4(1).

(8) A Note on Bailment

3.116 A bailment involves the delivery of the bailor's goods into the possession of the bailee with a promise (express or implied) given by the bailee that the goods will be redelivered or dealt with in a certain way.[252] The law of bailment is therefore concerned with the transfer of possession of a tangible item. This transfer may involve a contract but this is not necessary in all cases. The guiding characteristic of all modern bailments is the voluntary assumption of possession and arguably the modern subject of bailment may be defined in this way.[253] Historically, actions for a breach of a duty arising under a bailment have been enforced either in contract or in tort. Thus the limitation periods for contract and tort have been applied.[254] It is also conceivable that, if the plaintiff claims a restitutionary remedy for a tort, a different limitation period will apply than in respect of other tort actions. We discuss this below.[255]

3.117 At first sight, therefore, bailment raises no specific issues in relation to limitation periods. Rather bailment is merely a contextual category in which causes of action in contract or tort (or perhaps restitution) can be brought. While it is a particularly interesting context from a limitation perspective, in that more than one cause of action may be brought, it is in that sense no more significant than many other areas, for example, professional negligence and product liability.

3.118 On another view, however, bailment cannot be dismissed so lightly. Given the width of the subject matter, it is arguable that it is fictional to try to fit all actions brought for breach of duty arising under bailment into either contract, tort or restitution. Some courts and academic commentators have recognised in recent times the *sui generis* nature of bailment so that in some cases, the action is not one based on contract, tort or restitution but, arguably, "breach of bailment".[256]

3. CONCLUSION

3.119 The limitation regimes for contract and tort are probably those of greatest importance. We have seen that while the "contract" model is largely settled (six or twelve years from accrual of the cause of action) there are a number of different models applicable to tort: (i) six years from accrual of the cause of action (the basic model); (ii) three years from discoverability with a judicial discretion to disapply (personal injury); (iii) three years from discoverability with a long-stop of ten years from the supply of the product (Consumer Protection Act 1987); (iv) three years from discoverability, or six years from accrual of the cause of action, with a long-stop of 15 years from the negligent conduct (latent damage); and (v)

[252] See *Hobbs v Petersham Transport Co Pty Ltd* (1971) 124 CLR 220, 238 per Windeyer J.

[253] See N E Palmer, *Bailment* (2nd ed 1991), p 37 and *K H Enterprise (Cargo Owners) v Pioneer Container (Owners) (The Pioneer Container)* [1994] 2 AC 324, 340 - 342 *per* Lord Goff.

[254] See, eg *Chesworth v Farrar* [1967] 1 QB 407, where an action was brought by a bailor against a bailee for wrongful sale. The contractual limitation period was applied. See para 5.17 below.

[255] See para 5.17 below.

[256] See the cases and discussion in N E Palmer, *Bailment* (2nd ed 1991), Ch 1 and N E Palmer, "Ambulatory Bailments" (1983) CLP 91. See also *K H Enterprise (Cargo Owners) v Pioneer Container (Owners) (The Pioneer Container)* [1994] 2 AC 324.

one year from accrual with a judicial discretion to disapply (defamation or malicious falsehood). It is hard to see the justification for such complexity. Moreover, apart from the complexity caused by having different regimes, there is needless complexity within the different regimes. We have seen, for example, that the discoverability test, within the present law, is problematic; and that the law governing conversion is tortuous.

PART IV
STARTING DATE, LENGTH OF PERIOD, DISCRETION TO DISAPPLY AND LONG-STOP: BREACH OF TRUST

1. ACTIONS FOR (OR CONSEQUENT ON A) BREACH OF TRUST

(1) Introduction

4.1 The law on limitation periods for actions for (or consequent on) a breach of trust is laid down in section 21 of the 1980 Act. This is a notoriously complex section. It essentially provides two separate regimes for actions by a beneficiary under a trust:

(1) The regime governing fraudulent breaches of trust (section 21(1)(a)) and actions to recover trust property or its proceeds from the trustee (section 21(1)(b));

(2) The regime governing all other actions by a beneficiary to recover trust property or in respect of a breach of trust (section 21(3)).

No limitation period applies to actions falling within the first regime. The limitation period which applies to actions falling within the second regime is six years from the date on which the right of action accrued; and there is no judicial discretion to disapply and no long-stop.[1]

4.2 It is important to emphasise at the outset that section 38(1) of the 1980 Act defines "trustee", be reference to the definition in the Trustee Act 1925. Section 68(1)(17) of that Act expressly includes, for example, implied and constructive trustees, and personal representatives.[2] It has, however, been held not to apply to a trustee in bankruptcy.[3] There is no explicit reference in section 68(1)(17) of the Trustee Act 1925 to trustees under a resulting trust, and it has been suggested that it is arguable that this indicates an intention on the part of the legislature to exclude resulting trusts from the ambit of section 68 of the Trustee Act 1925.[4] But it is most unlikely that this interpretation is the one intended.[5] Subject to these

[1] The personal remedy in issue in relation to actions under s 21 is commonly the equitable action for an account. By s 23, the time limit for an account depends on the time limit for the underlying claim. See para 5.13 below.

[2] By s 68(1)(17) of the Trustee Act 1925: "'Trust' does not include the duties incident to an estate conveyed by way of mortgage, but with this exception the expressions 'trust' and 'trustee' extend to implied and constructive trusts, and to cases where the trustee has a beneficial interest in the trust property, and to the duties incident to the office of a personal representative, and 'trustee', where the context admits, includes a personal representative, and 'new trustee' includes an additional trustee."

[3] *Re Cornish* [1896] 1 QB 99.

[4] A McGee, *Limitation Periods* (2nd ed 1994), p 250.

[5] The expression "implied trusts" is sometimes used to mean all trusts other than express trusts which arise, or are presumed to arise, through the intention of the settlor. It seems likely that "implied ... trusts", for the purposes of Trustee Act 1925, s 68(1)(17), includes

qualifications, it would appear that, wherever property is held by a fiduciary for a beneficiary, section 21 applies.[6]

4.3 Two important concepts for the interpretation of section 21 are "trust" and "breach of trust". It is also important to draw attention at the outset to some of the difficulties for limitation periods that have arisen, and continue to arise, in respect of the distinction between express and constructive trusts.

(a) "Trust"

4.4 There is no single definition of the conditions which are necessary and sufficient for the existence of a trust. A trust will be characterised by the fact that the legal and beneficial title to the trust property are held in different hands. However, as *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*[7] makes clear, a trust will not arise in all cases where the legal and beneficial title to property are held separately. Lord Browne-Wilkinson notes in that case that in addition the legal owner, or trustee, must be obliged to carry out the purposes for which he holds the property in the case of an express or implied trust, or which are imposed on him by law because of his unconscionable conduct in the case of a constructive trust.[8] Further the trustee must be aware either that he is intended to hold the property for the benefit of others, or, in the case of a constructive trust, of the factors which would lead to the imposition of the trust. And the trust property must be identifiable.

4.5 In addition, a trust may be imposed by statute. Examples of this are existing strict settlements under the Settled Land Act 1925,[9] the trusts implied by the Law of

resulting trusts. But cf the wording "resulting, implied or constructive trusts" in Law of Property Act 1925, s 53(2).

[6] See, eg, *Burdick v Garrick* (1870) LR 5 Ch App 233 (fiduciary agents treated as trustees for the purposes of the Limitation Act). See also *North American Land and Timber Co v Watkins* [1904] 1 Ch 242 (an agent entrusted with funds to buy property treated as trustee of that property). It has been said that where the fiduciary relationship arises *as a result* of the relevant property coming into the hands of the fiduciary, rather than before, and independently of, the receipt of the property, s 21 does not apply: see A McGee, *Limitation Periods* (2nd ed 1994), pp 257 - 258; T Prime and G Scanlan, *The Modern Law of Limitation* (1993), p 218. The authority generally given for this proposition is *Clarkson v Davies* [1923] AC 100 (PC). But it appears that the view taken by the Privy Council in this case depended on the exclusion of constructive trusts from the pre-1939 equivalent of s 21 (as to which see paras 4.8 - 4.10 below): [1923] AC 101, 110 - 111. Where the receipt of the property brings about a constructive trust, and thereby a fiduciary relationship, it would seem that s 21 will apply: see also para 4.13 below.

[7] [1996] AC 699.

[8] *Ibid*, 765, *per* Lord Browne-Wilkinson.

[9] It is not possible to create new strict settlements: Trusts of Land and Appointment of Trustees Act 1996, s 2(1).

Property Act 1925 where land is owned by co-owners,[10] and the statutory trusts arising on an intestacy.[11]

(b) "Breach of trust"

4.6 The expression "breach of trust" has not been authoritatively defined. A controversial analysis was adopted by Sir Robert Megarry V-C in *Tito v Waddell (No 2)*.[12] One of the questions being considered was whether breaches of the rules that a trustee must not sell trust property to himself ("the self-dealing rule"), and that he must deal with trust property fairly, taking no advantage of his position as trustee ("the fair dealing rule") are "breaches of trust" for the purposes of the Limitation Act 1939. Sir Robert Megarry V-C held that they were not. Instead both the self-dealing rule and the fair-dealing rule should be considered to be disabilities imposed on trustees under the general law of equity rather than as a specific part of the law of trusts which lays down the duties of trustees. In consequence, it was held that none of the limitation provisions applying to breach of trust (nor indeed any other limitation period) laid down in the Limitation Act 1939 applied.

4.7 An act or omission which constitutes a breach of fiduciary duty will often also constitute a breach of trust, but this is not necessarily the case.[13] Where there is no breach of trust, an action for breach of fiduciary duty will not be covered by section 21 (or, apparently, any limitation period in the 1980 Act, although the doctrine of laches will apply).[14] *Nelson v Rye*[15] examined the circumstances in which a fiduciary also becomes a trustee. The defendant was the plaintiff's business manager and in that capacity received the income earned by the plaintiff. Laddie J held that, in consequence, he became a constructive trustee of that money, so that an action against him for breach of fiduciary duty for failing to render proper accounts was also an action for breach of trust. Since section

[10] Law of Property Act 1925, ss 34 and 36, as amended by Trusts of Land and Appointment of Trustees Act 1996, Schedule 2, paras 3 and 4.

[11] Administration of Estates Act 1925, s 33, as amended by Trusts of Land and Appointment of Trustees Act 1996, Schedule 2, para 5.

[12] [1977] Ch 106, 246 - 249. See C Harpum, "Stranger as constructive trustee" (1986) 102 LQR 267, 289.

[13] It is always the case, however, that a breach of trust will constitute a breach of fiduciary duty.

[14] See *Tito v Waddell (No 2)* [1977] Ch 106, 246 - 249, *per* Sir Robert Megarry V-C; *Attorney-General v Cocke* [1988] Ch 414, 420 - 421, *per* Harman J; *Nelson v Rye* [1996] 1 WLR 1378, 1390 - 1396, *per* Laddie J. See also the passage in the article by Sir Peter Millett, "Bribes and Secret Commissions" [1993] RLR 7, 23:

> Every agent is a fiduciary; he may or may not be a trustee. Often, he holds no money or property for his principal. If he receives goods from his principal he may be a bailee only. Where, however, he receives property from a third party intended for his principal, his obligation will almost invariably be to transfer it in specie to his principal, and, if so, he will be treated as holding it as trustee for his principal.

See also *Attorney-General of Hong Kong v Reid* [1994] 1 AC 324.

[15] [1996] 1 WLR 1378.

21(1)(b) applied, because the plaintiff was attempting to recover trust property, there was no limitation period.[16]

(c) Express or constructive trust

4.8 Before the passing of the Limitation Act 1939, express and constructive trusts were treated differently for the purposes of limitation periods. An express trustee was not permitted to rely on the lapse of time to excuse himself from a breach of his trust,[17] but a constructive trustee might plead limitation by analogy with the Limitation Act 1623. However, in certain circumstances the Court of Chancery would treat a constructive trustee in the same way as an express trustee for limitation purposes. This is illustrated by *Soar v Ashwell.*[18] This concerned express trusts in a will, under which two beneficiaries had a life interest in a fund, with remainder to their children. The fund was to be invested by the solicitor to the trust ("A") (who was not himself one of the trustees), and he appears to have retained it for his own purposes. When A died, there was no money to give to the child of one of the beneficiaries when he became entitled to his interest. A's estate was sued. The Court of Appeal examined whether A was a trustee in respect of the money - and then whether he was "such a trustee as a Court of Equity will not allow to rely on the Statute of Limitation".[19]

4.9 The Court recognised that for actions against some types of constructive trustee, the trustee could rely on limitation as a defence, while for others no limitation defence applied (just as it did not apply in respect of actions against express trustees). Bowen LJ gave three examples of types of constructive trusteeship where no limitation defence applied:[20]

(1) where a person who is not an express trustee nevertheless presumes to act as one;

(2) where a stranger to a trust participates in the fraud of the trustee; and

(3) where a person has received trust property and has dealt with it in a manner inconsistent with trusts of which he was aware.

The Court of Appeal held that A had assumed the liabilities of an express trustee (example (1) above), and was not therefore entitled to rely on the expiry of a limitation period.

4.10 The Limitation Act 1939 (and after it the 1980 Act) incorporated the definition of "trust" and "trustee" from the Trustee Act 1925. This expressly included not only

[16] But the plaintiff still failed because his delay was held to constitute laches: [1996] 1 WLR 1378, 1392 - 7.

[17] See *Burdick v Garrick* (1870) LR 5 Ch 233.

[18] [1893] 2 QB 390.

[19] *Ibid*, 393, *per* Lord Esher MR

[20] See also Kay LJ at p 396, who after a recitation of some of the authorities noted: "the result seems to be that there are certain cases of what are, strictly speaking, constructive trusts, in which the Statute of Limitations can not be set up as a defence".

express but implied and constructive trusts and trustees.[21] After 1939, therefore, the question whether a trust is an express trust or a constructive trust has not been relevant to the question whether section 21 of the 1980 Act (or its predecessor section 19 of the Limitation Act 1939) applies.

4.11 The courts were slow to recognise this. *Tintin Exploration Syndicate Ltd v Sandys,*[22] decided under section 19 of the Limitation Act 1939, suggested that the distinction between express and constructive trustees still applied. In this case the defendant acted as a de facto director of the plaintiff company, and received an *ultra vires* payment from the company. When an action was brought for the return of the money, he argued that the action was barred by the Limitation Act 1939, because he was only a constructive trustee. Roxburgh J rejected this argument, finding that he had assumed the liabilities of an express trustee (so coming into one of the categories of constructive trustees which the courts would treat as express trustees for limitation purposes). Roxburgh J cited *Soar v Ashwell* with approval, and appears to have assumed that section 19(1)(b) (now section 21(1)(b)) would not apply to a constructive trustee. This ignores the definition of trust incorporated into the 1939 Act, and it is suggested that it is unhelpful to distinguish between express and constructive trusts in interpreting section 21 of the 1980 Act.[23]

4.12 This has become clearer in cases since *Tintin Exploration*. For example, in *G L Baker Ltd v Medway Building and Supplies Ltd,*[24] Danckwerts J did not find it necessary to examine whether the breach of trust alleged came within one of the categories of constructive trust treated as express trusts for limitation purposes. A good recent example is *Nelson v Rye,*[25] which we have mentioned above.[26] Here the agent of a musician was being sued for an account for moneys he had received during the ten year period in which he managed the musician's affairs. Counsel for both plaintiff and defendant accepted that section 21 applied to both express and constructive trusts. The issue was instead whether everyone occupying a fiduciary position must necessarily be treated as a trustee.

[21] See para 4.2, n 2 above. The definition of "trustee" in the Trustee Act 1888 was deemed "to include an executor or administrator and a trustee whose trust arises by construction or implication of law as well as an express trust". This does not however seem to have removed the distinction between express and constructive trusts for limitation purposes. See *Taylor v Davies* [1920] AC 636 (PC). In this case it was argued that following the enactment of section 47(1) of the Limitations Act ((RS Ont, 1914, c 75), an Ontario Statute which duplicated the provisions of the Trustee Act 1888 on limitation provisions in respect of trusts), the exclusion of claims "to recover trust property or the proceeds thereof still retained by the trustee" applied equally to express and constructive trustees. This argument was rejected by the Privy Council, who applied the distinction between constructive trustees to be treated as express trustees, and "mere" constructive trustees examined in *Soar v Ashwell* [1893] 2 QB 390.

[22] (1947) 177 LT 412.

[23] One commentator describes the approach taken by the court in *Tintin Exploration* as "misplaced": see A McGee, *Limitation Periods* (2nd ed 1994), p 250.

[24] [1958] 1 WLR 1216. See para 4.16 below for a discussion of this case.

[25] [1996] 1 WLR 1378.

[26] See para 4.7 above.

4.13 A controversial question is whether section 21 can be said to apply to all actions which seek to impose a constructive trust on a stranger to the trust. It has been suggested that the language of section 21 is not wholly appropriate in the case of an action for what has historically been labelled "knowing assistance"[27] (that is, where a third party who dishonestly assists a trustee in a breach of trust is held liable to make good loss to the trust, even if none of the trust property comes into the third party's possession) because the same action cannot render the defendant both "trustee" and responsible for a "breach of trust".[28] More fundamentally, one can dispute whether the defendant who dishonestly assists a breach of trust, while not necessarily receiving any property, can sensibly be classified as a constructive trustee at all.[29] It has been argued that the provisions in section 21 on actions to recover trust property may not apply to actions for "knowing receipt" because the action is a personal one and it may therefore be misleading to say that the recipient is a constructive trustee.[30] It nevertheless appears likely that, notwithstanding the conceptual difficulties involved in applying section 21 to actions of this sort, claims for a remedy for "knowing receipt" or "knowing assistance" will be treated by the courts as falling within the provisions of section 21 as being "in respect of a breach of trust".[31]

(2) No Limitation Period to Apply: Section 21(1)

(a) Section 21(1)(a): Fraud or fraudulent breach of trust

4.14 Section 21(1)(a) provides that no period of limitation shall apply to an action in respect of any fraud, or fraudulent breach of trust, to which the trustee was party or privy.[32] The expressions "fraud" or "fraudulent" are not defined in the Act in respect of either section 21(1)(a), or section 32(1) which postpones the limitation period in cases of fraud.[33] *Beaman v ARTS Ltd*[34] examined the meaning of the expression "is based on the fraud of the defendant" in section 26(a) of the Limitation Act 1939 (the predecessor of section 32 of the 1980 Act). It was held that fraud must be a "necessary allegation to constitute the cause of action" for the action to come within section 26(a). The case of *Armitage v Nurse*[35] dealt directly

[27] *Barnes v Addy* (1874) LR 9 Ch App 244, 251 - 252, *per* Lord Selborne. In *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378, in which the Privy Council held that there is no need for the breach of trust assisted to be a dishonest and fraudulent one but that the liability rests on the assistor being dishonest, the preferred terminology was 'dishonestly procuring or assisting a breach of trust or fiduciary obligation'. See generally Hanbury & Martin, *Modern Equity* (15th ed 1997), pp 294 - 297.

[28] See the discussion in Charles Harpum, "The stranger as constructive trustee" (1986) 102 LQR 114, 267, 287ff, and H M McLean, "Limitation of Actions in Restitution" (1989) CLJ 472, 501ff.

[29] See Hanbury & Martin, *Modern Equity* (15th ed 1997), p 294.

[30] See P Birks, in *Commercial Aspects of Trusts and Fiduciary Obligations* (ed McKendrick), pp 153 - 156; A Burrows, *The Law of Restitution* (1993), pp 151, 441.

[31] See on "knowing receipt" *G L Baker Ltd v Medway Building and Supplies Ltd* [1958] 1 WLR 1216, 1221 - 1222, *per* Danckwerts J, discussed at para 4.16 below.

[32] But laches will apply: see para 4.7 above and para 9.14 - 9.17 below.

[33] See paras 8.11, 8.12 below.

[34] [1949] 1 KB 550. See para 8.12 below.

[35] [1997] 2 All ER 705.

with the meaning of fraud in section 21(1)(a) of the 1980 Act. The plaintiff in this case alleged that the trustees had, in investing certain of the funds in the settlement, acted wilfully and recklessly in breach of the terms of the trust, though no allegation of dishonesty was made. The trustees argued, inter alia, that the action was barred by section 21 of the 1980 Act. The plaintiff counter-argued that the action came within section 21(1)(a) of the 1980 Act, on the basis that the expression "fraud or fraudulent breach of trust" covered any wilful or reckless breach of trust, as such a breach would qualify as "a breach for which it would be against conscience for the trustees to avail themselves of the lapse of time". This argument was rejected by the Court of Appeal who, upholding Jacob J's decision, held that a claim of actual dishonesty was required. In Millett LJ's words, "The result is that in the absence of deliberate concealment liability for an honest breach of trust is statute-barred after six years, but liability for a dishonest breach of trust endures without limitation of time."[36]

4.15 Section 21(1)(a) only applies where the trustee was "a party or privy" to the fraud or fraudulent breach of trust. This requirement is identical to the phrasing used in section 19 of the Limitation Act 1939, and its predecessor section 8 of the Trustee Act 1888. The meaning of the phrase was considered in *Thorne v Heard,*[37] where the defendants, first mortgagees of land, had employed a solicitor to sell the land for them. He then wrongfully retained the balance of the proceeds of sale and converted them to his own use, instead of paying them over to the plaintiffs (the second mortgagees). The defendants did not know of his actions, which were not undertaken on their behalf, and did not benefit from them. It was held that the defendants had not been party or privy to the fraud committed by the solicitor. Kay LJ suggested[38] that the expression "party or privy" must indicate some degree of moral complicity in the wrongdoing.

4.16 Reliance on the terms of section 21(1)(a) (unlike section 21(1)(b)) is not restricted to actions against the trustee. Under the terms of the sub-section, the action must simply be "in respect of" the relevant breach of trust. Providing there has been a fraud or fraudulent breach of trust to which the trustee was party or privy, action can be taken against the person to whom the trust property has passed from the fraudulent trustee. In *G L Baker Ltd v Medway Building and Supplies Ltd,*[39] a director of the defendant company (also the accountant of the plaintiff company) misappropriated funds from the plaintiff and paid some of those funds to the defendant. There was no suggestion in the case as pleaded that the defendant had given value for the payments so as to be a bona fide purchaser for value without notice.[40] The plaintiff's action to recover these sums from the defendant was brought more than six years after the breach of trust. The plaintiff argued that no limitation period applied by reason of what is now section 21(1)(a)

[36] *Ibid*, 719.

[37] [1894] 1 Ch 599.

[38] [1894] 1 Ch 599, 608.

[39] [1958] 1 WLR 1216.

[40] The defendant's application to amend their pleadings to include this defence was rejected by Danckwerts J. Its appeal against his decision on this point was successful, but the Court of Appeal approved his remarks on limitation [1958] 1 WLR 1216, 1225.

of the 1980 Act. Danckwerts J agreed. The action was based on the fraudulent payment by the trustee (the accountant) to the defendant which was the origin of the proceedings against the defendant. It was not necessary for the action to be brought against the trustee for the plaintiff to be able to rely on section 21(1)(a) provided that the action was "in respect of" the trustee's fraud. This requirement is satisfied where the fraud forms the basis of the cause of action.

(b) Section 21(1)(b): Recovering trust property or the proceeds of trust property

4.17 By section 21(1)(b), no period of limitation is to apply to an action by a beneficiary "to recover from the trustee trust property or the proceeds of trust property in the possession of the trustee, or previously received by the trustee and converted to his use".

4.18 It must first be established that the action is to recover "trust property" or its proceeds. In *Re Howlett (deceased)*[41] the settlor died intestate. Accordingly, the property she had held in gavelkind passed absolutely to her son, subject to her husband's right to half of the rents and proceeds from the property until he died or remarried. Her husband remained in occupation of the property until his death, notwithstanding his remarriage, and in consequence no rents or profits were received. His estate was sued by the son, and it was held that as the husband had remained in occupation for his own purposes his estate would not be permitted to say that he had not received any rents or profits. The estate was liable for the rent he should have paid as occupier of the trust property, and this notional sum became part of the "trust property" for limitation purposes.

4.19 *In re Sharp*[42] the "trust property" consisted of deductions for income tax which the trustees should have made from annuities paid to the beneficiaries. It was acknowledged that this breach of trust was an entirely innocent one, and the trustees therefore had a limitation defence under section 8 of the Trustee Act 1888 (the predecessor of section 21(3) of the 1980 Act) in respect of the overpayments they had made to beneficiaries other than themselves more than six years before the proceedings. However, the trustees remained liable for all the overpayments they had received themselves which were trust property retained by them. In *Wassell v Leggatt*[43] money bequeathed to a wife, but taken by her husband against her will became "trust property", held by him as trustee for her. An action by the wife against his estate to recover the money several years later came within the terms of section 8(1) of the Trustee Act 1888 (the equivalent of s 21(1)(b) of the 1980 Act).[44]

4.20 An interesting case on the meaning of recovery of trust property, is *Attorney-General v Manchester City Council.*[45] The wording under consideration in that case

[41] [1949] Ch 767.

[42] [1906] 1 Ch 793.

[43] [1896] 1 Ch 554.

[44] See also *Re Eyre-Williams* [1923] 2 Ch 533; *Mitchinson v Spencer* (1902) 86 LT 618.

[45] Unreported, 7 March 1983.

was the expression "to recover money or other property" which appears in section 8(1) of the Trustee Act 1888. This expression is obviously similar to the expressions "to recover ... trust property or the proceeds of trust property" in section 21(1)(a) of the 1980 Act, and "to recover trust property" in section 21(3). The Attorney-General sought a declaration that the proceeds of sale of a picture which had been given away by the trustees of a charity in 1921 and sold in 1979, should be held on charitable trusts. It was agreed by the applicant and respondent that the relevant limitation period was the one provided for in the Trustee Act 1888.[46] Whitford J said that the action was "brought to recover money or other property", and consequently, in the absence of fraud, it was time-barred. It was not apparent on the face of the summons that the recovery of any property was being sought, but Whitford J noted that what was being sought in real terms was the recovery of the sale proceeds from the council so that it could be applied for the charitable purposes of the original holder of the picture, or of its successor.[47] This aspect of the decision has been criticised by some commentators[48] on the ground that it is stretching the language of the statute to describe the Attorney-General's action as one to recover property. We would respectfully agree with those criticisms, and submit that Whitford J's comments, which should be regarded as obiter, place too wide an interpretation on the wording used in section 8 of the Trustee Act 1888, and therefore, by implication section 21 of the 1980 Act.

4.21 In addition to showing that the action is to recover trust property or its proceeds, the plaintiff must establish that the property is either "in the possession" of the trustee, or has been "previously received by the trustee and converted to his use". The phrase "in the possession" of the trustee was originally "still retained by" the trustee, in the Trustee Act 1888, section 8, and the cases on that section offer guidance on the interpretation of this requirement in section 21(1)(b). In *Thorne v Heard,*[49] the plaintiffs, the second mortgagees of the property, argued that the defendants, the first mortgagees, still retained the proceeds of sale of the property, even though the money was received by the solicitor acting for the defendants as their agent and then misappropriated. The Court of Appeal held that trust property would be still retained by the trustees if it was in the hands of an agent from whom it could be recovered. Therefore the money was still retained by the trustees up to the bankruptcy proceedings of the solicitor acting for them, as up to that point it could have been recovered. After that time the trustees could not be said to retain the proceeds, as the money had effectively been lost.

4.22 Similarly in the case of *How v Winterton*[50] it was stressed that the trust property had to be in the hands of the trustee or at least under his control at the time of the

[46] Since, if the action was time-barred before the Limitation Act 1939, neither that Act nor the 1980 Act could operate to revive the possibility of a claim.

[47] In fact there seems to have been no evidence before Whitford J that either the original charity or any successor were still in existence, and it is unclear how the proceeds of sale would have been applied, or for whom they would have been applied.

[48] See A McGee, *Limitation Periods* (2nd ed 1994), p 245; T Prime and G Scanlan, *The Modern Law of Limitation* (1993), p 215.

[49] [1894] 1 Ch 599. See also para 4.15 above.

[50] [1896] 2 Ch 626, 636.

commencement of the action. Here the trustee, in breach of trust, failed to accumulate rents received from the trust property for the benefit of the beneficiary, but applied them in keeping down encumbrances. As the money spent in this way was not still retained by him, the trustee could claim the benefit of the six year limitation period.

4.23 An example of notional property held to be still in the possession of the trustee is provided by *In re Howlett,* which we have examined above.[51] Here the trustee was held to be chargeable with an occupation rent and, as he could not show that he had made any payments of rent to the trust, he was deemed to have the money still in his pocket.

4.24 Section 21(2)[52] deals with the situation in which trustees distribute trust property to beneficiaries which include the trustees themselves but, through no fault of their own, do so wrongly. In that situation, if section 21(1) applied in its full rigour, the trustees would be exposed to liability without any limitation period,[53] whilst any claim which the trustees might bring against the other beneficiaries to recover trust property would be time-barred after six years under section 21(3). Trustees in this position are partially relieved by section 21(2). Where trustees have retained trust property as part of their share on the distribution of the trust property, their liability in any subsequent action taken after the six year limitation period to recover that property will be limited to the amount they have retained in excess of their entitlement.

4.25 Suppose, for example, that A is a trustee of a trust and in 1989, believing that A, B and C are the only beneficiaries, realises the trust property and distributes the proceeds, totalling £120,000, equally among A, B and C, so that they get £40,000 each. Despite A having taken all reasonable care, there is a fourth beneficiary, D, who is entitled to an equal share, and commences an action against A in 1996. D's claim against A will not be subject to a limitation period, because of section 21(1). But any claim by A, or by D, against the other beneficiaries, will have become statute-barred in 1995. Under the provisions of section 21(2), A's liability to D will be limited to the difference between the quarter share which A should have retained for himself from the trust property, and the third share he in fact retained, i.e. the difference between £40,000 and £30,000. So A's liability will be limited to £10,000.

4.26 Trustees will only be able to rely on the provisions of section 21(2) if they can show that they acted honestly and reasonably in making the original distribution of the trust property. In addition, this provision does not apply to actions brought to recover the trust property before the expiry of the limitation period. Up to this time the trustee would be liable to pay the beneficiary the whole of the share he should have received out of the original distribution from the trust property retained by the trustee. The trustee would however be able to seek contributions

[51] See para 4.18.

[52] Originally introduced by Limitation Amendment Act 1980, s 5(1), on the recommendation of the Law Reform Committee. See *Twenty-first Report (Final Report on the Limitation of Actions)* (1977) Cmnd 6923, paras 3.91 - 3.93.

[53] Although laches might apply.

from the other beneficiaries who had received more than their fair share in the mistaken distribution. So if, in the example given previously, D commences an action in 1994, A will be liable to D in respect of the full £30,000, and will have to bring actions within the six-year limitation period (that is, before 1995) against B and C.[54]

(3) Other Actions by a Beneficiary in respect of a Breach of Trust: Section 21(3)

4.27 Under section 21(3), the limitation period for any action by a beneficiary to recover trust property or in respect of a breach of trust which does not fall within the provisions of section 21(1)(a) or section 21(1)(b) (discussed above) is six years from the date on which the cause of action accrued.

4.28 The cause of action will accrue to the beneficiary under section 21(3) on the date of the commission of the breach of trust and not, if different, at the date when the beneficiary suffers loss. In *Thorne v Heard,*[55] as we have seen, the proceeds of sale of property were misappropriated by a solicitor ("S") acting for the trustees (who were the first mortgagees of the property), instead of being paid in satisfaction of the second mortgage of the property. S concealed his misappropriation by continuing to pay the interest on the second mortgage. Consequently the beneficiaries (the second mortgagees) did not suffer loss until S became bankrupt fourteen years after the sale. The beneficiaries' action against the trustees was held to accrue at the time of the breach of trust - when the trustees, through the solicitor, failed to give the beneficiaries the proceeds of sale.[56] Consequently the action was time-barred.[57]

4.29 Under section 21(3), a right of action will not be treated as having accrued to any beneficiary entitled to a future interest in the property until the interest has fallen into possession. This mirrors the provisions of section 19 of the Limitation Act 1939 and section 8 of the Trustee Act 1888. The case of *In re Somerset*[58] concerned an action by both tenant for life and the infant remaindermen against

[54] This means that the section has the odd and perhaps unintended effect of shifting the risk, eg, of the insolvency of the other beneficiaries, away from the trustee when the 6 year limitation period has expired. Suppose, eg, in the two examples given above, B is bankrupt and there is no question of employing proprietary remedies in respect of any property which has passed through B's hands. In the first example (D commences action in 1996) D can only recover £10,000 from A, and must recover the shortfall direct from B and C, but in fact can only recover from C, so the resulting loss of £10,000 (the overpayment to B) falls on D. In the second example (D commences action in 1994) D would recover the full £30,000 from A, who would seek to recover the overpayments of £10,000 each from B and C but would only recover £10,000 in total because of B's insolvency, so the loss due to the insolvency falls on A.

[55] [1894] 1 Ch 599. See para 4.15 and 4.21 above. See also *Re Swain* [1891] 3 Ch 233.

[56] This was taken to be the date when S received the money, not the expiry of a reasonable period thereafter within which S might be expected to account for it. Nothing hangs, however, on any difference between the two dates, and some commentators have suggested that this aspect of the decision is obiter: A McGee, *Limitation Periods* (2nd ed 1994), p 247; T Prime and G Scanlan, *The Modern Law of Limitation* (1993), p 210.

[57] See also *In re Swain* [1891] 3 Ch 233 and *Re Somerset* [1894] 1 Ch 231.

[58] [1894] 1 Ch 231.

the trustees for investing trust money in a mortgage of property of insufficient value to secure the amount of the mortgage. In respect of the tenant for life, the cause of action accrued when the investment was made, over six years before the action was begun, so that the action was time-barred under section 8 of the Trustee Act. However, the infant remaindermen did not at that time have an interest in possession of the trust property, so that time had not started to run against them. The trustees were therefore liable to make good the loss to the estate in respect of the infant remaindermen.[59] In *Armitage v Nurse*[60] Millett LJ explained the rationale of section 21(3) as follows: "It is not that a beneficiary with a future interest has not the means of discovery, but that he should not be compelled to litigate (at considerable personal expense) in respect of an injury to an interest which he may never live to enjoy."

4.30 Section 21(3) applies only to actions by a beneficiary. *Attorney-General v Cocke*[61] concerned an action by the Attorney-General against the trustees of a charitable trust, seeking an injunction to restrain them from dealing with the trust property. The writ was issued over 25 years after the will setting up the trust had been proved. The trustees argued that the action was barred by section 21(3) of the 1980 Act. Harman J held that the action was not brought by a beneficiary, as in cases where the Attorney-General is suing on behalf of the public at large there could not be said to be any individual beneficiaries.[62] It followed that there was no applicable limitation period, and so the Attorney-General's action was not statute-barred. If, on the other hand, a charitable trust can be shown to have individual beneficiaries, then the limitation period for an action by the Attorney-General will depend on the cause of action on which the proceedings are based: for example, if the proceedings are to set aside a lease, the rules relating to actions for the recovery of land will apply.[63]

4.31 Section 21(4) incorporates the rule in equity that where the action of one beneficiary has become time-barred, that beneficiary should not be permitted to benefit from a successful action by another beneficiary whose claim is not time-barred.[64] This becomes relevant where the beneficiaries for a trust include both beneficiaries with an interest in possession (such as a life tenant) and beneficiaries with future interests (such as a remainderman). Under section 21(3), time will not start to run against the remaindermen until their interest has fallen into possession.

[59] See also *In re Blow* [1913] 1 Ch 358.

[60] [1997] 2 All ER 705, 720.

[61] [1988] Ch 414.

[62] Certainly no members of the public can be said to have an interest in possession in respect of such trusts. This question did not arise in *Attorney-General v Manchester City Council* (unreported, 7 March 1983) (see para 4.20 above) because the section under consideration in that case, Trustee Act 1888, s 8, did not contain the same reference to beneficiaries.

[63] That is, under Limitation Act 1980, s 15: see, eg, *President and Scholars of Magdalen College, Oxford v Attorney-General* (1857) 6 HL Cas 189, 10 ER 1267, which concerned a charitable trust for the benefit of the poor of a specified parish. But in *Attorney-General v Cocke*, Harman J said that "in almost all charitable trusts there are no individual beneficiaries", and appeared to doubt whether the *Magdalen College* case would be decided in the same way if the current wording of the statute had applied: [1988] 1 Ch 414, 419.

[64] See also *In re Somerset* [1894] 1 Ch 231; *Re Dive, Dive v Roebuck* [1909] 1 Ch 328 at 336.

The situation can therefore arise where over six years after a breach of trust committed by the trustee (other than one falling within the provisions of section 21(1)(a) and 21(1)(b) of the 1980 Act) the life tenant no longer has a claim against the trustee, but the remainderman has.

4.32 An example of the operation of the equitable rule now contained in section 21(4) of the 1980 Act can be seen in the case of *Want v Campain.*[65] Here the trustees had, in breach of trust, invested in a second mortgage which was insufficient to secure the trust property. An action was brought against them over six years after the investment was made by both the life tenant and two remaindermen. The life tenant, but not the remaindermen, was barred from recovering the loss to the estate. This money was therefore ordered to be paid into court, and the income paid to the executors of the trustee, until the death of the tenant for life.

2. ACTIONS IN RESPECT OF PERSONAL ESTATE[66] OF A DECEASED PERSON

4.33 Section 22 provides that:

> Subject to section 21(1) and (2) of this Act-
>
> (a) no action in respect of any claim to the personal estate of a deceased person or to any share or interest in any such estate (whether under a will or on intestacy) shall be brought after the expiration of twelve years from the date on which the right to receive the share or interest accrued; and
>
> (b) no action to recover arrears of interest in respect of any legacy, or damages in respect of such arrears, shall be brought after the expiration of six years from the date on which the interest became due.

4.34 As section 22 is expressed to be subject to section 21(1), and the definition of trustee in the 1980 Act includes personal representatives,[67] there will be no limitation period in respect of claims where the facts correspond to section 21(1), that is, where there is a fraud, or where the action is to recover trust property or its proceeds from the personal representative.

4.35 Where, in the context of the administration of an estate, section 21(1) does not apply, the question of which of section 21(3) and 22 is applicable depends on the capacity in which the personal representatives or trustees are acting. If they are clearly acting as personal representatives, section 22 will apply. This will be the case where a beneficiary is bringing an action against personal representatives who

65 (1893) 9 TLR 254.

66 In relation to the deceased person's *real* property, the rules relating to the recovery of land, and equitable interests in land, will apply: Limitation Act 1980, ss 15 and 18. See paras 6.4 - 6.41 below.

67 Section 38(1) incorporating the definition in Trustee Act 1925, s 68(1)(17). See para 4.2, n 2 above.

have wrongly distributed the estate.[68] It will also apply to claims by beneficiaries against someone who has been wrongly paid or overpaid by the personal representatives.[69] Even then, if the personal representative was fraudulent, section 21 applies and there will be no limitation period. But if executors are also appointed as trustees by the will and they have validly assented the estate to themselves as trustees then section 21(3) will apply.[70] Because of the lack of formality required to effect a valid assent of personalty, it is sometimes far from clear when the line between executorship and trusteeship is crossed.[71]

4.36 The limitation period under section 22(a) begins on the date when the right to receive the share or interest accrues and not, in accordance with the language found elsewhere in the 1980 Act, when the beneficiary's cause of action accrues. This will apply to actions against personal representatives, and to actions brought against persons wrongly paid or overpaid out of the estate.[72] It appears that the "right to receive" accrues on the date of death of the deceased, even though the beneficiary will not be able to enforce that right until, at the earliest, one year has expired after the death.[73] Although it is widely accepted to be the law,[74] the judicial authority for this rule, which leads to the anomalous result that time will run against a plaintiff before he or she has a right to commence an action[75] is actually not very strong.[76]

[68] Although if the personal representatives have acted honestly and reasonably, their liability may be mitigated by s 21(2): see para 4.24 - 4.26 above.

[69] *Re Diplock* [1948] Ch 465, 512 affirmed *sub nom Ministry of Health v Simpson* [1951] AC 251, 277. This case rejected the approach taken by the court in *Re Johnson* (1885) 29 Ch D 964, applying the Real Property Limitation Act 1833, s 8.

[70] See, eg, *Re Richardson* [1920] 1 Ch 423; *Re Oliver* [1927] 2 Ch 323. See also *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate* (17th ed 1993), p 907. Because the limitation period under s 21(3) is shorter than the one under s 22(a) it has been suggested that where executors are also appointed as trustees under a will it is prudent for them to assent property to themselves as trustees at the earliest possible date, as long as this does not involve fraud: see, eg, A McGee, *Limitation Periods* (2nd ed 1994), p 253.

[71] See, eg, in a context other than limitation, *George Attenborough & Son v Solomon* [1913] AC 76.

[72] *Re Diplock* [1948] Ch 465, 512 - 514; affirmed *sub nom Ministry of Health v Simpson* [1951] AC 251, 277.

[73] Administration of Estates Act 1925, s 44. This period is commonly referred to as "the executor's year".

[74] A McGee, *Limitation Periods* (2nd ed 1994), pp 254 - 255; T Prime and G Scanlan, *The Modern Law of Limitation* (1993), p 234.

[75] *Ibid.* There is a parallel (noted by McGee) between the position of a beneficiary against whom time is running under s 22, and that of potential plaintiffs who are unable to commence proceedings because of a procedural bar, but against whom time runs: see paras 9.26 - 9.27 below.

[76] See, eg, *Re Deeney* [1933] NI 80. The Court of Appeal in Northern Ireland, in that case, was following the Court of Appeal's decision in *Hornsey Local Board v Monarch Investment Building Society* (1889) 24 QBD 1, which is itself sometimes cited as direct authority (see, eg, A McGee, *Limitation Periods* (2nd ed 1994), p 255). *Hornsey Local Board v Monarch Investment Building Society* concerned the limitation period in respect of a statutory public health body's right to apportion the cost of street works among adjoining property owners, including the defendant. It was held there that the words "present right to receive" (in

relation to the apportioned cost) referred to the date on which the works were completed. It contained only a passing, and obviously obiter, reference to limitation periods in respect of deceased persons' estates: (1889) 24 QBD 1, 10 - 11, *per* Lindley LJ. Furthermore, the Court of Appeal in the *Hornsey Local Board* case depended heavily on the argument that if the statute were construed so that the limitation period commenced on the date of the apportionment, the board would be able to prevent time running by delaying the apportionment. That argument seems to be difficult to apply to limitation periods relating to administration of estates. However, in *Ministry of Health v Simpson* [1951] AC 251, 277, Lord Simonds, in the course of affirming the decision of the Court of Appeal (*Re Diplock* [1948] Ch 465) appeared to assume that the limitation period commenced at the end of the "executor's year", although this comment is obiter.

PART V
STARTING DATE, LENGTH OF PERIOD, DISCRETION TO DISAPPLY AND LONG-STOP: RESTITUTIONARY CLAIMS

1. INTRODUCTION

5.1 The argument for reform of limitation periods in relation to the law of restitution is easy to make, for it is clear that the current regime does not deal adequately with the newly recognised law of restitution. Rather more difficult is our present task of outlining the current legal position.[1]

5.2 A starting point is to note that certain sections of the 1980 Act indisputably lay down limitation periods for some restitutionary claims. For example, section 9 sets a six-year limitation period for restitutionary actions under the Law Reform (Frustrated Contracts) Act 1943 (or under any other enactment); section 10(1) sets a two-year limitation period for claims under the Civil Liability (Contribution) Act 1978; section 21(3) lays down a six-year limitation period for restitutionary actions by a beneficiary to recover trust property (not dealt with by section 21(1)(a) or 21(1)(b)); and section 22 applies a twelve-year limitation period for restitutionary actions claiming personal estate of a deceased person. These provisions are dealt with in detail in other parts of this paper. Suffice it to say here that the law of restitution pulls together, as based on the principle against unjust enrichment, these (and many other) apparently disparate areas.

5.3 However, when it comes to the bulk of restitutionary claims the Limitation Act 1980 does not explicitly apply. This means that the central choice facing the courts has been to construe the 1980 Act, albeit artificially, as applying to these claims; or to conclude that no limitation period applies to common law restitutionary claims and that any equitable restitutionary claims should be left to the doctrine of laches.

5.4 In the discussion that follows we discuss the limitation periods for restitutionary claims in two sections, "autonomous unjust enrichment" and "restitution for wrongs". This classification, put forward by Peter Birks, is significant legally and is also convenient.[2] Autonomous unjust enrichment deals with where the

[1] See generally HM McLean, "Limitation of Actions in Restitution" [1989] CLJ 472; A Burrows, *The Law of Restitution* (1993), pp 439 - 450.

[2] See P Birks, *An Introduction to the Law of Restitution* (rev ed 1989), pp 22 - 25, 40 - 44, 313 - 315, 346 - 355; Burrows, *The Law of Restitution* (1993), pp 16 - 21, 376, 440. For judicial recognition of this division, see *Halifax Building Society v Thomas* [1996] 2 WLR 63, CA. See also the central division in Goff and Jones, *The Law of Restitution* (4th ed 1993) between "Section One : Where the Defendant has Acquired a Benefit from or by the Act of the Plaintiff" and "Section Three: Where the Defendant has Acquired a Benefit through his own Wrongful Act." Beatson, *The Use and Abuse of Unjust Enrichment*, pp 206 - 243 is not convinced of the validity of the Birksian divide. Nor is Cane, "Exceptional Measures of Damages" in *Wrongs and Remedies in the Twenty-First Century* (ed Birks) (1996), pp 312 - 323.

defendant's unjust enrichment has been subtracted from the wealth of the plaintiff, that is, where the defendant's gain is equivalent to the plaintiff's loss. Payments made by a mistake or for a consideration that has failed are examples. Restitution for wrongs refers to restitutionary claims which strip away gains made by the commission of a wrong, such as a tort or breach of trust.

5.5 For the purposes of completeness we should add that there is no judicial discretion or long-stop in play in the area of restitutionary claims.

2. AUTONOMOUS UNJUST ENRICHMENT

5.6 It has long been thought that the limitation period for simple contracts laid down in section 5 of the 1980 Act applies to "quasi-contractual" claims, such as the action for money had and received to the plaintiff's use, for money paid to the defendant's use, and a quantum meruit. For example, in *Re Diplock*,[3] Lord Greene assumed that this section covered claims for money had and received. It must be noted however that this case was decided at a time when the implied contract theory, although under attack,[4] was still used to explain "quasi-contractual" claims. This theory has since been rejected by the House of Lords.[5]

5.7 Now that quasi-contract has become authoritatively recognised as belonging to a law of restitution that is independent of contract (and rests on the principle against unjust enrichment, not implied contract), can it still be said that section 5 applies? Hobhouse J has said that it does. In *Kleinwort Benson Ltd v Sandwell Borough Council*,[6] which dealt with restitutionary claims in respect of payments made under a void "swap" agreement, Hobhouse J relied on the decision in *Pepper v Hart*[7] and referred to Hansard to determine that the section was intended by Parliament to cover a claim for money had and received. It therefore seems clear that section 5 applies to restitutionary claims that historically have been grouped under the heading of quasi-contract.

5.8 If, then, the limitation period is six years from the date on which the cause of action accrued, when does the cause of action accrue for the purposes of time starting to run? The case law has largely focused on actions for money had and received, where it has been held that the cause of action accrues at the date when the payment which the plaintiff seeks to recover has been made, and that the limitation period therefore runs from that point.[8] But it is probably more accurate

[3] [1948] Ch 465, 514.

[4] See *Fibrosa Spolka Akcyjina v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32, 62 - 3, per Lord Wright.

[5] *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548. See also *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669.

[6] [1994] 4 All ER 890, 942 - 3.

[7] [1993] AC 593.

[8] See *Baker v Courage & Co* [1910] 1 KB 56; *In re Mason* [1928] 1 Ch 385, 393; *Re Blake* [1932] 1 Ch 54, 60; *Anglo-Scottish Beet Sugar Corporation, Ltd v Spalding Urban District Authority* [1937] 2 KB 607, 627. Cf *Freeman v Jeffries* (1869) LR 4 Exch 189 in which it was suggested that the plaintiff was obliged to give formal notice of his entitlement to the money to the defendant before he could maintain an action for the return of that money

to say that the cause of action will accrue for an action in restitution when the defendant has been unjustly enriched by receiving a payment (or other benefit) from the plaintiff even though this may be later than the date of payment or receipt of the payment. This is supported, in the context of when a cause of action accrues for the purposes of calculating interest payments, by cases on frustration. For example, in *BP Exploration Co (Libya) Ltd v Hunt (No 2),*[9] which concerned an action brought under the Law Reform (Frustrated Contracts) Act 1943, it was held that the action accrued when the contract became frustrated.[10] At that time (later than the date of receiving the payment), the plaintiff suffered a total failure of consideration and the defendant could be said to be in receipt of an unjust benefit.

5.9 In *Kleinwort Benson Ltd v Sandwell Borough Council,*[11] Hobhouse J noted that the bank's restitutionary cause of action, which he controversially treated as being based on 'absence of consideration',[12] did not accrue until the local authority could be said to be have been enriched, net of payments it had made to the bank. It therefore did not matter that three payments paid by the bank and three payments paid by the local authority were outside the six-year period preceding the issue of the writ. What was important was that there was a net unjust enrichment in respect of a single underlying transaction and that the writ claiming restitution of that net unjust enrichment was issued within six years of that net enrichment. Hobhouse J said:

> Only one underlying transaction was involved ... The successive payments merely altered the location and extent of the enrichment which existed from time to time. The earlier payments had long ceased to give any cause of action to either party. They were merely part of the previous dealings between the parties which were relevant to ascertaining what, if any, cause of action either party had at a later date.[13]

5.10 The same question arose in *Kleinwort Benson v South Tyneside Metropolitan Borough Council.*[14] Here Hobhouse J held that no account could be taken of the payments which had been made more than six years before the issue of the writ. The

against the defendant. See the discussion in A Burrows, *The Law of Restitution* (1993), pp 442 - 443 and Goff and Jones, *The Law of Restitution* (4th ed 1993), p 766.

9 [1983] 2 AC 352, 373H - 374A.

10 See also *Guardian Ocean Cargoes Ltd v Banco do Brasil (No 3)* [1992] 2 Lloyd's Rep 193, 200.

11 [1994] 4 All ER 890, reported with *Westdeutsche Landesbank Girozentrale v Islington London Borough Council.*

12 The 'absence of consideration' approach was also utilised by the Court of Appeal in *Westdeutsche Landesbank Girozentrale v Islington Borough Council* [1994] 1 WLR 938 although in the House of Lords [1996] AC 669 the language of 'failure of consideration' was preferred and Lord Goff referred to academic criticism that had been directed at the notion of 'absence of consideration'. As the ground of restitution was not regarded as being mistake, s 32 of the 1980 Act was treated as irrelevant.

13 [1994] 4 All ER 890, 941.

14 [1994] 4 All ER 972.

difference between this and the *Sandwell* case was that here the payments made by the plaintiff bank to the defendant local authority in the six years prior to the issue of the writ did not exceed the net (unjust) enrichment. That is, the plaintiff had overall paid £873,801.37 to the defendant. The defendant had overall paid £282,559.93 to the plaintiff. The defendant's net enrichment was therefore £591,241.44. But the plaintiff had only paid £582,257.19 (out of the total of £873,801.37) in the six years prior to the writ being issued. In contrast to the *Sandwell* case, therefore, the payments made by the plaintiff in the six years prior to the issue of the writ did not exceed (but fell short, by £8,784.25, of) the defendant's net enrichment. Hobhouse J held that the plaintiff was time-barred as regards £8,784.25 of the claim.

5.11 The overall principle to emerge therefore is that, in the swaps cases, the restitutionary cause of action was a continuing one for the net (unjust) enrichment on each swap contract. But in calculating that net enrichment payments made by the plaintiff more than six years before the issue of the writ were to be ignored if the payments made during the six years did not exceed the net enrichment.[15]

5.12 Under the heading of autonomous unjust enrichment must also be considered claims for rescission of an executed contract for, for example, misrepresentation, mistake, duress or undue influence. The limitation period for a claim for rescission is generally left to the doctrine of laches[16] (although it has been suggested that actions to recover money paid under a contract rescinded for duress are caught by section 5 of the 1980 Act).[17] Laches does not normally apply unless the plaintiff knew or could reasonably have known of the facts constituting the title to relief.[18] In addition, in cases of undue influence and duress delay only counts once the undue influence or duress has been removed, so that the plaintiff is free to make a choice.[19]

5.13 Some restitutionary actions (both within autonomous unjust enrichment and restitution for wrongs) are equitable actions for an account.[20] Under section 23 of the 1980 Act, an action for an account must be brought before the "expiration of

[15] See further A Burrows, "Swaps and the Friction between Common Law and Equity" [1995] RLR 15, 21 - 22.

[16] *Lindsay Petroleum Co v Hurd* (1874) LR 5 PC 221. See paras 9.14 - 9.17 below.

[17] Goff and Jones *The Law of Restitution* (4th ed 1993), p 770. See also *Maskell v Horner* [1915] 3 KB 106.

[18] *Lindsay Petroleum Co v Hurd* (1874) LR 5 PC 221, 241; *Alec Lobb (Garages) Ltd v Total Oil (GB) Ltd* [1985] 1 WLR 173. Cf *Leaf v International Galleries* [1950] 2 KB 86, where not rejecting a painting shortly after purchase was held to bar a claim five years later for rescission of the contract for an innocent misrepresentation (that the picture was painted by Constable).

[19] *Allcard v Skinner* (1887) 36 Ch D 145.

[20] The reverse proposition is all-inclusive: That is, it appears that all actions for an account are restitutionary.

any time limit under [the Act] which is applicable to the claim which is the basis of the duty to account". It is therefore important to identify the basis for the liability to account. In practice most actions for an account in autonomous unjust enrichment are against recipients of property transferred in breach of trust. As we have seen,[21] this is dealt with by sections 21-22 of the 1980 Act (albeit that these sections make no distinction between autonomous unjust enrichment and restitution for wrongs).

5.14 Factors which delay the running of time will be dealt with in detail below.[22] It is convenient, however, to mention here two provisions delaying the running of time which impact upon restitutionary claims. First, section 32(1)(c) provides that where there is a limitation period prescribed by the Act and the action is for relief from the consequences of a mistake, then the period of limitation shall not begin until the plaintiff has discovered the mistake or could have discovered it with reasonable diligence.[23] This means that an action for money had and received paid by mistake or for money mistakenly paid to the defendant's use or for a quantum meruit for services mistakenly rendered will not be time barred until six years after the plaintiff knows or should have known of his or her mistake.[24] This section would not apply if the plaintiff's only claim was for rescission of a contract in equity for mistake because in that case the 1980 Act will not provide a limitation period, and the limitation position is instead governed by the doctrine of laches.[25] This has little practical significance, however, because the equitable approach here as regards laches would be similar to the approach in section 32(1)(c).[26]

5.15 Secondly, section 29(5) provides that where any right of action has accrued to recover any debt or other liquidated pecuniary claim or any claim to the personal estate of a deceased person (or to any share or interest in any such estate), and the person liable or accountable for the claim acknowledges the claim (or makes any payment in respect of it) the right shall be treated as having accrued on and not before the date of the acknowledgement or payment. Actions for money had and received, money paid to the defendant's use, and an equitable order to account for

[21] See Part IV.

[22] See Part VIII.

[23] See *Phillips-Higgins v Harper* [1954] 1 QB 411; *Peco Arts Inc v Hazlitt Gallery Ltd* [1983] 1 WLR 1315. See also paras 8.21 - 8.22 below.

[24] A Burrows, *The Law of Restitution* (1993) pp 444 - 445.

[25] See *Peco Arts Inc v Hazlitt Gallery Ltd* [1983] 1 WLR 1315, 1327 - 8.

[26] See the discussion in Goff and Jones, *The Law of Restitution* (4th ed 1993), pp 768 - 770.

money received will fall within this section. In *Amantilla Ltd v Telefusion plc*,[27] it was held somewhat controversially, that a quantum meruit claim also fell within section 29(5).[28]

3. RESTITUTION FOR WRONGS

5.16 The extent to which a restitutionary remedy (whether an action for money had or received, an account of profits, or restitutionary damages) can be awarded for a civil wrong is unclear. We examine this area in our Report on Aggravated, Exemplary and Restitutionary Damages.[29] But what is clear is that for some torts and equitable wrongs[30] restitution may be awarded.

5.17 Where the underlying wrong is a tort, does the limitation period which applies to actions founded on tort, that is section 2 of the 1980 Act, apply also to actions for restitution for tort? Or does the fact that the remedy is restitutionary rather than compensatory (and indeed that there are different restitutionary remedies) bring into play a different limitation period? The natural interpretation of section 2 is that it does apply to restitution for tort. However, in *Chesworth v Farrar*,[31] Edmund Davies J held that an action for money had and received to recover the proceeds of sale of converted goods was not 'a cause of action in tort' for the purposes of the old six month time limit for tort actions against the deceased tortfeasor's estate. Rather the action was analogous to contract so that the contract limitation period applied, even though it was regarded as essential that the plaintiff establish the tort of conversion in order to succeed in her claim. In practice, however, it nowadays may matter little which approach is taken: on either approach the limitation period will be six years from accrual.

5.18 Where the underlying wrong is a breach of trust, the limitation period will be governed by section 21 of the 1980 Act.[32] This prescribes a period of six years[33] unless the action is in respect of a fraudulent breach of trust to which the trustee was party, or is to recover trust property or its proceeds from the trustee.[34] In this case, no statutory limitation period applies, although the doctrine of laches will apply.[35] Laches also applies in respect of restitutionary (and indeed all other) actions for breach of confidence, which is not dealt with in the 1980 Act.

5.19 The issue of when a cause of action accrues in respect of an action for restitution for wrongs is also generally undecided. Applying the view that, just as with a claim for compensation, the cause of action is the underlying wrong, the claim for

[27] (1987) Con LR 139.

[28] See discussion in HM McLean, "Limitation of Actions in Restitution" [1989] CLJ 472, 477 - 479. See also A McGee, *Limitation Periods* (2nd ed 1994), p 299.

[29] (1997) Law Com No 247.

[30] Equitable wrongs include breach of fiduciary duty and breach of confidence.

[31] [1967] 1 QB 407.

[32] See para 4.1 - 4.32 above.

[33] Section 21(2).

[34] Section 21(1).

[35] See *Nelson v Rye* [1996] 1 WLR 1378, and the discussion at paras 9.14 - 9.17 below.

restitution would be regarded as accruing at the same date as the tort or equitable wrong. An alternative approach is that, by analogy with the position for autonomous unjust enrichment, the cause of action accrues on the later of the date when the enrichment is received or the date of the relevant wrong.

PART VI
STARTING DATE, LENGTH OF PERIOD, DISCRETION TO DISAPPLY AND LONG-STOP: ACTIONS TO RECOVER LAND AND RELATED ACTIONS

6.1 The law on limitation periods for actions to recover land and related actions is set out in sections 15 to 20 and Schedule 1 of the 1980 Act. These provisions apply to actions to recover any interest in land,[1] actions to recover arrears of rent,[2] and actions to recover money secured by a mortgage or charge, or to recover the proceeds of the sale of land,[3] although it should be borne in mind that provisions of more general application may also be relevant. For example, the running of time might be postponed by the plaintiff's disability.[4] Special provisions postpone the start of the limitation period where there has been an acknowledgement of the plaintiff's title.[5]

6.2 The fact that the expiry of time can enable a person to acquire title to land through limitation means that there are parallels between limitation on the one hand, and, on the other hand, prescription, whereby the expiry of time can enable a person to acquire an easement or profit.[6] But despite the parallel, limitation and prescription are, in relation to the acquisition of interests and rights in land, quite separate concepts. They differ fundamentally in that prescription rests on the presumption of a previous grant of the right being claimed, and its lawful exercise, whereas limitation rests on adverse possession, which is necessarily an unlawful use of land.[7] Since the purpose of this project is to examine limitation of actions, that is, where the plaintiff has a cause of action against the defendant, adverse possession falls within it, whereas the creation of easements and profit by prescription is outside its scope.

6.3 However, as in relation to the tort of conversion, it would here be artificial to discuss the starting date and length of period without also considering what happens on the expiry of the limitation period.[8]

[1] Sections 15 - 18 and Schedule 1. See para 6.4 - 6.44 below.

[2] Section 19. See para 6.45 below.

[3] Section 20. See paras 6.46 - 6.50 below.

[4] See paras 8.2 - 8.5 below.

[5] See paras 8.27 - 8.35; 8.42 - 8.48 below.

[6] For a general discussion of the acquisition of easements and profits by prescription see R E Megarry and H W R Wade, *The Law of Real Property* (5th ed 1984), pp 869 - 892; *Cheshire and Burn's Modern Law of Real Property* (15th ed 1994), pp 543 - 557.

[7] Succinctly described by Nourse LJ in *Buckinghamshire CC v Moran* [1990] 1 Ch 623, 644 as "possession as of wrong". See paras 6.19 - 6.35 below.

[8] The general law on the expiry of a limitation period is dealt with in paras 9.1 - 9.5 below. See paras 3.108 - 3.115 in relation to conversion.

1. ACTIONS TO RECOVER LAND

6.4 By section 15(1) of the 1980 Act no action may be brought to recover land more than 12 years from the date on which the right of action accrued, whether to the plaintiff, or to the person through whom the land is claimed. Land is defined widely as including:

> corporeal hereditaments, tithes and rent charges and legal or equitable estate or interest therein, including an interest in the proceeds of the sale of land held upon trust for sale, but except as provided above in this definition does not include any incorporeal hereditament.[9]

6.5 Section 15(6) and Schedule 1 of the 1980 Act contain detailed rules to ascertain the date when the right of action to recover land accrues. Under section 18(1) these provisions apply to actions by those with equitable interests in land in the same way as to those with legal interests. A key requirement for all actions to recover land is set out in paragraph 8 of Schedule 1, which provides that no right of action to recover land may be treated as having accrued until the land is in adverse possession. The concept of adverse possession is discussed at paragraphs 6.19 to 6.35 below.

(1) Accrual of the Right of Action to Recover Land

(a) Present interests in land

6.6 The general rule for an action to recover land where the plaintiff, or his or her predecessor in title, was in possession of the land, but has been dispossessed or has discontinued possession, is that the right of action is treated as accruing on the date of the dispossession or discontinuance (that is the date on which another person entered into adverse possession of the land).[10] This, as opposed to the more complicated scenarios contemplated by the 1980 Act, is probably the most common situation in which adverse possession occurs in practice.[11]

6.7 Where the plaintiff, as beneficiary under a will or intestacy, is bringing an action to recover the land of a deceased person who was in possession of the land at death, and the deceased was the last person to have possession of the land, the right of action is treated as accruing at the date of death of the deceased.[12] On the other hand, if the deceased was dispossessed before he or she died, then time will not re-start in favour of the beneficiary.

6.8 Similarly, where an action is being brought to recover an interest in land passing under a transfer or other assurance which took effect after the right of action accrued to a previous holder of that interest, that action must be brought within

[9] Limitation Act 1980, s 38(1). See comments in para 6.2 above in relation to the acquisition of incorporeal hereditaments by prescription.

[10] Schedule 1, para 1. See para 6.19 - 6.35 below.

[11] T Prime and G Scanlan, *The Modern Law of Limitation* (1993), pp 182 - 183; A McGee, *Limitation Periods* (2nd ed 1994), p 206. It has been suggested that adverse possession occurs most frequently in the context of encroachments onto the boundaries of neighbouring land: K Gray, *Elements of Land Law* (2nd ed 1993), p 284.

[12] Schedule 1, para 2.

the limitation period running from the time when the right of action originally accrued.[13] However, if the transferor of the land was in possession at the date when the assurance took effect, and no-one has been in possession under the assurance (so that no right of action had accrued before the assurance took effect), the right of the person entitled to the land under the assurance to bring an action to recover the land is treated as accruing on the date when the assurance took effect.[14]

Example 1 D starts squatting on P1's land in 1993. P1 does not deal with the land. P1's title is extinguished, by adverse possession, in 2005 (12 years after 1993).

Example 2 D starts squatting on P1's land in 1993. P1 sells the land to P2 in 1996. P2's title is extinguished, by adverse possession, in 2005 (12 years after 1993).

Example 3 D starts squatting on P1's land in 1993 but leaves in 1994. P1 sells the land to P2 in 1996. D returns to the land in 1995. P2's title is extinguished, by adverse possession, in 2007 (12 years after 1995).

6.9 The Act also contains provisions to deal with the problems, now rarely encountered in practice, posed by a defective disentailing assurance of land which is subject to an entail.[15] If any person takes possession in reliance on the defective disentailing assurance, section 27 of the 1980 Act (described by one commentator as "convoluted")[16] provides that the assurance shall be treated as operating to bar the issue in tail, with retrospective effect, regardless of its defects, once that person or anyone else, other than a person entitled to possession under the settlement, has been in possession of the land for twelve years after the time when the assurance could have effectively barred the entail.[17]

(b) Future interests in land

6.10 Where the interest in land is a future interest, such as an interest in reversion or in remainder, the right of action will be treated as accruing when the interest falls into possession through the determination of the preceding interest, provided that the person entitled to the preceding interest was in possession of the land at that

[13] Section 15(4).

[14] Schedule 1, para 3. The date when an assurance takes effect is not defined in the 1980 Act: it must be strongly arguable, in the case of registered land, that a transfer would take effect when it is registered.

[15] Under the Fines and Recoveries Act 1833 an entail can be barred if the tenant in tail executes a disentailing assurance (eg a conveyance), whereupon, as long as the requirements of the statute are complied with, the grantee will take a fee simple, free from the subsequent interests. A disentailing assurance may, however, be defective because, eg, the requisite consents were not obtained from the protectors of the settlement. See R E Megarry and
H W R Wade, *The Law of Real Property* (5th ed 1984), pp 83 - 85.

[16] T Prime and G Scanlan, *The Modern Law of Limitation* (1993), pp 180 - 181.

[17] Section 27(2). The time specified in s 27(2) is the time at which the assurance, if it had been executed by the person entitled to the entailed interest, would have operated, without the consent of any other person, to bar the issue in tail and the estates and interests taking effect on the determination of the entailed interest: s 27(3).

time, and that no-one had already taken possession by virtue of the future interest claimed.[18] Where the person entitled to the preceding interest in the land (other than a term of years absolute) was *not* in possession at the date when that interest determined (so that a right of action accrued to that person before the determination of his or her interest), the limitation period will be:

(1) twelve years from the date the right of action accrued to the person entitled to the preceding interest; or

(2) six years from the date on which the right of action accrued to the person entitled to the succeeding interest

whichever period expires last.[19]

6.11 This provision does not, however, apply in the case of any estate or interest which falls into possession on the determination of an entailed interest and which might have been barred by the person entitled to the entailed interest.[20] In those circumstances, time will run against a person entitled in remainder, even though he or she may have no entitlement to possession of the land during the limitation period.[21]

6.12 Where the plaintiff has both a present and a future interest in land, and his right to bring an action to recover the present interest has become time-barred, he may not bring an action to recover the future interest unless in the meantime someone has recovered possession of the land under an intermediate interest.[22]

(c) Leases and tenancies

6.13 The general rule relating to future interests also applies to leases, so that the landlord's cause of action will accrue when its reversion falls into possession through the determination of the preceding interest,[23] that is, on the termination of the lease.[24] This will apply to recovery of the land, both from the tenant, and from

[18] Schedule 1, para 4. The same general rule also applies to leases: see para 6.13 below. Where someone entitled to the future interest has already taken possession of the land it seems to be implicit that if the possession was unlawful the cause of action would accrue when that possession was taken, and if it was lawful it would accrue when the possession ended: see A McGee, *Limitation Periods* (2nd ed 1994), p 183.

[19] Section 15(2). So, eg, if P1 is tenant for life of settled land, remainder to P2, and D starts squatting on part of the land in 1990, then P1 must commence proceedings to recover the land by 2002. If P1 dies in 1991, P2's right of action accrues in 1991, and P2 has until 2002 to commence proceedings. If, on the other hand, P1 dies in 2000, P2's limitation period will end in 2006.

[20] Section 15(3). See para 6.9 above in relation to the barring of entails.

[21] See R E Megarry and H W R Wade, *The Law of Real Property* (5th ed 1984), p 1037.

[22] Section 15(5).

[23] Section 15(2). But see para 6.16 below, in relation to the situation where rent is wrongfully received by a third party.

[24] *Chadwick v Broadwood* (1840) 3 Beav 308; 49 ER 121.

a third party who has dispossessed the tenant.[25] The question of when the tenancy is terminated will, in general, be decided according to the relevant principles of landlord and tenant law.[26]

6.14 Where the action is to recover land which is subject to a yearly or other periodic tenancy and there is no lease in writing, the determination of the tenancy, and therefore the accrual of the landlord's right of action, will be deemed to take place at the end of the period of the tenancy,[27] or, where rent is received in respect of the tenancy after this date, on the date of the last receipt of rent.[28] The meaning of "lease in writing" was examined in *Long v Tower Hamlets Borough Council.*[29] Here the tenant took possession of the premises after endorsing a copy of a letter to him from the Council setting out the terms of the tenancy agreement. It was held that this was evidence of the tenancy rather than a "lease in writing". To qualify, the document would have to create a leasehold interest in the land, being executed as a deed or fulfilling the requirements of section 54(2) of the Law of Property Act 1925.[30]

6.15 Sometimes when a lease comes to an end, and the tenant holds over by remaining in possession, a new tenancy will come into effect, either by common law, or by the operation of statutes intended to give the tenant security of tenure. Where a new tenancy comes into existence at common law, simply by virtue of the landlord receiving rent, the nature of that tenancy will depend on the intention of the parties.[31] If a periodic tenancy is created, section 15(2) of the 1980 Act will apply.[32] Where statute intervenes, the position is less clear cut. In *Jessamine Investment Co Ltd v Schwartz*[33] the Court of Appeal held that section 15(2) was capable of applying to a statutory tenancy under the Rent Act 1968 (although Megaw LJ expressed some doubt). But in the case, for example, of a business tenancy with a fixed contractual term which is continuing by virtue of section 24 of the Landlord and Tenant Act 1954, it would seem unlikely that section 15(2) would apply.[34]

[25] See paras 6.37 - 6.39 below in relation to situations where a squatter has dispossessed the tenant.

[26] See, eg, *Woodfall: Landlord and Tenant,* ch 17. See para 6.15 below in relation to "holding over".

[27] Schedule 1, para 5(1).

[28] Schedule 1, para 5(2).

[29] [1996] 3 WLR 317.

[30] See also *Moses v Lovegrove* [1952] 2 QB 533, in which the Court of Appeal held that a rent book did not amount to a lease in writing.

[31] *Javad v Mohammed Aqil* [1991] 1 WLR 1007 (CA).

[32] See para 6.13 above. See para 6.17 below in relation to the position where a tenancy at will is created.

[33] [1978] 1 QB 264.

[34] But see P Walter and J Harris, *Claims to the Possession of Land: The Law and Practice* (3rd ed 1997), p 617. Suppose that L grants T a lease in writing for 3 years from 1996, to which Part II of the Landlord and Tenant Act 1954 applies. The contractual term expires in 1999, but the tenancy continues by virtue of s 24 of the 1954 Act. It would appear that time would not run against the landlord until the continuation tenancy was terminated in accordance with the 1954 Act, even if, for example, T stopped paying rent in 2000. If, on

6.16 Although a third party cannot start time running against a landlord by taking *physical* possession of land while it is subject to a lease,[35] it has been established since the last century that a third party can start the limitation period by wrongfully receiving rents from the tenant.[36] This has been described as being equivalent to adverse possession of the reversion,[37] or as a means by which the stranger gains possession of the land.[38] The rule is now enacted as paragraph 6 of Schedule 1 to the 1980 Act. Three conditions must be satisfied in order for time to run:

(i) The lease must be a lease in writing reserving a rent of £10 or more a year;

(ii) The rent must be received, as rent,[39] by someone who wrongfully claims to be the tenant's direct landlord; and

(iii) No rent is subsequently received by the rightful landlord.

When these conditions are satisfied the right of action will accrue on the date when the rent was first received by the claimant to the reversion.[40] Time will, however, not run against the Crown under paragraph 6.[41]

6.17 As with tenants under other types of tenancy,[42] time will not start to run in favour of a tenant at will until the tenancy is terminated.[43] Before 1980 the law had provided that a tenancy at will would be deemed to end, and therefore time would run, as at the date one year after its creation, if it did not end earlier.[44] This led to a sharp distinction, for limitation purposes, between a tenancy at will, and a licence,

the other hand, the original lease contained provisions validly contracting out of the protection given by the 1954 Act, and the tenancy created by T holding over and paying rent (in the absence of writing) was a periodic tenancy to which s 15(2) of the Limitation Act 1980 applied, then time would run against L when T stopped paying the rent.

35 See para 6.13 above.

36 See T Prime and G Scanlan, *The Modern Law of Limitation* (1993), pp 184 - 185.

37 R E Megarry and H W R Wade, *The Law of Real Property* (5th ed 1984), p 1038 - 1039.

38 T Prime and G Scanlan, *The Modern Law of Limitation* (1993), p 185.

39 See *Doe d Newman v Godsill* (1840) 4 QB 603n, where the defendant received rent on account of an annuity payable to the defendant by the plaintiff landlord. This was held not to start time running against the landlord. Time will not run if the defendant receives rent as the plaintiff's agent: *Lyell v Kennedy* (1889) 14 App Cas 437 (see also para 6.32 below).

40 Schedule 1, para 6.

41 *Ibid*, para 6(2) See A McGee, *Limitation Periods* (2nd ed 1994), pp 155 - 156.

42 Except informal periodic tenancies.

43 The general wording of s 15(2) applies. In relation to tenancies at will generally see *Woodfall: Landlord and Tenant*, para 6.062 - 6.074.

44 Limitation Act 1939, s 9(1), repealed by Limitation Amendment Act 1980, s 3(1).

in respect of which time will never run until its termination.[45] This was regarded as anomalous,[46] and the special status of tenancies at will was brought to an end.

6.18 Where a forfeiture or breach of condition has given rise to a right to recover the land, the right of action will be treated as accruing on the date of the forfeiture or breach of condition.[47] If the right of action has accrued to someone with a future interest in the land, and the land is not recovered pursuant to that right, the right of action will be treated as not accruing until the relevant interest falls into possession.[48]

(2) Adverse Possession

(a) The meaning of adverse possession

6.19 The 1980 Act provides that:

> no right of action to recover land shall be treated as accruing unless the land is in the possession of some person in whose favour the period of limitation can run (referred to below in this paragraph as "adverse possession")[49]

6.20 Adverse possession is therefore central to the provisions of the 1980 Act on limitation periods for the recovery of land. Although the concept of adverse possession has a long history, and until the nineteenth century was a technical term of art,[50] it does not receive any more precise definition in the 1980 Act than the one quoted above. It has therefore fallen to the courts to develop the meaning of adverse possession, which has given rise to what has been described as "a mass of authority, some of it conflicting".[51]

6.21 Adverse possession must be continuous throughout the limitation period, and if the land ceases to be in adverse possession, the right of action will cease to be treated as having accrued.[52] In practice, it is possible for adverse possession to come to an end in a number of different ways before the original owner's title is extinguished:[53] the owner may reach an arrangement with the person in adverse possession[54] under which the squatter is permitted to remain,[55] or the squatter

[45] See, eg, *Cobb v Lane* [1952] 1 All ER 1199; *Hughes v Griffin* [1969] 1 WLR 23; *Heslop v Burns* [1974] 1 WLR 1241; *Palfrey v Palfrey* (1973) 229 EG 648. See para 6.26 below in relation to licences.

[46] See, eg, R E Megarry and H W R Wade, *The Law of Real Property* (5th ed 1984), p 1039.

[47] Schedule 1, para 7(1).

[48] Schedule 1, para 7(2).

[49] Schedule 1, para 8.

[50] R E Megarry and H W R Wade, *The Law of Real Property* (5th ed 1984), p 1034.

[51] A McGee, *Limitation Periods* (2nd ed 1994), p 211.

[52] Schedule 1, para 8(2).

[53] See T Prime and G Scanlan, *The Modern Law of Limitation* (1993), p 186.

[54] Who, for the sake of brevity, will be referred to in this section as "the squatter".

[55] This would mean that possession would not be adverse: see para 6.26 below.

might leave the land voluntarily, or the owner might succeed in removing him. One squatter can take advantage of the adverse possession of an earlier squatter to claim title to the land once the limitation period has expired.[56] This is probably the case whether the second squatter took possession of the property with the first squatter's agreement, or against the first squatter's will (that is, adverse possession vis-à-vis both the paper owner and the first squatter).[57]

6.22 The act of adverse possession involves two elements: a loss of possession by the owner and a taking of possession by the squatter. This can happen in one of two ways, as described by Slade LJ in *Buckinghamshire County Council v Moran* "(1) discontinuance by the paper owner followed by possession, or (2) dispossession (or, as it is sometimes called, 'ouster') of the paper owner."[58] Discontinuance, in the sense of abandonment, will require proof, and only the slightest acts on the owner's part will suffice to establish that use has not been discontinued.[59]

6.23 The squatter must have the requisite intention to possess the land, sometimes known as *animus possidendi.*[60] This constitutes the intention to exclude the owner as well as other people.[61] The meaning of *animus possidendi* was explained by Slade J in *Powell v McFarlane*:[62]

> [T]he *animus possidendi* involves the intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow.[63]

[56] *Mount Carmel Investments v Peter Thurlow Limited* [1988] 1 WLR 1078. See also *Willis v Earl Howe* [1893] 2 Ch 545, 553.

[57] See, eg K Gray, *Elements of Land Law* (2nd ed 1993) pp 286 - 287. Cf A McGee, *Limitation Periods* (2nd ed 1994), p 211, where it is submitted that, after *Mount Carmel*, the position is still unclear where the second squatter has taken adverse possession as against the first squatter. But if, in this situation, the second squatter is *not* entitled to aggregate his or her period of adverse possession with that of the first squatter, it seems strange that the plaintiff in *Mount Carmel* needed to rely on a purported assignment of rights from the first squatter to the plaintiff, as paper owner. Where one squatter dispossesses another time will, of course run, as between the squatters, from the time of that dispossession: *Mount Carmel Investments v Peter Thurlow Limited* [1988] 1 WLR 1078, 1086, *per* Nicholls LJ.

[58] [1990] Ch 623, 635.

[59] *Powell v McFarlane* (1979) 38 P & CR 452, 472, *per* Slade J. For an example of discontinuance, see *Red House Farms (Thorndon) Ltd v Catchpole* [1977] 2 EGLR 125 (CA).

[60] See, eg, *Buckinghamshire CC v Moran* [1990] 1 Ch 623, 636, *per* Slade LJ. The intention of the *owner* is in itself irrelevant, although the court may take the squatter's knowledge of the owner's intentions into account in deciding whether the squatter has *animus possidendi*: *ibid*, 644 - 645, *per* Nourse LJ.

[61] *Littledale v Liverpool College* [1900] 1 Ch 19, 23, *per* Lindley MR.

[62] (1979) 38 P & CR 452, 471 - 472.

[63] See paras 6.29 - 6.31 below in relation to the acts which may be sufficient to demonstrate the necessary intention.

It is not necessary, however, for the squatter to take possession with the intention of owning it: an intention to possess is sufficient.[64]

6.24 If there is no evidence to the contrary, there is a presumption that the owner of the land is in possession of it.[65] It will then be for the squatter to bring evidence to rebut the presumption and show that, as a matter of fact, the paper owner is no longer in possession. Sometimes there may be doubt, because of uncertainty in the title, as to who the paper owner actually is, and therefore who has the benefit of the presumption.[66]

6.25 In each case, it is necessary for someone other than the owner to demonstrate that he or she has taken possession of the land without the consent of the owner. Lack of knowledge of the dispossession on the owner's part, in the absence of fraud, will not prevent adverse possession from taking place. [67] Nor will a lack of power on the owner's part to deal with the land.[68] But it is not sufficient for the owner merely to share occupation of the land with the squatter.[69]

6.26 Possession is never adverse where the squatter enters the property as the owner's licensee.[70] An example of this rule is provided by *Hyde v Pearce.*[71] Here a purchaser was allowed to take possession of a property pursuant to the contract for sale before completion. A dispute as to the purchase price then arose, and the contract was never completed. Fourteen years after going into possession, the purchaser claimed to have good possessory title to the property. The Court of Appeal rejected the claim, on the grounds that he had entered into possession with the consent of the owner, under the terms of the contract, and that the contract had never been repudiated. In *BP Properties Limited v Buckler*[72] the Court of Appeal went considerably further, in holding that an owner's unilateral offer of a licence to a squatter already in adverse possession, to which the squatter did not respond, brought the adverse possession to an end. The correctness of the decision must be open to doubt because it rests on the erroneous assumption that it is the paper owner's intention rather than the squatter's that is relevant to adverse possession.[73]

64 *Buckinghamshire CC v Moran* [1990] 1 Ch 623, 642 - 643, *per* Slade LJ. Cf *Littledale v Liverpool College* [1900] 1 Ch 19, 23, *per* Lindley MR; *George Wimpey & Co Ltd v Sohn* [1967] Ch 487, 510 - 511, *per* Russell LJ.

65 *Powell v McFarlane* (1977) 38 P & CR 452. Under s 38(8) of the 1980 Act, receipt of rent or tithes is to be construed as possession of land in the case of tithes and rent charges.

66 T Prime and G Scanlan, *The Modern Law of Limitation* (1993), p 188.

67 *Rains v Buxton* (1880) 14 Ch D 537.

68 *Midland Railway Co v Wright* [1901] 1 Ch 738.

69 *Morris v Pinches* (1969) 212 EG 1141.

70 See, eg, *Hughes v Griffin* [1969] 1 WLR 23, 30, *per* Harman LJ; *Powell v McFarlane* (1977) 38 P & CR 452, 469, *per* Slade J.

71 [1982] 1 WLR 560.

72 (1988) 55 P & CR 337.

73 For criticism see H Wallace, "Limitation, Prescription and Unsolicited Permission" [1994] Conv 196, 198 - 207.

6.27 Before the 1980 Act some decisions were felt to have established the doctrine that a licence would be implied in favour of the squatter, even where there was no factual basis for doing so, if the acts of the squatter did not substantially interfere with any plans the owners might have for the future use of undeveloped land.[74] Paragraph 8(4) of Schedule 1 to the 1980 Act reversed the effect of these cases by providing that it may not be assumed that a squatter's occupation of land is with the permission of the owner merely because it is not inconsistent with the owner's present or future occupation of that land. This does not prevent the court holding that such occupation is by the implied consent of the owner where the facts justify such a finding.

6.28 In *Buckinghamshire County Council v Moran*[75] it was nevertheless argued that a rule that where an owner had plans for a specific future use of land, the owner's possession should not be regarded as being discontinued unless and until the squatter's conduct interfered with that intended use,[76] survived the enactment of paragraph 8(4) and the consequent abolition of the implied licence doctrine. This argument was decisively rejected by the Court of Appeal, which held that the earlier cases could be explained on the basis, not of an implied licence, but on the basis that in the absence of clear evidence to the contrary the court should infer from the squatter's knowledge of the intended use that there was no intention to possess.[77] The Court of Appeal recently reaffirmed this reasoning in *London Borough of Hounslow v Minchinton.*[78]

6.29 Whether a squatter has taken sufficient control over the land to establish adverse possession or not is a question of fact in each case, and will depend on the nature of the land and the possible uses for it. The character of the land is especially important.[79] Where, for example, the only practical use for land was as a shooting ground, organising occasional shoots over the land was sufficient to demonstrate adverse possession.[80] It is particularly difficult to establish that unoccupied land is in adverse possession. Circumstances which have led the court to conclude that the squatter has taken possession of the land, with the relevant intention, include the following:

[74] See in particular *Wallis's Cayton Bay Holiday Camp Ltd v Shell-Mex and BP Ltd* [1975] QB 94 (Stamp LJ dissenting) and *Gray v Wykeham Martin & Goode* (unreported, 17 January 1977); and also *Tecbild Ltd v Chamberlain* (1969) 20 P & CR 633. See also T Prime and G Scanlan, *The Modern Law of Limitation* (1993), pp 188 - 189; A McGee, *Limitation Periods* (2nd ed 1994) pp 212 - 213.

[75] [1990] Ch 623.

[76] *Leigh v Jack* (1879) 5 Ex D 264, 273, *per* Bramwell LJ.

[77] [1990] Ch 623, 637 - 640, *per* Slade LJ. See also *Powell v McFarlane* (1979) 38 P & CR 452, 484, *per* Slade J.

[78] (1997) 74 P & CR 221. See also H W Wilkinson, "Possession as of Wrong" (1997) 147 NLJ 1662.

[79] See *Marshall v Taylor* [1895] 1 Ch 641.

[80] *Red House Farms (Thorndon) Limited v Catchpole* [1977] 2 EGLR 125, although, since it was established in that case that the owner had abandoned its use of the property, the test, in terms of activities carried out on the land, that the squatter had to satisfy to be shown to have taken possession, was not a difficult one.

(1) where the land has been effectively enclosed so as to prevent access by anyone apart from the squatter;[81]

(2) where a gully on the land has been filled in with a view to preparing the land for building, a fence has been erected round the land and reinstated after being removed by the owner;[82]

(3) ploughing up and cultivating agricultural land and fencing it off as part of a holding already owned.[83]

6.30 Acts which can be interpreted in a way that is inconsistent with an intention to take possession will not amount to adverse possession. For example, in *Littledale v Liverpool College*[84] the plaintiffs had a right of way across a strip of land between two fields. They erected a gate at each end of the strip, and padlocked them. This action was used to found a claim for possessory title to that land. Had they not had the right of way, it might well have been sufficient to show adverse possession of the strip. However, the Court found that the action was equivocal, and that the gates had been erected, not to exclude the true owners, but to protect their right of way by excluding the public.

6.31 Acts which have been found too trivial to show the relevant intention, and therefore do not constitute adverse possession, include using land to rear greyhounds;[85] grazing family ponies on the land and repairing the fencing,[86] using land to dispose of chicken manure,[87] and, sometimes, fencing land off, where the purpose of the fence is something other than excluding the owner.[88] In addition, where the squatter shares possession of the property with the owner, there is no adverse possession, as the owner has not been dispossessed.

(b) Possession on behalf of others

6.32 Possession of land by a party other than the owner will not be adverse where the land is held on behalf of the owner. This will be the case, for example, where possession is obtained by an agent of the true owner.[89] Similarly, anyone entering into possession of land belonging to an infant with knowledge of the child's rights will be assumed to hold the land as guardian for the child.[90]

[81] See *Buckinghamshire County Council v Moran* [1990] 1 Ch 623, where the land was also annexed to the adjoining plot and maintained as part of the garden.

[82] *Treloar v Nute* [1976] 1 WLR 1295.

[83] *Seddon v Smith* (1877) 36 LT 168.

[84] [1900] 1 Ch 19.

[85] *Williams Brothers Direct Supply Ltd v Raftery* [1958] 1 QB 159.

[86] *Tecbild Ltd v Chamberlain* (1969) 20 P & CR 633.

[87] *Basildon District Council v Manning* (1975) 237 EG 879.

[88] See, eg, *Williams Brothers Direct Supply Ltd v Raftery* [1957] 1 QB 159; *George Wimpey & Co Ltd v Sohn* [1967] Ch 487; *Basildon District Council v Manning* (1975) 237 EG 879.

[89] *Lyell v Kennedy* (1889) 14 App Cas 437.

[90] *Young v Harris* (1891) 65 LT 45.

6.33 Where land is held by co-owners, there is a presumption at common law, following the decision in *Culley v Doe d Taylorson*, that possession of that land by one tenant in common is possession on behalf of the other tenants, so that it will not be considered adverse possession.[91] This presumption can be rebutted if the circumstances show that the possession has excluded the other tenants in common. The decision of the Privy Council in *Paradise Beach and Transportation Co Ltd v Price-Robinson*,[92] in which time was held to run where some, but not all, of the tenants in common were in possession, has seemed difficult to reconcile with *Culley*, but the conflict can perhaps be resolved by viewing the *Paradise Beach* case as one in which, on its facts, the presumption was rebutted.[93]

6.34 Where a tenant of property takes possession of other land, there is a presumption that the additional land is held as part of the tenancy. The consequences of this were explored in the judgment of Sir John Pennycuick V-C in *Smirk v Lyndale Developments Limited.*[94] Here, a tenant had taken possession of a plot of land, adjacent to his own holding and also belonging to his landlord, and cultivated it as a garden. The freehold of the land was sold, and the new landlord wished to develop the land. The tenant applied for a declaration that he had good possessory title to the land. It was held that the tenant was occupying the land as an addition to the land comprised in his tenancy and not otherwise adversely to the landlord. When the tenancy ended, so would his right to the additional land.[95]

6.35 In *Smirk*, the tenant had taken possession of land adjacent to his original holding. In contrast, the presumption that the additional land is held as part of the tenancy may be rebutted if the land occupied by the tenant is some distance from land subject to the tenancy.[96] The presumption will also be rebutted if the tenant makes it clear to the landlord that he is asserting his own title against the landlord.[97]

(3) Consequences of expiry of limitation period

(a) Freehold Title

6.36 Under section 17 of the 1980 Act, subject to the provisions on settled land and to section 75 of the Land Registration Act 1925, the expiry of a limitation period in respect of an action to recover land not only bars the remedy but extinguishes the

[91] (1840) 11 Ad & El 1008, 113 ER 697.

[92] [1968] AC 1072.

[93] See A McGee, *Limitation Periods* (2nd ed 1994), pp 216 - 217; T Prime and G Scanlan, *The Modern Law of Limitation* (1993), pp 193 - 194.

[94] [1975] Ch 317.

[95] The Vice-Chancellor held, however, that there was a surrender of the existing tenancy and a grant of a new one when the new landlord purchased the freehold, so the tenant had not been in adverse possession for long enough to get good title as against the new landlord. This part of the decision was reversed on appeal.

[96] [1975] Ch 317, 328, per Sir John Pennycuick V-C. It has been suggested that the presumption does not apply at all where the additional land is not adjacent to the land demised by the lease because, for example, of the logical difficulty encountered where the tenant is tenant of several different properties under different landlords: A McGee, *Limitation Periods* (2nd ed 1994), p 220.

[97] *Long v Tower Hamlets Borough Council* [1996] 3 WLR 317.

title to the land of the person who would have been able to bring an action to recover it. This is contrary to the usual effect of the expiry of a limitation period, which is to bar the remedy but not the right.[98] Where the extinguished title is a fee simple, the squatter does not succeed to the old title, but becomes entitled to a separate possessory title in the land. Where the land is registered, the squatter is entitled to be registered as the proprietor of the land, and until such registration, the registered owner will hold the legal estate in the land on trust for the squatter.[99]

(b) Leasehold Title

6.37 Where the extinguished title is a leasehold, the position is more complicated, and differs markedly depending whether the title is registered or unregistered. Where the title is unregistered, the squatter obtains a possessory title as against the lessee of the property, but the title of the lessor is unaffected.[100] The title obtained by the squatter is a fee simple,[101] although one that can be defeated by the "paper" freeholder once the lease has come to an end. Therefore, the squatter does not succeed to the full leasehold estate held by the lessee, and there will be no privity of estate between the squatter and the lessor.[102]

6.38 *St Marylebone Property Co Limited v Fairweather*[103] is now the leading case where the leasehold title is unregistered. After a neighbour (S) had obtained possessory title of leasehold property, the former lessee of the property (T) surrendered his interest to the lessor (L). L then claimed the right to eject S from the property. A majority of the House of Lords[104] held that the surrender operated to determine the term of years, so that L's estate fell into possession, and its right of action against S accrued at that point. Because S's title was an entirely new title there was no transmission to S of T's rights against L. Consequently, L was entitled to eject S.[105]

6.39 The position when the leasehold title is registered is significantly different. *Spectrum Investment Co Limited v Holmes*[106] dealt with facts similar to *St Marylebone Property Co Limited v Fairweather*, except that both the freehold and leasehold title were registered, and the squatter had been registered as proprietor of the leasehold estate on the expiry of the limitation period. The lessee purported to surrender

[98] See paras 9.1 - 9.5 below. But see para 3.109 above (conversion).

[99] Land Registration Act 1925, s 75(1). But see *St Marylebone Co Ltd v Fairweather* [1963] AC 510, 542 - 543, where Lord Radcliffe expressed doubts as to the nature of the trust. See also A McGee, *Limitation Periods* (2nd ed 1994), pp 222 - 223; T Prime and G Scanlan, *The Modern Law of Limitation* (1993), pp 196 - 197.

[100] *St Marylebone Property Co Ltd v Fairweather* [1963] AC 510.

[101] See, eg, *Rosenberg v Cook* (1881) 8 QBD 162, 165, *per* Jessel MR.

[102] *Tichbourne v Weir* (1892) 67 LT 735.

[103] [1963] AC 510.

[104] Lord Radcliffe, Lord Denning and Lord Guest; Lord Morris of Borth-y-Gest dissenting (Only four Lords were sitting).

[105] For criticism see K Gray, *Elements of Land Law* (2nd ed 1993), p 288; R E Megarry and H W R Wade, *The Law of Real Property* (5th ed 1984), p 1052. But see also E Cooke, "Adverse possession - problems of title in registered land" (1994) 14 LS 1, 6 - 7.

[106] [1981] 1 WLR 221.

the leasehold title to the lessor. However, at the time of surrender, the lessee was no longer the registered proprietor of the leasehold interest. Browne-Wilkinson J found that the squatter had been correctly registered proprietor of the leasehold interest under section 75(2) of the Registration Act 1925. The lessee was no longer in a position to surrender the interest, and the surrender was therefore ineffective. Browne-Wilkinson J left open the wider question whether the squatter simply became the successor in title to the lessee, taking subject to and with the benefit of the covenants in the lease. He also noted that until the point of registration, the squatter would be in the same position whether the land was registered or unregistered.

(c) Settled Land[107]

6.40 Where the limitation period has expired in respect of the right of action of a tenant for life or statutory owner of settled land, the legal estate is not extinguished until the right of action of any beneficial owner has been barred under the provisions of the 1980 Act. Where the beneficial owner's right of action has not accrued or has not been barred under the Act the estate remains vested in the tenant for life or statutory owner and will devolve in accordance with the provisions of the Settled Land Act 1925.[108] Where settled land is held by a statutory owner, he or she remains able to bring an action to recover the land on behalf of the beneficial owner even if the statutory owner's own right of action has become time-barred.[109]

6.41 Similarly, where land is held on trust, and the limitation period for an action by the trustees to recover the land has expired, the legal estate of the trustees is not extinguished until the right of action of any person entitled to a beneficial interest in the land or the proceeds of sale has become barred under the 1980 Act.[110] The trustees also remain able to bring an action on behalf of the beneficial owner where their own right of action has become time-barred.[111]

(4) The Crown and Special Corporations

6.42 Section 15(7) and part 2 of Schedule 1 of the 1980 Act modify the application of section 15(1) in respect of actions to recover land brought by the Crown,[112] or by spiritual or eleemosynary corporations sole (that is archbishops, bishops, vicars and other officers in the Church of England, and corporations established for the perpetual distribution of free alms). The limitation period for such actions is set at thirty years instead of twelve. Where the action is to recover foreshore,[113] the

[107] Under the Trusts of Land and Appointment of Trustees Act 1996, s 2 it is not now possible to create new settlements of land within the meaning of the Settled Land Act 1925. The 1996 Act implemented recommendations contained in the Law Commission's Report on Transfer of Land: Trusts of Land (1989) Law Com No 181.

[108] Section 18(2).

[109] Section 18(4).

[110] Section 18(3).

[111] Section 18(4).

[112] Or by the Duchy of Cornwall or the Duchy of Lancaster: s 37.

[113] Foreshore is defined as "the shore and bed of the sea and of any tidal water, below the line of the medium high tide between the spring tides and the neap tides": Schedule 1, para 11(3).

limitation period is either sixty years from the date of accrual of the action, or thirty years from the date when the land ceased to be foreshore, whichever first expires.

6.43 If section 17 of the 1980 Act is read literally, successful adverse possession of unregistered land against the Crown extinguishes the *whole* of the Crown's title so that the squatter would acquire a title to land which is allodial.[114] Similarly, if this interpretation is correct, then, as regards registered land owned by the Crown,[115] section 75(1) of the Land Registration Act 1925 might be construed so that the statutory trust in favour of the squatter was a trust of the whole of the Crown's interest. But it is a fundamental principle of English land law that all land in England and Wales is held in fee from the Crown,[116] and it seems certain that the 1980 Act did not intend this principle to be disturbed, so that the effect of the expiry of the limitation period must be to extinguish the Crown's title in so far as it is inconsistent with the creation of a fee simple in the squatter, but not otherwise.

6.44 Where the right of action accrued to the Crown, or to the relevant corporation but the action is brought by a person claiming through it, the limitation period will expire either after the period during which the action could have been brought by the Crown or corporation, or twelve years after the action accrued to a person other than the Crown or corporation, whichever first expires.

2. ACTIONS TO RECOVER RENT

6.45 By section 19 of the 1980 Act, no action may be brought (or distress made) to recover arrears of rent, or damages in respect of arrears of rent, more than six years from the date on which the arrears became due. There is no extended limitation period if the lease is under seal and (as is invariably the case) contains a covenant to pay rent.[117] If rent is already in arrears, a new cause of action will arise each time a new instalment of rent becomes due.[118] So, for example, if in 1987 T stops paying rent to L, and L issues proceedings for the arrears in 1997, L will be able to recover rents due from 1991 to 1997: the other instalments will be statute barred. Where a landlord is seeking to recover arrears of rent from a guarantor who has given a guarantee in respect of the tenant's performance of its covenants, the moneys sought will be classed as damages in respect of arrears of rent, and there will be a limitation period under section 19 of six years from the demand being made of the guarantor.[119]

[114] That is, held independently of any ultimate lordship.

[115] Although land (eg foreshore) which has always been owned by the Crown, as opposed to passing into Crown ownership by transfer or escheat, is incapable of registration, because it is not, and has never been, "land of any tenure" within the Land Registration Act 1925, s 3(viii). See *Scmlla Properties Ltd v Gesso Properties (BVI) Ltd* [1995] BCC 793, 798, *per* Stanley Burnton QC (sitting as a deputy judge of the Chancery Division).

[116] See, eg, R E Megarry and H W R Wade, *The Law of Real Property* (5th ed 1984), p 12; F Pollock and F W Maitland, *The History of English Law* (2nd ed 1968), vol 1, pp 232 - 237.

[117] See s 8(2).

[118] *Archbold v Scully* (1861) 9 HLC 360, 11 ER 769.

[119] *Romain v Scuba TV Ltd* [1996] 3 WLR 117. But under the Landlord and Tenant (Covenants) Act 1995, s 17(3) there is a time limit of six months within which the landlord

3. ACTIONS TO RECOVER MONEY SECURED BY A MORTGAGE OR CHARGE OR TO RECOVER PROCEEDS OF THE SALE OF LAND

6.46 The limitation period for a mortgagor's action to redeem a mortgage, when the mortgagee is in possession of the property, is twelve years after the mortgagee has taken possession.[120]

6.47 The limitation periods in respect of the mortgagee's rights are set out in section 20 of the 1980 Act. The limitation period for actions to recover a principal sum of money secured by a mortgage or other charge, whether on real or personal property, or to recover the proceeds of the sale of land, is twelve years.[121] The right of action will accrue when the right to receive the money accrues. Where the property mortgaged consists of a future interest, or an unmatured life insurance policy, the right of action will not accrue until the interest falls into possession, or the policy matures or is determined.[122]

6.48 Actions to foreclose in respect of mortgaged personal property also have a limitation period of twelve years, under section 20(2). Where the mortgagee is in possession of the mortgaged property, the right of action will not accrue until its possession ceases.

6.49 Under section 20(5) the limitation period in respect of actions to recover arrears of interest in respect of any sum of money secured by a mortgage or other charge or payable in respect of proceeds of the sale of land is limited to six years after the date on which the interest became due. This was held in *Barclays Bank PLC v Walters*[123] to mean six years after the interest becomes due for payment in accordance with whatever terms have been agreed between the parties (whether in the mortgage deed or elsewhere). However, where the property charged was previously in the possession of a prior mortgagee (or other incumbrancer) an action within one year after that possession ceases can recover all the arrears of interest due during the period of the previous possession, even if that period is greater than six years.[124] As with actions to recover the principal, the date when the interest is treated as becoming due is postponed where the property charged consists of a future interest or life insurance policy until the interest falls into possession, or the policy matures or is determined.[125] The expiry of the limitation period for recovering arrears of interest does not preclude the mortgagee from deducting arrears of interest from the sale proceeds if the mortgagee goes into possession and the mortgagor subsequently brings a redemption action.[126]

must notify the default to the guarantor. If the landlord fails to do so, the guarantor is not liable to pay.

[120] Section 16.

[121] Section 20(1). Actions to foreclose in respect of mortgaged real property are excluded from s 20, coming under s 15. See s 20(4).

[122] Section 20(3).

[123] Unreported, 13 October 1988 (CA).

[124] Section 20(6).

[125] Section 20(7).

[126] *Holmes v Cowcher* [1970] 1 WLR 834.

6.50 Where a lender holds a second mortgage over a property, and it is no longer able to enforce its rights because the limitation period has expired, its rights will be barred, not only against the mortgagor, but also against the first mortgagee.[127] So, the statute-barred second mortgagee will lose the right to redeem the first mortgage.[128] If the first mortgagee exercises the power of sale, the second mortgagee has no right to receive any of the proceeds of sale under section 105 of the Law of Property Act 1925.[129]

[127] The same applies, mutatis mutandis, to third and subsequent mortgagees, with regard to prior mortgages. See, eg, *Young v Clarey* [1948] Ch 191.

[128] *Cotterell v Price* [1960] 1 WLR 1097.

[129] *Young v Clarey* [1948] Ch 191.

PART VII
STARTING DATE, LENGTH OF PERIOD, DISCRETION TO DISAPPLY AND LONG-STOP: MISCELLANEOUS ACTIONS

1. ACTIONS ON A JUDGMENT

7.1 By section 24 of the 1980 Act, no action may be brought on a judgment more than six years after the judgment becomes enforceable.[1] This must be read subject to the distinction recognised by the courts between enforcing a judgment by suing on it, and enforcing a judgment by execution. Section 24 only applies to suing on a judgment. This was confirmed in *National Westminster Bank v Powney.*[2] Hearing an appeal against a decision to set aside a warrant for possession, the Court of Appeal endorsed the distinction made in *WT Lamb & Sons v Rider*[3] between the substantive right to sue on a judgment and the procedural remedies provided by the courts for execution of a judgment. It was held that applications to levy execution did not come within the definition of "action" under section 24 and that, therefore, no limitation period under the 1980 Act applied to them.[4]

7.2 By section 24(2) of the 1980 Act, arrears of interest in respect of a judgment debt are not recoverable after the expiry of six years from the date on which the interest became due. In *Lowsley v Forbes,*[5] the Court of Appeal held that this limitation period is also only applicable to the interest the plaintiff can claim in actions on a judgment; it does not apply to the interest the plaintiff can claim in executing a judgment.[6]

[1] Under the provisions of Rules of the Supreme Court, Order 42 rule 3, the judgment will take effect on the date it is given, unless the Court orders it to take effect on a later day. There is an exception under rule 3A for judgments entered in default of acknowledgement against a foreign state. Such judgments take effect two months after the judgment has been served on the state.

[2] [1991] Ch 339. See also *Berliner Industriebank Aktiengesellschaft v Jost* [1971] 1 QB 278, 293, affirmed by the Court of Appeal [1971] 2 QB 463; *Lowsley v Forbes, The Times,* 5 April 1996; and *In re A Debtor* [1997] 2 WLR 57.

[3] [1948] 2 KB 331.

[4] Under the provisions of RSC, O 46, r 2 (and CCR, O 26 r 5(1)), leave of the court is necessary to levy execution where six years or more have elapsed since the date of the judgment or order. An action on the judgment can, by producing a fresh judgment, extend the time available for enforcing the earlier judgment either by execution without leave of the court for a further six years, or by reliance on the later judgment in related proceedings. In *ED & F Man (Sugar) Ltd v Haryanto* (CA) (unreported, 17 July 1996) an action on the judgment brought expressly for this purpose was held to be permissible by the Court of Appeal. The burden is on the defendant to show that such an action is an abuse of the process of the court.

[5] *The Times,* 5 April 1996.

[6] Evans LJ noted that "I am inclined to the view that s 24(2) is a historical relic and may be an oddity in itself now that the periods for the judgment and for interest are the same." See transcript.

2. ARBITRATION

(1) Arbitration Awards

7.3 Under section 7 of the 1980 Act the limitation period for an action to enforce an arbitration award is six years from the date when the cause of action accrued. In *Agromet Motoimport v Maulden Engineering Co (Beds) Ltd*[7] the plaintiffs sued on an arbitration award after the limitation period in respect of the original breach of contract, which had given rise to the award, had expired. The defendants argued that the cause of action referred to in section 7 accrued when the breach of the original agreement occurred. This argument was rejected. It was held that the action to enforce the award is an independent action arising from an implied term in the agreement that the arbitration award will be honoured, distinct from the original breach of contract occasioning the arbitration. The cause of action therefore accrues from the breach occasioned by the defendants' failure to honour the award when called upon to do so.[8]

(2) Arbitral Proceedings

7.4 Under section 13 of the Arbitration Act 1996, the provisions of the Limitation Act 1980 and any other enactment relating to the limitation of actions apply to arbitral proceedings as they apply to legal proceedings.[9] The term "cause of action" in the Limitation Act 1980 has been interpreted as the "cause of arbitration" in the case of an arbitration. So, for example, in *Christian Salvesen (Properties) Ltd v Central Electricity Generating Board*[10] the claimants applied for compensation under the Electricity Lighting Act 1882 for the loss of the development value of their land because of the construction of five pylons carrying overhead power lines on that land, which had led to an application for planning permission for residential development being rejected. The Act provided for such compensation to be assessed by arbitration. The Lands Tribunal noted, obiter, that the application was an action to recover a sum recoverable by virtue of an enactment under section 9 of the 1980 Act (so that the limitation period was six years from when the cause of action or arbitration arose), and that the cause of arbitration accrued when the pylons were first constructed, rather than when the applicants were refused planning permission. The application was therefore time barred.[11]

7.5 Section 14 of the Arbitration Act 1996 provides that the parties are free to agree when arbitral proceedings are to be regarded as commenced for the purposes of

[7] [1985] 1 WLR 762.

[8] *Ibid*, 773, *per* Otton J.

[9] The Arbitration Act 1996 ss 13 - 14 replace s 34 of the Limitation Act 1980. Under ss 94 - 95 of the Arbitration Act 1996 (which replaces s 34(6) of the Limitation Act 1980) these provisions apply in the same way to arbitrations under an enactment. Section 13(3) of the Arbitration Act 1996 provides that in determining when a cause of action accrued for the purpose of the Limitation Acts, any provision that an award is a condition precedent to the bringing of legal proceedings in respect of a matter to which the arbitration agreement applies is to be disregarded.

[10] (1984) 48 P & CR 465. See also *Pegler v Railway Executive* [1948] AC 332.

[11] See also *Vincent v Thames Conservancy* (1953) 4 P & CR 66 and *International Bulk Shipping and Services Ltd v Minerals and Metals Trading Corp of India* [1996] 1 All ER 1017.

the Limitation Acts. In the absence of such an agreement, the arbitral proceedings will be considered to have started when one party serves on the other a notice in writing requiring the submission of a dispute to an arbitrator who has already been appointed, or the appointment of an arbitrator (or where the arbitrator is to be appointed by a person other than the parties to the dispute, where a notice is served on the appointor, requiring him or her to select an arbitrator).[12]

7.6 Whether a letter between the parties is enough to commence the arbitration under the provisions of section 14 will depend on the terms of the letter. In *Nea Agrex SA v Baltic Shipping Co*,[13] a letter sent within the limitation period saying simply "please advise your proposals in order to settle this matter, or name your arbitrators", and asking for a reply, was held to be a notice in writing requiring the appointment of an arbitrator. However, in *Surrendra Overseas Ltd v Government of Sri Lanka*,[14] a communication that "In view of the attitude taken by the charterers in their calculation of lay-time, owners will be putting the matter to arbitration. We will be advising you concerning details of the arbitrator appointed in due course" was held to be a statement of future intention which did not start the arbitration, and the arbitration was time barred. Further, in *Vosnoc Ltd v Transglobal Projects Ltd*[15] a notice, requiring differences to be submitted to arbitration in accordance with an agreement, was held not to be equivalent to a request to appoint an arbitrator[16] and was thus insufficient to start the arbitration and stop time running.[17]

7.7 Section 12 of the Arbitration Act 1996 gives the court the power to extend any time limit provided for in an arbitration agreement. It replaces section 27 of the Arbitration Act 1950, which provided that such a time limit could be extended by the court if "it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may, on such terms, if any, as the justice of the case may require ... extend the time for such period as it thinks proper". This provision was widely interpreted by the courts. The principles applied by the courts in deciding whether or not to exercise their discretion were set out in *The Aspen Trader*[18] where Brandon LJ said that "'Undue hardship' means excessive hardship and, where the hardship is due to the fault of the claimant, it means hardship the consequences of which are out of proportion to such fault".[19] Factors to be taken into account included the length of the delay; the amount at stake; whether the delay was due to the fault of the claimant (and if so the degree of such fault) or circumstances

[12] Section 14(3) - s 14(5).

[13] [1976] QB 933.

[14] [1977] 1 WLR 565.

[15] *The Times*, 27 August 1997.

[16] Contrary to dicta of Lord Denning MR in *Nea Agrex v Baltic Shipping Co* [1976] QB 933.

[17] The notice stated, inter alia "by this letter the dispute is referred to the arbitration of three arbitrators in London."

[18] [1981] 1 Lloyd's Rep 273.

[19] [1981] 1 Lloyd's Rep 273, 279.

outside his control; whether the claimant was misled by the other party; and whether the other party has been prejudiced by the delay.[20]

7.8 Section 12 of the 1996 Act, by contrast, has reduced the court's discretion, providing that the court may make an order extending any time limit fixed by the arbitration agreement only if satisfied:

(1) "that the circumstances are such as were outside the reasonable contemplation of the parties when they agreed the provision in question, and that it would be just to extend the time, or

(2) that the conduct of one party makes it unjust to hold the other party to the strict terms of the provision in question."[21]

7.9 In addition, section 12 provides that a party to an arbitration may only apply to the court for an order extending an arbitration time limit if a claim has arisen under the arbitration agreement and "after exhausting any available arbitral process for obtaining an extension of time".[22]

3. ACTIONS ON A STATUTE (INCLUDING ACTIONS FOR CONTRIBUTION)

(1) Actions on a Statute

(a) Sections 8 - 9

7.10 Under section 8(1) of the 1980 Act, the limitation period for actions upon a specialty is twelve years from the date on which the cause of action accrued. Section 8(2) of the 1980 Act states that the twelve year limitation period prescribed by subsection 8(1) does not apply where a shorter limitation period is set under any other provision of the 1980 Act.[23] The primary exception to the general rule that actions on a statute are subject to a twelve year limitation period is provided by section 9 of the 1980 Act, which provides that the limitation period for actions to recover any sum "recoverable by virtue of any enactment" is six years from the date on which the cause of action accrued. Such actions, while still being actions on a specialty, are therefore subject to a shorter limitation period.

7.11 Historically, it was said that a specialty was an obligation contained in a sealed document[24] and there is a line of authority that an obligation contained in a statute is also to be treated as a specialty.[25] In *Collin v Duke of Westminster,*[26] a case

[20] [1981] 1 Lloyd's Rep 273, 279, applied in *Comdel Commodities Ltd v Siporex Trade SA (No 2)* [1990] 2 Lloyd's Rep 207 (HL).

[21] Section 12(3).

[22] Section 12(2).

[23] See eg, *Romain v Scuba TV Ltd* [1996] 3 WLR 117.

[24] For a recent decision see *Aiken v Stewart Wrightson Members Agency Ltd* [1995] 1 WLR 1281, affirmed [1996] 2 Lloyd's Rep 117.

[25] See *Aylott v West Ham Corporation* [1927] 1 Ch 30 (CA); *Gutsell v Reeve* [1936] 1 KB 272; *Pratt v Cook, Son & Co (St Paul's) Ltd* [1940] AC 437; *Re Compania de Electricidad de la*

concerning a claim by a lessee to be entitled to acquire the freehold of the building where he lived under the provisions of the Leasehold Act 1967, Oliver LJ, giving the judgment of the Court of Appeal, noted that any cause of action, that the applicant had, derived from the Leasehold Act 1967 alone, and held that section 8 of the 1980 Act applied. He rejected the argument that "specialties" were limited to deeds or contracts under seal. The test applied by Oliver LJ to ascertain whether the action was an action on a statute (so coming within section 8) was "whether any cause of action exists apart from the statute".[27] The abolition of the seal for private law purposes by the Law Reform (Miscellaneous Provisions) Act 1989 does not appear to have affected the limitation issues in relation to actions on a statute.

7.12 Section 9 of the 1980 Act re-enacts, with minor amendments,[28] section 2(1)(d) of the Limitation Act 1939. A sum will most obviously be "recoverable by virtue of any enactment" for the purposes of section 9 where the money claimed is recoverable because of a particular statute and there is no other cause of action. In *Central Electricity Generating Board ("CEGB") v Halifax Corpn,*[29] a leading House of Lords decision on section 2(1)(d) of the Limitation Act 1939, the plaintiffs claimed that money held by the defendants had vested in the British Electricity Authority (predecessor in title of CEGB) under the operation of the Electricity Act 1947. Lord Reid noted that the sum sued for was only recoverable because the right to the sum had vested in the claimants by virtue of the relevant enactment, so that section 2(1)(d) applied to bar the action six years after its accrual. It was irrelevant that the plaintiffs were not in a position to prove that the money had been held by the defendants in their capacity as authorised electricity undertakers (so that it was caught by the vesting provisions of the Electricity Act 1947) until the Minister had given a determination to that effect. The House of Lords noted that no new right or liability came into existence at the date of that determination,[30] and no cause of action existed other than the statutory cause of action.

7.13 Another more recent illustration of the operation of section 9 is provided by the difficult case of *Hillingdon London Borough Council v ARC Ltd.*[31] A claim before the courts for compensation for compulsory purchase was held to accrue when the

Provincia de Buenos Aires Ltd [1980] Ch 146. See R Redmond-Cooper, *Limitation of Actions* (1992), pp 31 - 33; A McGee, *Limitation Periods* (2nd ed 1994), pp 49 - 53; and the Law Commission's consultation paper on The Execution of Deeds and Documents by or on behalf of Bodies Corporate (1996) Consultation Paper No 143, paras 2.9 - 2.10; 11.4 - 11.10 and 13.6 - 13.9.

[26] [1985] QB 581.

[27] [1985] QB 581, 602. See also *Pratt v Cook, Son & Co (St Paul's) Ltd* [1940] AC 437.

[28] Section 2(1)(d) contained an exception "other than a penalty or forfeiture or sum by way of penalty or forfeiture" which has not been repeated in the 1980 Act.

[29] [1963] AC 785.

[30] The result was that the limitation period was held to be six years from 1 April 1948, rather than six years from 18 September 1958 (the date of the minister's decision).

[31] [1997] 3 All ER 506.

local authority entered on to the land in question, although the amount of compensation the owner of that land was entitled to had, in the case of dispute, to be decided by the Lands Tribunal. In this case the applicant's claim was time-barred by section 9 of the 1980 Act as the claimant had not issued proceedings in the courts (and indeed had not even made a reference to the Lands Tribunal) within 6 years of the local authority entering on to the land.[32]

7.14 It has also been held that section 9 (or its predecessor section 2(1)(d)) applies in the following cases:

(1) a claim in arbitral proceedings to recover compensation assessed by an arbitrator under the provisions of a statute;[33]

(2) actions by local authorities under section 10(3) of the Housing Act 1957 to recover expenses incurred by the authority in carrying out work done to property controlled by the defendant;[34]

(3) an action under section 214 of the Insolvency Act 1986 for a contribution to a company's assets for wrongful trading, the contribution to be assessed by the court.[35]

7.15 Whether an action is governed by section 8 or section 9 of the 1980 Act is determined by the nature of the relief sought. Where an action brought under a statute seeks relief other than the payment of a sum of money, the relevant limitation period is that provided for in section 8.[36]

7.16 The cause of action under section 8 or section 9 will be considered to accrue for limitation purposes once the plaintiff is able to assert "every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the

[32] We agree with the obiter dicta of Stanley Burnton QC, sitting as a Deputy High Court Judge, to the effect that it would be more sensible if the Lands Tribunal was clearly recognised as having the power to award compensation so that the six years limitation period under section 9 of the 1980 Act applied directly to the claim before the Lands Tribunal (rather than the applicant needing to issue proceedings in the ordinary courts within the six year limitation period to recover the sum assessed by the Lands Tribunal). The judge thought that, in the event of his decision not being appealed, so that there would be no opportunity for an appellate court to rule on this, there should be legislation to clarify the point. We agree but, as the jurisdiction of the Lands Tribunal is not a limitation matter, it would seem inappropriate for it to be dealt with in this project.

[33] *Pegler v Great Western Railway* [1947] 1 All ER 355 (CA), affirmed sub nom *Pegler v Railway Executive* [1948] AC 332 (HL), a claim for compensation under the Railways Act 1921. See also *West Riding County Council v Huddersfield Corpn* [1957] 1 QB 540, a claim for compensation under the Local Government Act 1933.

[34] *Swansea City Council v Glass* [1992] QB 844.

[35] *Moore v Gadd*, *The Times*, 17 February 1997.

[36] Applying these principles, an action under the Law Reform (Frustrated Contracts) Act 1943 would be subject to the limitation period prescribed in s 9.

judgment of the court".[37] Whether all the relevant elements of the cause of action are present is a matter of construction of the statute under which the cause of action arises. In practice the courts have held that this requirement is fulfilled if a statement of claim could not be struck out as disclosing no cause of action.[38]

(b) Actions on a statute and "statutory torts"

7.17 A difficulty in interpreting the Limitation Act 1980 - although few, if any, practical consequences turn on this - is whether section 9 (or conceivably section 8) applies, as opposed to section 2, in cases where the statute concerned confers a right against another private citizen and provides a remedy if that right is infringed. An example is actions for infringement of patent rights under the Patents Act 1977. Such actions are actions to enforce rights granted by statute (which could not be brought in the absence of the statute) and, where damages are sought, are also actions to recover money recoverable by virtue of an enactment. They are however regarded as actions in tort,[39] and in *Sevcon Ltd v Lucas CAV Ltd,*[40] an action for damages for patent infringement, it was accepted by both appellants and respondents that the limitation period for torts in section 2 of the 1980 Act was the applicable provision.[41]

7.18 The same question arises in relation to, for example, actions under the Misrepresentation Act 1967. Although an action for damages for non-fraudulent misrepresentation, where the burden is on the defendant to prove that he or she had reasonable grounds for making the statement, is (and can only be) brought by virtue of the statute, it appears that such actions are normally treated as being founded on tort.[42] Though there is no authority on the application of the 1980 Act to actions founded on the Misrepresentation Act 1967, it would seem that

[37] Lord Esher MR in *Coburn v Colledge* [1897] 1 QB 702, 706. This test was accepted and applied in *Central Electricity Generating Board v Halifax Corpn* [1963] AC 785, 800 *per* Lord Reid.

[38] See *Swansea Council v Glass* [1992] 1 QB 844, 852 *per* Taylor LJ (applying the test formulated by Lord Mackay in *Sevcon Ltd v Lucas CAV Ltd* [1986] 1 WLR 462).

[39] *General Tire and Rubber Co v Firestone and Rubber Co Ltd* [1975] 1 WLR 819, *per* Lord Wilberforce at 824.

[40] [1986] 1 WLR 462.

[41] It appears not to have been argued that s 9 of the 1980 Act applied. Though this decision has been criticised for this reason (among others) by Andrew McGee, "Patent Nonsense" (1986) 49 MLR 650 it accords with the treatment of patent infringement as a statutory tort for, inter alia, conflicts of laws purposes (see *Morton-Norwich Products Inc v Intercen Ltd* [1978] RPC). It would be inconsistent if actions for damages for patent infringement were treated differently for limitation purposes.

[42] The Misrepresentation Act 1967 is described in *Clerk & Lindsell on Torts* (17th ed 1995), para 14-43, as "in effect extend[ing] the tort of deceit". See also dicta of Bridge LJ in *Howard Marine and Dredging Co Ltd v A Ogden Sons (Excavations) Ltd* [1978] QB 574, 595: "the remaining ... question raised in this appeal is whether Mr O'Loughlin's undoubted misrepresentation gives rise to any liability in tort either under the provisions of the Misrepresentation Act 1967 or at common law for breach of a duty of care ...". Further, *Royscot Trust Ltd v Rogerson* [1991] 2 QB 297 held that the appropriate measure of damages in cases under s 2(1) of the Misrepresentation Act 1967 was the tortious measure and the remoteness test was the same as that applicable to the tort of deceit.

such actions should be classified as actions founded on tort for limitation purposes.

7.19 It is a fortiori, from the above treatment of some statutory actions as statutory torts, that an action for the tort of breach of statutory duty (where the existence of a right to damages is not expressly laid down in the statute but is 'implied' by the courts) is an action founded on tort for limitation purposes.[43]

7.20 An action against a receiver by a preferential creditor under the Companies Act 1929 for failing to satisfy the preferential debts of a company before paying ordinary creditors has also been treated as a claim in tort for limitation purposes.[44]

(c) Actions on a statute and contract

7.21 A similar problem in interpreting the 1980 Act also arises in respect of the relationship between actions founded on simple contract (section 5) and actions on a statute (under sections 8 or 9). It appears to be necessary to distinguish between cases where the statute merely implies obligations into, or retrospectively validates, an existing contract,[45] and cases where the statute creates the contract. The distinction is illustrated by the cases of *Aylott v West Ham Corpn,*[46] and *Cork & Bandon Railway Co v Goode.*[47] In the first case the local authority resolved to pay their enlisted employees both the difference between their civilian and service pay and any increases of pay to which they would have become entitled during their war service. At the time the resolution was made, the contract was illegal. During the war, the Local Government (Emergency Provisions) Act 1916 validated such agreements with retrospective effect. The plaintiff sued for additional pay to which he was entitled from the local authority for his war service years, arguing that the action was an action on the statute, and that he was therefore entitled to the longer limitation period given to specialties. The Court of Appeal rejected this, holding that the action arose out of the agreement, not upon the statute. By contrast, in the second case - an action to recover calls on shares brought by a railway company in reliance on the Company Clauses Consolidation Act 1845[48] - an argument by the defendant that the action was founded upon contract was rejected on the ground that there would have been no contract by the shareholder to pay the calls apart from the statute.[49] The action was therefore an action upon the statute so that the limitation provisions for specialties applied.[50]

[43] See generally *Winfield & Jolowicz on Tort* (14th ed), Ch 7.

[44] *Westminster Corpn v Haste* [1950] Ch 442. It does not appear to have been argued that s 9 might apply in this case.

[45] As with the obligations implied by the Sale of Goods Act 1979.

[46] [1927] 1 Ch 30.

[47] (1853) 13 CB 826, 138 ER 1427.

[48] 8 & 9 Vic c 6, and also the Cork and Bandon Railway Act 1845, 8 & 9 Vic c cxxii.

[49] This can be contrasted with *In re Compania de Electricidad de Provincia de Buenos Aires Ltd* [1980] Ch 146, where Slade J held that claims against a company for unpaid dividends under the Articles of Association of the company (which on registration give rise to a contract between the company and its members under what is now s 14 of the Companies

(2) Actions for Contribution under the Civil Liability (Contribution) Act 1978

(a) Section 1 of the Civil Liability Contribution Act 1978 ("the 1978 Act")

7.22 An action under section 1 of the 1978 Act must comply with the requirements of both the 1980 Act and the provisions of the 1978 Act affecting the limitation period. Under section 1 of the 1978 Act, an action to recover a contribution may be brought even though the defendant has ceased to be liable for the damages for which he seeks the contribution (for example, because of the expiry of a limitation period barring the remedy), provided that the defendant was so liable immediately before he was ordered (or agreed) to pay the damages.[51] However, an action against the potential contributor will be barred if the contributor has ceased to be liable in respect of the damage for which the contribution is sought because of the expiry of a limitation period which extinguished the right of the plaintiff (rather than simply barring the remedy).[52]

(b) Section 10 of the Limitation Act 1980

7.23 By section 10(1) of the 1980 Act, the limitation period for an action by a defendant to recover a contribution under section 1 of the 1978 Act towards any damages he or she is liable to pay (whether upon judgment or upon settlement of a dispute) is two years from the date on which the right to bring the action accrued.

7.24 The date on which the right accrued is decided in accordance with the provisions of sections 10(3) and 10(4). Under section 10(3), where the contribution is sought in respect of damages awarded by a judgment or an arbitration award, the relevant date is the date of the judgment or award. Section 10(3) also provides that no account is to be taken of a judgment or award made on appeal which varies the amount of the damages awarded against the defendant. In consequence, where the defendant is found liable to pay damages by a court of first instance, the limitation period will run from the date of that judgment, whether or not an appeal court later reduces or increases the amount of damages the defendant is liable to pay. Where the defendant's liability to pay damages arises only from the decision of an appeal court, the limitation period will run from the date of the appellate decision.

Act 1985) was six years - the period for actions on a contract, rather than a specialty. See further K Reece-Thomas, "The section 14 Contract: Limitation Issues" (1997) 16 CJQ 318.

[50] A case like *Cork v Goode* today in which the plaintiff sought a sum of money in reliance on a statute would come within s 9. Before the Limitation Act 1939 came into force, the closest equivalent to s 9 of the 1980 Act was provided by s 3 of the Civil Procedure Act 1833, applying, inter alia, to actions for "penalties, damages, or sums of money given to the party grieved by any statute". This was interpreted as applying only in actions for penalties, rather than compensation: see *Thomson v Lord Clanmorris* [1900] 1 Ch 718.

[51] Section 1(2).

[52] Section 1(3).

7.25 Under section 10(4), where the contribution is sought in respect of damages paid as part of an agreed settlement, the relevant date is the earliest date at which agreement on the amount of damages was reached between the defendant and the person to whom the damages were paid. It is irrelevant whether the potential defendant admits liability as part of the settlement or not; it is also irrelevant that other terms in the settlement have not been concluded at the date when the amount has been agreed between the parties. Only the agreement of the amount is important for limitation purposes. The position where the defendant is sued by more than one plaintiff in respect of the same damage (as with damage caused to jointly owned property) and reaches agreement on the amount of damages due to each plaintiff at different times is unclear. Section 10(4) could be interpreted as meaning that a fresh right of action will accrue in respect of each payment made by the defendant, so that the limitation period for an action to recover a contribution for a particular payment will run from the date when that payment was agreed. An alternative interpretation is that one right of action accrues in respect of all payments made by the defendant in settlement of a particular dispute, so that the limitation period in respect of an action to recover a contribution for any payment runs from the date the amount of the latest payment was agreed. There appears to be no authority on the point and it is unclear which interpretation is correct.

(3) Other Statutes

(a) Introduction

7.26 Section 39 of the 1980 Act states that the provisions of the 1980 Act are subject to any other period of limitation provided in any other enactment.[53] A number of statutes do include limitation provisions in respect of particular actions. Table 2 - at the end of this Part - lists the principal limitation periods found outside the 1980 Act.[54] They include those Acts which incorporate international conventions into English law.

7.27 A number of these statutes give the court a discretion to exclude the limitation period. This is the case for the Matrimonial Causes Act 1973, the Solicitors Act 1974, the Sex Discrimination Act 1975, the Inheritance (Provision for Family and Dependants) Act 1975, the Race Relations Act 1976, the Company Directors Disqualification Act 1986, the Merchant Shipping Act 1995 and the Disability Discrimination Act 1995. In our discussion of options for reform, we shall be looking at whether the use of judicial discretion to exclude limitation periods should be supported. It therefore seems worthwhile here briefly outlining the nature of the discretion under these Acts.

[53] This is to be distinguished from causes of action in statutes (where no special limitation period is laid down by the particular statute) which are governed by, eg, ss 8 - 9 of the 1980 Act.

[54] This is not a comprehensive list of all statutory limitation periods outside the Limitation Act 1980. It would be a Herculean task to identify all such limitation periods, and it is not one we have thought realistic to attempt.

(b) Discretionary exclusion of the limitation period

(i) Matrimonial Causes Act 1973 ("MCA 1973")

7.28 Under section 13 of the MCA 1973, the court may not grant a decree of nullity on grounds other than non-consummation of the marriage unless the proceedings for a decree are instituted within three years of the marriage taking place. However, where the court is satisfied that the petitioner has within that period suffered from mental disorder within the meaning of the Mental Health Act 1983, it has a discretion to grant leave for the institution of proceedings if the judge "considers in all the circumstances of the case it would be just to grant leave".[55]

(ii) Solicitors Act 1974

7.29 Under section 70 of the Solicitors Act 1974, the time limit for an application for the taxation of a solicitor's bill is twelve months from the date of delivery of the bill. However, the court may grant an application for taxation of an unpaid bill after this time limit if there are "special circumstances".[56] The meaning of "special circumstances" was explored in *Re Norman.*[57] Here it was suggested that "special circumstances" included not only "pressure and overcharge, or overcharge extending to fraud", but also extended to cases where the amount charged was particularly high, and errors had been made. In a more recent case, *Kralj v Birkbeck Montague,*[58] the Court of Appeal found special circumstances where the solicitors concerned had dissuaded their client from taxing their costs and had charged her substantially more than was recovered inter partes.

(iii) Inheritance (Provision for Family and Dependants) Act 1975 ("IPFDA 1975")

7.30 Under section 4 of the IPFDA, no application for an order for provision under the Act may be made outside the time limit of six months from the date on which representation with respect to the date of the deceased is taken out except with the permission of the court. The discretion of the court is unfettered, and is to be exercised "judicially and in accordance with what is just and proper".[59] Some of the factors to be considered by the court in deciding whether to exercise its discretion were reviewed in *Re Salmon, deceased.*[60] Sir Robert Megarry VC held that the onus is on the plaintiff to satisfy the court that there are grounds to take the case out of the general rule. The court will consider how promptly, and in what circumstances, the applicant has sought the permission of the court after the

[55] Section 13(4).

[56] Section 70(3). Where the bill has been paid, the applicant must show the existence of "special circumstances" for an application for taxation made within the twelve month period. The court has no jurisdiction to make an order for taxation of a bill which has been paid more than twelve months after the delivery of that bill.

[57] (1886) 16 QBD 673. The case was decided under the Solicitors Act 1843 (6 & 7 Vict. c 73), which also provided that when twelve months have elapsed since a bill was delivered, the bill is not to be taxed "except under special circumstances".

[58] Unreported, 18 February 1988.

[59] *In re Salmon, dec'd, Coard v National Westminster Bank Limited* [1981] 1 Ch 167, 175.

[60] [1981] 1 Ch 167.

expiry of the time limit; whether negotiations between the parties started before the expiry of the time limit; whether the estate has been distributed; and whether a refusal to extend the time would leave the plaintiff without redress against anybody.

(iv) Discrimination Acts[61]

7.31 The Sex Discrimination Act 1975, the Race Relations Act 1976 and the Disability Discrimination Act 1995 contain a framework of time limits, within which the various available types of enforcement action must be taken. For example, a complaint relating to employment discrimination must be made to an industrial tribunal within three months after the act complained of was done.[62] Civil proceedings must be brought in the courts in relation to discrimination in areas other than employment within six months of the act complained of.[63]

7.32 These Acts provide that the court or tribunal may consider a complaint, claim or application made to it out of time if "in all the circumstances of the case, it considers that it is just and equitable to do so".[64] In *Foster v South Glamorgan Health Authority*[65] Popplewell J, giving the judgment of the Employment Appeal Tribunal, noted that it is the practice of the industrial tribunals and the Employment Appeal Tribunal to apply the limitation periods with great strictness and to limit the circumstances in which an extension will be granted. In that case, the applicant brought a claim under the Sex Discrimination Act 1975 that there had been an act of sex discrimination because she had been obliged to retire at the age of 60, where a man could have worked until 65. As the law appeared when she retired, she had no claim. After the case of *Marshall v Southampton and South*

[61] Different time limits apply under the Equal Pay Act 1970. A reference may only be made to an industrial tribunal under the 1970 Act (other than a reference by a court under s 2(3)) if the employee concerned has been employed under the relevant contract during the six months prior to the reference, (s 2(4)) and awards are limited to arrears of remuneration or damages in respect of the two years up to the institution of proceedings (s 2(5)). There is no discretion to disapply the time limit or accept references out of time. Where, by virtue of European Community law, employees have rights under the 1970 Act but the existence of the rights is only discovered later, Community law will not override the time limits in sections 2(4) and (5) to allow them to be enforced: *Preston v Wolverhampton Healthcare NHS Trust* [1997] IRLR 233 (CA), which concerned equality of pension rights.

[62] Sex Discrimination Act 1975, s 76(1); Race Relations Act 1976, s 68(1); Disability Discrimination Act 1995, s 8(8) and Sch 3, Part I, para 3(1). See *General Medical Council v Rovenska, The Times*, 31 December 1996 (CA).

[63] Sex Discrimination Act 1975, s 76(2)(a); Race Relations Act 1976, s 68(2)(a); Disability Discrimination Act 1995, s 25(6) and Sch 3, Part II, para 6. In race and sex discrimination cases relating to public sector education, the time period is eight months: Sex Discrimination Act 1975, s 76(2)(b); Race Relations Act 1976, s 68(2)(b). In *Cannon v Barnsley MBC* [1992] IRLR 474 (EAT), it was held that a directly effective European Community law right arising under the (incorrectly implemented) Equal Treatment Directive, 76/207/EEC, did not come under s 76(1).

[64] Sex Discrimination Act 1975, s 76(5); Race Relations Act 1976, s 68(6); Disability Discrimination Act 1995 s 8(8) and Sch 3, Part I, para 3(2) and s 25(6) and Sch 3, Part II, para 6(3).

[65] [1988] ICR 526, 528 (EAT).

West Hampshire Area Health Authority,[66] decided shortly before the expiry of her limitation period, her case appeared to be unanswerable. The industrial tribunal found as a fact that the applicant's delay of four months since the *Marshall* decision in bringing her application was excusable in the circumstances. However, the tribunal held that it would not be just and equitable to extend the time limit for the applicant, because it would be inequitable to put her in a better position than the other applicants who had retired since the date of the Equal Treatment Directive of 1976 but before the decision of *Marshall* clarified the effect of that Directive. The Employment Appeal Tribunal held that in comparing the applicant's position to all other people who had failed to bring a claim because of the pre-*Marshall* understanding of the law, the industrial tribunal was using an invalid comparator. The case was remitted to the tribunal for further consideration.

(v) Company Directors Disqualification Act 1986 ("CDDA 1986")

7.33 Under section 7 of the CDDA 1986, an application for the making of a disqualification order against any person can only be brought out of time (that is, more than two years after the date the company became insolvent) with the leave of the court. Some of the factors the court should take into account in deciding whether or not to grant leave were considered in *Re Probe Data Systems*[67] to include

(1) the length of the delay;

(2) the reasons for the delay;

(3) the strength of the case against the director; and

(4) the degree of prejudice caused to the director by the delay.

7.34 These considerations are not, however, exclusive, nor are they to be treated as rigid criteria. In *Re Cedar Developments Ltd,*[68] it was stressed that all the relevant factors must be taken into account. In *Secretary of State for Trade and Industry v Davies,*[69] it was held that the sole requirement under the section was that the judge should exercise his discretion judicially. The inadequacy of reasons for a delay in bringing the proceedings was only one of the factors to be taken into account: it would not necessarily be decisive.

7.35 The court has sometimes been reluctant to grant leave to bring proceedings out of time, due to the fact that disqualification proceedings are quasi-penal in nature, involving a substantial interference with the freedom of the individual.[70]

[66] [1986] ICR 335.

[67] [1992] BCLC 405.

[68] [1994] 2 BCLC 714.

[69] [1996] 4 All ER 289 (CA).

[70] See *Re Copecrest Ltd* [1993] BCLC 1118.

(vi) Merchant Shipping Act 1995 ("the MSA 1995")

7.36 Under section 190 of the MSA 1995[71], the Court has a discretion to extend the limitation period as it sees fit, and in certain cases the court is obliged to extend the limitation period. The obligation is triggered where the court is satisfied that the plaintiff has had no reasonable opportunity to arrest the defendant vessel within the jurisdiction of the court or within the territorial waters of the country to which the plaintiff's ship belongs or in which the plaintiff resides or has his principal place of business. In such a case, the court must extend the limitation period to an extent sufficient to give the plaintiff a reasonable opportunity to arrest the ship.

7.37 The factors which will persuade the court to extend the limitation period in cases where it has a discretion have been considered in a number of cases decided under the equivalent provision of the Maritime Conventions Act 1911.[72] In *The Albany and the Marie Josaine*[73] Sheen J enumerated the relevant factors as follows:

(1) the degree of blameworthiness - is the delay before the issue of the writ excusable?

(2) the length of the delay;

(3) were the circumstances which caused the delay beyond the control of the party who has been dilatory?

(4) are there any special circumstances?

7.38 Sheen J gave further guidance on matters which are not likely to be seen as special circumstances in *The Gaz Fountain,*[74] where he held that it is never an exceptional circumstance that the plaintiff will be deprived of his claim, that the defendant knew of the dispute, that the defendant will not be disadvantaged by a short extension of the time limit or that the failure to issue the writ within the time limit is due to an oversight.

7.39 In *The Zirje,*[75] Sheen J suggested that the exercise of the discretion should not be confined to cases where there appear to be special or exceptional circumstances, but that the court should grant an extension where in all the circumstances there appeared to be good reason to do so. In *The Zirje* he was persuaded to grant an extension because the defendants had agreed not to contest liability, were willing to grant an extension subject to the imposition of an unreasonable condition, and the extension sought was one of only three days.

[71] This reenacts Maritime Conventions Act 1911, s 8 (as amended by the Merchant Shipping (Salvage and Pollution) Act 1995) in substantially the same terms.

[72] Section 8, Maritime Conventions Act 1911.

[73] [1983] 2 Lloyd's Rep 195.

[74] [1987] 2 Lloyd's Rep 151.

[75] [1989] Lloyd's Rep 493.

TABLE 2

Statutory Limitation Periods outside the Limitation Act 1980

Act	**Nature of Action**	**Starting Point**	**Limitation period**	**Discretionary Exclusion?**
Common Law Procedure Act 1852, section 210	Proceedings for relief from ejectment for non-payment of rent	Execution by landlord	Six months	No
Riot (Damages) Act 1886, section 3 and SR & O 1921 No 1536, reg 2	Claim for compensation for riot damage	The day the injury, stealing, or destruction took place	14 days	Yes (up to 42 days)
Foreign Jurisdiction Act 1890, section 13	Proceedings against any person for any act done in pursuance of the Foreign Jurisdictions Act 1890	Date of the act, neglect or default of which complaint is made	6 months	No
Police (Property) Act 1897, section 1(2)	Proceedings for recovery of property subject to an order for delivery under section 1	Date of the order	6 months	No

Act	Nature of Action	Starting Point	Limitation period	Discretionary Exclusion?
Landlord and Tenant Act 1954, section 29	Application for order for a new tenancy	Date of landlord's notice or tenant's request	4 months[76]	No
Carriage by Air Act 1961, Schedule 1, Art 29	Action for damages	Date of arrival at destination; date aircraft should have arrived or date on which the carriage stopped	2 years	No
Carriage of Goods by Road Act 1965, Schedule, Art 32	An action arising out of carriage under the Convention on the Contract for the International Carriage of Goods by Road	(i) Date of delivery (partial loss, damage or delay) ii) 30 days after the expiry of the agreed time limit, or 60 days after the goods were taken over by the carrier (total loss) iii) 3 months after the making of the contract of carriage (all other cases)	One year (3 years in the case of wilful misconduct)	No
Compulsory Purchase Act 1965, section 4	Exercise of powers for the compulsory purchase of land	Date the compulsory purchase order becomes operative	3 years	No

[76] The application must be made *no earlier* than 2 months after the date of the landlord's notice or tenant's request.

Act	Nature of Action	Starting Point	Limitation period	Discretionary Exclusion?
Uniform Law on International Sales Act 1967, Schedule 1, Art 39	Notice to supplier that goods not confirming to the contract	Delivery of the goods	2 years[77]	No
Post Office Act 1969, section 30	Action for damage to a registered inland package	Date the package was posted	12 months	No
Equal Pay Act 1970, section 2	Proceedings for compensation (by way of arrears of remuneration or damages) for failure to comply with an equality clause	Date to which remuneration or damages relate	2 years	No
Taxes Management Act 1970, section 33(1)(a)	Claim for relief for excessive tax assessment (income tax and capital gains tax)	31 January next following the year of assessment to which the return relates	5 years	No
Ibid, section 33(1)(b)	Claim for relief for excessive assessment (corporation tax)	31 January next following the end of the accounting period to which the return relates	6 years	No

[77] Notice must, in any event, be given promptly. The time limit does not apply if the lack of conformity constituted a breach of a guarantee covering a longer period.

Act	Nature of Action	Starting Point	Limitation period	Discretionary Exclusion?
Ibid, section 33A	Claim for relief by partners for excessive tax paid due to an error in partnership statement	Filing date	5 years	No
Ibid, section 34(1)(a)	Assessment to tax (income tax and capital gains tax)	31 January next following the year of assessment to which the return relates	5 years[78]	No
Ibid, section 34(1)(b)	Assessment to tax (corporation tax)	31 January next following the end of the accounting period to which the return relates	6 years	No
Ibid, section 40	Assessment to tax on personal representatives	End of the year of assessment in which the deceased died	3 years	No
Ibid, section 43	Claim for relief under the Taxes Acts (corporation tax)	31 January next following the end of the accounting period to which it relates	6 years	No

[78] Where income (chargeable to tax under Schedule E) is received in a year of assessment subsequent to that for which it is assessable, an assessment made be made at any time within six years after the year of assessment in which it was received. Where the assessment seeks to make good tax lost through the fraud of the defaulter, the time is extended to 20 years after the end of the year of assessment (for income tax and capital gains tax) and 21 years (for corporation tax): see s 36.

Act	Nature of Action	Starting Point	Limitation period	Discretionary Exclusion?
Carriage of Goods by Sea Act 1971, Schedule 1, Art 6	Loss or damage to goods	Date of delivery or when goods should have been delivered	One year	No
Local Government Act 1972, section 92	Proceedings for disqualification against a member of a local authority	Date on which the member acted while disqualified	6 months	No
Matrimonial Causes Act 1973, section 13	Application for a decree of nullity	Date of marriage	3 years	Yes[79]
Carriage of Passengers by Road Act 1974, Schedule, Art 22)	(i) Action for death or personal injury (including mental injury)	(i) Date the person suffering loss or damage had or should have had knowledge of it	(i) 3 years (but not more than 5 years from the date of the accident)	(i) Yes
	(ii) Other action arising out of carriage	(ii) Date vehicle arrived at destination or, in case of non-arrival, ought to have arrived	(ii) One year	(ii) No
Solicitors Act 1974, section 70	Application for taxation of bill	Date of delivery of bill (or date of payment, if payment has been made)	12 months	Yes[80]

[79] If the court is satisfied the petitioner suffered from mental disorder during that period and it would be just to grant leave for the institution of proceedings: s 13(4).

[80] If the applicant can show the existence of "special circumstances". Once 12 months have expired since payment, the court has no jurisdiction to order taxation.

Act	Nature of Action	Starting Point	Limitation period	Discretionary Exclusion?
Solicitors Act 1974, section 54	Application to strike a solicitor off the roll for defect in service under articles, admission or enrolment	Date of enrolment	12 months[81]	No
Sex Discrimination Act 1975, section 76	(i) Complaint of discrimination in employment[82]	Date act complained of was done	(i) 3 months	Yes, where the tribunal considers it is "just and equitable" to consider the matter out of time
	(ii) Claim to court of discrimination in other areas		(ii) 8 months in education-related matters; otherwise 6 months	
	(iii) Application for decision that contravention of sections 38 - 40[83] occurred		(iii) 6 months	
	(iv) Application for an injunction against further contravention of ss 38 - 40		(iv) 5 years	
	(v) Application by	Date act complained	(v) 6	Yes, where the

[81] Unless fraud is shown to have been committed in connection with the defect or failure, in which case there is no limitation period.

[82] Under s 63.

[83] Discriminatory advertisements, instructions to discriminate and pressure to discriminate.

Act	Nature of Action	Starting Point	Limitation period	Discretionary Exclusion?
	Equal Opportunities Commission for preliminary finding of discrimination	of was done	months	tribunal considers it is “just and equitable” to consider the matter out of time
Oil Taxation Act 1975, Schedule 2, para 12(2)	Further assessment to tax (where excessive allowable loss has been claimed)	End of the chargeable period in which the allowable loss accrued	6 years	No
Inheritance (Provision for Family and Dependants) Act 1975, section 4	Application for order for provision	Date on which representation with respect to the estate of the deceased is first taken out	6 months	Yes

Act	Nature of Action	Starting Point	Limitation period	Discretionary Exclusion?
Race Relations Act 1976, section 68	(i) Complaint of discrimination in employment[84]	Date act complained of was done	(i) 3 months	Yes, where the tribunal considers it "just and equitable" to consider the matter out of time
	(ii) Claim to court of discrimination in other areas		(ii) 8 months in education-related matters; otherwise 6 months[85]	
	(iii) Application for decision that contravention of sections 29-31[86] occurred		(iii) 6 months	
	(iv) Application for an injunction against further contravention of sections 29-31		(iv) 5 years	
	(v) Application by Commission for Racial Equality for preliminary finding of discrimination		(v) 6 months	

[84] Under s 54.

[85] Discriminatory advertisements, instructions to discriminate and pressure to discriminate.

[86] Where an application for assistance is made under s 66 in relation to proceedings or prospective proceedings, the period of six (or eight) months is extended by two months: s 68(3).

Act	Nature of Action	Starting Point	Limitation period	Discretionary Exclusion?
Rent Act 1977, section 94	Recovery of overpaid rent	Date of payment	2 years	No
Vaccine Damage Payments Act 1979, section 3	Claim for payment under section 1 of the Act	The latest of: (a) the date of vaccination; (b) the date the disabled person attained the age of two; and (c) 9 May 1978	6 years	No
Highways Act 1980, section 59	Proceedings for the recovery of expenses incurred in maintaining highways due to extraordinary traffic	(a) The time the damage is done, or (b) (where the damage is the consequence of any particular building contract or work extending over a long period) the date of completion of the contract or work	(a) 12 months or (b) 6 months	No

Act	Nature of Action	Starting Point	Limitation period	Discretionary Exclusion?
Compulsory Purchase (Vesting Declarations) Act 1981, section 10	Referral to Lands Tribunal of question of disputed compensation[87]	Date the person claiming compensation first knew (or could be reasonably expected to know) of the vesting of the interest in the relevant authority	6 years	No
Representation of the People Act 1983, section 122	Presentation of parliamentary election petition	Date the return was made to the Clerk of the Crown	21 days[88]	No

[87] When general vesting declaration made.

[88] Where the petition questions the return or election alleging a corrupt practice, and the petition alleges a payment of money or other reward in furtherance of that corrupt practice, it may be presented within 28 days of the payment. Where the petition alleges an illegal practice, it may be presented within 21 days after the tenth day after the end of the time allowed for delivering to the returning officer returns as to election expenses (or after the date of receipt by the returning officer of those returns, where later).

Act	Nature of Action	Starting Point	Limitation period	Discretionary Exclusion?
Ibid, section 129	Presentation of a petition questioning an election under the Local Government Acts	Date of the election	21 days[89]	No
Companies Act 1985, section 5(3)	Application to cancel alteration to the Memorandum of Association	Date the resolution altering the Memorandum was passed	21 days	No
Companies Act 1985, section 54(3)		Date the resolution for re-registration was passed	28 days	No
Companies Act 1985, section 157(3)	Application to cancel resolution authorising giving financial assistance for the purchase of shares	Date the resolution authorising financial assistance was passed	28 days	No

[89] Where the petition questions the election on the ground of corrupt practice, and alleges a payment of money or other reward in furtherance of that corrupt practice, it may be presented within 28 days of the payment. Where the petition questions the election on the ground of an illegal act, and alleges a payment or other act, it may be presented within 28 days of that payment or other act.

Act	Nature of Action	Starting Point	Limitation period	Discretionary Exclusion?
Companies Act 1985, section 176	Application to cancel resolution approving payment out of capital for redemption or purchase of shares	Date the resolution was passed	5 weeks	No
Companies Act 1985, section 651	Application to declare a dissolution void	Date of dissolution	2 years	No
Companies Act 1985, section 653	Application to restore to the register a company struck off as defunct	Date of publication in the Gazette of section 652 notice	20 years	No
Companies Act 1985, section 92	Action to recover loss caused by breach of pre-emption rights		2 years	No
Companies (Tables A to F) Regulations 1985,[90] Table A, Art 108	Action to recover dividends declared but not paid	Date the dividend became due for payment	12 years	No

[90] 1985 No 805.

Act	Nature of Action	Starting Point	Limitation period	Discretionary Exclusion?
Patronage (Benefice) Measure 1986, section 4	Action to rectify the register of persons with a right to appoint to a benefice	Entry in the register or date the benefice held adversely to the claim of any person	30 years	No
Company Directors Disqualification Act 1986, section 7	Application for a disqualification order	Date the company became insolvent	2 years	Yes
Social Security (Claims and Payments) Regulations 1987,[91] reg 19 and Schedule 4, para 1	Claim for jobseeker's allowance	Day in respect of which the claim is made	Same day[92]	Yes (up to 12 months)

[91] 1987 No 1968.

[92] Subsequent applications may be made on the date specified in the notice given to the applicant by the unemployment benefit office.

Act	Nature of Action	Starting Point	Limitation period	Discretionary Exclusion?
Ibid, Schedule 4, para 2	Claim for sickness benefit, invalidity benefit or severe disablement allowance	Day in respect of which the claim is made	1 month (for an original claim) or 6 days (first claim after becoming incapable of work)[93] or 10 days (for a continuat-ion claim)	Yes (up to 12 months)
Ibid, reg 19(6)(a)	Claim for guardian's allowance, child benefit and any increase in benefit in respect of a child or adult dependant	Day on which the claimant is entitled to the benefit	6 months	No
Ibid, Reg 19(6)(b)	Retirement pension, widow's benefit, maternity allowance and invalid care allowance	Day on which the claimant is entitled to the benefit	12 months	No

[93] Other than an original claim.

Act	Nature of Action	Starting Point	Limitation period	Discretionary Exclusion?
Ibid, Schedule 4, para 3	Claim for disablement benefit including increases	Date on which the claimant becomes entitled to benefit	3 months	Yes (up to 12 months)
Ibid, Schedule 4, para 6	Income support and family credit	Day in respect of which claim is made	Same day[94]	Yes (up to 12 months)
Ibid, Schedule 4, para 9	Claim for social fund payments for funeral expenses	Date of funeral	3 months	Yes (up to 12 months)
Ibid, Schedule 4, para 8	Claim for social fund payments for maternity expenses	Date of confinement	3 months	Yes (up to 12 months)
Ibid, Schedule 4, para 11	Claim for disability working allowance	Day in respect of which claim is made	Same day[95]	Yes (up to 12 months)

[94] Where family credit has previously been claimed and awarded, further benefit should be claimed within the period from 28 days before to 14 days after the final day of the earlier award.

[95] Where disability working allowance has previously been claimed and awarded, a renewal claim may be made within a period starting 42 days before and ending 14 days after the expiry of the existing award.

Act	Nature of Action	Starting Point	Limitation period	Discretionary Exclusion?
Town and Country Planning Act 1990, section 94	Enforcement notice by local planning authority	Date of breach of planning control	4 years	No
Vehicle Excise and Registration Act 1994, section 50	Action by the Secretary of State to recover underpaid duty or by licence holder to recover overpaid duty	The end of the period in respect of which the vehicle licence was taken out	12 months	No
Merchant Shipping Act 1995, Schedule 6, Art 16	Action against carrier in respect of (i) death or (ii) personal injury to a passenger or (iii) loss or damage to luggage	(i) Where death occurs during passage, date when passenger should have disembarked, or, where death occurs subsequently, date of death.[96] (ii) Date of disembarkation. (iii) Later of date when disembarkation should have occurred, and actually occurred.	2 years	No

[96] Provided that the limitation period calculated from the date of death does not exceed 3 years from the date of disembarkation.

Act	Nature of Action	Starting Point	Limitation period	Discretionary Exclusion?
Disability Discrimination Act 1995, section 8	Complaint against discrimination in employment	The time the act complained of was done	3 months	Yes, where the tribunal considers it "just and equitable" to consider the matter out of time
	Claim to court of discrimination in other areas under section 25	Time the act complained of was done	6 months[97]	
Employment Rights Act 1996, section 111	Complaint of unfair dismissal	Effective date of termination	3 months	Yes[98]

97 Where a person appointed in connection with arrangements under s 28 of the Act is approached before the end of the 6 month period, that period is extended by 2 months (Schedule 3, Part II, para 6(2)).

98 Where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within 3 months, the complaint may be presented within such further period as the tribunal considers reasonable.

PART VIII
FACTORS WHICH POSTPONE THE RUNNING OF TIME

8.1 In some circumstances the commencement of a limitation period may be delayed or the period may start to run again (that is, the clock may be reset after time has started to run). This section examines the general factors which postpone the running of time, namely (i) disability (ii) fraud, concealment and mistake, and (iii) acknowledgement and part payment.

1. PLAINTIFF UNDER A DISABILITY

8.2 The section of the 1980 Act dealing generally with plaintiffs under a disability is section 28. Where, on the date when a right of action accrued, the person to whom it accrued was under a disability, the limitation period will not run until the disability ceases or the potential plaintiff dies, whichever occurs first. For the purposes of the 1980 Act a person is treated as being under a disability while an infant or of unsound mind (that is, "a person who by reason of mental disorder within the meaning of the Mental Health Act 1983, is incapable of managing and administering his property and affairs").[1] Although those under a disability cannot institute proceedings on their own behalf, their guardian or a person acting as next friend can act for them in pursuing the cause of action.

8.3 The general rule in disability cases is that, unless the plaintiff dies, the limitation period will end six years after the disability comes to an end,[2] but this is subject to some exceptions. For defamation claims the plaintiff has one year from the end of the disability to commence proceedings.[3] For contribution proceedings the plaintiff has two years,[4] and for actions for personal injuries and death the plaintiff has three years from the end of the disability.[5] In the case of actions under the Consumer Protection Act 1987 the limitation period ends three years after the end of the disability, but subject to the ten-year long-stop period applicable in such cases.[6] There is an overriding long stop for actions to recover land or money

[1] Section 38(2), (3). Some guidance on the meaning of "incapable of managing his property and affairs" is given in *Kirby v Leather* [1965] QB 367, where it was suggested by Lord Denning that the phrase meant incapable of managing his affairs in relation to the accident which gave rise in that case to the plaintiff's cause of action. Further guidance on the meaning of "an unsound mind" is provided by s 38(4), which conclusively presumes a person to be "of an unsound mind" when the person concerned is liable to be detained or subject to guardianship under the Mental Health Act 1983, or is being treated as an in-patient at a mental hospital or mental nursing home in a period immediately following a time when the patient was liable to be detained.

[2] Section 28(1).

[3] Section 28(4A), inserted by Defamation Act 1996, s 5(3).

[4] Section 28(5).

[5] Section 28(6).

[6] Section 28(7). For the long stop period see para 3.103 above.

charged on land of thirty years from the accrual of the cause of action.[7] In relation to latent damage, there is a separate provision (section 28A) dealing with disability. As we shall see below,[8] that provision is a complex one.

8.4 The general effect of the postponement of the start of the limitation period in section 28 is that defendants may remain exposed to the threat of litigation for an indefinite period of time, particularly where the potential plaintiff suffers from incurable mental disability. The problems this causes are illustrated in *Headford v Bristol and District Health Authority.*[9] The plaintiff suffered permanent brain damage, due to oxygen deprivation, in an operation at the defendant's hospital in 1964 when he was ten months old. Proceedings seeking damages for the negligence were issued in July 1992. In the interval several important witnesses, including the anaesthetist, had died. It was apparent from statements served on behalf of the plaintiff that his parents had become aware that they might have a strong claim against the authority shortly after the operation. The judge at first instance struck the action out as an abuse of the process of the court. The Court of Appeal reversed this decision, and noted that the issue of a properly pleaded first writ, within the time limit permitted by Parliament, is unlikely to be capable of being categorised as an abuse of process. Delay, without more, would not cause the institution of proceedings to be an abuse, if they were within that time limit.[10]

8.5 Section 28 is restricted to cases where there is disability at the date when any right of action accrued and, therefore, once time has started to run, a supervening disability does not reset (or stop) the clock.[11] This is in line with the general principle of English law that once time has started to run it is not to be suspended: but it is capable of producing unjust results in the case of a person who suffers from recurrent but intermittent mental illness, so that he or she may be under a disability at some but not all times.

8.6 On the other hand, section 28A of the 1980 Act,[12] which concerns latent damage, does deal (or at least is intended to deal) with disability which supervenes between the accrual of a cause of action and the time when it becomes discoverable. It provides:

> (1) Subject to subsection (2) below, if in the case of any action for which a period of limitation is prescribed by section 14A of this Act-

[7] Section 28(4).

[8] See paras 8.6 - 8.10 below.

[9] [1995] PIQR P180, CA, reversing [1994] 5 Med LR 406, QBD.

[10] See also *Hogg v Hamilton* [1992] PIQR P387.

[11] *Purnell v Roche* [1927] 2 Ch 142. In personal injuries cases, supervening disability is something which will be taken into account by the court in deciding under section 33 of the 1980 Act if it would be equitable to allow the action to proceed in spite of the expiry of the limitation period: see para 3.72 above.

[12] Inserted by the Latent Damage Act 1986, s 2(1).

(a) the period applicable in accordance with subsection (4) of that section is the period mentioned in paragraph (b) of that subsection;

(b) on the date which is for the purposes of that section the starting date for reckoning that period the person by reference to whose knowledge that date fell to be determined under section (5) of that section was under a disability; and

(c) section 28 of this Act does not apply to the action;

the action may be brought at any time before the expiration of three years from the date when he ceased to be under a disability or died (whichever first occurred) notwithstanding that the period mentioned above has expired.

(2) An action may not be brought by virtue of subsection (1) above after the end of the period of limitation prescribed by section 14B of this Act.

8.7 It will be seen that the circumstances in which section 28A applies are very limited. It will not apply to all latent damage cases, but only to those where the applicable primary limitation period under section 14A of the 1980 Act[13] is that of three years from the date of the requisite knowledge,[14] rather than six years from the accrual of the cause of action,[15] which effectively restricts it to cases where a period of more than three years elapses between accrual of the cause of action, and the acquisition of the relevant constructive or actual knowledge.[16] Moreover, because (by virtue of section 28A(1)(b)) the operation of sections 28 and 28A is mutually exclusive, section 28A will only apply in cases where the plaintiff's disability began between the accrual of the cause of action and the time when the cause of action was discovered or became discoverable.[17] Some commentators have argued that the correct construction of the section results in an even narrower application of section 28A, restricted to cases where the plaintiff is a successor in title to the person with the original claim.[18] This construction is contrary to the policy of the statute[19] and, in our view, is not necessitated by the wording of section 28A.

[13] See paras 3.87 - 3.93 above.

[14] Under s 14A(4)(b) and (5): see para 3.93 above.

[15] Under s 14A(4)(a).

[16] Section 28A(1)(a). See A McGee, *Limitation Periods* (2nd ed 1994), pp 98 - 100, 324 - 326. Cf T Prime and G P Scanlan, *The Modern Law of Limitation* (1993), pp 64 - 65.

[17] Section 28A(1)(b). If the disability began *before* the accrual of the cause of action, s 28 will apply, instead of s 28A.

[18] See A McGee, *Limitation Periods* (2nd ed 1994), p 325; T Prime and G P Scanlan, *The Modern Law of Limitation* (1993), p 64. This construction depends on a wide interpretation of "does not apply" in section 28A(1)(c).

[19] See Law Reform Committee *Twenty-Fourth Report (Latent Damage)* (1984) Cmnd 9390, paras 4.17, recommendation (b), which reads:

8.8 Where section 28A applies, the limitation period will be three years from the date on which the disability ends or the plaintiff dies, but subject to the overriding long stop of fifteen years from the date of the act or omission, stipulated by section 14B of the 1980 Act.[20] This contrasts with the six-year period under section 28, which is not subject to any long stop.[21]

8.9 The operation (or non-operation) of section 28A can be illustrated by some examples.

Example 1 In 1987, the defendant D constructs a building in such a way that he is liable in the tort of negligence to the owner P, and actual damage occurs, triggering the cause of action, in 1988. The damage becomes discoverable[22] in 1992, but in 1989 P becomes mentally incapable, and does not regain his capacity until 1993. Under section 28A the plaintiff will have a limitation period of three years from the date when he regains his legal capacity, so he will have until 1996 to commence an action.

Example 2 The facts are the same as Example 1, except that P's disability continues until 2003. Although section 28A applies, P's claim is barred by the long stop in section 14B.

Example 3 The facts are the same as Example 1, except that P loses his capacity late in 1987. Section 28 will apply rather than section 28A, so the limitation period will run for six years after the end of the disability, (that is, until 1999).

Example 4 As in the previous examples, negligent construction takes place in 1987 and the cause of action accrues in 1988. P loses capacity in 1989, and regains it in 1990, a few months after (also in 1990) the damage becomes discoverable. Section 28 will not apply,[23] but nor will section 28A.[24] The limitation period will be six years from the date of accrual of the cause of action, and will therefore end in 1994. If section 28A *had* applied in this situation, the limitation period would have

> Where a plaintiff becomes subject to a disability after the damage occurs but before it becomes discoverable he should [subject to the overriding long stop] be entitled to the benefit of the three year extension which we propose as from the cesser of the disability if this provides a longer period than is available under the general law.

[20] See para 3.99 above.

[21] See Law Reform Committee *Twenty-Fourth Report (Latent Damage)* (1984) Cmnd 9390, para 4.17.

[22] That is, P had constructive knowledge of the facts, under s 14A of the 1980 Act.

[23] Because the disability began after the cause of action accrued.

[24] Because of section 28A(1)(a). We should stress that s 14A(4) requires one to take as the relevant period whichever expires later of the "6 years from accrual" or "3 years from discoverability" periods. It is not therefore possible to say that s 28A(1)(a) is necessarily applicable when one is applying the 3-year period.

ended in 1993.[25] But, as the next example illustrates, section 28A(1)(a) can create potential anomalies.

Example 5 The facts are the same as Example 4, except that the plaintiff remains incapable until 1995. Since neither section 28 nor section 28A operates to stop the running of time, his claim is time-barred in 1994, even though he is still under disability, and has been under disability at all times since the cause of action became discoverable with reasonable diligence. This follows from the wording of the statute, but it appears to run counter to the recommendations of the Law Reform Committee, on which the Latent Damage Act 1986 was based.[26]

8.10 Where the plaintiff is a successor in title to another person who had a claim, section 28A will usually apply in a similar way.[27] Suppose that, in Examples 1, 2, 4 and 5 above, P purchased the building from Q in 1989, before losing his capacity. P's cause of action will be deemed to have accrued when the original cause of action accrued, in 1988.[28] The limitation period will end in the same years as in the original example. The position is different, however, in Example 3. Although P loses his legal capacity in 1987, and is under disability in 1988 when the cause of action is deemed to have accrued, before he purchased the building, section 3(3) of the Latent Damage Act 1986 disapplies section 28 of the 1980 Act. Because P is still under disability when the cause of action is discoverable, section 28A applies, and the limitation period ends in 1996, three years after the end of the disability.

2. FRAUD, CONCEALMENT AND MISTAKE

8.11 Under section 32 of the 1980 Act, the limitation period prescribed in the Act for a cause of action will not begin to run in three cases:

(1) where the action is based on the fraud of the defendant;

(2) where any fact which is relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; and

(3) where the action is for relief for the consequences of a mistake.

"Defendant" for the purposes of the section includes references to the defendant's agent and to any person through whom the defendant claims.[29] The

[25] See A McGee, *Limitation Periods* (2nd ed 1994), pp 99 - 100, where it is suggested that the drafting of section 28A(1)(a) is intended to avoid just this anomalous result, whereby section 28A would have shortened the limitation period instead of lengthening it.

[26] See *Twenty-Fourth Report (Latent Damage)* (1984) Cmnd 9390, paras 4.15 - 4.18, especially recommendation (b) quoted at para 8.7 n 19 above.

[27] It has been seen that some commentators have argued that these are the only circumstances in which s 28A is capable of applying: see para 8.7 above.

[28] Latent Damage Act 1986, s 3(2)(b). See para 3.100 above.

[29] Section 32(1).

postponement will last until the plaintiff has discovered the fraud, concealment or mistake, or could with reasonable diligence have discovered it.

(1) Action based on Fraud

8.12 The first exception is of limited application. It is confined to cases where fraud is an essential element of the action. In *Beaman v ARTS Ltd*[30] the plaintiff stored several packages with the defendants in 1935 before she moved to Turkey. On the outbreak of war the defendants lost touch with her, and in 1940 when they wished to wind the business up, the defendants decided to give the plaintiff's property away. When the plaintiff returned, she sued the defendants, claiming damages for conversion. The Court of Appeal held that section 26 (a) of the Limitation Act 1939[31] only applied where fraud had to be proved to enable the plaintiff to succeed - which would not be the case in an action for conversion, where fraud was not a necessary or a relevant consideration. An example given by Lord Greene MR of an action which would be "based upon the fraud of the defendant" for the purposes of section 26 (a) was an action for damages for deceit.[32]

(2) Deliberate Concealment

8.13 Under section 26(b) of the Limitation Act 1939 where "the right of action" was "concealed by the fraud"[33] of the defendant or his agent the period of limitation did not begin to run until the plaintiff discovered the fraud or could with reasonable diligence have discovered it. This was amended in 1980[34] and under section 32(1)(b) of the Limitation Act 1980 the central wording is now "where any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant". Further guidance on the meaning of this is provided in section 32(2), which states that "deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in the breach of duty."

8.14 Authorities on section 26(b), such as *Beaman v ARTS Ltd*,[35] *Kitchen v Royal Air Forces Association*,[36] and *King v Victor Parsons & Co*[37] had interpreted the phrase "concealed by the fraud of any such person" so liberally that Megarry V-C noted in *Tito v Waddell*[38] that "as the authorities stand, it can be said that in the ordinary use of language not only does 'fraud' not mean 'fraud' but also 'concealed' does

[30] [1949] 1 KB 550. See also para 4.14 above.

[31] The predecessor of section 32 (1)(a) of the 1980 Act.

[32] See also *GL Baker Ltd v Medway Building and Supplies Ltd* [1958] 1 WLR 1216 (discussed in para 4.16 above), where an action for fraudulent breach of trust was held to come within the provisions of s 26(a) of the Limitation Act 1939.

[33] This was the first statutory enactment of the equitable doctrine of concealed fraud.

[34] Limitation Amendment Act 1980, s 7.

[35] [1949] 1 KB 550. See also para 4.14 above.

[36] [1958] 1 WLR 563.

[37] [1973] 1 WLR 29.

[38] [1977] Ch 106, 245.

not mean 'concealed', since any unconscionable failure to reveal is enough." No reference to fraud remains in section 32(1)(b), and it is suggested that the authorities on section 26(b) are therefore of limited relevance for the interpretation of this exception.[39]

8.15 A question which has arisen is whether a plaintiff can rely on section 32(1)(b) where a builder has done defective work at the start of a building project which is then covered up in the course of the succeeding work, without any intent to conceal what has been done from the plaintiff. Although dealing with section 26(b) it was noted in *William Hill Organisation Ltd v Bernard Sunley & Sons Ltd*[40] that:

> Simply getting on with the work after something shoddy or inadequate has been done or omitted does not necessarily give rise to a legal inference of concealment or of equitable fraud.

This is the case even where the later work has necessarily covered up the builder's negligence. However, the nature of the defect may indicate that the builder was aware that the work being done was substandard. In such a case, if the builder does not advise the architects or project managers of the problem, and does nothing to rectify it, but continues building work which conceals the defects, this will provide evidence of deliberate concealment.[41] In short, for the plaintiff to be able to claim an extension of the limitation period on the grounds that there has been deliberate concealment, the defendant must have concealed[42] relevant facts, intending the plaintiff not to discover the truth or reckless as to whether the plaintiff discovers the truth or not.

8.16 In *Johnson v Chief Constable of Surrey*[43] the plaintiff brought proceedings in 1991 for damages for wrongful imprisonment in 1974 to 1975. He alleged that the police had deliberately concealed from him the fact that they had no reasonable cause to suspect a co-accused, and by implication the lack of any grounds on which to arrest him. The Court of Appeal held that the plaintiff's right of action had been complete at the moment of arrest. Whilst the facts concealed from him might have made his case stronger, or his right to damages more susceptible of proof, they were not necessary to complete the right of action.

[39] Lord Browne-Wilkinson noted in *Sheldon v RHM Outhwaite Ltd* [1996] AC 102, 145: "[I]n my judgment it is inconsistent with the plain Parliamentary intention lying behind the amendment of the Act of 1939 to continue to construe the Act of 1980 as if it were still a statutory enactment of the equitable doctrine of concealed fraud. The Act is not. Section [32](1)(b) is a statutory provision setting out the circumstances in which the ordinary time limits will not apply and contains no reference to the old concealed fraud doctrine".

[40] (1983) 22 BLR 1 (A case on the 1939 Act).

[41] See, for example, *Gray v T P Bennett & Sons* (1987) 43 BLR 63. See also *Lewisham London Borough v Leslie & Co Ltd* (1979) 250 EG 1289.

[42] The defendant will be held to have concealed the facts from the plaintiff even though he has not taken any active steps to conceal matters from the plaintiff, where he has been guilty of an unconscionable failure to reveal the facts to the plaintiff: *Westlake v Bracknell District Council* [1987] 1 EGLR 161.

[43] *The Times*, 23 November 1992 (CA).

8.17 In *Sheldon v RHM Outhwaite (Underwriting Agencies) Ltd,*[44] the cause of action of the plaintiffs, Lloyd's names, was alleged to have arisen as a result of various acts and omissions in 1982 by the defendants, the members' agents of the underwriting syndicate to which the plaintiffs belonged. The plaintiffs issued proceedings for damages for breach of contract, breach of fiduciary duty and negligence in 1992. They claimed that they had been prevented from discovering the facts relevant to their cause of action by deliberate concealment undertaken by the defendants in 1984, after the cause of action accrued. This raised the question whether section 32(1)(b) could apply to cases of deliberate concealment after time had started to run (that is, subsequent concealment). The House of Lords reviewed three possible interpretations of the subsection:

(1) The subsection does not apply to subsequent concealment. Therefore, where time has started to run before the defendants act to conceal the relevant facts from the plaintiffs, the subsection does not apply, and once the limitation period prescribed by the Act has expired, the action will be time-barred, even if the plaintiffs never became aware of the facts giving them a cause of action against the defendants.

(2) The subsection does apply to subsequent concealment. It has the result that the limitation period is restarted (that is, the clock is reset) after the concealment has been discovered.

(3) The subsection does apply to subsequent concealment. It has the effect of suspending time. That is, it excludes a period of time, starting when the facts are concealed from the plaintiffs and ending when they discover the concealment, from the limitation period. When the discovery is made, the plaintiffs would therefore have an amount of time, equivalent to the time remaining of the limitation period at the point when the concealment took place, to issue proceedings against the defendants.

8.18 The majority of the House of Lords rejected the first interpretation and held that the subsection clearly applied to every case of deliberate concealment, whether that concealment coincided with the accrual of the cause of action or not. The interpretation of the phrase "shall not begin to run" caused more difficulty. Although Lord Browne-Wilkinson and Lord Nicholls[45] felt that the third interpretation would be the most logical,[46] both agreed that this could not be

[44] [1996] AC 102.

[45] The two judges forming the majority with Lord Keith of Kinkel.

[46] Lord Nicholls in particular felt that both the first and third interpretations would frustrate the intention of Parliament, suggesting that if the first interpretation were taken to its logical extreme, a defendant could be deprived of a defence of limitation which had accrued before the concealment took place. If the third interpretation were adopted an artificial distinction would be read into the subsection, and the mischief it aimed at (protecting the plaintiff from deliberate concealment practised by the defendant) would not be met. However, though regarding the second interpretation as the most attractive, he accepted that it could not be supported on the words of the statute, and chose, with reluctance, to support the first interpretation.

supported by the wording of this phrase. The second interpretation was therefore adopted.

8.19 Lord Lloyd of Berwick, giving the minority opinion,[47] favoured the first interpretation (which had also been favoured by the Court of Appeal). He noted that Parliament could not be said to have intended that section 32(1)(b) should apply to cases of subsequent concealment, and that the wording of the subsection should not be distorted to read as though the words "shall not begin to run" meant "shall be treated as not beginning to run". He expressed concern that the first interpretation would lead to the plaintiffs being able to rely on an act of concealment taking place after the limitation period had ended. He also recognised the possibility that Parliament might have intended to distinguish between deliberate concealment at the time when the cause of action accrues, and subsequent concealment, in the same way as it distinguishes disability at the time the cause of action accrues (which prevents time running) and subsequent disability (which generally has no effect on the running of time).[48]

8.20 The opinions in *Sheldon v Outhwaite* demonstrate the problems with section 32(1)(b).[49] Although the solution favoured by the majority is preferable to limiting the protection offered by the subsection to cases where the concealment practised by the defendant coincided with the accrual of the cause of action, it is not entirely satisfactory. By accepting that the limitation period should be restarted when the plaintiff has discovered the concealment, regardless of how much of the limitation period had expired when the concealment took place, the judgment could be said to have over-protected the plaintiff. There is no clear justification for giving a plaintiff, who took no action in the first five years and eleven months of a limitation period a further six years, from when he discovers the truth, to bring his action because the defendant concealed a relevant fact during the last month of the limitation period. Indeed as Lord Lloyd of Berwick pointed out, on this interpretation it would seem that the clock can be reset even after the normal limitation period has expired. It is unfortunate that the wording of the statute prevented the majority from adopting its preferred solution.

[47] With which Lord Mustill agreed.

[48] See paras 8.2 - 8.5 for a discussion of section 28 on disability. It seems unlikely that Parliament had this intention:

(i) Section 32(1) contains no equivalent to the phrase "if on the date when any right of action accrued" in s 28 which prevents a plaintiff relying on disability which did not exist at that date (see para 8.5);

(ii) In cases where there has been deliberate concealment by the defendant, the plaintiff's inability to bring an action against the defendant is the result of the defendant's conduct. This is not the case where the plaintiff suffers from a disability. It may be reasonable not to extend the time during which defendants remain exposed to an action for damages because of a plaintiff's subsequent disability which is in no way attributable to the defendants (though see paras 3.72 above, and 12.126 - 12.128 below). However, it is hard to see why Parliament should have intended that defendants should benefit from their culpable conduct when that conduct does not coincide precisely with the time when the cause of action accrues to the plaintiff.

[49] See McGee, "Subsequent Concealment of Material Facts" (1995) 111 LQR 580.

(3) Relief from Consequences of Mistake

8.21 The third exception under section 32 applies where the action is "for relief for the consequences of a mistake". In such a case, time will run from the moment the plaintiff has discovered the mistake, or could with reasonable diligence have discovered it. There have been few cases on this exception. *Phillips-Higgins v Harper,*[50] a case on section 26(c) of the Limitation Act 1939[51] concerned an agreement made in 1939 between the plaintiff and the defendant that the defendant would pay the plaintiff as assistant solicitor a salary and a share of the annual profits of the practice. The plaintiff believed that she was entitled to a third share of the profits. The defendant paid her a quarter of the profits. The plaintiff did not appreciate this until 1951, when she brought proceedings against her employer for a declaration that she was entitled to a third share of the profits, and an account of those profits. She argued that section 26 (c) of the Limitation Act 1939 applied. Pearson J held that the mistake needed to be an essential element of the cause of action. Here the cause of action was for breach of contract. He noted that the only consequence of the mistake made by the plaintiff was that she had not instituted proceedings in time to avoid the operation of the Limitation Acts. The action was not therefore for the consequences of a mistake within section 26(c).

8.22 A more recent case on section 32(1) of the 1980 Act discussed the action which should be taken by a plaintiff exercising "reasonable diligence" to discover a mistake. In *Peco Arts Inc v Hazlitt Gallery Ltd,*[52] the plaintiff had brought a drawing wrongly attributed to Ingres from the defendants. Both plaintiffs and defendants acted under the belief that the drawing was genuine, and the plaintiff did not discover the mistake until eleven years after buying the painting. The plaintiff issued proceedings for the return of the purchase price and interest as money paid under a mutual mistake of fact (with alternative claims for the rescission of the contract in equity and for damages under the Misrepresentation Act 1967 for negligent misrepresentation). It was accepted that had the mistake not been made the plaintiff would not have brought the drawing. The defendant argued that had the plaintiff acted with reasonable diligence, she would have discovered the mistake far sooner. Webster J said that "reasonable diligence" for the purposes of section 32(1)(c) meant

> not the doing of everything possible, not necessarily the using of any means at the plaintiff's disposal, not even necessarily the doing of anything at all; but that it means the doing of that which an ordinarily prudent buyer and possessor of a valuable work of art would do having regard to all the circumstances, including the circumstances of the purchase.[53]

He held that the plaintiff had used reasonable diligence and was therefore able to rely on section 32(1)(c), so that the action was not time-barred.

[50] [1954] 1 QB 411.

[51] The equivalent of s 32(1)(c) of the 1980 Act.

[52] [1983] 1 WLR 1315.

[53] [1983] 1 WLR 1315, 1323.

(4) Proviso to Section 32

8.23 By reason of section 32(3), even where there has been fraud, concealment or a mistake within the meaning of section 32(1), section 32 will not extend the limitation period for actions:

(1) to recover any property or to recover its value; or

(2) to enforce a charge against any property, or to set aside a transaction affecting any property

if the action is brought against the purchaser of property (or someone who claims though that person) and the property concerned has been purchased for valuable consideration by an innocent third party[54] after the fraud, concealment or transaction in which the mistake was made took place.

8.24 Where for example, goods forming part of trust property have been sold by a trustee in breach of trust (the sale having been deliberately concealed from the other trustees), and then sold on to another purchaser for value, the purchasers of the goods would be protected from an action by the trustees to recover either the goods or damages for their conversion after the expiry of the limitation period, provided that they came within the definition of "innocent third party".[55] If the purchasers of a stolen (or converted) article are not "innocent third parties", section 32 will prevent time running in their favour if the purchasers or any person through whom they claim have deliberately concealed facts relevant to the plaintiff's cause of action.[56]

Example P lends D1 a sculpture in 1980. In 1985, D1 sells the sculpture to D2, passing it off as his own property. He conceals this from P by displaying a facsimile. The fraud is discovered in 1993, there being no reasonable possibility that P could have discovered it earlier. Prima facie, the applicable limitation period for an action in conversion by P against D2 would be six years from 1985, since D2 is a bona fide purchaser and his purchase is not related to the theft.[57] If section 32(1) applied, the start of P's limitation period against D2 would be postponed to

[54] By s 32(4), a purchaser is an "innocent third party" for the purposes of s 32(3):

(a) in the case of fraud or concealment of any fact relevant to the plaintiff's right of action, if he was not a party to the fraud or (as the case may be) to the concealment of that fact and did not at the time of the purchase know or have reason to believe that the fraud or concealment had taken place; and

(b) in the case of mistake, if he did not at the time of the purchase know or have reason to believe that the mistake had been made.

See paras 3.108 - 3.115 above in relation to limitation periods for conversion.

[55] See *Eddis v Chichester Constable* [1969] 2 Ch 345.

[56] *Eddis v Chichester Constable* [1969] 2 Ch 345. It will not always be the case that relevant facts have been deliberately concealed in cases of theft - see *RB Policies at Lloyd's v Butler* [1950] 1 KB 76 where the fact that the identity of the thief is unknown was held to be insufficiently material to the plaintiff's cause of action in respect of a stolen motor car to prevent time running.

[57] Sections 4(1) and (2). See para 3.114 above.

1993, by virtue of D1's concealment. But section 32(1) does not apply because D2 is a bona fide purchaser and therefore able to take advantage of section 32(3). So the limitation period, as against D2, ends in 1991, even though this is two years before P could have known about the fraud.[58]

(5) The Effect of Section 32 on Consumer Protection Act Claims and Latent Damage Claims

8.25 We have seen that, in relation to claims under the Consumer Protection Act 1987 and in relation to claims in respect of negligently inflicted latent damage which does not involve personal injury, there are two limitation periods: an initial limitation period based on discoverability,[59] and a long-stop period.[60] The question arises of how these regimes interact with the postponements of limitation periods normally available under section 32.

8.26 In relation to claims under the Consumer Protection Act 1987, section 32(1) does not apply to override the long-stop in any circumstances.[61] The position in relation to latent damage claims is slightly less straightforward. Deliberate concealment will operate to disapply the long-stop.[62] The other factors which postpone the start of a limitation period under section 32, fraud and mistake, do not have this effect.[63] But deliberate concealment will also disapply the initial limitation period, so that if there is deliberate concealment in a latent damage case, the limitation period of six years generally applicable to torts[64] will apply, but commencing on the date when the plaintiff discovered, or could with reasonable diligence have discovered, the concealment. So, if D negligently constructs a building for P in 1989, and the negligence causes immediate damage which is not discovered (or discoverable) by P until 1994, then the limitation period for P's claim in negligence would normally expire in 1997, three years after P's date of knowledge.[65] But if P's failure to discover the damage resulted from D's deliberate concealment, the limitation period will expire in 2000, six years after the date on which P discovered the concealment.

[58] P's action against D1 is not, and will not become, barred, although it may well be worthless.

[59] Limitation Act 1980, s 11A(4): see paras 3.101 - 3.102 above (Consumer Protection Act claims). Limitation Act 1980, s 14A: see paras 3.93 - 3.98 above (latent damage claims). In relation to latent damage claims there is an alternative initial limitation period of 6 years from the date on which the cause of action accrued.

[60] Limitation Act 1980, s 11A(3); see also para 3.103 above (Consumer Protection Act claims); Limitation Act 1980, s 14B; see also para 3.99 above (latent damage claims).

[61] Limitation Act 1980, s 32(4A).

[62] *Ibid*, s 32(5). See Law Reform Committee, *Twenty-Fourth Report (Latent Damage)* (1984) Cmnd 9390, para 4.20.

[63] Although since section 14B is limited to negligence claims it is hard to see that fraud and mistake could be relevant.

[64] Under Limitation Act 1980, s 2.

[65] *Ibid*, s 14A.

3. ACKNOWLEDGEMENT AND PART PAYMENT

8.27 Under sections 29 to 31 of the 1980 Act, a fresh right of action will be considered to have accrued in certain cases when an acknowledgement or part payment is made after a right of action has accrued.[66] The effect of this is to restart the limitation period (that is, the clock is reset) for that action from the date of that acknowledgement or payment. A limitation period may be repeatedly extended if further acknowledgements or payments are made, but once a limitation period for any right of action has expired no acknowledgement or payment made after that date is capable of reviving that right of action.[67]

(1) Types of Actions to which Acknowledgement and Part Payment Apply

(a) Actions to recover land (including a foreclosure action)[68]

8.28 A right of action to recover land will have accrued if someone is in adverse possession of the land.[69] If the squatter acknowledges the title of the person to whom the right of action has accrued, that acknowledgement will give rise to a new right of action, which will arise on the date when the acknowledgement was made, interrupting the period of adverse possession. In *Edginton v Clark*,[70] a letter written by a squatter to the agent of the owners of the property on which he was squatting, offering to buy the property, was held to be sufficient acknowledgement of their title to ensure that a fresh cause of action accrued at the date the acknowledgement was given. The letter amounted to an acknowledgement that, as between himself and the owners, the owners had a better title to the land.

8.29 Where a right of action to recover land has accrued to a person who is entitled to that land on the determination of an entailed estate, and someone is in possession of that land by virtue of a defective disentailing assurance,[71] an acknowledgement given by the person in possession will have a double effect. It will, first, give the person entitled to the land a fresh right of action and, secondly, disapply section 27, so that the assurance can never be retrospectively validated, even if the person giving the acknowledgement stays in adverse possession of the land for a further twelve years from the date of the acknowledgement.[72]

[66] The rule that an acknowledgement or part payment restarts the limitation period in relation to certain claims (for example, simple contract debts) began as a common law rule, based on an implied promise to pay. See Law Revision Committee, *Fifth Interim Report (Statutes of Limitation)* (1936) Cmd 5334 para 19.

[67] Section 29(7).

[68] Similar rules apply to mortgages of personal property.

[69] See para 6.6 above.

[70] [1964] 1 QB 367.

[71] Which would be treated as having operated to bar the entail under s 27 of the 1980 Act once the person taking possession of the land under the terms of that assurance had been in possession for the limitation period. See para 6.9 above.

[72] Section 29(2)(b). See T Prime and G Scanlan, *The Modern Law of Limitation* (1993), pp 45 - 46.

8.30 Where a right of action has accrued to a mortgagee, a payment in respect of the debt[73] will cause a fresh right of action to accrue to the mortgagee at the date on which the payment is made.[74]

8.31 If a mortgagee has taken possession of mortgaged land under the terms of the mortgage, an acknowledgement by the mortgagee of the title of the mortgagor, or of the equity of redemption of the mortgagor, will allow the mortgagor twelve years from the date of that acknowledgement within which to bring an action to redeem the mortgage.[75] Similarly, if the mortgagee receives a payment in respect of the mortgage debt (whether of interest or principal), the mortgagor will be able to bring an action to redeem the land within twelve years of the payment.[76]

(b) Liquidated pecuniary claims and claims to personal estate

8.32 Under section 29(5) where a right of action accrues to recover a debt or other liquidated pecuniary claim, or a share in the personal estate of the deceased, either an acknowledgement or a payment in respect of the amount claimed, made by the debtor to the person to whom the right of action has accrued, will restart the limitation period in respect of that claim, from the date of the acknowledgement or payment. There is little authority as to what claims are liquidated claims within the meaning of the subsection.[77] A claim for remuneration on a *quantum meruit* basis has, in *Amantilla Ltd v Telefusion PLC*,[78] been held to be a "debt or other liquidated claim" for the purposes of section 29(5).

(2) What Constitutes an Acknowledgement or Part Payment?

(a) Acknowledgements

8.33 An acknowledgement, to be effective for the purposes of section 29 to 31, must be in writing and signed by the person who makes it.[79] The acknowledgement does not have to quantify the amount due, but it must include an admission that a sum is due,[80] and if the sum is not quantified in the acknowledgement, it must be capable of ascertainment by calculation or by using extrinsic evidence, without

[73] Whether a payment of interest or the principal.

[74] Section 29(3). See paras 8.44 - 8.48 below in relation to the rights of third parties.

[75] Section 29(4)(b).

[76] Section 29(4)(a).

[77] A McGee, *Limitation Periods* (2nd ed 1994), p 299.

[78] (1987) 9 Con LR 139. See para 5.15 above.

[79] Section 30(1). Providing that a written acknowledgement has been made, the existence of that acknowledgement may be proved by oral evidence if, for example, the acknowledgement has been lost: *Read v Price* [1909] 2 KB 724.

[80] A statement denying that the defendant is liable will not constitute an acknowledgement, even when it contains an admission that the money claimed was paid to the defendant: *Re Flynn, dec'd (No 2)* [1969] 2 Ch 403. But see *Beale v Nind* (1821) 4 B & Ald 568; 106 ER 1044, where a letter from the defendant denying liability on the basis that repayment had already been made to the plaintiff was held to constitute an acknowledgement. See, further, A McGee, *Limitation Periods* (2nd ed 1994), p 312.

further agreement by the parties.[81] Documents which have been recognised as potentially valid acknowledgements within the terms of the section include correspondence,[82] pleadings,[83] interrogatories,[84] and company accounts.[85]

8.34 The question of what constitutes a sufficient acknowledgement, where the debt is admitted as to part only, was considered in *Surrendra Overseas Ltd v Government of Sri Lanka*.[86] This was a shipping case, in which the plaintiffs claimed unpaid freight and demurrage which had become due over six years before arbitration proceedings were started. The defendants had written a letter to the plaintiffs within the limitation period which calculated the amount due to the plaintiffs, and deducted two other amounts. The plaintiffs alleged that this letter, together with payment of the balance calculated by the defendants to be due after the set off, was an acknowledgement of the full debt claimed. Kerr J held that a debtor will only have acknowledged the claim if he has admitted his liability to pay the amount which the plaintiff seeks to recover, so that if there is a denial of liability on the ground of a cross-claim, there is no acknowledgement of the whole. However, he said that there was an acknowledgement of liability for the amount left after the cross-claims had been deducted (although this amount, in fact, had already been paid).

8.35 It is true that in both *Swann v Sowell*[87] and *Re River Steamer Co*,[88] acknowledgements subject to counterclaims were held not to be sufficient, but in

[81] See *Good v Parry* [1963] 2 QB 418; *Dungate v Dungate* [1965] 1 WLR 1477; *Kamouh v Associated Electrical Industries International Ltd* [1980] QB 199. On the apparent conflict between *Good* and *Dungate* as to whether the acknowledgement itself must quantify the debt see A McGee, *Limitation Periods* (2nd ed 1994), pp 303 - 304; T Prime and G Scanlan, *The Modern Law of Limitation* (1993), pp 51 - 52. See also note by R E Megarry (1966) 82 LQR 17.

[82] *Dungate v Dungate* [1965] 1 WLR 1477.

[83] *Re Flynn, dec'd. (No 2)* [1969] 2 Ch 403 although, on the facts, the pleading in question was held not to be an acknowledgement (see n 80 above).

[84] *Lovell v Lovell* [1970] 1 WLR 1451. An interrogatory which seeks to compel the defendant to give an acknowledgement, and destroy a limitation defence, will be disallowed.

[85] Where the balance sheet of a company includes an amount owing to "sundry creditors", it will be an effective acknowledgement to a creditor who can prove that he or she actually received a copy of the balance sheet, and is one of the sundry creditors referred to. Such an acknowledgement will take effect at the date of the balance sheet. *Re Gee & Co (Woolwich) Ltd* [1975] Ch 52, *Re Compania de Electricidad de al Provincia de Buenos Aires Ltd* [1980] Ch 146. In *Re Gee & Co*, Brightman J rejected the submission that English law required that an acknowledgement, to be effective, must be of a debt which is actually existing at the date when the acknowledgement is written. He distinguished *Consolidated Agencies Ltd v Bertram Ltd* [1965] AC 470 (PC) as being decided on the basis of Indian Law. Where the creditor concerned is one of the two directors who has signed the accounts, they cannot be an effective acknowledgement unless they have been ratified by the company in general meeting, in line with the rule that a creditor cannot acknowledge his own debt. *Jones v Bellgrove Properties Ltd* [1949] 2 KB 700, *Re Transplanters (Holding Company) Ltd* [1958] 1 WLR 822. See A McGee, *Limitation Periods* (2nd ed 1994), pp 304 - 306; T Prime and G Scanlan, *The Modern Law of Limitation* (1993), pp 53 - 54.

[86] [1977] 1 WLR 565.

[87] (1819) 2 B & Ald 759, 106 ER 543.

both cases the set-off or counterclaim appears to have exceeded the amount of the "main" indebtedness.[89] Thus where the defendant acknowledges the debt, but at the same time contends that an existing set-off or counterclaim reduces the creditor's claim in part, it appears that this will be an acknowledgement of indebtedness for the balance only.

(b) Part payment

8.36 Part payment of a debt can be viewed as a sort of acknowledgement which, due to its inherent certainty, needs no formality.[90] Nevertheless, questions arise as to whether a payment relates to the debt in question, and whether certain actions constitute a payment.

8.37 A payment must be "in respect of"[91] the debt in question in order to restart the limitation period. In *Surrendra Overseas Ltd v Government of Sri Lanka*[92] Kerr J also rejected the contention that the payment made by the defendants was a "payment" in respect of the whole of the debt claimed. As with an acknowledgement, a part payment, in order to restart the limitation period for an action on a debt, "must be evidence of an admission of liability for the debt claimed".[93] This can only be assessed by reference to the act and intention of the debtor.[94] Here the debtor clearly did not accept liability for any sum other than the amount actually paid to the plaintiff, and in consequence the payment was not a sufficient acknowledgement of the whole amount claimed by the plaintiff.

8.38 The same test was applied in *Kleinwort Benson Ltd v South Tyneside Metropolitan Borough Council.*[95] Here payments were made by the defendants in the belief the payments were required under the terms of an interest rate swap contract. The contract was void because ultra vires the local authority. Hobhouse J held that the payments made under the void contracts could not be regarded as evidence that the defendants acknowledged their liability to make restitution to the plaintiffs of the sums earlier received by the defendants. Unaware of that liability, the defendants had had no such intention.

8.39 Where there is a series of dealings between the plaintiff and the defendant, it is necessary to differentiate between situations where the dealings give rise to a series

[88] (1871) 6 Ch App 822.

[89] It has also been suggested that these decisions rest on the requirement, now obsolete, that an acknowledgement should incorporate an express or implied promise to pay. See T Prime and G Scanlan, *The Modern Law of Limitation* (1993), pp 54 - 55; A McGee, *Limitation Periods* (2nd ed 1994), p 306.

[90] See, eg, the Law Revision Committee *Fifth Interim Report (Statutes of Limitation)* (1936) Cmd 5334, para 20.

[91] Section 29(5).

[92] [1977] 1 WLR 565. See para 8.34 above.

[93] *Ibid*, 577.

[94] See also *Re Footman Bower & Co. Ltd* [1961] Ch 443.

[95] [1994] 4 All ER 972. See also on this case para 5.10 above.

of discrete debts, and those where there is a single running account. Where there are separate debts, a payment will only restart the limitation period in relation to the debt to which it is referable, assuming that it has not already become statute-barred.[96] On the other hand, with an account running between the debtor and the creditor over a long period, where payments are made by the debtor on account of the total amount, without reference to a specific debt, each payment will be treated as referable to the whole balance owed by the debtor, regardless of the timing of particular debts which make up the total amount owed to the creditor.[97]

8.40 The question then arises of what constitutes a payment. Certainly money or money's worth will suffice.[98] Moreover, in *Maber v Maber*,[99] it was held that a transaction where no money actually passed could in certain circumstances amount to a "payment" sufficient to stop time running. In that case, the plaintiff had made a loan to his son. Over six years after the loan,[100] the son said to the plaintiff that he was prepared to pay the interest due on the loan, and made as if to take the money out of his pocket. The plaintiff stopped him, saying that he would give the money to his daughter-in-law instead. The plaintiff then made out a receipt for the money, as though he had received it from his son, and gave the receipt to his daughter-in-law. Although no money had actually changed hands, this "payment" was held, by a majority of the Court of Exchequer,[101] to be sufficient to defeat a defence under the Statutes of Limitations, on the ground that what had taken place amounted substantially to payment. The only thing lacking was that the parties had not performed the "idle ceremony" of physically taking the money out, handing it over and handing it back.[102] But in a dissenting judgment Bramwell B said that he regarded the actions of the parties as incapable of constituting a payment, since it had not effected any change in the legal position of the debtor, the wife, who had not given any consideration, being unable to sue her husband for the interest if she wished to do so.[103] He regarded the situation as more analogous to one where the debtor offered payment but the creditor refused it.

8.41 It is probably impossible to lay down a "hard and fast" rule applicable in circumstances where, as in *Maber v Maber*, a creditor forbears from demanding, or

[96] The general rule where a debtor has multiple debts to the same creditor is that a payment is appropriated to the debt specified to the debtor or, if none is specified, to the debt specified by the creditor or, if neither party specifies, first to such debts as are not statute-barred: *Re Footman Bower & Co Ltd* [1961] 1 Ch 443; *Mills v Fowkes* (1839) 5 Bing (NC) 455; 132 ER 1174; *Nash v Hodgson* (1855) De G M & G 474; 43 ER 1318. See A McGee, *Limitation Periods* (2nd ed 1994), pp 311 - 312; T Prime and G Scanlan, *The Modern Law of Limitation* (1993), p 58.

[97] *Re Footman Bower & Co Ltd* [1961] 1 Ch 443.

[98] T Prime and G Scanlan, *The Modern Law of Limitation* (1993), pp 56 - 57.

[99] (1867) LR 2 Exch 153.

[100] There was then no equivalent of s 29(7), so a valid payment could revive the claim.

[101] Martin, Channell and Pigott BB, Bramwell B dissenting.

[102] (1867) LR 2 Exch 153, 156, *per* Martin B.

[103] *Ibid*, 156 - 157.

refuses to accept, money which is due to him or her. It is necessary in all such cases to examine precisely what the parties did. But it seems essential for there to be at least a tender of the sum by the debtor for there to have been a payment for the purposes of section 29(5): otherwise a creditor would be able to extend the limitation period unilaterally by writing off small amounts of the debt.[104] And it seems doubtful whether, if a debtor offers payment but the creditor refuses, leaving the amount offered still outstanding, this will constitute a payment.

(c) Acknowledgement or part payment by or to an agent

8.42 Under section 30(2), an acknowledgement or payment may be made by an agent of the person required to make it under section 29, and may be addressed to an agent of the person to whom the right of action has accrued. A person will not be an agent for the purposes of making an acknowledgement unless he or she is duly authorised to make it. In *Wright v Pepin*,[105] Harman J noted that it was unnecessary for the agent to be expressly authorised to give an acknowledgement: it was enough that giving the acknowledgement was within the scope of the agent's authority. In that case, the agent was a solicitor, instructed to settle the affairs of her client. Harman J held that she had the authority to acknowledge her client's mortgage for the purposes of the Limitation Act 1939.[106] In *Re Transplanters (Holding Company) Ltd*,[107] it was held that an auditor of a company is not an agent of the company for the purpose of giving an acknowledgement.

8.43 But in *Re Beavan*,[108] the debtor's agent was held to have insufficient authority to give an acknowledgement. The debtor was incapable of managing his affairs because of mental illness. One of his sons undertook the management of his business, and bank account, by agreement with the bank and gave an acknowledgement for one of his father's debts. The court held that the acknowledgements given during the father's lifetime did not stop the limitation period "because clearly there is no agency and no capacity on the part of the manager to act for the person of unsound mind at all".[109] After his father's death, the son also completed an affidavit referring to the debt for the Inland Revenue, acting as one of his father's executors. It was alleged that the affidavit was also an acknowledgement of the debt. The court accepted that, in acting as his father's executor, the son had the necessary authority at the time the affidavit was made, but held that the affidavit was not an acknowledgement of the debt, as it was not made to the creditor.[110]

[104] A McGee, *Limitation Periods* (2nd ed 1994), pp 310 - 311.

[105] [1954] 1 WLR 635.

[106] In *Trustee in Bankruptcy of Bowring-Hanbury v Bowring-Hanbury* [1943] 1 All ER 48 a solicitor was held to lack the necessary authority to acknowledge a debt.

[107] [1958] 1 WLR 822.

[108] [1912] 1 Ch 196.

[109] *Ibid*, 204, *per* Neville J.

[110] For criticism of the decision see A McGee, *Limitation Periods* (2nd ed 1994), pp 300 - 301; T Prime and G Scanlan, *The Modern Law of Limitation* (1993), p 49.

(3) Acknowledgements and Part Payments by Co-Debtors and Other Third Parties

8.44 The question whether an acknowledgement or part payment by one person will bind other persons, in the sense of re-starting the running of time against them, is governed by section 31 of the 1980 Act. It has been noted that in general the effect on third parties of a part payment is likely to be greater than that of an acknowledgement.[111]

8.45 In the case of debts and other liquidated pecuniary claims, a part payment will bind all persons liable,[112] but an acknowledgement will bind only the person who made it.[113]

8.46 An acknowledgement or a part payment by one personal representative will be sufficient to bind the estate of the deceased. A part payment by a beneficiary may be sufficient to restart the running of time against the estate.[114]

8.47 An acknowledgement of title to land[115] by a person in possession will bind all other persons who are in possession during the limitation period that follows the acknowledgement.[116] The position in relation to mortgaged property is more complex. Time is re-started by a payment made by either the person in possession of the land, or by the person who is liable for the debt.[117] If the land has been occupied by a squatter, the mortgagor can prevent time running in favour of the squatter as against the mortgagee by making a payment on the mortgage to the mortgagee. This will not stop time running in favour of the squatter as against the mortgagor who is no longer in possession of the property.[118] The payment will bind all other persons in possession of the mortgaged property during the ensuing period of limitation, so far as the mortgagee's right to foreclose or otherwise recover the possession of the property is concerned.[119]

8.48 Where two or more mortgagees are in possession of the mortgaged land, and only one gives an acknowledgement, the acknowledgement will only bind that mortgagee and its successors.[120] The limitation period[121] will continue to run in favour of the other mortgagee. If the mortgagee giving the acknowledgement is entitled to part of the mortgaged land, but not to an ascertained part of the

[111] A McGee, *Limitation Periods* (2nd ed 1994), p 301.

[112] Section 31(7).

[113] Section 31(6).

[114] See, eg, *Re Hollingshead* (1888) 37 Ch D 651; *Re Lacey* [1907] 1 Ch 330.

[115] Or to a benefice or mortgaged personalty.

[116] Section 31(1).

[117] Section 29(3). See para 8.30 above.

[118] See A McGee, *Limitation Periods* (2nd ed 1994), p 298.

[119] Section 31(2).

[120] Section 31(3).

[121] Calculated from the moment the mortgagees went into possession of the mortgaged land: s 16, and see para 6.46 above.

mortgage debt, the mortgagor is entitled to redeem the proportion of the whole debt which is equivalent to the proportion of all the mortgaged land to which the mortgagee is entitled. In contrast, where there are two or more mortgagors, and a mortgagee in possession of the mortgaged land gives such an acknowledgement to one of the mortgagors, that acknowledgement is treated as being given to all the mortgagors.[122]

[122] Section 31(5).

PART IX
ADDITIONAL ISSUES

1 WHAT HAPPENS WHEN TIME EXPIRES?

9.1 The general rule is that expiry of a limitation period bars the remedy but does not extinguish the right.[1] Where there is a defence of limitation in any particular action, that defence must be specifically pleaded by the defendant.[2] It follows that if the defendant elects to contest the action on the merits, the plaintiff may still obtain his remedy, notwithstanding the fact that the limitation period prescribed by the statute has expired.

9.2 Even if a defendant does successfully plead a limitation defence, so that the plaintiff has no remedy through the courts, there may be other "self-help" methods open to him or her to enforce the right.[3] For example:

(1) A solicitor's lien may be enforced after his costs have become statute-barred under the 1980 Act.[4]

(2) An executor may deduct the amount of a statute-barred debt owed by a legatee to the estate from any legacy paid to that legatee.[5]

(3) If a creditor receives money from a debtor on account of debts, and that money is not appropriated to a specific debt, the creditor may appropriate the money to a statute-barred debt.[6]

9.3 Once an action has become time-barred, the defendant has an accrued right to rely on that time bar despite the subsequent repeal of the relevant limitation provision (unless the contrary intention appears in the repealing legislation).[7]

[1] See *Curwen v Milburn* (1889) 42 ChD 424, 434 - 5, *Royal Norwegian Government v Constant & Constant and Calcutta Marine Engineering Co Ltd* [1960] 2 Lloyd's Rep 431, 442. The exceptions to this rule are discussed in para 9.4.

[2] RSC, O 18, r 8. It is not open to the court to raise the matter if the parties themselves do not (*Kennett v Brown* [1988] 1 WLR 582, 585).

[3] See the discussion in Law Revision Committee *Fifth Interim Report (Statutes of Limitation)* (1936) Cmd 5334, pp 32 - 35.

[4] *Higgins v Scott* (1831) 2 B & A 413, 109 ER 1196.

[5] See *Re Rownson* (1885) 29 ChD 358.

[6] See *Mills v Fowkes* (1839) 5 Bing NC 455, 132 ER 1174. A debt which is statute-barred may not be validly set off against debts owed (*Walker v Clements* (1850) 15 QB 1046, 117 ER 755 considered in *Henriksens Rederi A/S v THZ Rolimpex, The Brede* [1974] QB 233, 257).

[7] *Yew Bon Tew v Kenderaan Bas Mara* [1983] 1 AC 553. The consequences of this rule became apparent in *Arnold v Central Electricity Generating Board* [1988] AC 228, discussed in more detail in para 9.38 below. Note also that by s 29(7) of the 1980 Act an action, once barred by the Act, is not to be revived by any subsequent acknowledgement or payment: see paras 9.10 - 9.11 below.

9.4 There are a number of exceptions to the rule that the expiry of the limitation period bars the remedy and does not extinguish the right:

(1) Under section 17 of the 1980 Act, once a limitation period prescribed by the 1980 Act for any action to recover land has expired, the title of the person previously able to bring such an action is extinguished.[8]

(2) Under section 3 of the 1980 Act, once a limitation period in respect of a cause of action for conversion of personal property has expired,[9] the title to that property of the person to whom the cause of action accrued is extinguished.

(3) Under section 11A(3) of the 1980 Act once the ten year "long-stop" period within which an action for damages may be brought under the Consumer Protection Act 1987 has expired, the right of action is extinguished.[10]

(4) The expiry of the one-year limitation period imposed under article 3(6) of the Hague Visby rules[11] also serves to extinguish the right, rather than merely barring the remedy.[12]

9.5 Where the plaintiff's right has been extinguished by the expiry of a limitation period, he has no entitlement to a remedy whether through the courts *or otherwise.* It is suggested in the Rules of the Supreme Court that the rule that a limitation defence must be pleaded applies even in actions for the possession of land where the expiry of a limitation period extinguishes the right.[13] But this is in principle doubtful and in *Dawkins v Lord Penrhyn*[14] it was held that if it was apparent from the Statement of Claim that the time within which a title to land must be asserted had gone by, a limitation defence may be raised on an application to strike out the claim which does not specifically refer to the question of limitation. Lord Cairns LC distinguished between questions of limitations arising in personal actions ("where it cannot be predicated that the Defendant will appeal to the Statute of Limitations for his protection") and actions relating to real property where the plaintiff's right is extinguished by the action of the Statute.[15]

[8] The rules with respect to settled land and land held on trust are more complex, delaying the point at which title is extinguished until every right of action by a person beneficially interested in the land has expired. See further the discussion at paras 6.40 - 6.41 above.

[9] Where the cause of action relates to the theft of the property in question, it is disregarded for the purpose of s 3. See further paras 3.112 - 3.115 above.

[10] But the other "long-stop" provision in the 1980 Act dealing with negligently caused latent damage merely bars the action: see s 14B of the 1980 Act, discussed at para 3.99 above.

[11] See Schedule 1 of the Carriage of Goods by Sea Act 1971.

[12] *Aries Tanker Corporation v Total Transport Ltd* [1977] 1 WLR 185.

[13] RSC, O 18, r 8, note 18/8/10.

[14] (1878) 4 App Cas 51 (HL).

[15] The same distinction was referred to in *Dismore v Milton* [1938] 3 All ER 762, 763, *per* Greer LJ. See also *Ronex Properties Ltd v John Laing Construction Ltd* [1983] QB 398.

2 WHAT THE PLAINTIFF NEEDS TO DO TO PREVENT THE EXPIRY OF THE LIMITATION PERIOD: ISSUE OR SERVICE OF PROCEEDINGS?

9.6 The limitation period stops running against the plaintiff when proceedings are issued against the defendant.[16] This is achieved by the issue of the originating document, such as a writ in a High Court action or a summons in a county court action. The advantages of this rule are its simplicity and certainty. A disadvantage is that the limitation period will stop running before the action comes to the attention of the defendant. It also differs from the time when an English court will recognise that it is seised of the proceedings within the meaning of Article 22 of the (Brussels) Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968.[17] It was decided by the Court of Appeal in *Dresser UK Ltd v Falcongate Freight Management Ltd*[18] that proceedings are not "decisively, conclusively, finally and definitely pending before" the court on the issue of proceedings. In that case, although declining to lay down a general rule as to when the court would become seised of proceedings, the Court of Appeal preferred the date of service of proceedings on the defendants.

3 CONTRACTING OUT OF, OR WAIVING, THE STATUTORY LIMITATION PERIOD

9.7 The defendant may agree by contract not to plead the statutory limitation period (or that the limitation period should be extended, postponed or suspended).[19] Such a contract will be valid provided that it is supported by consideration (or effected by deed) and subject to normal rules on the validity of contract terms.[20] How such a contract may be enforced is less clear. In *Lade v Trill*[21] and *Lubovsky v Snelling*[22] the defendants were prevented from relying on limitation defences[23] in answer to the plaintiff's cause of action. However, in *East India Company v Oditchurn Paul*[24] Lord Campbell suggested, obiter, that the plaintiff's only remedy would be to bring another action for breach of the agreement not to plead the Limitation Act 1623.

[16] See *Thompson v Brown* [1981] 1 WLR 744, 752 - 753; *Dresser UK Ltd v Falcongate Freight Ltd* [1992] QB 502.

[17] Given force in English law by the Civil Jurisdiction and Judgments Act 1982.

[18] [1992] QB 502.

[19] See *Lade v Trill* (1842) 11 LJ Ch 102; Law Reform Committee *Twenty-First Report (Final Report on Limitation of Actions)* (1977) Cmnd 6923, paras 2.54 - 2.61; *Chitty on Contracts, General Principles* (27th ed 1994), paras 28-075 - 28-087. In this respect, English law differs from Scottish law, which by s 13 Prescription and Limitation (Scotland) Act 1973 invalidates any provision in an agreement which purports to exclude a negative prescription period.

[20] See para 14.6, n 8, below.

[21] (1842) 11 LJ Ch 102.

[22] [1944] KB 44.

[23] Arising under the Limitation Act 1623 and the Fatal Accidents Act 1846 respectively.

[24] (1850) 7 Moo PC 85, 13 ER 811, 821 - 822.

9.8 It seems that such an agreement will in certain circumstances be implied. It was held in *Lubovsky v Snelling*[25] that an agreement between plaintiff and defendant whereby liability in damages to the plaintiff's cause of action was "once and for all definitively accepted by the defendant and his insurers" prevented either the defendant or the insurer from raising any defence which might contest that liability, so that an agreement not to plead a limitation defence could be implied. Some doubt was cast on this principle in *The Sauria and the Trent.*[26] Lord Evershed MR noted that

> As a matter of principle, I confess that whatever may have been the facts in the *Lubovsky* case, I have the greatest difficulty in seeing how you can formulate an agreement which will have the effect ... of binding the defendants contractually not to raise the plea of section 8 of the [Maritime Conventions Act 1911][27] in any action the plaintiffs may choose to bring for finding that the damage suffered apparently was done by the barge Trent, however long after the cause of action they may elect to start those proceedings.[28]

At the least, *The Sauria and the Trent* suggests that the circumstances in which the court would be prepared to imply an agreement not to plead the statute from an unconditional acceptance of liability by the defendants are far more limited than was suggested in *Lubovsky v Snelling.*

9.9 An agreement between the parties that the defendant is liable has alternatively been held to give rise to an estoppel preventing the defendant from relying on a limitation defence. In *Wright v Bagnall & Sons Ltd*,[29] the plaintiff applied out of time for compensation under the Workmen's Compensation Act 1897 in respect of an accident suffered in the course of his employment. Before the expiry of the time limit the employer had started paying the plaintiff a weekly sum expressed to be on account of his compensation under the Act, and the parties negotiated on the payment of a lump sum to the plaintiff. The plaintiff's application, made after the negotiations were unsuccessful, was initially rejected as being time-barred. On his appeal, the Court of Appeal held that there was evidence of an agreement that compensation should be paid, leaving only the amount to be determined, so that the defendants were debarred from raising a limitation defence.[30] It was suggested

[25] [1944] KB 44.

[26] [1957] 1 Lloyd's Rep 396.

[27] The Maritime Conventions Act 1911, s 8, has been replaced by the Merchant Shipping Act 1995, s 190. See paras 7.36 - 7.39 above.

[28] [1957] 1 Lloyd's Rep 396, 400. Lord Evershed's approach was preferred in *Asianic International Panama SA and Transocean Transport Corporation v Transocean Ro-Ro Corporation, The Seaspeed America* [1990] 1 Lloyd's Rep 150.

[29] [1900] 2 QB 240.

[30] *Rendall v Hill's Dry Docks and Engineering Co* [1900] 2 QB 245, a case which also involved a claim for compensation under the Workers Compensation Act 1897 made out of time, was decided against the plaintiff on the facts. However, it seems to have been accepted that, had the parties agreed that the employers were liable to pay compensation, the agreement would have had the effect of waiving their right to raise a limitation defence.

that the defendants were also debarred because they had allowed the six month limitation period to expire while negotiations were still proceeding.[31]

9.10 Contracting out of, or waiving, the statutory limitation period is clearly closely linked to the acknowledgement of a claim under section 29 of the 1980 Act. But, as we have seen, the provisions on acknowledgement apply only to certain types of action, have the effect of restarting the limitation period, and cannot revive an action that has expired.[32] In contrast, contracting out, or waiver, is not so restricted.

9.11 The relationship between acknowledgement and contracting out of a limitation period was one of the issues raised in *Colchester Borough Council v Smith.*[33] Here the defendant, who had been in adverse possession of land owned by the Council for over twelve years, entered into a tenancy agreement with the Council after that period which included a clause in which the defendant acknowledged the landlord's title, and agreed that he had not gained any right, title or interest to the land in question by adverse possession. This acknowledgement could not postpone the limitation period because the twelve year period had already expired.[34] Nevertheless, when the Council brought proceedings to recover possession of the land, Ferris J held that the defendant was estopped by contract or convention from relying on a limitation defence after having entered into the agreement in which he had specifically disclaimed such a defence for valuable consideration.[35] His decision was upheld by the Court of Appeal on the grounds that the agreement was entered into to resolve a dispute between the plaintiff and defendant and to prevent court proceedings. The courts have an interest in

[31] The Law Reform Committee noted in its *Twenty-First Report (Final Report on Limitation of Actions)* (1977) Cmnd 6923 that the fact that negotiations were proceeding when the limitation period expired would not, without more, enable the plaintiff to defeat a limitation defence (see para 2.55). In cases where a limitation defence has been raised under the Marine Conventions Act 1911 (now consolidated in the Merchant Shipping Act 1995), the fact that the parties were still negotiating when time ran out has been held to give grounds for the court to exercise its discretion to extend the limitation period, if proceedings were issued shortly after the expiry of the limitation period: See *Asianic International Panama SA and Transocean Transport Corporation v Transocean Ro-Ro Corporation, The Seaspeed America* [1990] 1 Lloyd's Rep 150, and dicta in *The Sauria and the Trent* [1957] 1 Lloyd's Rep 396. There is however no authority to suggest that the existence of ongoing negotiations will prevent the defendant relying on a limitation defence where, as with cases where the 1980 Act is pleaded, the court does not have a general discretion to extend the limitation period.

[32] See paras 8.27 - 8.32 above.

[33] [1992] Ch 421. We discuss the difficulties posed by this decision in paras 12.179 - 12.181 below.

[34] *Sanders v Sanders* (1881) 19 Ch D 373, and *Nicholson v England* [1926] 2 KB 93 are common law authority for the principle that once an owner's title has been extinguished, a subsequent acknowledgement cannot revive it. This has been enshrined (and extended to include cases where the right is barred not extinguished) in section 29(7), which had no predecessor in the Limitation Act 1939. As the limitation period in relation to the land occupied by the defendant expired before May 1981, the Council's action against Mr Tillson was governed by the 1939 Act.

[35] [1991] Ch 448.

upholding agreements to compromise disputes. The defendant was therefore estopped from going behind the agreement and litigating that dispute.[36]

4 LACHES AND ACQUIESCENCE

9.12 Section 36(1) of the 1980 Act disapplies the time limits governing actions founded on tort, contract (whether simple contract or a specialty), to recover a sum under an enactment, or to enforce a judgment or award, as regards any claim for specific performance of a contract or for an injunction or other equitable relief "except in so far as any such time limit may be applied by the court by analogy in like manner as the corresponding time limit under any enactment repealed by the Limitation Act 1939 was applied before 1st July 1940." We discuss this provision in the next section.[37]

9.13 Section 36(2) of the 1980 Act states that nothing in the Act shall affect the court's equitable jurisdiction to refuse relief "on the ground of acquiescence or otherwise". This preserves the equitable doctrines of laches and acquiescence, which apply to equitable (as opposed to common law) remedies. For example, the doctrines apply to applications for specific performance for breach of contract and for an account of profits for intellectual property torts or breach of fiduciary duty or breach of confidence.[38]

(1) Laches

9.14 The equitable doctrine of laches allows a defendant a defence where, because of the delay by the plaintiff in asserting his rights,[39] it would be unjust to allow the plaintiff a remedy.[40] It was held by Wilberforce J in *Re Pauling's Settlement*[41] that

[36] Cf *The August Leonhardt* [1985] 2 Lloyd's Rep 28 where the plaintiff alleged that the defendant was estopped by convention from asserting a limitation defence. Kerr LJ, giving the judgment of the Court of Appeal in that case, noted that all estoppels involve some statement or conduct by the party alleged to be estopped on which the alleged representee was entitled to rely (and did rely), and that in the case of estoppels by convention there must be mutually manifest conduct by the parties which is based on a common but mistaken assumption, which can be relied on by the representee. In that case, Kerr LJ held that there was no common assumption and that the parties acted independently of each other.

[37] See paras 9.21 - 9.22 and 13.160 below. See generally, Jack Beatson, "Limitation Periods and Specific Performance" in Lomnicka and Morse (eds) *Contemporary Issues in Commercial Law* (1997), pp 9 - 23.

[38] It also appears that a shareholder's remedy under s 459 of the Companies Act 1985 is subject to laches (although there is no statutory limitation period). See *Re DR Chemicals Ltd* [1989] BCC 39, 53, *per* Peter Gibson J: "It is common ground that laches may bar relief on a s 459 petition." See Law Commission, Shareholder Remedies, Consultation Paper No 142 (1996), para 20.9.

[39] See *Milward v Earl Thanet* (1801) 5 Ves 720 n1, 31 ER 824; *Lindsay Petroleum Company v Hurd* (1874) LR 5 PC 221.

[40] See ICF Spry, *The Principles of Equitable Remedies* (4th ed 1990), pp 222 - 234; Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies* (3rd ed 1992), Ch 36; Hanbury and Martin, *Modern Equity* (15th ed 1997), pp 29, 654 - 655.

[41] [1962] 1 WLR 86 at 115. Wilberforce J's judgment on this point was approved by the Court of Appeal [1964] Ch 303, 353. Cf *Kleinwort Benson Ltd v Sandwell Borough Council* [1994] 4 All ER 890, 943 in which Hobhouse J said that it was common ground between the parties that a six year limitation period applied to the equitable "tracing" remedy by

laches cannot be invoked where there is a statutory limitation period. This limits the application of the doctrine to those actions where the 1980 Act or another statute does not provide a limitation period (whether because the cause of action is not dealt with in any statute, or because the 1980 Act states that no limitation period shall apply to a particular cause of action, such as actions in respect of a fraudulent breach of trust or to recover trust property from the trustee).[42]

9.15 In *Lindsay Petroleum Company v Hurd*[43] it was noted that two factors which are always important when it is claimed that the plaintiff has lost his right to a remedy through laches are:

> the length of the delay and the nature of the acts done in the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.

It is not enough that there has been delay by the plaintiff; it must actually be unjust to award the remedy sought against the defendant, whether as a result of the delay or other factors. Laches has been described as not being a "technical or arbitrary doctrine",[44] and what is held to be just or unjust in a particular case will depend on the facts of that case, not on whether the plaintiff has delayed beyond a set time before seeking a remedy.

9.16 The factors the court must take into consideration in deciding whether a defence of laches can apply were summarised in *Nelson v Rye*[45] as including the period of the delay, the extent to which the defendant's position has been prejudiced by the delay and the extent to which that prejudice was caused by the actions of the plaintiff. It was noted in that case that where substantial prejudice will be suffered by the defendants, the defendant need not prove that it was caused by the delay. However, the plaintiff's knowledge that delay will cause such prejudice is a factor to be taken into account.

9.17 It was held in *Lindsay Petroleum Company v Hurd* that before the plaintiff can lose the right to a remedy, it is necessary for the plaintiff to have sufficient knowledge of the facts which give rise to the right to that remedy. In this, laches differs from the Limitation Act 1980, which provides in most cases that the limitation period runs from the accrual of the cause of action, regardless of the knowledge of the plaintiff.

analogy under s 36 *and* that there was a jurisdiction to refuse relief for acquiescence or otherwise.

[42] Section 21(1).

[43] (1874) LR 5 PC 221, 240.

[44] *Lindsay Petroleum Company v Hurd* (1874) LR 5 PC 221, 239, quoted in *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218, 1276, *per* Lord Blackburn, and *Nelson v Rye* [1996] 1 WLR 1378, 1392.

[45] [1996] 1 WLR 1378. See para 4.7 above.

(2) Acquiescence

9.18 Where the plaintiff has delayed the institution of proceedings, it may be open to the court to infer that he has acquiesced to the loss of his rights. As described in *Leeds v Amherst*[46]

> If a party, having a right, stands by, and sees another dealing with the property in a manner inconsistent with that right, and makes no objection while the act is in progress, he cannot afterwards complain.

9.19 The classic modern illustration of the doctrine is *Shaw v Applegate.*[47] Here the defendants had partly used his property for an amusement arcade in breach of a restrictive covenant with the plaintiff. The plaintiff had not complained about this for six years, although he knew about it and, in consequence, the defendants had gone on to buy and install more amusement machinery. The Court of Appeal held that acquiescence barred the plaintiff's claim for a prohibitory and mandatory injunction. But damages in lieu were awarded, thereby showing that acquiescence can be a slightly wider defence for an injunction than for damages.

9.20 As with laches, the plaintiff must be aware of all the facts relevant to his rights before he can be said to acquiesce.[48] However, unlike the defence of laches, acquiescence is not dependent on the plaintiff's delay but does require the plaintiff to have given an express or implied representation that he or she will not require performance of the obligation in question or otherwise insist on his or her rights.[49] This may be inferred from the conduct of the plaintiff.[50]

5 APPLICATION OF 1980 ACT TO EQUITABLE REMEDIES BY ANALOGY

9.21 We have seen that under section 36(1) of the 1980 Act the time limits for actions for tort, contract, defamation, to enforce a judgment or award, recover money under an enactment or on a specialty do not apply to any claim for specific performance or an injunction or for other equitable relief "except in so far as such time limit may be applied by the court by analogy in like manner as the corresponding time limit under any enactment repealed by the Limitation Act 1939 was applied before 1 July 1940".[51]

9.22 Before statute law was first consolidated in the Limitation Act 1939, the courts applied the statutory time limits to cases in equity in certain circumstances. Where the remedy corresponded to a remedy at law or was awarded in support of a legal right, a court of equity would apply the time limit applicable to the legal

[46] (1846) 2 Ph 117, 41 ER 886, 888.

[47] [1977] 1 WLR 970.

[48] *Re Howlett* [1949] 1 Ch 767, 775.

[49] ICF Spry, *The Principles of Equitable Remedies* (4th ed 1990), pp 237 - 240; Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies* (3rd ed 1992), paras 3618 - 3619; Hanbury and Martin, *Modern Equity* (15th ed 1997), p 647.

[50] See *Allcard v Skinner* (1887) 36 ChD 145.

[51] See para 9.12 above, and 13.159 - 13.160 below.

remedy,[52] so that, for example, a plaintiff would not be awarded specific performance of an agreement after the limitation period for an action for breach of that agreement had expired.[53] Similarly, where a plaintiff's rights to land had been barred at law due to the expiry of a statutory limitation period, a court of equity would not grant the equivalent equitable remedy.[54] Section 36(1) preserves the court's power to apply the limitation periods prescribed in the 1980 Act to equitable remedies by analogy. This is of limited relevance since the consolidation and extension of the limitation statutes in the Limitation Act 1939 and the 1980 Act. As noted in *Re Diplock*[55] the application of a statutory limitation period by analogy is only relevant where no express provision of the Act applies.[56] One example of the application of a statutory period by analogy to an equitable remedy occurs in actions for restitution. Hobhouse J noted in *Kleinwort Benson Ltd v Sandwell Borough Council*[57] that it was common ground between the parties that, so far as section 5 of the 1980 Act applied to an action for money had and received, under section 36 the same limitation period would apply to the equitable tracing remedy sought by the bank.

6 BURDEN OF PROOF

9.23 The burden of proof where a limitation defence has been raised by the defendant is not entirely clear. One might have thought that, as limitation is regarded as a defence which must be pleaded by the defendant, the burden of proof should be on the defendant. But this appears not to be the law.[58]

9.24 In *Cartledge v E Jopling & Sons Ltd,*[59] Lord Pearce noted, obiter, that when limitation becomes an issue because the defendant has pleaded a limitation defence the burden falls on the plaintiff to prove that the cause of action accrued within the statutory period. However, he went on to suggest that once the plaintiff has met this burden "the burden passes to the defendants to show that the apparent accrual of a cause of action is misleading and that in reality the cause of action accrued at an earlier date." This has been variously interpreted to support the suggestion that, although there is some burden on the plaintiff, the main

[52] See *Knox v Gye* (1872) LR 5 HL 656, 674 and ICF Spry, *The Principles of Equitable Remedies,* (4th ed 1990), pp 407 - 415.

[53] *Firth v Slingsby* (1888) 58 LT 481, 483, col 1.

[54] *Nevarre v Rutton* (1714) 2 Eq Cas Abr 9; 22 ER 7 - 8.

[55] [1948] Ch 465.

[56] In *Re Diplock,* for example, a claim in equity to recover money wrongly paid to a third party, which the court would previously have treated as analogous to a common law action for money had and received (see *Re Blake* [1932] 1 Ch 54) was held to fall within s 20 of the Limitation Act 1939, as a claim to part of the personal estate of the deceased person.

[57] [1994] 4 All ER 890, 943.

[58] Though there is some authority for this proposition: see *Clarkson v Modern Foundries Ltd* [1957] 1 WLR 1210, 1213, where Donovan J noted "The present is a case where the whole injury was caused by a default on the defendants' part; and the only question is whether, as to part of it, the Limitation Act can be successfully pleaded. Here the onus is on the defendants." But see paras 3.26 - 3.27 above.

[59] [1963] AC 758, 784.

burden falls on the defendant,[60] and as supporting the view that an initial burden is imposed on the plaintiff, which once discharged, is succeeded by an burden on the defendant to show that in truth the cause of action arose at an earlier date.[61] In *Driscoll-Varley v Parkside Health Authority*[62] Hidden J held that the subsequent burden on the defendant included, for example, the question of constructive knowledge. In consequence, once the plaintiff had proved that he or she did not have actual knowledge of the injury more than three years before proceedings were issued, the burden of establishing that the plaintiff had constructive knowledge of the injury at an earlier date fell on the defendant.[63]

9.25 The relevant authorities were reviewed in *Crocker v British Coal Corporation*[64] by Mance J, who held that the legal burden of proof rests throughout on the plaintiff, whether the issue is when the cause of action accrued or when the plaintiff first had knowledge of the facts.[65] He noted that where the plaintiff's knowledge is an issue under section 14(3) of the 1980 Act, there may well be an evidential burden on the defendant, though this did not in his view displace the legal burden of proof, which remains with the plaintiff.

7 THE "SEVCON" PROBLEM: RESTRICTIONS ON THE PLAINTIFF'S RIGHT TO SUE

9.26 Although rare, there are situations where, although the cause of action has accrued and time has started to run, the plaintiff is unable to sue because his right to bring the proceedings is subject to a further requirement outside his control. The case of *Sevcon Ltd v Lucas CAV Ltd*[66] is the classic example of this problem. Here, the plaintiff's claim related to the infringement of a patent which had taken place after the patent specification had been published, but before the patent had been

[60] See *NV Stoomv Maats "De Maas" v Nippon Yusen Kaisha, The Pendrecht* [1980] 2 Lloyd's Rep 56, where Parker J suggested that Lord Pearce's dicta "was such as materially to cut down the extent of the burden on a plaintiff, as it had been stated by the Court of Appeal, albeit recognising that there was some burden upon him."

[61] See *London Congregational Union Incorporated v Harris and Harriss* [1988] 1 All ER 15, *per* Ralph Gibson LJ at 30. In the same case, Sir Denys Buckley, agreeing with Ralph Gibson LJ, described the burden as "shifting" from plaintiff to defendant ([1988] 1 All ER 15, 34. The concept of a "shifting burden of proof" was also adopted in *Driscoll-Varley v Parkside Health Authority* [1991] 2 Med LR 346.

[62] [1991] 2 Med LR 346.

[63] This seems to have been accepted by the Court of Appeal in *Nash v Eli Lilly* [1993] 1 WLR 782, 795 - 796. In a passage later described by Mance J as "difficult", Purchas LJ commented "If the defendant wishes to rely on a date prior to the three-year period immediately preceding the issue of the writ, the onus is on the defendant to prove that the plaintiff had or ought to have had knowledge by that date."

[64] (1996) 29 BMLR 159.

[65] The suggestion in *Driscoll-Varley v Parkside Health Authority* [1991] 2 Med LR 346 that the burden of proving knowledge is on the defendant was not followed. Cf *Parry v Clwyd Health Authority* [1997] PIQR P1, P14, where Colman J said, "The burden of proof of constructive knowledge is on the defendant."

[66] [1986] 1 WLR 462 (HL). See also *General Tire and Rubber Co v Firestone Tyre and Rubber Co Ltd* [1975] 1 WLR 819.

granted. Under section 13(4) of the Patents Act 1949[67] no proceedings could be commenced for the infringement of a patent before the actual grant of a patent. However, the House of Lords held that the plaintiff's cause of action accrued when the patent was infringed, so that the limitation period started running at that point. As a result, the limitation period expired before the plaintiff's right to bring the action had crystallised on the grant of the patent.

9.27 A similar problem arose in *O'Connor v Isaacs.*[68] Here the plaintiff was imprisoned on a number of occasions between 1942 and 1945 for failing to make payments under a maintenance order which it turned out had been made by magistrates in excess of their jurisdiction. In 1954 the order was quashed and the plaintiff brought an action against the magistrates for false imprisonment. Diplock J, with whom the Court of Appeal agreed, held that the last cause of action accrued in 1945 and that the quashing of the order in 1954 merely fulfilled a requirement which barred the remedy rather than forming an integral part of the cause of action.[69] The action was therefore time-barred.[70] There is, however, an important difference between the facts of this case and *Sevcon Ltd v Lucas CAV Ltd,* namely that the fulfilment of the additional requirement which had to be met before the plaintiff could bring his action for compensation was not outside the plaintiff's control. He could have chosen to apply to quash the magistrates' order some years before he did.[71]

8 ADDING NEW CLAIMS IN EXISTING ACTIONS[72]

9.28 We have explained in the Introduction[73] that although it is, on the face of it, a "purely procedural" matter, we do think it necessary and appropriate to deal, albeit briefly, with new claims in existing actions in this paper. This is for two reasons. First, this area is largely governed by section 35 of the Limitation Act

[67] Now s 69(2) of the Patents Act 1977.

[68] [1956] 2 QB 288, 328 per Diplock J (CA).

[69] It would appear that 1954 would have been the operative date if contrary to the position in this case, the quashing of the order had been an integral part of the cause of action. See also *Coburn v Colledge* [1897] 1 QB 702 (CA).

[70] The *O'Connor* case can be distinguished from *Musurus Bey v Gadban* [1894] 2 QB 352 (CA). Here it was held that the limitation period in respect of an action for debt against a foreign diplomat did not start to run from the time the diplomat borrowed the money, but from the time when the diplomat no longer had diplomatic immunity. Until this point the court held that there was no defendant to the money lender's cause of action. The loss of immunity was therefore an integral part of the cause of action, as opposed to a merely procedural bar. See also *Board of Trade v Cayzer, Irvine & Co* [1927] AC 610 (HL). (The reasoning in *Musurus Bey v Gadban* seems to be inconsistent with the approach to immunity taken in *Empson v Smith* [1996] 1 QB 426, 437 per Diplock LJ. See also *Shaw v Shaw* [1979] Fam 62).

[71] The same applies in *Central Electricity Generating Board v Halifax Corporation* [1963] AC 785 (where the plaintiffs could have applied for a ministerial determination earlier than they in fact did), and *Hillingdon London Borough Council v ARC Ltd* [1997] 3 All ER 506 (where the plaintiffs could have made an application to the Lands Tribunal considerably earlier than they did). See paras 7.12 - 7.13 above.

[72] See A McGee, *Limitation Periods* (2nd ed, 1994), Ch 23.

[73] See para 1.42 above.

1980 and cannot be reformed without primary legislation. Secondly, we are aware that difficulties have been, and continue to be, caused by section 35 and the accompanying Rules of Court.

9.29 Where a "new claim" is made in an existing action, section 35 provides that it is deemed to be a separate action, and to have commenced, in the case of third party proceedings,[74] on the date those proceedings were commenced, and in the case of any other claim on the date the proceedings were commenced in the original action[75] (the 'relation-back' principle). A new claim is defined as any claim by way of set-off or counterclaim, and any claim involving the addition or substitution of a new cause of action or party.[76] By section 35(3), however, new claims which have been related back in this way (other than an original set-off or an original counterclaim by a party who has not previously made any claim in the action) will not be permitted after the expiry of a time limit under the 1980 Act which would affect a new action to enforce the claim, unless rules of court permit, or unless section 33[77] applies. Mandatory conditions are set out, which must be satisfied if a new claim is to be permitted under rules of court.[78] Where the claim involves a new cause of action, the cause of action must arise out of substantially the same facts which are already in issue on any claim in the original action.[79] Where the claim involves the addition or substitution of a new party, that addition or substitution must be necessary for the determination of the original action.[80] It will not be regarded as necessary unless the new party is substituted for a party whose name was originally included by mistake for the new party's name, or if a claim made in the original action cannot be maintained by or against an existing party unless the new party is joined or substituted as plaintiff or defendant in the action.[81]

9.30 The provisions of section 35 have been accompanied by the Rules of the Supreme Court, Order 15, rule 6,[82] and Order 20, rule 5[83] (which also apply in county court

[74] Defined in s 35(2) as "any proceedings brought in the course of any action by any party to the action against a person not previously a party to the action, other than proceedings brought by joining any such party to any claim already made in the original action by the party bringing the proceedings"

[75] Section 35(1).

[76] Section 35(2).

[77] Which gives the court discretion to disapply the limitation period in personal injury cases: see paras 3.66 - 3.76 above.

[78] Section 35(4).

[79] Section 35(5)(a).

[80] Section 35(5)(b).

[81] Section 35(6).

[82] Rule 6(5) No person shall be added or substituted as a party after the expiry of any relevant period of limitation unless either -

(a) the relevant period was current at the date when proceedings were commenced and it is necessary for the determination of the action that the new party should be added, or substituted, or

(b) the relevant period arises under the provisions of s 11 or 12 of the Limitation Act 1980 and the Court directs that those provisions should not apply to the action by or against the new party.

actions under Order 15, rule 1(2) of the County Court Rules). Order 15, rule 6 is relevant where there is an application to add or substitute a new party to the action. Order 20, rule 5 applies where the plaintiff wishes to amend the writ, or

In this paragraph "any relevant period of limitation" means a time limit under the Limitation Act 1980 or a time limit which applies to the proceedings in question by virtue of the Foreign Limitation Periods Act 1984.

Rule 6(6) Except in a case to which the law of another country relating to limitation applies, and the law of England and Wales does not so apply, the addition or substitution of a new party shall be treated as necessary for the purposes of paragraph (5)(a) if, and only if, the Court is satisfied that -

(a) the new party is a necessary party to the action in that property is vested in him at law or in equity and the plaintiff's claim in respect of an equitable interest in that property is liable to be defeated unless the new party is joined, or

(b) the relevant cause of action is vested in the new party and the plaintiff jointly but not severally, or

(c) the new party is the Attorney General and the proceedings should have been brought by relator proceedings in his name, or

(d) the new party is a company in which the plaintiff is a shareholder and on whose behalf the plaintiff is suing to enforce a right vested in the company, or

(e) the new party is sued jointly with the defendant and is not also liable severally with him and failure to join the new party might render the claim unenforceable.

[83] Rule 5(1)

Subject to O 15, rr 6, 7, and 8 and the following provisions of this rule, the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.

Rule 5(2)

Where an application to the Court for leave to make the amendment mentioned in paragraph (3), (4) or (5) is made after any relevant period of limitation current at the date of issue of the writ has expired, the Court may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just to do so.

In this paragraph "any relevant period of limitation" includes a time limit which applies to the proceedings in question by virtue of the Foreign Limitation Periods Act 1984.

Rule 5(3)

An amendment to correct the name of a party may be allowed under paragraph (2) notwithstanding that is it alleged that the effect of the amendment will be to substitute a new party if the Court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the party intending to sue or, as the case may be, intended to be sued.

Rule 5(4)

An amendment to alter the capacity in which a party sues may be allowed under paragraph (2) if the new capacity is one which that party had at the date of the commencement of the proceedings or has since acquired.

Rule 5(5)

An amendment may be allowed under paragraph (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment.

any party wishes to amend a pleading. These rules fill out in detail the requirements of section 35 of the 1980 Act.

9.31 The notion in section 35(1) that new claims are deemed to have been started at the date of the original action (the "relation-back" principle), departs from the common law position, which holds that amendments made during the course of the proceedings should be considered to have been made on the date they were made.[84] The question then arises of when and how any possible limitation questions are to be settled. Are sections 35(1) and (3) to be interpreted so that, if the court allows a new claim to proceed, it will be open to the person, against whom that claim is made, to plead any arguments based on limitation in his or her defence? Or are they to be interpreted so that, once the court allows the new claim to be brought, the relation-back doctrine takes effect, with the result that no further limitation issues can be raised?[85] In *Kennett v Brown*[86] the Court of Appeal had supported the first of these interpretations. However, the Court of Appeal later overruled *Kennett v Brown* in *Welsh Development Agency v Redpath Dorman Long Ltd,*[87] where the second interpretation was adopted. It was held that, where a plaintiff sought to add causes of action which were found not to arise out of substantially the same facts as the causes of action already pleaded, an amendment should only be allowed if the plaintiff could show that the defendant did not have a reasonably arguable case on limitation, and that therefore the operation of section 35(1) did not deprive the defendant of a limitation defence which it would have been able to raise if the new claim had been commenced as a separate action.

9.32 What constitutes a "new claim" has been the source of difficulty. As we have seen, section 35 focuses on two situations: the addition of a new cause of action, and the addition or substitution of a new party. Interpreted literally, this might seem include cases where the writ needs to be amended to change the identity of the plaintiff in existing proceedings because another body has succeeded by operation of law to all its assets, including the cause of action. In *Yorkshire Regional Health Authority v Fairclough Building Limited*[88] the Court of Appeal held that where all the assets and liabilities of a regional health authority were the subject of a statutory transfer to a hospital trust, as part of a reorganisation of the National Health Service, such a substitution of a new party to an existing claim did not involve the making of a "new claim" and was thus not affected by section 35 of the Limitation Act 1980. Furthermore, even if there were a new claim, the substitution plainly fell within Order 15, rule 7,[89] and section 35(3) therefore did not prohibit

[84] See *Ketteman v Hansel Properties Ltd* [1987] AC 189 and *Liff v Peasley* [1980] 1 WLR 781.

[85] See R James "The 'Relation Back' Principle of Amendment - a Source of Confusion" (1987) 38 NILQ 257. See further R James "New Claims and Limitation Periods" (1995) 14 CJQ 42.

[86] [1988] 1 WLR 582.

[87] [1994] 1 WLR 1409. The Court of Appeal (Glidewell, Simon Brown and Peter Gibson LJJ) regarded themselves as able to overrule the earlier decision because *Kennett v Brown* was decided *ex tempore* and on an interlocutory basis, by only two Lords Justices.

[88] [1996] 1 WLR 210.

[89] RSC, O 15, r 7 reads:

the court from allowing the action to proceed with the new plaintiff, although the limitation period had expired.[90]

9.33 Section 35 has the potential effect of allowing a counterclaim to be used as a means to pursue claims which would otherwise have been statute-barred. But this is subject to the court's discretion to decide that a claim should be disposed of as a separate action rather than as a counterclaim.[91] That discretion will generally be exercised on the basis of the procedurally most convenient way of trying the case.[92] In *Ernst & Young v Butte Mining plc (No 2)*[93] Lightman J said that he could conceive of circumstances in which the court might exercise its discretion to allow a counterclaim to proceed in order to avoid the subject matter becoming statute barred.[94] But where a counterclaim was not justified by procedural convenience the circumstances would have to be special.[95]

9 COMMENCEMENT AND RETROSPECTIVITY

9.34 We intend to make absolutely clear when our proposed Act will commence. But in deciding what is appropriate as the commencement date, it is important to realise that the commencement date, and in particular, provisions giving retrospective effect to limitation enactments have given rise to some difficulties in the past. The general rule of interpretation is that, unless a contrary intention appears, a statute is presumed not to be intended to have a retrospective operation.[96] This is particularly the case where giving an enactment a retrospective interpretation would mean that it "takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new

(1) Where a party to an action dies or becomes bankrupt but the cause of action survives, the action shall not abate by reason of the death or bankruptcy; (2) Where at any stage of the proceedings in any cause or matter the interest or liability of any party is assigned or transmitted to or devolves upon some other person, the court may, if it thinks it necessary in order to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, order that other person to be made a party to the cause or matter and the proceedings to be carried on as if he had been substituted for the first mentioned party.

[90] See also *Industrie Chimiche Italia Centrale v Alexander Tsaviliris & Sons Maritime Co, The Choko Star* [1996] 1 WLR 774, where the original plaintiff, an Italian company, had merged with another company by way of universal succession, having the effect in Italian law of vesting all the assets and liabilities of the plaintiff in the new company. In that case counsel for the plaintiff did not pursue the argument that there was no new claim. Mance J held that RSC O 15, r 7 applied and that the requirements of s 35 were therefore satisfied. Cf *Toprak Enerji Sanayi A/S v Sale Tilney Technology PLC* [1994] 1 WLR 840 (Judge Diamond QC).

[91] RSC, O 15, r 5(2).

[92] See, eg, *Manchester, Sheffield and Lincolnshire Railway Co v Brooks* (1877) 2 Ex D 243.

[93] [1997] 2 All ER 471.

[94] *Ibid*, 482.

[95] Lightman J gave as a possible example the situation where the defendant made a counterclaim during the limitation period which would be applicable if the defendant had commenced its action by writ, but the court subsequently decided under O 15, r 5(2) that the action should be brought separately, by which time the limitation period for commencing the action by writ had expired: *ibid*, 482.

[96] Francis Bennion, *Statutory Interpretation* (2nd ed 1992), section 97.

disability, in regard to events already past".[97] However, where an enactment is procedural in effect rather than substantive, it is assumed to have retrospective effect, on the grounds that procedural amendments are expected to improve matters for everyone concerned.[98] Applying this distinction between procedure and substance, one can say that an essential question in determining when a limitation statute should commence is whether it should be viewed as procedural (and hence having retrospective effect) or substantive.

9.35 Three cases can be used to illustrate the difficulties. In *The Ydun,*[99] the plaintiffs had a cause of action against port authorities for the grounding of their barque. When the cause of action arose, the limitation period was six years. However, after the cause of action arose, the Public Authorities Protection Act 1893 came into force (on 1 January 1894), reducing the limitation period to six months. The plaintiffs issued proceedings in November 1898 against the authority within the original limitation period - but after the six months period had expired. It was held that the new Act applied, so that their action was time-barred:

> when a new enactment deals with rights of action, unless it is so expressed in the Act, an existing right of action is not taken away. But where the enactment deals with procedure only, unless the contrary is expressed, the enactment applies to all actions, whether commenced before or after the passing of the Act. The Act of 1893 is an Act dealing with procedure only.[100]
>
> There is abundant authority that the presumption against a retrospective constructive has no application to enactments which affect only the procedure and practice of the courts.[101]

The effect of the 1893 Act was, therefore, to deprive the plaintiffs of an existing right to bring an action.

9.36 In *Yew Bon Tew v Kenderaan Bas Mara,*[102] the limitation period for the plaintiffs' claim had expired when a new Act *extending* the relevant limitation period came into force. The Privy Council held that:

> an accrued right to plead a time bar, which is acquired after the lapse of the statutory period, is in every sense a right, even though it arises under an act which is procedural. It is a right which is not to be taken away by conferring on the statute a retrospective operation, unless such a construction is unavoidable.

The plaintiffs' action was therefore held to be time-barred.

[97] *Yew Bon Tew v Kenderaan Bas Mara* [1983] 1 AC 553 at 558.

[98] Bennion, *op cit,* section 98.

[99] [1899] P 236.

[100] Per AL Smith LJ [1899] P 236, 245.

[101] Per Vaughan Williams LJ [1899] P 236, 246.

[102] [1983] 1 AC 553, 563.

9.37 It appears, therefore, that subject to a clear provision to the contrary, a limitation statute will not be construed as having retrospective effect where the consequence would be to deprive defendants of an accrued defence of limitation.

9.38 This approach was rather more controversially applied in *Arnold v Central Electricity Generating Board.*[103] Here an action was brought under the Fatal Accidents Act 1976 by the widow of a man who, until 1943, had worked for the predecessor of the defendant. He died in 1982 from an industrial disease caused by his exposure to asbestos dust during that employment. He only became aware of the disease two years before his death. The defendant pleaded a defence under section 21 of the Limitation Act 1939, which applied a limitation period of one year after the date the cause of action accrued to actions against public authorities. This provision had been repealed by the Law Reform (Limitation of Actions, etc) Act 1954, which was itself followed by the Limitation Act 1963, the Limitation Act 1975 and the Limitation Act 1980 (the Act in force when the proceedings were issued). Starting from the principle that the repeal of an enactment does not affect any right accrued under that enactment,[104] Lord Bridge[105] examined whether any of the intervening limitation statutes could be said to have had retrospective effect such that they revived a previous time-barred action. He found that they did not, as section 1(1) only gives relief from the limitation period imposed by section 2(1) of the 1939 Act as amended by the Law Reform (Limitation of Actions, etc) Act 1954. The defendants were therefore entitled to rely on the expiry of the limitation period prescribed by the 1939 Act. The decision considerably curtailed the retrospective effect of the Limitation Act 1963. This cannot have been the intention behind the Limitation Act 1963, as this result would have given the plaintiffs in *Cartledge v E Jopling & Sons Ltd*[106] no relief - and it was concern at the result in that case which led directly to the 1963 Act.[107]

9.39 Most of the Limitation Acts passed since the Limitation Act 1939 contain detailed transitional provisions setting out how they apply to causes of action accruing before the commencement date of the Act. In summary:

(1) the 1939 Act does not apply to actions barred before its commencement, or to actions begun before its commencement;

[103] [1988] AC 228.

[104] See Interpretation Act 1978, s 16(1).

[105] Who gave the leading speech.

[106] [1963] AC 758.

[107] As Lord Bridge noted, the result was that the Limitation Act 1963 would not apply to any cause of action which accrued before 4 June 1954 when the Law Reform (Limitation of Actions, etc) Act 1954 came into force. The relevant cause of action in *Cartledge v E Jopling & Sons Ltd* [1963] AC 758 accrued before October 1950 - so that the Limitation Act 1963 could not have saved the plaintiffs' action. The Law Reform Advisory Committee for Northern Ireland noted in its Fourth Annual Report (1992 - 93) that the decision in *Arnold* could give rise to injustice and that legislation should be introduced to reverse it (see page 11 and their Discussion Paper on Actions Arising out of Insidious Diseases (July 1992)). The decision clearly has the potential to cause injustice, but as this only affects causes of action accruing before June 1954, we believe that its likely future impact is very limited, and we would not therefore favour specifically legislating to overrule the decision.

(2) the Law Reform (Limitation of Actions, etc) Act 1954 provides that causes of action accruing before the Act was passed, but not yet time-barred, are to be governed by the longer of the old and new limitation periods. Otherwise, it does not apply to such actions;

(3) the Limitation Act 1963 has considerable retrospective effect, applying to causes of action accruing before it was passed, save those where a final order or judgment was given before the Act was passed;[108]

(4) the Limitation Act 1975 applies the same approach as the 1963 Act: that is, it applies retrospectively to actions arising before its commencement, though not to actions where a final order or judgment was given before the Act commenced;

(5) the Limitation Act 1980 does not apply to actions barred by the Limitation Act 1939 before the commencement of the Act or to actions which have been begun before its commencement.

(6) the main limitation provisions of the Latent Damage Act 1986 (that is, sections 1 and 2) do not apply to actions barred by the Limitation Acts 1939 or 1980 before its commencement or to actions begun before its commencement. Subject to that, the Act has effect in relation to causes of action accruing before, as well as after, it came into effect.

[108] Though, as noted above, *Arnold v CEGB* [1988] AC 228 has limited this.

SECTION B: OTHER JURISDICTIONS

PART X
OTHER JURISDICTIONS

1. SCOTLAND

10.1 Scottish law uses both the concept of prescription, which originated in Roman law and is in general use in civil law jurisdictions,[1] and that of limitation, which is derived from English law. It is said by Scottish writers on the subject[2] that prescription is a legal presumption of abandonment or satisfaction of the claim; this is why prescription periods can have the effect of extinguishing the plaintiff's rights. By contrast limitation is a denial of an action after a certain time without regard to the subsistence of the claim. Historically, Scottish law had no concept of limitation periods, but a number of them have been introduced into Scottish law, usually because limitation provisions enacted for England were also applied to Scotland. The distinction between prescription and limitation is crucial when considering the effect of the expiry of a particular period. It is also of significance in the context of private international law.[3]

10.2 At present the Scottish law on prescription and limitation is primarily contained in the Prescription and Limitation (Scotland) Act 1973, though that Act draws heavily on the older law on the subject, and it may be instructive to look briefly at the historical forms of prescription under Scottish law.

(1) The Traditional Forms of Prescription[4]

10.3 Traditionally there were three principal forms of prescription in Scottish law: positive prescription,[5] short negative prescription and long negative (extinctive) prescription.

(a) Positive prescription

10.4 Positive prescription of heritable rights, originally applying after 40 years, though the period has now been reduced to 10 years,[6] allowed title to heritable property to

[1] See also paras 10.125 - 10.143 (France); 10.144 - 10.173 (Germany).

[2] *Bell's Principles of the Law of Scotland,* §586 cited in D Walker, *The Law of Prescription and Limitation of Actions in Scotland* (4th ed 1990), p 4 n 25.

[3] A provision stipulating a prescription period is treated as a rule of substantive law, whereas a provision stipulating a limitation period is treated as a procedural rule. Therefore, for example, where a court in another jurisdiction is applying Scottish law as the *lex causae*, it will apply Scottish prescription periods, but not Scottish limitation periods.

[4] For discussion of the traditional forms of prescription see the Scottish Law Commission's Report on Reform of the Law Relating to Prescription and Limitation of Actions (1970) Scot Law Com No 15, Parts II - IV and the Memorandum that preceded it (1968) Memorandum No 9, Parts I - III. See also paras 10.4 - 10.6 below in relation to the distinction between positive and negative prescription.

[5] Also known as acquisitive prescription or usucaption.

become unchallengeable except where the possessor's title was based on a forged instrument. This form of prescription may appropriately be compared to the limitation rules applying in English law for actions to recover land, where it is settled that the expiry of the limitation period does extinguish other claims and, through the concept of adverse possession, gives the squatter title to the land; it may be noted, though, that Scottish law will require the person asserting a claim to title to have some form of written title,[7] whereas in English law there will often be no document of title on which the squatter bases a claim.

(b) Short negative prescription

10.5 The second traditional form of prescription in Scottish law was the short negative prescription. Under this heading came different sorts of contractual action with prescription periods of various lengths between three and 20 years. The distinguishing feature of actions in this category was that the lapse of time did not bar the plaintiff's right but merely altered the requirements as to onus and method of proof,[8] and it was therefore capable of co-existing with a longer negative prescription period, which would extinguish the plaintiff's right.

(c) Long negative prescription

10.6 The third form of prescription was the long negative prescription, the effect of which was to extinguish the plaintiff's rights. This was set at 20 years for most causes of action.

(2) The Prescription and Limitation (Scotland) Act 1973

10.7 The Prescription and Limitation (Scotland) Act 1973 reformed the old law on prescription. In particular the second form of prescription described above was replaced with a new short negative prescription which does have the effect of extinguishing rights and differs from long negative prescription only in the length of the prescription period.

10.8 The 1973 Act resulted from a 1970 Report by the Scottish Law Commission,[9] which had stemmed from a recognition that the law of prescription was in need of "clarification, co-ordination and modernisation."[10] The 1973 Act has since been amended by, for example, the Prescription and Limitation (Scotland) Act 1984, based on a further report of the Scottish Law Commission,[11] by section 12 of the

[6] Conveyancing and Feudal Reform (Scotland) Act 1970, s 8: now Prescription and Limitation (Scotland) Act 1973, s 1.

[7] So that a squatter without any form of paper title will not acquire good title by adverse possession, but a grantee from such a squatter will do so.

[8] See D Walker *The Law of Prescription and Limitation of Actions in Scotland* (4th ed 1990), p 2. There was one exception to this general rule, *viz* the 7 year prescription period for cautions, expiry of which would extinguish the cautioner's liability.

[9] Reform of the Law Relating to Prescription and Limitation of Actions (1970) Scot Law Com No 15.

[10] First Programme of Law Reform (1965) Scot Law Com No 1, para 15.

[11] Prescription and Limitation of Actions - Report on Personal Injuries Actions and Private International Law Questions (1983) Scot Law Com No 74.

Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 and by the Prescription (Scotland) Act 1987. A more recent report of the Scottish Law Commission, dealing with latent damage and related issues, has not yet been implemented.[12]

(a) Short Negative Prescription

10.9 The short negative prescription introduced by section 6 of the 1973 Act is a five-year prescription period for all the categories of obligation to which this provision applies. Unlike the old short negative prescription periods, the expiry of the five-year short negative prescription period extinguishes the plaintiff's claim entirely.[13]

10.10 Schedule 1 to the Act lists the relevant obligations, which include obligations to pay rents, obligations arising under annuities, obligations arising from unjust enrichment or from *negotiorum gestio*, obligations under bills of exchange and promissory notes, and obligations arising out of any other contract. Most importantly, obligations to make reparation are included,[14] so that actions for delict, which under the old law were subject only to the twenty-year long negative prescription period, are within the five-year rule. But short negative prescription does not apply to an obligation to make reparation for personal injury,[15] or to actions for defamation,[16] or to an obligation to make reparation for damage caused by a defective product.[17] It can therefore be seen that short negative prescription applies primarily to the areas of law corresponding to contract, tort and restitution in English law.

10.11 Schedule 2 to the Act specifies when the five-year period starts to run in certain classes of case which fall within Schedule 1. Where there is a series of transactions between the parties charged on continuing account, time runs from the date on which payment for the goods last supplied, or the services last rendered, becomes due.[18] It is not necessary that all goods or services shall have been provided under one contract, and the effect of this is likely to be that, while the parties are dealing on a continuous basis, time never runs in relation to any of the claims for payment. In the case of a claim for the repayment of a loan or deposit, time runs from the repayment date stated in the contract or, if there is no such date, from the date when a written demand for repayment is first made.[19] Where work is to be done or

[12] Report on Prescription and Limitation of Actions (Latent Damage and Other Related Issues) (1989) Scot Law Com No 122.

[13] Prescription and Limitation (Scotland) Act 1973, s 6(1).

[14] *Ibid*, Schedule 1, para 1(d).

[15] *Ibid*, Schedule 1, para 2(g). See paras 10.22 - 10.26 below in relation to limitation periods for personal injury claims.

[16] *Ibid*, Schedule 1, para 2(gg), inserted by Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, s 12(5). See para 10.27 below in relation to limitation periods for defamation claims.

[17] *Ibid*, Schedule 1, para 2(ggg), inserted by Consumer Protection Act 1987, Schedule 1, para 12.

[18] *Ibid*, Schedule 2, para 1.

[19] *Ibid*, Schedule 2, para 2.

payment made by instalments, time runs from the date when the last instalment was due to be performed or paid, as the case may be.[20]

10.12 In the case of any other type of obligation falling within Schedule 1 time runs from the date when the obligation becomes enforceable.[21] Subject to the discoverability rule for latent damage,[22] this date is deemed to be the date on which the loss, injury or damage occurred.[23] So, for example, where an action is brought for reparation for breach of contract in circumstances where the damage, though not latent, occurs some time after the breach, the prescription period will begin when the damage occurs, not on the date of the breach of contract. Where the default is a continuing one, and the damage begins to occur before the default has ceased, the obligation is deemed to be enforceable, and the prescription period begins, when the default ceases.[24]

10.13 Where there is latent damage a discoverability test is applied in relation to short negative prescription. Section 11(3) of the 1973 Act applies to obligations to make reparation for injury,[25] loss or damage caused by an act, neglect or default. It provides that in such cases time does not run until the creditor knows or could with reasonable diligence discover that such loss, injury, or damage has occurred.[26] The prescription period could therefore start to run before it could be known that the damage suffered was significant. The Scottish Law Commission has recommended that the statute be amended so that before the prescription period can run the damage must be sufficiently serious to justify the bringing of an action on the assumption that the defender does not dispute liability and is able to satisfy a decree.[27]

10.14 Some interesting contrasts with the provisions introduced in England by the Latent Damage Act 1986[28] may be observed. First, section 11(3) applies to any obligation to make reparation arising from negligence, whether tortious or contractual. In that sense it is wider than the English provisions. The restriction to negligent breaches of duty means, however, that it does not apply to any strict duty. The result is that some contractual claims, but not all, will fall within the section. Following the dictum of Lord McDonald in *Dunfermline District Council v Blyth & Blyth Associates*[29] it would seem that in order to start time running the pursuer must know, as well as knowing that it has occurred, that the injury, loss or damage has occurred "in circumstances giving rise to an obligation upon someone

[20] *Ibid*, Schedule 2, para 4.

[21] *Ibid*, s 6(3).

[22] See para 10.13 below.

[23] Prescription and Limitation (Scotland) Act 1973, s 11(1). See, eg, *Renfrew Golf Club v Ravenstone Securities Ltd* 1984 SC 22 (OH).

[24] *Ibid*, s 11(2).

[25] Not including personal injury: see paras 10.22 - 10.26 below.

[26] See Reform of the Law Relating to Prescription and Limitation of Actions (1970) Scot Law Com No 15, paras 97 - 98.

[27] Report on Prescription and Limitation of Actions (Latent Damage and Other Related Issues) (1989) Scot Law Com No 122, paras 2.17 - 2.25.

[28] Limitation Act 1980, ss 14A and 14B: see paras 3.87 - 3.99 above.

[29] 1985 SLT 345 (OH).

(who may not be immediately identifiable) to make reparation to [the pursuer]."[30] This connotes knowledge of the legal significance of the events, which in turn suggests some knowledge of the relevant law. This is more favourable to plaintiffs than the English position, where knowledge of the legal significance of the facts is not required.[31] But knowledge of the defender's identity is not relevant,[32] which is *less* favourable to the pursuer than the English law.[33] The Scottish Law Commission has recommended that the discoverability formula should expressly include knowledge that the damage was attributable to the act or omission, and knowledge of the defender's identity,[34] but that knowledge of whether an action lies in law in respect of the act or omission should be expressed to be irrelevant.[35]

10.15 There is no judicial discretion to extend or disapply the short negative prescription period. In its report published in 1989 the Scottish Law Commission recommended that no such discretion should be introduced.[36]

10.16 The running of the short negative prescription period is excluded where the plaintiff refrains from making a claim because of fraud on the part of the defender or his agent,[37] or because of error induced by the words or acts of the defender,[38] or while the original creditor is under legal disability.[39] It may be noted that the form of words used here appears to allow for the suspension of a prescription period which has already started to run, and for more than one suspension of the same prescription period.

10.17 The running of a short negative prescription period is halted either by the bringing of a claim or by the making of part performance which clearly indicates that the obligation still subsists,[40] or by an acknowledgement.[41] The acknowledgement must be "an unequivocal written admission clearly acknowledging that the obligation still subsists". As the short negative prescription applies generally to claims in delict and contract, other than specifically excluded classes such as claims for personal injury, defamation and defective products, it follows that acknowledgement and part payment are available to stop the clock in a wider class of cases than in English law.

30 *Ibid*, 345.

31 See para 3.95 above.

32 In *Dunfermline DC v Blyth & Blyth Associates* Lord McDonald said that the pursuer would have "five years to identify the [defender] and bring his claim against him." 1985 SLT 345, 345.

33 See para 3.94 above.

34 Report on Prescription and Limitation of Actions (Latent Damage and Other Related Issues) (1989) Scot Law Com No 122, paras 2.32 - 2.51.

35 *Ibid,* paras 2.52 - 2.55.

36 *Ibid*, paras 2.81 - 2.83.

37 Prescription and Limitation (Scotland) Act 1973, s 6(4)(a)(i).

38 *Ibid*, s 6(4)(a)(ii).

39 *Ibid*, s 6(4)(b).

40 *Ibid*, s 10(1)(a).

41 *Ibid*, s 10(1)(b).

(b) Long Negative Prescription

10.18 The long negative prescription period is set at twenty years by the 1973 Act.[42] The period commences when the relevant obligation becomes enforceable. With the exception of latent damage, the same rules apply to the date of enforceability for the purpose of long negative prescription as apply to short negative prescription.[43] Subject to a few exceptions,[44] this section applies to obligations of any kind (including actions for contribution between wrongdoers and most claims relating to property). It also expressly includes claims which are also subject to the five-year short negative prescription period.[45] Although in the vast majority of claims in delict or breach of contract the short negative prescription will prevent a claim being made before the long negative prescription period becomes relevant, it is possible that where latent damage has occurred the short negative prescription period might still be running[46] when the long negative prescription period expires, in which case the long negative prescription will extinguish the claim, effectively acting as a long-stop.[47]

10.19 As with short negative prescription, no judicial discretion exists to extend or disapply the prescription period, and the Scottish Law Commission has supported the continuation of this state of affairs.[48]

10.20 The running of the long negative prescription period will be restarted by a part performance and acknowledgement,[49] but will not be suspended by fraudulent concealment or the pursuer's disability.[50]

10.21 A few types of action are excluded from the operation of the long negative prescription period, including claims under the Consumer Protection Act 1987 (where the provisions are modelled on those for personal injuries but subject to a special ten-year prescription period as provided by that Act);[51] actions for damages

[42] Section 7. The Scottish Law Commission has recommended that the period in respect of an obligation to make reparation be shortened to 15 years: Report on Prescription and Limitation of Actions (Latent Damage and Other Related Issues) (1989) Scot Law Com No 122, paras 3.36 - 3.46.

[43] See para 10.12 above.

[44] See para 10.21 below.

[45] Prescription and Limitation (Scotland) Act 1973, s 7(2).

[46] Under s 11(3): see para 10.13 above.

[47] See Report on Prescription and Limitation of Actions (Latent Damage and Other Related Issues) (1989) Scot Law Com No 122, paras 3.11 - 3.16.

[48] Report on Prescription and Limitation of Actions (Latent Damage and Other Related Issues) (1989) Scot Law Com No 122, paras 3.17 - 3.19.

[49] Prescription and Limitation (Scotland) Act 1973, s 7(1)(b).

[50] The possibility of suspending the long negative prescription period for disability was rejected by the Scottish Law Commission: see Reform of the Law Relating to Prescription and Limitation of Actions (1970) Scot Law Com No 15, paras 28 - 30. See also Report on Prescription and Limitation of Actions (Latent Damage and Other Related Issues) (1989) Scot Law Com No 122, paras 3.43 - 3.45.

[51] Prescription and Limitation (Scotland) Act 1973, ss 22A and 22B, inserted by Consumer Protection Act 1987, Schedule 1, para 10.

for personal injuries; actions for defamation; and a small number of actions (including recovery of stolen property from a thief and claims against trustees in respect of their own fraud) which are declared by Schedule 3 to the 1973 Act to be incapable of becoming prescribed at all. The last of these will be familiar to English lawyers as mirroring provisions in section 21 of the 1980 Act.

(c) Personal Injuries

10.22 Personal injuries actions are governed by the amended sections 17 and 18 of the 1973 Act inserted by the Prescription and Limitation (Scotland) Act 1984.[52] They are similar in broad terms to those applying in English law,[53] and are clearly modelled on those provisions. The restriction which they create is a limitation period rather than a prescription period.

10.23 The limitation period is three years from the date when the injuries are sustained or, if later, from the date when the pursuer first became aware, or it would have been reasonably practicable for the pursuer to become aware, that the injuries were sufficiently serious to justify bringing an action, that they were attributable to an act or omission, and that the defender (or a person for whom he was responsible) was a person to whose act or omission the injuries were attributable. In deciding the seriousness of the injuries Scottish law requires the making of the same assumptions as does English law, namely that the defender does not dispute liability and is able to satisfy a decree against him.

10.24 "Personal injuries" are defined in the same way as in English law, that is, as including any impairment of a person's physical or mental condition,[54] but an important difference between English and Scottish law is that the personal injuries rules apply however the injury was caused. Section 17, dealing with personal injuries not resulting in death, applies to an action of damages where the damages claimed consist of or include damages for personal injuries and there is no requirement that the injuries be caused by negligence, nuisance or breach of duty. The apparent application of this section to claims in trespass would indicate that a case with facts similar to *Stubbings v Webb*[55] would be decided differently in Scotland.

10.25 Section 18 of the 1984 Act, mirroring section 12 of the 1980 Act, applies similar provisions in a case where the personal injuries result in death. Here, time runs from the date of the death or, if later, the date when the person bringing the action first knew or could practicably have known the facts mentioned above in relation to section 17.

[52] Section 2. These replace the old ss 17 - 19 of the 1973 Act, and implement the recommendations in the Scottish Law Commission's report on Prescription and Limitation of Actions - Report on Personal Injuries Actions and Private International Law Questions (1983) Scot Law Com No 74, Part III.

[53] See paras 3.38 - 3.65 above.

[54] Prescription and Limitation (Scotland) Act 1973, s 22(1); cf Limitation Act 1980, s 38.

[55] [1993] AC 498: see para 3.32 - 3.35 above.

10.26 In both section 17 and section 18 time does not run while the pursuer is under legal disability. This means that, unlike in English law, a supervening disability does operate to stop time running against the plaintiff. Section 19A[56] allows the court to override the three-year limitation periods for actions for personal injuries[57] if it considers it just to do so. The discretion differs from that given to the court in English law[58] in its omission of a list of the factors that must be taken into account when exercising the discretion.

(d) Defamation

10.27 Section 18A of the 1973 Act, inserted by section 12 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, creates a limitation period of three years for actions for defamation.[59] This limitation period runs from the date of accrual of the cause of action, but the date of accrual is defined by section 18A(4)(b) as being the date when the publication or communication first comes to the notice of the pursuer. This appears to go even further then the personal injuries rules in protecting pursuers, since the test is actual knowledge rather than constructive knowledge. The court has discretion to extend the limitation period if it appears equitable to do so.[60]

2. IRELAND[61]

10.28 The Statute of Limitations 1957[62] is modelled on the English Limitation Act 1939, and consequently there are strong similarities in the laws of the two jurisdictions.

(1) Actions in Contract

10.29 The basic rule under Irish law is that an action founded on simple contract may not be brought "after the expiration of six years from the date on which the cause of action accrued."[63] The statutory wording is identical to that of the

[56] Inserted originally by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980, s 23.

[57] Or defamation: see para 10.27 below.

[58] Limitation Act 1980, s 33. See para 3.66 - 3.76 above.

[59] The changes to limitation periods for defamation actions introduced by the Defamation Act 1996, s 5 (see para 3.105 - 3.107 above) do not apply to Scotland. This resulted largely from responses to the Government's consultation before the introduction of the Defamation Bill, especially from the Scottish Law Commission and the Law Society of Scotland (see *Hansard* (HC) 24 June 1996, vol 280, col 111 (Mr G Streeter MP)). An amendment tabled to apply the section to Scotland was withdrawn: *Hansard* (HC) 24 June 1996, vol 280, cols 106 - 115. The exclusion of Scotland from the scope of s 5 has been criticised as being "for no good reason": K McK Norrie, "The Defamation Act 1996 - Much Ado About Not Very Much" 1996 SLT (News) 311, 314.

[60] Prescription and Limitation (Scotland) Act 1973, s 19A (which also applies to claims for personal injuries).

[61] See, generally, J C Brady and T Kerr, *The Limitation of Actions in the Republic of Ireland* (1984).

[62] As amended by the Statute of Limitations (Amendment) Act 1991: see para 10.40 below.

[63] Statute of Limitations 1957, s 11(1).

corresponding English provision.[64] Where the plaintiff is claiming damages for personal injuries in respect of a breach of duty which arises by virtue of a contract, a different limitation period applies, and this is discussed below.[65] As in England, the cause of action is taken to have accrued when the breach of contract actually takes place, rather than when the plaintiff suffers damage, but there then arises the problem of how, if at all, the rules on limitation periods cater for latent damage.[66]

10.30 For most types of action upon an instrument under seal[67] the limitation period is twelve years, again from the accrual of the cause of action.[68]

(2) Actions in Tort

10.31 Subject to two main exceptions, actions founded on tort must be brought after the expiration of six years from the date on which the cause of action accrued.[69] The first main exception is an action for damages for personal injuries. Until the passing of the Statute of Limitations (Amendment) Act 1991, the limitation period applicable thereto was three years from the date on which the cause of action accrued. The present law and its background are dealt with separately below.[70] The second main exception is a claim for slander actionable only on proof of special damage,[71] in respect of which the limitation period is three years from the date on which the cause of action accrued.[72]

10.32 The question of when the cause of action accrued is therefore crucial to the limitation period. With negligence and other torts that are actionable only on proof of actual damage the cause of action will not accrue until actual damage has occurred.[73]

[64] Limitation Act 1980, s 5: see para 3.1 above.

[65] See para 10.40 below.

[66] See paras 10.33 - 10.42 below.

[67] But excluding those to recover: arrears of a rentcharge or a conventional rent; any principal sum of money secured by a mortgage or other charge; or arrears of interest in respect of such a sum of money; or arrears of an annuity charged on personal property.

[68] Statute of Limitations 1957, s 11(5). Cf the similar position in England and Wales see paras 3.1; 7.10 above.

[69] *Ibid*, s 11(2)(a).

[70] See paras 10.33 - 10.42 below.

[71] That is, slander which does not fall into any of the following categories: slanders which impute unchastity or adultery to any woman or girl; slanders affecting a person's official, professional or business reputation; slanders imputing a criminal offence punishable by imprisonment; and slanders imputing a contagious disease tending to exclude the sufferer from society: see B M E McMahon and W Binchy, *Irish Law of Torts* (2nd ed 1990), pp 615 - 618.

[72] Statute of Limitations 1957, s 11(2)(c).

[73] *Hegarty v O'Loughran* [1990] 1 IR 148.

(3) Latent Damage

10.33 The problem of latent damage is common to actions in both contract and tort.[74] The hardship potentially created by limitation periods based on the time of the wrongdoing or the damage, rather than the time of discoverability, gave rise to a constitutional challenge in *Cahill v Sutton*.[75] The plaintiff in that case was prescribed tablets by the defendant in 1968. Although the plaintiff suffered ill-effects almost immediately she did not commence proceedings until 1972.[76] She contended that because, under the provisions of the Statute of Limitations which barred her own action, a plaintiff could lose the right to bring an action barred before he or she could discover its existence, those provisions must be ineffective because they offended against Articles 40.3.1 and 40.3.2 of the Republic's Constitution, which provide:

> **[Article 40.3.1]** The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.
>
> **[Article 40.3.2]** The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.

10.34 The challenge was rejected by the Supreme Court, on the basis that the plaintiff had insufficient *locus standi* to make the challenge. The Supreme Court took the view that any constitutional defect in the relevant section of the Statute of Limitations could be remedied by adding a saving provision delaying the start of the limitation period where plaintiffs were (through no fault of their own) unaware of the facts, but such a proviso would not have assisted the plaintiff in this case.[77] As her claim was therefore doomed to fail whether or not the constitutionality of the statute was upheld, the Supreme Court held that the plaintiff did not have sufficient interest to give her *locus standi*.

10.35 The members of the Supreme Court in *Cahill v Sutton* refrained scrupulously from saying whether, if the plaintiff had had *locus standi*, the challenge would have succeeded, although the wording of the Statute of Limitations received heavy criticism. Henchy J, with whom the other members of the court concurred, said that the

> justice and fairness of [a provision similar to that contained in the English Limitation Act 1963, now section 11 of the Limitation Act

[74] It is possible for rights of action to exist concurrently in contract and in tort in relation to the same facts: *Finlay v Murtagh* [1979] IR 249 (Sup Ct).

[75] [1980] IR 269.

[76] The plaintiff originally sued in both tort and contract, although she later abandoned the tortious claim.

[77] Because there was no delay between her suffering the ill-effects of the medication, and her knowing that she had suffered those ill-effects.

1980[78]] are so obvious that the enactment by our Parliament of a similar provision would merit urgent consideration.[79]

10.36 The constitutionality of the Statute of Limitations was again tested in *Morgan v Park Developments Limited*.[80] The plaintiff was attempting to recover damages for negligence in relation to defects in a house built for him by the defendant. The house was built in 1961 and bought by the plaintiff in 1962. Within months the plaintiff had complained of cracks in the walls. Over the following years there were attempts, some of which were made by the defendants, to repair the cracks, but in 1979 the plaintiff was advised by an architect that the cracks resulted from a serious structural defect. The plaintiff commenced proceedings in 1980. In the High Court Carroll J held that accrual of the cause of action, for the purposes of section 11 of the Statute of Limitations 1957, had two possible meanings. The first was the date on which the damage caused by the negligence actually first occurred. The second was the date on which the damage became discoverable with reasonable diligence.[81] She said that if she applied the first of the two constructions of the statute the effects would be "harsh and absurd" and that it seemed to her that "no law which could be described as 'harsh and absurd' or which the Courts could say was unreasonable and unjustifiable in principle could also be constitutional."[82] No such objections applied to a construction based on discoverability. Since she was obliged to choose the construction which was consistent with the Constitution, Carroll J upheld the discoverability test. But, since the plaintiff still failed on the facts, the judge's ruling on the correct construction of the statutory wording was *obiter*.

10.37 In 1987, the Irish Law Reform Commission reported on limitation periods in relation to personal injury.[83] By this time, following the decision at first instance in *Hegarty v O'Loughran*,[84] the law was in such a state of uncertainty that any one of three statements might have correctly described the law in relation to the limitation period for tortiously inflicted personal injuries:[85]

[78] See para 3.29 above.

[79] [1980] IR 269, 288.

[80] [1983] ILRM 156.

[81] Cf the decision of the House of Lords in *Pirelli General Cable Works Ltd v Oscar Faber & Partners* [1983] 2 AC 1, which had been given recently at the time *Morgan v Park Developments Ltd* was decided.

[82] [1983] ILRM 156, 160.

[83] *Report on the Statute of Limitations: Claims in Respect of Latent Personal Injuries* LRC 21 (1987).

[84] [1987] ILRM 603. In this case, which involved a claim for medical negligence, Barron J rejected the contention that the cause of action accrued, and the limitation period began, when it became discoverable. He appeared to hold that the cause of action accrued on the date when the act causing the damage was committed, rather than the date when the damage itself occurred, although nothing turned on this distinction on the facts. See para 10.32 above and para 10.39 below in relation to the Supreme Court's decision on appeal.

[85] *Report on the Statute of Limitations: Claims in Respect of Latent Personal Injuries* LRC 21 (1987), p 6.

(a) The first-instance decision in *Hegarty v O'Loughran* was correct and the law so resulting was consistent with the Constitution, so that no discoverability test applied; or

(b) the dicta of Carroll J in *Morgan v Park Developments Limited* were correct and applicable to personal injuries, so that the limitation period ran from the date of discoverability; or

(c) the first-instance decision in *Hegarty v O'Loughran* was correct but the law so resulting was inconsistent with the Constitution, so that there was no limitation period at all.

10.38 The Irish Law Reform Commission considered various possible options for reform, and decided that the limitation period for personal injury cases should be based on discoverability. Its main argument in favour of this reform was that the hardship to defendants caused by extending limitation periods in this way would be less than the hardship to plaintiffs who, under the existing law, lost the right to bring an action before they knew that such a right existed.[86] The Commission acknowledged the strength of arguments as to "where and why the line should be drawn against plaintiffs with what might unsympathetically be described as a hardluck story",[87] but took the view that these arguments affected how the test of discoverability should be drawn, rather than whether it should be adopted at all. The Commission considered but rejected the option of a judicial discretion to extend or disapply the limitation period, saying that such a discretion would either have to be drawn in broad and unfettered terms, introducing uncertainty, or with more qualifications, like the one available in English law under section 33 of the Limitation Act 1980[88] whose "subsequent history does not suggest it as a desirable model."[89] The Commission also considered, but rejected, the introduction of a statutory long-stop for limitation in personal injury cases.[90]

10.39 The Law Reform Commission's recommendations were substantially implemented in the Statute of Limitations (Amendment) Act 1991, although the existing law received some clarification before the 1991 Act was passed, when the Supreme Court decided the appeal in *Hegarty v O'Loughran*,[91] with all the members of the court rejecting the reasoning in *Morgan* and supporting a limitation period beginning on the date when the plaintiff first suffered damage.

86 *Report on the Statute of Limitations: Claims in Respect of Latent Personal Injuries* LRC 21 (1987), p 42, quoting from *Morgan v Park Developments Ltd* [1983] ILRM 156, 160, *per* Carroll J.

87 *Ibid*, p 43.

88 Formerly contained in the Limitation Act 1975. See paras 3.66 - 3.76 above.

89 *Report on the Statute of Limitations: Claims in Respect of Latent Personal Injuries* LRC 21 (1987), p 46.

90 *Ibid*, pp 47 - 48.

91 [1990] 1 IR 148. See para 10.32 n 73 above.

10.40 Under the 1991 Act, an action[92] claiming damages for personal injuries caused by negligence, nuisance or breach of duty (including breach of contract), must be brought within three years from the date on which the cause of action accrued, or within the three years from the plaintiff's "date of knowledge".[93] This is identical to the wording of the section 11 of the Limitation Act 1980 in England.[94] The date of knowledge is the date on which the plaintiff first had knowledge:

> (a) that the person alleged to have been injured had been injured;
>
> (b) that the injury in question was significant;
>
> (c) that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty;
>
> (d) the identity of the defendant; and
>
> (e) if it alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant.[95]

These elements are, again, present in the English legislation.[96] Subsection (2) imputes to the plaintiff knowledge which he or she might reasonably be expected to acquire from facts observable or ascertainable by him or her, and from facts ascertainable with the help of expert advice which it is reasonable to seek, but subject to a proviso[97] that the plaintiff is not fixed with knowledge of facts ascertainable only with the help of expert advice so long as all reasonable steps have been taken to obtain that advice.[98] There is, however, another proviso, which does not appear in the English legislation, that the person injured is not fixed with knowledge of a fact relevant to the injury which he or she has failed to acquire as a result of the injury.[99] This was intended to reflect the fact that, although an average person might reasonably be expected to take steps to gather information, an injured plaintiff in a debilitated condition often might not be able to pursue inquiries with the same degree of vigour.[100]

[92] Other than one brought under fatal accidents legislation: Statute of Limitations (Amendment) Act 1991, s 6.

[93] *Ibid*, s 3(1).

[94] See para 3.29ff above.

[95] Statute of Limitations (Amendment) Act 1991, s 2(1).

[96] See paras 3.38 - 3.51 above. Element (a) - knowledge of the injury itself - is not expressly mentioned, but must be implicit in the plaintiff's knowledge that an injury is significant.

[97] Statute of Limitations (Amendment) Act 1991, s 2(3)(a). See, eg, *Boylan v Motor Distributors Ltd* [1994] 1 ILRM 115.

[98] Identical to wording in Limitation Act 1980, s 14(3).

[99] Statute of Limitations (Amendment) Act 1991, s 2(3)(b).

[100] *Report on the Statute of Limitations: Claims in Respect of Latent Personal Injuries,* LRC 21 (1987), p 45.

10.41 In accordance with the recommendations of the Law Reform Commission, the 1991 Act did not contain a statutory long-stop provision. It remains to be seen, however, whether the courts will use their inherent jurisdiction to strike out claims for delay as actively where a long delay between the commencement of proceedings and the events to which they relate is due to lack of discoverability, as they do at present where such a delay is due to the plaintiff's disability.[101] This jurisdiction has been described by one commentator as "a judicial 'long stop', operating as an important qualification to the discoverability principle."[102]

10.42 Although the Statute of Limitations (Amendment) Act 1991 resolved the uncertainty in relation to personal injuries, there still remained the question of whether the lack of a discoverability test in the Statute of Limitations 1957, in relation to other causes of action, could be attacked on constitutional grounds. This question was resolved in *Tuohy v Courtney*,[103] in which the Supreme Court decisively rejected such a challenge. It was held that Parliament, in legislating on limitation, was engaged in a balancing of constitutional rights and duties, and that in a challenge to the constitutional validity of any statute the role of the courts was not to impose its own view of what those rights and duties should be. Therefore, the limitation period for latent damage other than personal injuries remains based, as the case may be, on the date of the breach of contract, or the date on which the plaintiff suffers damage, regardless of discoverability.

(4) Actions for Breach of Trust

10.43 The main provision of the Statute of Limitations 1957 dealing with the limitation period for breaches of trust is section 43(1)(a). This provides:

> Subject to section 44 of this Act,[104] an action to recover money or other property or in respect of any breach of trust, not being an action for which a period of limitation is fixed by any other provision of this Act, shall not be brought against a trustee or any other person claiming through him after the expiration of six years from the date on which the right of action accrued.

The definition of a trustee in the Statute excludes "a person whose fiduciary relationship arises merely by construction or implication of law and whose fiduciary relationship is not deemed by any rule of law to be that of an express trustee."[105] This distinction between express trusts, on the one hand, and implied and constructive trusts on the other, contrasts with the position under English law.[106]

[101] See para 10.51 below.

[102] B M E McMahon and W Binchy, *Irish Law of Torts* (2nd ed 1990), p 831.

[103] [1994] 2 ILRM 503.

[104] See para 10.44 below.

[105] Statute of Limitations 1957, s 2(2)(a)(i).

[106] See paras 4.8 - 4.13 above.

10.44 There are two exceptions to the limitation period generally applicable in respect of breaches of trust, similar to the exceptions applied by English law.[107] These are claims founded on a fraud or fraudulent breach of trust to which the trustee is a party or privy, and claims to recover trust property, or its proceeds, which are still retained by the trustee or previously received by the trustee and converted to the trustee's own use.[108] In both cases no limitation period will apply.

(5) Actions in respect of Land

10.45 Generally, no action to recover land may be brought in Irish law by anyone except a state authority after the expiration of twelve years from the date on which the right of action accrued to the plaintiff, or to any person through whom the plaintiff claims.[109] "Land" is defined broadly so as to include corporeal hereditaments and rentcharges, and an interest in the proceeds of sale of land held on trust for sale, but excludes incorporeal hereditaments.[110] An action to recover land includes an action claiming a declaration of title to land, possession proceedings brought by a mortgagee or the owner of a registered charge.[111]

10.46 The date on which a right to recover land accrues for limitation purposes depends on the type of interest claimed. In the case of a present interest, the relevant date will be the date of the plaintiff's dispossession or the discontinuance of the plaintiff's possession.[112] In the case of *future* interests, the date of accrual will generally be the date on which the interest falls into possession.[113] However, if the person entitled to the preceding interest was not in possession when that preceding interest came to an end, the limitation period will expire on the later of twelve years from the date on which the right of action accrued to the person entitled to the preceding interest, and six years from the date on which the right of action accrued to the person entitled to the succeeding interest.[114] Where property is leasehold, the accrual of the lessor's right of action will depend on the nature of the tenancy. Where a tenancy is oral and periodic, the right accrues on the determination of the tenancy, which is deemed to be the expiry of the first year or tenancy period, or, if later, the date on which the lessor accepts rent.[115] Similarly, where a tenancy is a tenancy at will, the right again accrues on the determination of the tenancy, which is deemed to be the date one year after the commencement of the tenancy unless it has been determined earlier.[116] With other leasehold

[107] See paras 4.14 - 4.23 above.

[108] Statute of Limitations 1957, s 44.

[109] Statute of Limitations 1957, s 13(2). State authorities must bring an action within 30 years, except in relation to land which is, or has been, foreshore, in which case the limitation period is 60 years: *ibid*, 13(1).

[110] *Ibid*, s 2(1). Cf the English definition: see para 6.4 above.

[111] *Ibid*, s 2(1).

[112] *Ibid*, s 14(1).

[113] *Ibid*, s 15(1).

[114] *Ibid*, s 15(2)(a). Special rules, involving longer limitation periods, apply to State land: s 15(2)(b).

[115] *Ibid*, s 17(2).

[116] *Ibid*, s 17(1).

interests the right of action will accrue on the determination of the term of the lease.[117]

10.47 The Statute of Limitations 1957 provides that no right of action shall be deemed to have accrued for the purposes of the Act unless there is adverse possession, that is, that "the land is in the possession ... of some person in whose favour the period of limitation can run".[118] In *Murphy v Murphy*[119] the Supreme Court held that the requirement of adverse possession amounted to no more than that the possession should be inconsistent with the "real" owner's title. It was immaterial that the "real" owner should be aware of her own rights in the property.

10.48 In general the effect of expiry of the limitation period is to extinguish the title of the person to whose right of action the limitation period applies.[120] In *Perry v Woodfarm Homes Limited*[121] a majority of the Supreme Court[122] held that a lessee with unregistered title against whom a squatter had taken twelve years' adverse possession could not effectively surrender its lease to the lessor thereby putting the lessor into possession and enabling the squatter to be ejected. In doing so, the court agreed with the reasoning of Lord Morris's dissenting speech in *St Marylebone Property Co Limited v Fairweather*.[123] The position is, however, different where the leasehold title is registered.[124]

(6) Restitution

10.49 Section 11(1) of the Statute of Limitations 1957 provides for a limitation period of six years, from the accrual of the cause of action, for "actions founded on quasi-contract". This limitation period is the one applicable to the majority of restitutionary claims. This contrasts with the Limitation Act 1980 in England, and its predecessor the Limitation Act 1939, neither of which contain any parallel provision.[125] Where the claim arises from mistake, for example a claim for restitution of money paid under a mistake of fact, the limitation period will not start to run until the plaintiff has discovered the mistake or could with reasonable diligence have discovered it.[126]

[117] Subject to an exception, substantially identical to that applying in England and Wales, where rent is received by someone who wrongly claims to be entitled to the reversion: *ibid*, s 17(3). See para 6.16 above.

[118] Statute of Limitations 1957, s 18(1). There is an identical provision in the English Limitation Act 1980: see para 6.19 above.

[119] [1980] IR 183. See also, eg, *Cork Corpn v Lynch* [1995] 2 ILRM 598.

[120] Statute of Limitations 1957, s 24.

[121] [1975] IR 104.

[122] Walsh and Griffin JJ; Henchy J dissenting.

[123] [1963] AC 510. See para 6.38 above.

[124] *Perry v Woodfarm Homes Limited* [1975] IR 104, 120, *per* Walsh J. Cf the English decision *Spectrum Investment Co Ltd v Holmes* [1981] 1 WLR 221: see para 6.39 above.

[125] See para 5.3 above.

[126] Statute of Limitations 1957, s 72(1).

(7) Factors Postponing the Running of Time

10.50 Irish law provides for the running of time to be postponed where the plaintiff is subject to a legal disability at the time when an action accrues. In cases other than those involving personal injuries, there will be generally be an extension of the limitation period to the date six years (or three years for a claim for slander) from the end of the disability.[127] In the case of a claim based on personal injuries, there is a three-year extension from the end of the disability, if a disability exists either when the plaintiff's cause of action accrues or on the date of the plaintiff's knowledge.[128] There is no provision suspending the running of time in the event of supervening disability. There is a long-stop date, in land-related actions, of 30 years from the date on which the right of action first accrued.[129]

10.51 In relation to personal injury claims, the Statute had contained a proviso that the section extending the limitation period would not apply unless the plaintiff could prove that the person under the disability was not in the custody of a parent when the right of action accrued,[130] but in *O'Brien v Keogh*[131] the Supreme Court held that the proviso infringed the citizen's personal right to litigate, and was therefore contrary to Article 40 of the Constitution.[132] The provision was repealed by the Statute of Limitations (Amendment) Act 1991.[133] There is no statutory long-stop date, which means that the possibility exists of actions being brought many years after the events alleged to have given rise to the claim. However the courts have developed a willingness to use their inherent equitable jurisdiction to strike out cases for inordinate delay in prosecution in a manner which has been regarded as amounting to a *de facto* long stop.[134] This tendency was begun by the Supreme Court in *O'Domhnaill v Merrick*,[135] in which there had been considerable delay in progressing the proceedings after they had been commenced. But in *Toal v Duignan*[136] there was little delay after the commencement of proceedings, yet the plaintiff's claim against several of the defendants was still struck out, on the basis of the length of time which had elapsed since the alleged omissions which formed the basis of the complaint.[137]

[127] *Ibid*, ss 48 and 49.

[128] Statute of Limitations (Amendment) Act 1991, s 5(1). In relation to the date of the plaintiff's knowledge see para 10.40 above.

[129] *Ibid*, s 49(1)(d). A similar provision appears in the English Limitation Act 1980, s 28(4). See para 8.3 above.

[130] Formerly s 49(2)(a)(ii).

[131] [1972] IR 144.

[132] See para 10.33 above in relation to Article 40 of the Constitution.

[133] Section 5(4). The repeal was recommended by the Irish Law Reform Commission: see *Report on the Statute of Limitations: Claims in Respect of Latent Personal Injuries,* LRC 21 (1987), pp 51 - 52.

[134] B M E McMahon and W Binchy, *Irish Law of Torts* (2nd ed 1990), p 831.

[135] [1984] IR 151.

[136] [1991] ILRM 135 (Sup Ct).

[137] See also *Toal v Duignan (No 2)* [1991] ILRM 140, in which the Supreme Court struck out the same plaintiff's claim against some, but not all, of the other defendants.

10.52 As in England, fraud, concealment or mistake will prevent the running of the limitation period.[138] If the Irish courts were to follow the English decision *Sheldon v RHM Outhwaite (Underwriting Agencies) Limited*,[139] the limitation period will be restarted in the event of concealment after the cause of action has accrued. There are provisions delaying the running of the limitation period in the event of acknowledgement[140] and part payment[141] analogous to those in force in England and Wales.[142]

3. AUSTRALIA

10.53 Each Australian State and Territory has its own specific limitations enactment.[143] In addition, further provisions relating to particular subject matter are spread throughout various pieces of legislation on both a State and Federal level.[144] Most of the current legislation in Australia is based on English legislation. For example, Victoria, Queensland and Tasmania adopted the reforms put in place in England by the Limitation Act 1939. Although New South Wales did not copy the 1939 reforms the overall effect is generally the same. The legislation in the Northern Territory and the Australian Capital Territory is based on the New South Wales model. Western Australia did not adopt the 1939 reforms and the current legislation in that State, subject to a few amendments, still reflects the position in England prior to the Limitation Act 1939, although the Law Reform Commission of Western Australia has recently recommended the adoption of a modern limitation statute.[145] The law in South Australia, subject to a few exceptions, is similar to that currently in force in Western Australia.

(1) Actions in Contract

10.54 The limitation period in most jurisdictions in Australia for an action for breach of contract is six years running from the date on which the cause of action accrues[146]

[138] Statute of Limitations 1957, ss 71 and 72. Concealment must be fraudulent rather than merely deliberate.

[139] [1996] AC 102 (HL): see paras 8.17 - 8.20 above.

[140] Statute of Limitations 1957, ss 50 - 60. See also, eg, *Smith v Ireland* [1983] ILRM 300.

[141] *Ibid*, ss 61 - 70.

[142] See paras 8.27 - 8.48 above.

[143] **New South Wales** Limitation Act 1969; **Queensland** Limitation of Actions Act 1974; **South Australia** Limitation of Actions Act 1936; **Tasmania** Limitation Act 1974; **Victoria** Limitation of Actions Act 1958; **Western Australia** Limitation Act 1935; **Australian Capital Territory** Limitation Ordinance 1985; **Northern Territory** Limitation Act 1981. See also **Victoria** Wrongs Act 1958; **Western Australia** Fatal Accidents Act 1959; Law Reform (Miscellaneous Provisions) Act 1941.

[144] See eg, **Commonwealth** Trade Practices Act 1974, s 82(2) and **New South Wales** Motor Accidents Act 1988, s 52. See also *Wardley Australia Ltd v Western Australia* (1992) 66 ALJR 839 (High Ct).

[145] *Report on Limitation and Notice of Actions* Project No 36 - Part II (1997). The Commission recommends the general application of a limitation period of three years from discoverability, subject to a long-stop (or "ultimate period") of 15 years from the date when the claim arose.

[146] **Australian Capital Territory** Limitation Ordinance 1985, s 11(1); **New South Wales** Limitation Act 1969, s 14(1)(a); **Queensland** Limitation of Actions Act 1974, s 10(1)(a);

except in the Northern Territory, where the limitation period is three years from that date.[147] As in England, where the contract is made by deed, the limitation period is generally 12 years.[148]

(2) Actions in Tort

10.55 The standard limitation period for an action for damages in tort is six years from the date on which the cause of action accrues.[149] Again, the Northern Territory is the exception, having a limitation period of three years from the accrual of the cause of action.[150] A period of three years from the date of the accrual of the cause of action is generally applied to actions for personal injuries.[151] Shorter limitation periods than six years are also applied to some torts.[152]

(3) Latent Damage

10.56 Australian jurisdictions have not generally adopted the date of discoverability as the starting point for the limitation period for personal injury or other latent damage claims, although there is limited use of a discoverability test, in actions in Victoria relating to personal injuries consisting of a "disease or disorder", and in asbestos-related claims in Western Australia.[153] There is, however, widespread use of provisions giving the courts discretion to extend the limitation period. Sometimes these provisions apply only to personal injury claims. In the Australian

South Australia Limitation of Actions Act 1936, s 35(a); **Tasmania** Limitation Act 1974, s 4(1)(a); **Victoria** Limitation of Actions Act 1958, s 5(1)(a); **Western Australia** Limitation Act 1935, s 38(1)(c)(v).

[147] **Northern Territory** Limitation Act 1981, s 12(1)(a).

[148] **Australian Capital Territory** Limitation Ordinance 1985, s 13; **New South Wales** Limitation Act 1969, s 16; **Northern Territory** Limitation Act 1981, s 14(1). In Queensland and Tasmania, the limitation period for actions on a specialty is 12 years unless a shorter period is prescribed by another provision: **Queensland** Limitation of Actions Act 1974, s 10(3) and (3A); **Tasmania** Limitation Act 1974, s 4(3). Exceptions are: **South Australia** Limitation of Actions Act 1936, s 34 (15 years); **Victoria** Limitation of Actions Act 1958, s 5(3) (15 years unless a shorter period is prescribed by another provision); **Western Australia** Limitation Act 1935, s 38(1)(e)(i) (20 years).

[149] See **Australian Capital Territory** Limitation Ordinance 1985, s 11(1); **New South Wales** Limitation Act 1969, s 14(1)(b); **Queensland** Limitation of Actions Act 1974, s 10(1)(a); **South Australia** Limitation of Actions Act 1936, s 35(c); **Tasmania** Limitation Act 1974, s 4(1)(a); **Victoria** Limitation of Actions Act 1958, s 5(1)(a); **Western Australia** Limitation Act 1935, s 38(1)(c)(vi).

[150] **Northern Territory** Limitation Act 1981, s 12(1)(b).

[151] **New South Wales** Limitation Act 1969, s18A(2); **Queensland** Limitation of Actions Act 1974, s 11; **South Australia** Limitation of Actions Act 1936, s 36(1); **Tasmania** Limitation Act 1974, s 5(1). But in Victoria and Western Australia the limitation period for an action in respect of personal injuries is 6 years: **Victoria** Limitation of Actions Act 1958, s 5(1A); **Western Australia** Limitation Act 1935, ss 38(1)(c)(vi) and 38A.

[152] For example, Western Australia and South Australia apply a two year limitation period to actions for slander: see **Western Australia** Limitation Act 1935, s 38(1)(a)(ii); **South Australia** Limitation of Actions Act 1936, s 37. Western Australia also applies a four year limitation period for actions for trespass to the person, menace, assault, battery, wounding and imprisonment: Limitation Act 1935, s 38(1)(b).

[153] **Victoria** Limitation of Actions Act 1958, s 5(1A); **Western Australia** Limitation Act 1935, s 38A.

Capital Territory, the Limitation Ordinance 1985 allows the court to extend the limitation period for an action for personal injuries for such period as it determines, if it is just and equitable to do so.[154] Similar provisions have been adopted in New South Wales[155] and Victoria.[156] In Tasmania, the court may extend the limitation period of three years in a personal injury case for a period of no more than a further three years if it is considered just and reasonable so to do.[157] In personal injury actions in Queensland, if any material fact of a decisive character is only discoverable after the beginning of the final year of the limitation period, the court may order that the limitation period be extended to the date one year after the date of discoverability.[158]

10.57 But some other jurisdictions have also provided for an extended limitation period in cases of latent damage other than personal injury. South Australia and the Northern Territory confer on the court a discretion to extend the limitation period in all claims to such an extent and upon such terms as the court thinks fit (in the Northern Territory) or as the justice of the case requires (South Australia), where the plaintiff only becomes aware of material facts after the date twelve months before the expiration of the limitation period, and commences proceedings within twelve months after his or her discovery of the relevant facts.[159] In the Australian Capital Territory, the court has a discretion to extend the limitation period in cases of latent damage to property up to 15 years from the act or omission giving rise to the action if it is just and reasonable to do so.[160]

(4) Actions for Breach of Trust

10.58 Limitation provisions for actions for breach of trust are also closely based on English legislation. In Western Australia and South Australia the relevant provisions come from the English Trustee Act 1888: subjecting actions against a trustee to a limitation period of six years except where the claim is based on fraud,

[154] The court is required to have regard to all the circumstances of the case, including some identified factors. See Limitation Ordinance 1985, s 36.

[155] In cases of non-latent injury, the court may extend the normal three year limitation period to a maximum of five years: Limitation Act 1969, ss 60A-E. Where the plaintiff is unaware of the injury, the court may extend the limitation period for such period as it thinks fit, providing that an application is made by the plaintiff within three years of his or her knowledge of the nature or extent of the injury, or of the connection between the injury and the defendant's act or omission: Limitation Act 1969, ss 60G, 60I(1). The court may order extensions of time, both under ss 60A-E and under ss 60F-J in relation to the same claim: see s 60J. See further *Harris v Commercial Minerals Ltd* (1996) 70 ALJR 425.

[156] Limitation of Actions Act 1958, s 23A(1) - (2).

[157] Limitation Act 1974, s 5(3).

[158] Limitation of Actions Act 1974, ss 30 - 31. For a recent discussion of the Queensland provision, see *Brisbane South Regional Health Authority v Taylor* (1996) 70 AJLR 866.

[159] **South Australia** Limitation of Actions Act 1936, s 48; **Northern Territory** Limitation Act 1981, s 44. In cases of defective building work, South Australia, the Northern Territory and Victoria have introduced legislation providing for a ten year limitation period running from a fixed date such as the date of completion, or the issue of an occupancy permit or final certificate by the local regulatory authority. No action may be brought outside this period. See **Victoria** Building Act 1993, s 134; **South Australia** Development Act 1993, s 73; and **Northern Territory** Building Act 1993, s 160.

[160] Limitation Ordinance 1985, s 40(1).

fraudulent breach of trust or the retention or conversion of trust property, which is not subject to any limitation period.[161] Queensland,[162] Tasmania[163] and Victoria[164] have followed the English Limitation Act 1939 with regards to actions for breach of trust. They therefore apply a uniform period of six years for all actions against trustees, whatever the nature of the trust (save for actions related to fraudulent breach of trust and trust property). New South Wales has gone further, subjecting actions in respect of fraud, fraudulent breach of trust or retention or conversion of trust property to a limitation period of twelve years running from the date of discoverability.[165] Other actions for breach of trust are subject to the six year limitation period.[166]

(5) Actions in respect of land

10.59 In general, limitation provisions on actions to recover unregistered land in most Australian jurisdictions are similar to those contained in the English Limitation Act 1939:[167] actions to recover land are subject to a limitation period of twelve years from the moment the land comes into adverse possession, and after the expiry of that period the person in adverse possession of the land can claim title to it, as the owner's rights are extinguished.[168] There are however significant differences with respect to land which is registered under the Torrens system.[169] Some jurisdictions still recognise the acquisition of title following a period of adverse possession,[170] some subject such acquisition to further restrictions,[171] and in some jurisdictions

[161] **Western Australia** Limitation Act 1935, s 47; **South Australia** Limitation of Actions Act 1936, ss 31 - 32.

[162] Limitation of Actions Act 1974, s 27.

[163] Limitation Act 1974, s 24.

[164] Limitation of Actions Act 1958, s 21.

[165] Limitation Act 1969, s 47. See also **Australian Capital Territory** Limitation Ordinance 1985, s 27(1) and **Northern Territory** Limitation Act 1981, s 32.

[166] **New South Wales** Limitation Act 1969, s 48. The corresponding provision in the Northern Territory is similar, except with a three-year limitation period: Limitation Act 1981, s 33.

[167] Which was followed in Queensland, Tasmania, Victoria and New South Wales (though New South Wales made a number of changes to the drafting of the Act). See **Queensland** Limitation of Actions Act 1974, ss 13 - 24, **Tasmania** Limitation Act 1974, ss 10 - 21; **Victoria** Limitation of Actions Act 1958, ss 7 - 18; **New South Wales** Limitation Act 1969, ss 27 - 39. It should be noted that the limitation provisions of Western Australia and South Australia on actions to recover land still reflect the provisions of the 1833 and 1874 English Real Property Limitation Acts.

[168] In addition, in New South Wales and Tasmania, the limitation period for an action to recover land by virtue of a forfeiture or breach of condition runs from the date of discoverability of the facts giving the right of forfeiture or showing that the condition is broken: **New South Wales** Limitation Act 1969, s 32; **Tasmania** Limitation Act 1974, s 14(1). In South Australia and Western Australia, actions to recover land in respect of concealed fraud are based on a discoverability test: **South Australia** Limitation of Actions Act 1936, s 25(1); **Western Australia** Limitation Act 1935, s 27.

[169] In force in all Australian jurisdictions: for general background see D J Whalan, *The Torrens System in Australia* (1982).

[170] Tasmania, Victoria and Western Australia.

[171] See **Queensland** Limitation of Actions Act 1974, ss 13 - 26; **South Australia** Limitation of Actions Act 1936, ss 4 - 30 and 33; **New South Wales** Limitation Act 1969, ss 27 - 39.

the title of the registered proprietor of the land cannot be defeated by adverse possession.[172]

10.60 South Australia and Western Australia retain provisions for mortgage related actions which are based on the English Real Property Limitation Act 1833.[173] In contrast, Queensland, Tasmania and Victoria derive their mortgage related limitation provisions from the English Limitation Act 1939.[174] New South Wales has gone further, adopting a uniform regime for mortgages of both personalty and realty and ensuring that all mortgage related remedies are subject to a limitation period.[175] Similar provisions have been adopted in the Northern Territory and the Australian Capital Territory.[176]

(6) Long-stops

10.61 Long-stops are generally not used in Australia although some jurisdictions limit the extent to which disability can suspend the running of the limitation period, either in relation to land-related claims,[177] or in relation to all claims.[178]

(7) Factors postponing the running of time

10.62 Disability postpones the running of time in all regimes in all Australian jurisdictions[179] and in some "disability" is defined in detail. For example, in New South Wales a person is under a disability:

> (a) while he is an infant; or

[172] Australian Capital Territory and Northern Territory.

[173] As amended by the Real Limitation Property Act 1874. See **Western Australia** Limitation Act 1935, ss 29, 32, 34 and 35; **South Australia** Limitation of Actions Act 1936, ss 12, 27, 33 and 35(e). In South Australia the limitation period is 15 years, rather than 12 as in Western Australia.

[174] See **Queensland** Limitation of Actions Act 1974, ss 20, 26; **Tasmania** Limitation Act 1974, ss 18 and 23; **Victoria** Limitation of Actions Act 1958, ss 15 and 20.

[175] **New South Wales** Limitation Act 1969, ss 40 - 46, 65.

[176] **Northern Territory** Limitation Act 1981, ss 25 - 31; **Australian Capital Territory** Limitation Ordinance 1985, ss 22 - 26.

[177] Limited to 30 years from accrual in the following jurisdictions: **Queensland** Limitation of Actions Act 1974, s 29(2)(b); **Tasmania** Limitation Act 1974, s 26(4); **Victoria** Limitation of Actions Act 1958, s 23(c).

[178] **South Australia** Limitation of Actions Act 1936, s 45(3); **Northern Territory** Limitation Act 1981, s 36(4).

[179] The most "old-fashioned" are to be found in Western Australia, where the provisions on disability are inherited from the English Real Property Limitation Acts of 1833 and 1874 (in respect of actions for land and rent), and the Limitation Act 1623, and the Civil Procedure Act 1833. Disability for actions to recover land includes "infancy, coverture (except in the case of a married woman entitled to make such entry or distress, or bring such action), idiocy, lunacy, or unsoundness of mind": Limitation Act 1935, s 16. In respect of other actions, disability includes "infancy or insanity": *ibid*, s 40. The fact that the plaintiff is beyond the seas does not extend the limitation period, but if the plaintiff is beyond the seas when the cause of action accrues, the limitation period is deemed to start on his return.

(b) while he is, for a continuous period of twenty-eight days or upwards, incapable of, or substantially impeded in, the management of his affairs in relation to the cause of action in respect of the limitation period for which the question arises, by reason of-

(i) any disease or any impairment of his physical or mental condition;
(ii) restraint of his person, lawful or unlawful, including detention or custody under the Mental Health Act 1958;
(iii) war or warlike operations; or
(iv) circumstances arising out of war or warlike operations.[180]

10.63 Some jurisdictions, however, provide for a regime under which a prospective defendant can start time running against a prospective plaintiff who is under a disability by serving a notice to proceed on the person in charge of the plaintiff's affairs.[181]

10.64 In New South Wales, the disability regime is not applicable to the recovery of a penalty or forfeiture except where the person having the cause of action is an aggrieved party.[182] Some jurisdictions have more detailed provisions dealing with the limits of the disability regime. For example, in Queensland section 29 of the Limitation of Actions Act 1974 provides:[183]

(2) Notwithstanding [the extension of time provided for in subsection 1]-

(a) where a right of action that has accrued to a person under a disability accrues on the death of that person while

[180] **New South Wales** Limitation Act 1969, s 11. See also **Australian Capital Territory** Limitation Ordinance 1985, s 8(3). Cf the position in Queensland and Tasmania, where the plaintiff is regarded as under disability if he or she is a minor, of unsound mind or imprisoned, and Victoria, where minority and unsoundness of mind (but not imprisonment) are regarded as disabilities: **Queensland** Limitation of Actions Act 1974, ss 5(2) and (3); **Tasmania** Limitation Act 1974, ss 2(2) and (3); **Victoria** Limitation of Actions Act 1958, s 3(2) and (3).

In South Australia the legislation provides that "...a person is under a legal disability in relation to an action or proceeding while he remains an infant or while he is subject to a mental deficiency, disease or disorder by reason of which he is incapable of reasoning or acting rationally in relation to the action or proceeding that he is entitled to bring": Limitation of Actions Act 1936, s 45(2). In the Northern Territory a "disabled person" is defined to mean "a person who, by reason of age, disease, illness or mental or physical infirmity, is incapable of managing his affairs in respect of legal proceedings": Limitation Act 1981, s 4 .

[181] **Northern Territory** Limitation Act 1981, s 38; **New South Wales** Limitation Act 1969, s 53; **Tasmania** Limitation Act 1974, s 27; **Australian Capital Territory** Limitation Ordinance 1985, s 31.

[182] **New South Wales** Limitation Act 1969, s 52. See also **Australian Capital Territory** Limitation Ordinance 1985, s 30(3); **Northern Territory** Limitation Act 1981, s 36(3). A similar provision applied in England: Limitation Act 1939, s 22(e). For the meaning of "aggrieved party" see *Robinson v Currey* (1881) 7 QBD 465.

[183] See also **Tasmania** Limitation Act 1974, s 26; **Victoria** Limitation of Actions Act 1958, s 23.

still under a disability to another person under a disability - a further extension of time shall not be allowed by reason of the disability of the second person;

(b) an action to recover land or money charged on land shall not be brought by virtue of this section by a person after the expiration of 30 years from the date on which the right of action accrued to that person or a person through whom the person claims;

(c) an action to recover damages in respect of personal injury or damages in respect of injury resulting from the death of any person shall not be brought by a person after the expiration of 3 years from the date on which that person ceased to be under a disability or died, whichever event first occurred.

(3) This section does not apply -

(a) in a case where the right of action first accrued to a person (not under a disability) through whom the person under a disability claims;

(b) to an action to recover a penalty of forfeiture or sum by way of a penalty or forfeiture by virtue of an enactment save where the action is brought by an aggrieved party.

10.65 In some jurisdictions the legislation provides for the suspension of time in the case of supervening disability.[184] The plaintiff in those jurisdictions having this provision can take advantage of the remainder of the limitation period after the disability ceases and some jurisdictions provide that the limitation period will expire three years after the end of the disability if it would otherwise have ended sooner.[185] As noted above[186] some jurisdictions have the equivalent of a 30 year long-stop provision, which limits the extent to which disability can postpone or extend the limitation period.

10.66 An acknowledgement or part payment by the defendant will also serve to postpone the running of time in most Australian jurisdictions. In New South Wales, the Australian Capital Territory and the Northern Territory, no distinction is drawn between “acknowledgement” and “part payment”. These concepts are unified under the term “confirmation”.[187] Moreover, “confirmation” is extended to all

[184] **New South Wales** Limitation Act 1969, s 52(1)(d) and (2); **South Australia** Limitation of Actions Act 1936, s 45(1); **Northern Territory** Limitation Act 1981, s 36(1)(d) and (2); **Australian Capital Territory** Limitation Ordinance 1985, s 30(1)(d) and (2). In Queensland, Tasmania and Victoria, no provision is made for supervening disability: see **Queensland** Limitation of Actions Act 1974, s 29(1); **Tasmania** Limitation Act 1974, s 26(1); **Victoria** Limitation of Actions Act 1958, s 23(1).

[185] **New South Wales** Limitation Act 1969, s 52(1)(e); **Northern Territory** Limitation Act 1981, s 36(1)(e).

[186] See para 10.61 above.

[187] **New South Wales** Limitation Act 1969, s 54; **Australian Capital Territory** Limitation Ordinance 1985, s 32; **Northern Territory** Limitation Act 1981, s 41.

causes of action. A confirmation is only effective if given before the expiry of the limitation period.[188] Western Australia and South Australia in contrast have kept provisions based on English statutes from the nineteenth century, so that the rules on acknowledgement and part payment vary from one claim to another.[189] The provisions on Queensland, Tasmania and Victoria are derived from the English Limitation Act 1939.[190]

10.67 In most Australian jurisdictions, where the action is based on fraud or mistake, or the cause of action has been deliberately concealed from the plaintiff, the limitation period will not run until the plaintiff discovered the cause of action or should with reasonable diligence have discovered it.[191] In Western Australia and South Australia, however, the running of time is only delayed[192] for equitable actions to recover land or rent, where there has been a concealed fraud.[193]

4. NEW ZEALAND

10.68 The relevant New Zealand legislation is the Limitation Act 1950, which is based on the English Limitation Act 1939. The legislation generally applies fixed limitation periods, in most cases six years, running from the accrual of the cause of action. The 1950 Act was reviewed by the New Zealand Law Commission, and in its report, published in 1988,[194] the Commission recommended the replacement of

[188] In most Australian jurisdictions, the expiry of the limitation period bars the right of action rather than extinguishing the plaintiff's right, except in the case of actions for the recovery of land or rent, where the right and title of the plaintiff are extinguished. In the Australian Capital Territory, Northern Territory, Queensland, Tasmania and Victoria, the expiry of the limitation period also extinguishes title in an action to recover chattels. See **Australian Capital Territory** Limitation Ordinance 1985, s 43(1); **Northern Territory** Limitation Act 1981, s 19(2); **Queensland** Limitation of Actions Act 1974, s 12(2); **Tasmania** Limitation Act 1974, s 6(2) and **Victoria** Limitation of Actions Act 1958, s 6(2). New South Wales takes a different approach, viewing the expiry of a limitation period as extinguishing the right rather than as a procedural bar in all cases: **New South Wales** Limitation Act 1969, s 63.

[189] A distinction must for example be drawn between ordinary personal actions, specialty debts, actions relating to land, mortgages, actions to recover money charged on land and other matters.

[190] **Queensland** Limitation of Actions Act 1974, ss 35 - 37; **Tasmania** Limitation Act 1974, ss 29 - 31; **Victoria** Limitation of Actions Act 1958, ss 24 - 26.

[191] **Australian Capital Territory** Limitation Ordinance 1985, ss 33 and 34; **New South Wales** Limitation Act 1969, ss 55 and 56; **Northern Territory** Limitation Act 1981, ss 42 and 43; **Queensland** Limitation of Actions Act 1974, s 38; **Tasmania** Limitation Act 1974, s 32; **Victoria** Limitation of Actions Act 1958, s 27. In New South Wales, Australian Capital Territory and Northern Territory the deliberate concealment of the identity of the defendant will also stop time running.

[192] Or, in South Australia, suspended: see para 10.59, n 168 above.

[193] **Western Australia** Limitation Act 1935, s 27; **South Australia** Limitation of Actions Act 1936, s 25. But in South Australia, where there has been fraudulent concealment in a case which does not fall within the section, the court may exercise its general jurisdiction to extend the limitation period (see para 10.57 above).

[194] *Report No 6, Limitation Defences in Civil Proceedings,* NZLC R6 (1988). See also the discussion paper that preceded the report, The Limitation Act 1950, PP3 (1987).

the Act with a new Limitation Defences Act. There are three central features of the proposals,[195] which have not yet been implemented: [196]

(a) a standard limitation period of three years for all claims,[197] from the act or omission giving rise to the action;[198]

(b) an extension of the limitation period where the plaintiff is able to show a lack of knowledge of certain facts;[199] and

(c) a long stop of 15 years from the act or omission to which the claim relates.[200]

(1) Actions in Contract

10.69 The limitation period in New Zealand for an action founded on simple contract is six years from the date on which the cause of action accrued, that is from the date of the breach.[201] There is a limitation period of twelve years for an action on a deed.[202] Actions for personal injury based on a breach of contract are subject to different rules, and are dealt with below.[203]

(2) Actions in Tort

10.70 The limitation period for an action in tort (other than actions in respect of personal injuries[204] or defamation)[205] is six years from the accrual of the cause of

[195] The proposed New Zealand scheme is not significantly different from our provisionally proposed core regime. However, we believe that it has disadvantages by comparison with our own provisional proposals. The commencement date for the limitation period under the New Zealand scheme will be earlier than the date the cause of action accrues in, for example, actions for torts actionable only on proof of damage where the damage does not coincide with the defendant's act or omission. It seems anomalous that a limitation period should start running before the plaintiff can recover damages. Moreover, under our regime it is clear, as a matter of policy, that the approach to the initial limitation period through discoverability is plaintiff - orientated, which it would not be if one could be time-barred before one has a right to sue: the long-stop then comes in as the defendant's protection. While getting to a similar result, the New Zealand scheme loses that clarity of policy aim.

[196] See *Report No 6, Limitation Defences in Civil Proceedings,* NZLC R6 (1988), p vii.

[197] "Claim" being defined simply as "a claim in a civil proceeding": *Report No 6, Limitation Defences in Civil Proceedings,* NZLC R6 (1988), draft Bill cl 18.

[198] *Ibid*, ch VI.

[199] That is, knowledge of the occurrence of the act or omission on which the claim is based, of the identity of the defendant, and of the harm suffered, and that the harm was significant. In those circumstances the limitation period is three years from the date on which the plaintiff acquired the relevant knowledge. See *Report No 6, Limitation Defences in Civil Proceedings,* NZLC R6 (1988), ch VII.

[200] *Ibid*, ch X.

[201] Limitation Act 1950, s 4(1)(a).

[202] *Ibid*, s 4(3).

[203] See para 10.72 below.

[204] See para 10.72 below.

[205] See para 10.71 below.

action.[206] As in England and in other common law jurisdictions a tort actionable on proof of damage, such as negligence, accrues when the plaintiff suffers damage, rather than when the act or omission takes place.

10.71 Limitation periods in respect of defamation were amended by section 55 of the Defamation Act 1992. The limitation period is now two years from the date on which the cause of action accrued,[207] subject to the court's discretion to grant leave to a plaintiff to bring an action at any time within six years of the accrual of the cause of action, where the court considers that the delay in bringing the action was occasioned by mistake of fact or law.[208]

(3) Personal Injury[209]

10.72 In the case of any action in respect of "bodily injury"[210] the limitation period is two years from the accrual of the cause of action,[211] or six years with the consent of the defendant.[212] This provision is not limited to actions in tort but includes, for example, actions based on breach of contract.[213] An application may be made to the court for leave to bring an action at any time within six years of accrual of the cause of action. The court may grant such leave (if it thinks it just to do so) where it considers that the delay was occasioned by mistake of fact or law[214] or other reasonable cause and that the defendant will not be materially prejudiced.[215] If the recommendations of the New Zealand Law Commission were implemented, the differences in the limitation rules between actions for personal injury and other types of action would disappear, so that the limitation period for personal injury actions would be three years from the relevant act or omission, or, if later, three years from the date on which the plaintiff acquires the relevant knowledge.[216]

[206] Limitation Act 1950, s 4(1)(a).

[207] Limitation Act 1950, s 4(6A). The cause of action for both libel and slander accrues on the publication or speaking of the offending words since all defamation is now actionable in New Zealand without proof of special damage: Defamation Act 1992, s 4.

[208] Limitation Act 1950, s 4(6B).

[209] Actions in common law for damages are barred where compensation is available under the state no-fault accident compensation scheme: Accident Rehabilitation and Compensation Insurance Act 1992, s 14(1). This applies to most accidents, although the scheme is less comprehensive than before its reform in 1992, and the relevance of common law actions is correspondingly greater.

[210] The expression "bodily injury" is not defined in the Act but see, eg, *Gabolinscy v Hamilton City Corpn* [1975] 1 NZLR 150 and *Maxwell v North Canterbury Hospital Board* [1977] 2 NZLR 118, in which it was held to extend to "inconvenience and worry" (*Gabolinscy*) and "inconvenience" and "mental anxiety" (*Maxwell*) which in neither case amounted to a recognisable psychiatric illness or was accompanied by physical injury.

[211] See paras 10.73 - 10.77 below in relation to latent damage.

[212] Limitation Act 1950, s 4(7), inserted by Limitation Amendment Act 1970.

[213] *Gabolinscy v Hamilton City Corpn* [1975] 1 NZLR 150; *Maxwell v North Canterbury Hospital Board* [1977] 2 NZLR 118.

[214] Other than as to this provision.

[215] Limitation Act 1950, s 4(7).

[216] See para 10.68 above.

(4) Latent Damage

10.73 As in other jurisdictions latent damage has posed serious problems,[217] but the New Zealand courts are now pursuing an approach based on discoverability. Before the House of Lords' decision in *Pirelli General Cable Works Ltd v Oscar Faber & Partners*[218] the New Zealand Court of Appeal had moved towards a discoverability test in *Mount Albert Borough Council v Johnson.*[219] After the decision in *Pirelli* the High Court followed the English law in some cases but not others,[220] and in *Askin v Knox*[221] the New Zealand Court of Appeal declined to decide which direction New Zealand law should take, although it referred to the "injustice" caused by the House of Lords' decision.[222]

10.74 Then, in *Invercargill City Council v Hamlin*, a discoverability test was applied in relation to economic loss caused by a local authority's negligent approval of the foundations of a house,[223] first by a majority of the New Zealand Court of Appeal,[224] and then by the Privy Council.[225] In 1972 the plaintiff entered into a contract with a builder under which the plaintiff bought a plot of land and the builder contracted to build a house on it. The negligent inspection took place later the same year. The foundations were defective but the plaintiff did not discover this fact until 1989, when an engineer advised him. The plaintiff commenced proceedings in 1990. It was held, both by the New Zealand Court of Appeal and the Privy Council, that the limitation period started in 1989, since it had been found that the plaintiff could not be reasonably expected to have discovered the defect sooner. In reaching this conclusion, the courts refused to follow the earlier House of Lords decision in *Pirelli General Cable Works Ltd v Oscar Faber & Partners.*[226] But the scope of the Privy Council's decision was expressly limited to latent defects in buildings,[227] and it was recognised that application of a discoverability rule was especially logical where a plaintiff was recovering damages for economic loss because the loss did not actually occur until it had become

[217] The New Zealand Law Commission said that latent damage was "at least indirectly responsible" for the reference to them of the law on limitation periods: see *Report No 6, Limitation Defences in Civil Proceedings,* NZLC R6 (1988), para 62.

[218] [1983] 2 AC 1. See para 3.15 above.

[219] [1979] 2 NZLR 234.

[220] See, the discussion of these cases (and others) in the New Zealand Law Commission's report on *Report No 6, Limitation Defences in Civil Proceedings,* NZLC R6 (1988), para 76.

[221] [1989] 1 NZLR 248.

[222] *Ibid*, 256, *per* Cooke P (giving the judgment of the court).

[223] In allowing the claim for economic loss the court refused to follow the House of Lords' decision in *Murphy v Brentwood DC* [1991] 1 AC 398. The claim was not affected by the long stop period stipulated by the Building Act 1991, s 91 because the section applies only to proceedings commenced after 1 July 1993: see para 10.77 below.

[224] [1994] 3 NZLR 513 (Cooke P, Richardson, Casey and Gault JJ; McKay J dissenting).

[225] [1996] AC 624.

[226] [1983] 2 AC 1. See para 3.15 above.

[227] [1996] AC 624, 644, *per* Lord Lloyd of Berwick (giving the judgment of the court). See also [1994] 3 NZLR 513, 522, *per* Cooke P (NZ CA).

discoverable.[228] Moreover, one should appreciate that the approach in *Invercargill* was not to contrast discoverability and accrual of the cause of action as starting dates: rather the cause of action was regarded as accruing at the date of discoverability.

10.75 The decision in *Invercargill City Council v Hamlin* could therefore be argued not to have any direct application in a wider context. But the ambit of the discoverability rule has been broadened by two subsequent decisions of the New Zealand Court of Appeal. First, in *S v G*[229] discoverability was applied to an action arising out of sexual abuse. The defendant had been convicted of indecently assaulting the plaintiff when she was below the age of majority. The plaintiff, some years later, brought an action against the defendant in negligence[230] and in trespass to the person in respect of psychological and emotional damage caused by the abuse.[231] It was held that the plaintiff's cause of action in negligence began when the plaintiff discovered, or should have discovered, a causal link between that damage and the abuse. In reaching this decision the court drew upon the reasoning of the Supreme Court of Canada in *KM v HM*.[232] As regards the claim for trespass to the person, which did not require proof of damage, the Court of Appeal supported the trial judge in holding that a discoverability test should be applied, but with regard to the date on which the plaintiff realised, or should have realised, her lack of genuine consent to the plaintiff's actions.[233] The court recognised that this could mean that time could run in respect of trespass claims before it started to run in a negligence claim on the same facts,[234] but the rules relating to fraudulent concealment could operate to delay the start of the limitation period.[235]

10.76 Now, in *G D Searle & Co v Gunn*,[236] the New Zealand Court of Appeal has applied discoverability to personal injury cases outside the area of sexual abuse and, it

[228] So, eg, before discovering the defect the plaintiff could have sold the property for its full market value. See [1994] 3 NZLR 513, 522, *per* Cooke P; 533, *per* Casey J (NZ CA); [1996] AC 624, 648, *per* Lord Lloyd of Berwick (PC).

[229] [1995] 3 NZLR 681.

[230] Based on the defendant's duty of care as a doctor.

[231] The plaintiff also brought a claim based on breach of fiduciary duty. The court rejected her contention that no limitation period applied under the Limitation Act 1950 to such an action and held that either a limitation period applied by analogy to those applicable in common law claims, or else the doctrine of laches would produce a similar result: [1995] 3 NZLR 681, 688 - 689. Cf, on this point, *KM v HM* (1992) 96 DLR (4th) 289 (Sup Ct of Canada): see para 10.98 below.

[232] (1992) 96 DLR (4th) 289: see paras 10.98 below. Having established an accrual date based on discoverability the court then had to decide whether to grant leave to the plaintiff to bring the proceedings under the Limitation Act 1950, s 4(7) (see para 10.72 above). On the facts the court refused to grant leave.

[233] Cf *Stubbings v Webb* [1993] AC 498 (HL): see paras 3.32 - 3.35 above. This case is not mentioned in the judgment in *S v G*.

[234] Because of delay between the plaintiff realising her lack of consent, and the onset of psychological damage.

[235] See para 10.81 below.

[236] [1996] 2 NZLR 129.

seems, to tort claims generally.[237] The plaintiff had had an intrauterine contraceptive device, manufactured by the defendant, fitted in 1981. The device was removed about two weeks later because the plaintiff experienced pain, and later in the month she was admitted to hospital for treatment. During the following years she experienced further medical problems. According to her statement of claim,[238] she did not discover that these later problems were caused by her use of the device until she read a magazine article in 1991, and she commenced proceedings in 1992. The New Zealand Court of Appeal held that the construction of "cause of action", for the purpose of section 4 of the Limitation Act 1950, should be consistent for all different fact situations, and that accordingly the reasoning in *Invercargill City Council v Hamlin* should be applied, so that, for the purposes of section 4(7), a cause of action accrued "when bodily injury of the kind complained of was discovered or was reasonably discoverable as having been caused by the acts or omissions of the defendant."[239]

10.77 As a result of the growth in building litigation exemplified by a case such as *Mount Albert Borough Council v Johnson* the New Zealand Parliament enacted section 91 of the Building Act 1991,[240] which introduced a long stop date of ten years from the act or omission on which the proceedings are based, in respect of proceedings arising from building work in the construction, alteration, demolition or removal of buildings, or the exercise of building control functions in relation thereto. When proceedings are brought against authorities in respect of the issue of a building consent or certificate the date of the act or omission is the date of the consent or certificate.[241]

(5) Actions for Breach of Trust

10.78 The limitation period generally applicable to an action by a beneficiary to recover trust property is six years from the date of accrual of the cause of action.[242] But there will be no limitation period where the action is in respect of a fraud or fraudulent breach of trust to which the trustee was a party or privy, or to recover trust property, or the proceeds of trust property, from the trustee.[243] The New Zealand Law Commission recommended that, in respect of these two categories of claim, the recommended general long stop period of fifteen years should be displaced by one of three years from the beneficiary's knowledge of the breach of trust.[244]

[237] Although leave has been granted for an appeal to the Privy Council.

[238] The appeal related to an order to strike out the claim as being time-barred, and so these facts were assumed to be true for the purposes of the appeal.

[239] [1996] 2 NZLR 129, 133.

[240] Amended by Building Amendment Act 1992, s 12; and Building Amendment Act 1993, s 19.

[241] Building Act 1991, s 91(3).

[242] Limitation Act 1950, s 21(2).

[243] *Ibid*, s 21(1).

[244] *Report No 6, Limitation Defences in Civil Proceedings,* NZLC R6 (1988), paras 304 - 305; see also draft Bill cl 5(2)(d).

(6) Actions in respect of Land

10.79 The limitation period in New Zealand for actions to recover land is twelve years from the date on which the right accrued,[245] adverse possession being a necessary condition for the right to be deemed to have accrued.[246] When the limitation period expires against a person, his or her title will be extinguished.[247] But different rules apply to Maori customary land,[248] and to land which is registered under the Land Transfer Act 1952.[249] Where land is registered, adverse possession of at least 20, and usually 30, years will be necessary before title can be acquired as against the holder of the "paper" title.[250] The New Zealand Law Commission has recommended abolition of the limitation provisions relating to adverse possession, in circumstances where the original dispossession amounted to trespass.[251]

(7) Factors Postponing the Running of Time

10.80 Acknowledgement and part payment will operate to restart the limitation period in the case of debts and other liquidated claims for money, and land-related actions, but not otherwise.[252] The New Zealand Law Commission has recommended reform of this rule, so that it would apply to all claims, but would require a plaintiff to show that he or she refrained from bringing a claim in reliance on the acknowledgement or part payment.[253]

10.81 Time will not run against a plaintiff in the event of fraud or fraudulent concealment, until the time when the plaintiff has discovered, or could with reasonable diligence have discovered, the fraud.[254] For these purposes, fraud includes failure to disclose facts in breach of an equitable duty, and is not limited to fraud at common law.[255] It could also extend, in sexual abuse cases, to deceit as

[245] Limitation Act 1950, s 7(2). There is an exception for Crown land, in respect of which the limitation period is 60 years: *ibid*, s 7(1).

[246] *Ibid*, s 13(1).

[247] *Ibid*, s 18.

[248] *Ibid*, s 6(1).

[249] *Ibid*, s 6(2).

[250] Land Transfer Amendment Act 1963, ss 3 and 4. See New Zealand Law Commission, *op cit*, paras 348 - 350.

[251] *Report No 6, Limitation Defences in Civil Proceedings,* NZLC R6 (1988), paras 359 - 362. Cf the similar recommendation, now implemented, of the British Columbia Law Reform Commission: see paras 10.99 below.

[252] Limitation Act 1950, s 25. Acknowledgements must be written: *ibid*, s 26.

[253] *Report No 6, Limitation Defences in Civil Proceedings,* NZLC R6 (1988), paras 268 - 274; draft Bill, cl 11. The Commission also recommended that the limitation period should be extended where the act or omission was being investigated by the Ombudsman, or where alternative dispute resolution, arbitration, or litigation in another court, was being pursued in relation to the same act or omission: *ibid*, paras 275 - 279; draft Bill, cl 7.

[254] Limitation Act 1950, s 28.

[255] *Inca Ltd v Autoscript (New Zealand) Ltd* [1979] 2 NZLR 700 (Sup Ct); *Official Assignee of Collier v Creighton* [1993] 2 NZLR 534 (NZ CA). In the latter case the plaintiff's appeal to the Privy Council, which did not turn on any issue of law relating to the construction of s 28, was dismissed [1996] 2 NZLR 257 (*sub nom Collier v Creighton*).

to the nature of the acts being carried out.[256] Under the scheme recommended by the New Zealand Law Commission, the extension of time in favour of a plaintiff lacking the requisite knowledge would operate in fraudulent concealment cases, and there would be a special exception to the long stop.[257]

10.82 Where a plaintiff is under disability due to infancy or mental illness at the time when the cause of action accrues, the limitation period, in an action for personal injuries, is deemed to begin when the disability ends.[258] Under section 24 of the New Zealand Limitation Act 1950, a person "shall be deemed to be under a disability while he is an infant or of unsound mind".[259] There is a conclusive presumption that a person is of unsound mind "while he is detained or kept in custody (otherwise than as a voluntary boarder) under any provision of the Mental Health Act 1969".[260] The definition is therefore very similar to that adopted under the English Limitation Act 1980.

10.83 In relation to other claims a limitation period of six years from the accrual of the cause of action is applicable,[261] subject to a long stop, in land-related claims, of 30 years from accrual.[262] There are no rules to deal with supervening disability.

10.84 The New Zealand Law Commission has recommended a thorough reform of the law relating to disability of adults,[263] so that the three-year limitation period would not run during periods exceeding 28 days when the plaintiff was incapable of, or substantially impaired in, managing his or her affairs because of his or her physical or mental condition, detention or war.[264] These recommendations, which are modelled on the New South Wales legislation,[265] would substantially broaden the scope of the disability provisions, in extending the disabling circumstances necessary for the provision to apply, and in catering for the possibility of supervening disability. The various forms of adult disability would, however, not affect the operation of the fifteen-year long stop recommended by the Commission. The New Zealand Law Commission has also recommended that, where a plaintiff is under 18 years of age at the date of the act or omission, both the general limitation period and the "long stop" period should end on his or her twenty-first birthday.[266]

[256] *S v G* [1995] 3 NZLR 681, 688 (NZ CA). See para 10.75 above.

[257] *Report No 6, Limitation Defences in Civil Proceedings,* NZLC R6 (1988), para 303.

[258] Limitation Act 1950, s 24(a).

[259] *Ibid*, s 2(2).

[260] *Ibid*, s 2(3).

[261] *Ibid*, s 24(b).

[262] *Ibid*, s 24(e).

[263] *Report No 6, Limitation Defences in Civil Proceedings,* NZLC R6 (1988), paras 258 - 261.

[264] Or warlike operations or circumstances arising from them.

[265] See para 10.62 above.

[266] *Report No 6, Limitation Defences in Civil Proceedings,* NZLC R6 (1988), paras 257 and 307.

5. CANADA

10.85 Statutory rules of limitation in the Canadian common law jurisdictions have their origin in the English Statute of Limitations 1623. In 1931, however, the Conference of Commissioners on Uniformity of Legislation approved a Uniform Limitation of Actions Act. The Uniform Act was adopted in several jurisdictions.[267] Since then, although there are differences between the law in different provinces and territories, strong similarities remain. Although a new Uniform Limitation Act was produced in 1982 no jurisdictions have adopted it, and in recent years various jurisdictions have been involved in law reform initiatives, which have had a greater or lesser effect on the law.[268]

10.86 One significant feature of Canadian limitation law, is the existence, in every jurisdiction, of special short limitation periods.[269] For example, special short limitation periods apply in most Canadian jurisdictions in respect of claims for medical negligence.[270] They are also widespread in relation to claims against public bodies. Some jurisdictions have adopted discoverability tests in special limitation periods,[271] but others base limitation periods on the date when, for example, the supply of medical services ended.[272] The proliferation of special limitation periods has attracted criticism in reviews of the law by law reform agencies.[273]

(1) Actions in Contract

10.87 In most Canadian jurisdictions the limitation period for ordinary actions in contract is six years from the date on which the plaintiff's cause of action accrued.[274] In most jurisdictions the limitation period for an action on a specialty is the same as for an action on a simple contract.[275]

[267] Alberta, Manitoba, Prince Edward Island, Saskatchewan, Northwest Territories and the Yukon.

[268] The main unimplemented initiatives have been those by the Law Reform Commissions of Ontario (completed in 1969) and Saskatchewan (1989). There were unsuccessful attempts to pass statutes in Ontario to reform the law in relation to limitation periods in 1983 (Bill 160) and 1992 (Bill 99). Statutes have recently been enacted in Newfoundland and Alberta, although the Alberta statute has yet to come into force. Discussion, in this section, of the law in Alberta is on the basis of the new law.

[269] For a survey of special limitation periods, see K Roach, "The Limitations of Public Choice: The Case of Short Limitation Periods" (1993) 31 Osgoode Hall LJ 721, 724 - 727.

[270] Legislation in Ontario having been enacted as long ago as 1887: see K Roach, *op cit*, 724.

[271] Eg **Ontario** Health Disciplines Act, RSO 1990, s 17 (medical negligence: one year limitation period from the date when the facts are reasonably discoverable); **New Brunswick** Medical Act 1981, s 67 (medical negligence: limitation period ends on latest of: two years from termination of services, one year from the date when the facts are reasonably discoverable, or one year from the end of legal disability).

[272] Eg **Saskatchewan** Medical Profession Act 1981, s 72.

[273] See, eg, Law Reform Commission of Saskatchewan, *Proposals for a New Limitation of Actions Act Report to the Minister of Justice* (1989), pp 51 - 63, especially at p 51, in which such a proliferation is described as "the single greatest problem plaguing Saskatchewan limitation law".

[274] See, eg, **British Columbia** Limitation Act, RSBC 1979, s 3(4); **Manitoba** Limitation of Actions Act, RSM 1987, s 2(1)(i); **Nova Scotia** Limitation of Actions Act, RSNS 1989, s 2(1)(e); **Newfoundland** Limitations Act 1995, ss 6 and 9; **Ontario** Limitations Act, RSO

(2) Actions in Tort

10.88 General limitation periods[276] for tort in Canada tend to run from the date on which the plaintiff's cause of action accrued but, as we shall see,[277] the date of accrual has commonly been construed as the date of discoverability. The most usual limitation period for negligently inflicted[278] personal injury is two years,[279] although a few jurisdictions have retained a six-year limitation period.[280]

10.89 Defamation tends to carry a shorter limitation period in most jurisdictions than other torts, the commonest period being two years from the date of accrual.[281] In some jurisdictions different limitation periods are applied for libel as opposed to slander.[282] Periods for trespass to the person[283] tend to be shorter than for property-related torts.

1990, s 45(1)(g); **Prince Edward Island** Statute of Limitations, RSPEI 1988, s 2(1)(g); **Saskatchewan** Limitation of Actions Act, RSS 1978, s 3(1)(f); **Northwest Territories** Limitation of Actions Act, RSNWT 1987, s 2(1)(f); **Yukon** Limitation of Actions Act, RSY 1986 - 1990, s 2(1)(f). Cf **Alberta** Limitations Act 1996, s 3(1) (2 years from discoverability). See paras 10.90 - 10.98 below in relation to the problem of latent damage.

275 Exceptions include New Brunswick and Ontario (20 years from accrual of cause of action) and Nova Scotia (10 years from accrual): **New Brunswick** Limitation of Actions Act, RSNB 1973, s 2; **Ontario** Limitations Act, RSO 1990, s 45(1)(b); **Nova Scotia** Limitation of Actions Act, RSNS 1989, s 2(1)(c).

276 That is, limitation periods in situations not covered by the numerous special provisions that apply to, eg, medical negligence: see para 10.86 above.

277 See para 10.96 below.

278 Including, generally, injury caused by breach of contractual or other duty.

279 **Alberta** Limitations Act 1996, s 3(1); **British Columbia** Limitation Act, RSBC 1979, s 3(1)(a); **Manitoba** Limitation of Actions Act, RSM 1987, s 2(1)(e); **Newfoundland** Limitations Act 1995, s 5(a) and (b); **Prince Edward Island** Statute of Limitations, RSPEI 1988, s 2(1)(d); **Saskatchewan** Limitation of Actions Act, RSS 1978, s 3(1)(d); **Northwest Territories** Limitation of Actions Act, RSNWT 1987, s 2(1)(d); **Yukon** Limitation of Actions Act, RSY 1986 - 1990, s 2(1)(d).

280 **Ontario** Limitations Act, RSO 1990, s 45(1)(g). The Law Reform Commission of Ontario recommended that the period be reduced to 2 years: see Ontario Law Reform Commission, *Report on Limitation of Actions* (1969), pp 32 - 42. See also **Nova Scotia** Limitation of Actions Act, RSNS 1989, s 2(1)(e), but this is subject to an exception providing for a two-year limitation period in motor accident cases: *ibid*, s 2(1)(f).

281 The cause of action will generally accrue, in relation to libel, at the time the defamatory words are published and, in relation to slander, when the plaintiff suffers special damage. See **British Columbia** Limitation Act, RSBC 1979, s 3(1)(c); **Manitoba** Limitation of Actions Act, RSM 1987, s 2(1)(c); **New Brunswick** Limitation of Actions Act, RSNB 1973, s 4; **Newfoundland** Limitations Act 1995, s 5(d); **Prince Edward Island** Statute of Limitations, RSPEI 1988, s 2(1)(c); **Saskatchewan** Limitation of Actions Act, RSS 1978, s 3(1)(c); **Northwest Territories** Limitation of Actions Act, RSNWT 1987, s 2(1)(c); **Yukon** Limitation of Actions Act, RSY 1986 - 1990, s 2(1)(c).

282 **Nova Scotia** Limitation of Actions Act, RSNS 1989, s 2(1)(a) and (e) (one year for slander, 2 years for libel); **Ontario** Limitations Act, RSO 1990, s 45(1)(g) and (i) (2 years for slander, 6 years for libel).

283 Eg one year in Nova Scotia and two years in Manitoba, New Brunswick, Prince Edward Island and Saskatchewan for trespass to the person, compared with 6 years for trespass to land in those jurisdictions.

(3) Latent Damage

10.90 Nearly all the common law Canadian jurisdictions now have some form of rule which prevents the limitation period running when the cause of action is not capable of being discovered, although this has come about in a variety of ways.

10.91 In British Columbia the running of time for various wrongs, including personal injury, damage to property and professional negligence does not run until:[284]

> the identity of the defendant is known to [the plaintiff] and those facts[285] within his means of knowledge are such that a reasonable man, knowing those facts and having taken the appropriate advice a reasonable man would seek on those facts, would regard those facts as showing that
>
> (i) an action on the cause of action would, apart from the effect of the expiration of a limitation period, have a reasonable prospect of success; and
>
> (ii) the person whose means of knowledge is in question ought, in his own interests and taking his circumstances into account, to be able to bring an action.

This provision[286] formed part of the recommendations of the Law Reform Commission of British Columbia.[287] It is, however, subject to the general long stop provision of section 8 of the Act.[288]

10.92 The Limitations Act 1996 introduces discoverability for all actions in Alberta.[289] The limitation period commences on the date when the plaintiff knew, or in the circumstances ought to have known,

> (i) that the injury[290] had occurred
>
> (ii) that the injury was attributable to the conduct of the defendant; and
>
> (iii) that the injury, assuming liability on the part of the defendant, warrants bringing proceedings.[291]

[284] **British Columbia** Limitation Act, RSBC 1979, s 6(3).

[285] Deemed to include the existence of a duty owed to the plaintiff and the fact that the breach of a duty caused the plaintiff's injury, damage or loss: *ibid*, s 6(4)(b).

[286] As did, substantially, the rest of the Act.

[287] Report on *Report on Limitations Part 2 - General,* LRC 15 (1974), pp 71 - 82. But note the memorandum of dissent by Mr Peter Frazer recommending a more lenient test from the plaintiff's point of view: *ibid*, pp 82 - 83.

[288] See para 10.100 below.

[289] The Act incorporates recommendations made by the Alberta Law Reform Institute, *Limitations,* Report No 55 (1989), pp 33 - 35; see also Institute of Law Research and Reform, Alberta: *Limitations* Report for Discussion No 4 (1986), pp 107 - 133, 144 - 149.

[290] Defined to include personal injuries, property damage, economic loss, non-performance of an obligation and the breach of a duty: section 1(f).

10.93 Recent legislation in Newfoundland has also introduced a discoverability test, to be applied to personal injury, property damage and professional negligence actions and to a limited range of other actions.[292] Time will not run until the plaintiff knows or, considering all the circumstances, ought to know that he or she had a cause of action.[293] The elements of the knowledge required to start the limitation period are not defined, but must include knowledge that the plaintiff had a cause of action as a matter of law.

10.94 In Manitoba a different approach is taken. The court has a discretion to grant the plaintiff leave to proceed out of time if it is satisfied that not more than 12 months have elapsed between the date on which the applicant first knew or ought to have known of all the material facts of a decisive character upon which the action is based and the date of the application for leave.[294]

10.95 The Nova Scotia legislation gives the court discretion to disapply the limitation period in actions for, broadly speaking, contract or tort, if it appears to be equitable to do so having regard to the degree to which the limitation period prejudices the plaintiff, and to which a decision to disapply would prejudice the defendant.[295] The court must take certain stated factors into account.[296] There is no long stop, but the discretion to disapply does not apply where the limitation period is 10 years or longer.[297]

10.96 In nearly all of those jurisdictions where there is no statutory discoverability rule, the courts have nevertheless applied one, construing a reference in limitation legislation (both general and special) to the date when a cause of action accrued, as a reference to the date when the cause of action was reasonably discoverable.[298] This tendency was begun by the decision of the Supreme Court of Canada in *City of Kamloops v Nielsen*,[299] where the court was construing a special limitation period applying to actions against local authorities in British Columbia.[300] The principle adopted in the *Kamloops* case was applied more widely by the Supreme Court in

[291] Section 3(1).

[292] That is, actions for relief against the consequences of a mistake, fatal accident actions and actions for non-fraudulent breach of trust: Limitations Act 1995, s 14(1). This implements the recommendations of the Newfoundland Law Reform Commission, *Report on Limitation of Actions* NLRC-R1 (1986), p 7 and Newfoundland Law Reform Commission, *Working Paper on Limitation of Actions* NLRC-WP1 (1985), pp 192 - 204.

[293] But a long-stop applies: see para 10.100 below.

[294] **Manitoba** Limitation of Actions Act, RSM 1987, s 14(1). There is a long-stop: see para 10.100 n 319 below.

[295] **Nova Scotia** Limitation of Actions Act, RSNS 1989, s 3(2).

[296] *Ibid*, s 3(4).

[297] Eg an action on a specialty.

[298] Thereby rejecting the reasoning of the House of Lords in *Pirelli General Cable Works Ltd v Oscar Faber & Partners* [1983] 2 AC 1: see para 3.15 above.

[299] (1984) 10 DLR (4th) 641.

[300] **British Columbia** Municipal Act 1960, s 738 (one year limitation period from accrual of cause of action).

Central Trust Co v Rafuse,[301] a professional negligence case. Since then *City of Kamloops v Nielsen* and *Central Trust Co v Rafuse* have been widely followed by courts in Canada.[302]

10.97 One of the most problematic areas of latent damage is that of sexual abuse, where there can be a very long delay between the abusive acts and the manifestation and understanding of the effects of those acts, for example as psychiatric illnesses.[303] Some jurisdictions have legislated specifically on claims for sexual abuse. In British Columbia, Newfoundland and Saskatchewan there is no limitation period at all for a cause of action based on misconduct of a sexual nature.[304] In Ontario the Limitations Act Consultation Group appointed by the Attorney-General recommended that limitation periods should be abolished in sexual abuse claims.[305] In Nova Scotia a cause of action for various types of trespass to the person will be deemed not to have arisen until the plaintiff is aware of the harm and of its causal relationship with the abuse, and time will not run while the plaintiff is not reasonably capable of commencing proceedings because of physical, mental or psychological conditions resulting from the abuse.[306]

10.98 But the Canadian courts have also taken an active role in dealing with this problem. In *KM v HM*[307] the plaintiff had been abused during the period from 1964 to 1974, between the ages of 8 and 17. She later married, but her marriage failed in 1983. She started to attend meetings of a self-help group in 1984 and commenced therapy in 1984, and it was only then that she realised that the psychological damage she had suffered was due to the abuse. She commenced proceedings in 1985. The Supreme Court of Canada held that under the relevant

301 (1986) 37 CCLT 117.

302 See, eg, *Consumers Glass Co Ltd v Foundation Co of Canada Ltd* (1985) 20 DLR (4th) 126 (Ont CA); *Desormeau v Holy Family Hospital* (1989) 76 Sask R 241 (Sask CA). The courts in Alberta refused to apply a discoverability test until one was enacted in the Limitations Act 1996: see, eg, *Costigan v Ruzicka* (1985) 13 DLR (4th) 368 (Alta CA); *Fidelity Trust Co v Weiler* [1988] 6 WWR 427 (Alta CA).

303 See generally paras 13.17 - 13.37 below.

304 **British Columbia** Limitation Act, RSBC 1979, s 3(3)(k); **Newfoundland** Limitations Act 1995, s 8(2); **Saskatchewan** Limitation of Actions Act, RSS 1978, s 3(3.1).

The Newfoundland provision requires that, for the limitation period not to apply, the defendant must be under the care or authority of the plaintiff, or be financially, emotionally or otherwise dependent on the plaintiff, or be the beneficiary of a fiduciary relationship with the plaintiff.

The Saskatchewan legislation is limited to claims for trespass to the person, assault and battery, and so would, eg, not relate to an action in negligence against a non-abusing parent, but it also excludes any limitation period for any claims for trespass to the person, assault and battery where at the time of the injury there was an “intimate and personal relationship” or the plaintiff was in a state of dependency with regard to the person who caused the injury.

305 *Recommendations for a New Limitations Act Report of the Limitations Act Consultation Group* (1991) pp 17 - 21. Concern at the state of the law of limitations in sexual abuse cases was one of the main reasons behind the setting up of the Group, although the common law has developed since then so as to lessen those concerns: see para 10.98 below.

306 **Nova Scotia** Limitation of Actions Act, RSNS 1989, s 2(5).

307 (1992) 96 DLR (4th) 289 (Sup Ct of Canada).

statute[308] time should run against the plaintiff when she was reasonably capable of discovering the wrongful nature of the acts perpetrated against her and, by a majority,[309] that it should be presumed that a plaintiff in these circumstances would not discover the connection between the abuse and the injuries suffered until therapy began. Moreover, the court unanimously held that in any case the defendant had committed a breach of fiduciary duty, to which no limitation period applied under the Ontario legislation.[310]

(4) Actions in respect of Land

10.99 The most common limitation period in relation to actions to recover land is one of 10 years from the date when the right of action accrues,[311] with that date being deemed to be the date of dispossession, if the plaintiff is dispossessed. In New Brunswick, Nova Scotia and Prince Edward Island the commencement date is the same, but the limitation period is 20 years.[312] However, there is an essential inconsistency between the Canadian system of land registration, where registration as proprietor confers a title which is indefeasible, and the doctrine of adverse possession, which operates to defeat the title of a legal owner. This inconsistency was recognised by the Law Reform Commission of British Columbia in its 1974 Report, and its recommendation that there should be no limitation period where an owner was dispossessed in circumstances amounting to trespass[313] was implemented in 1979.[314] The Law Reform Commission of Saskatchewan took a similar view,[315] although its recommendation has not become law. The same inconsistency was also recognised by the law reform bodies of Ontario and Alberta in their reviews of limitation statutes. Both took the view that such a review was not the appropriate place to reform the law as regards adverse possession,[316] but

[308] **Ontario** Limitations Act, RSO 1990, s 45(1)(j).

[309] La Forest, L'Heureux-Dubé, Gonthier, Cory and Iacobucci JJ; Sopinka and McLachlin JJ dissenting.

[310] A defence of laches could be raised, but this was rejected on the facts.

[311] **Manitoba** Limitation of Actions Act, RSM 1987, s 25; **Newfoundland** Limitations Act 1995, s 7(g); **Ontario** Limitations Act, RSO 1990, s 4; **Saskatchewan** Limitation of Actions Act, RSS 1978, s 18; **Northwest Territories** Limitation of Actions Act, RSNWT 1987, s 18; **Yukon** Limitation of Actions Act, RSY 1986-1990, s 17.

[312] **New Brunswick** Limitation of Actions Act, RSNB 1973, s 29; **Nova Scotia** Limitation of Actions Act, RSNS 1989, s 10; **Prince Edward Island** Statute of Limitations, RSPEI 1988, s 16.

[313] *Report on Limitations Part 2 - General,* LRC 15 (1974), p 50.

[314] **British Columbia** Limitation Act, RSBC 1979, s 3(3)(a). See also s 12.

[315] *Proposals for a New Limitation of Actions Act Report to the Minister of Justice* (1989) pp 23 - 25.

[316] See Ontario Law Reform Commission, *Report on Limitation of Actions* (1969), pp 66 - 67; Alberta Law Reform Institute, *Limitations,* Report No 55 (1989), pp 39 - 40. Cf *Limitations* Report for Discussion No 4 (1986), pp 208 - 213, in which the Alberta Law Reform Institute provisionally recommended the abolition of limitation periods for the recovery of real (and personal) property.

the new Limitations Act in Alberta does not provide for a limitation period in claims to recover land.[317]

(5) Long-stops

10.100 British Columbia provides for an ultimate limitation period, beyond which claims may not be made:[318] an action may not be brought more than 30 years after the plaintiff first had the right to bring an action, except for medical negligence cases, for which the long-stop period is six years.[319] This provision was reviewed in 1990 by the Law Reform Commission of British Columbia, which recommended that the ultimate limitation period should be reduced to ten years, or thirty years in cases involving fraud, including fraudulent concealment, with the special ultimate limitation period for medical negligence being abolished.[320] Both the statutes recently passed in Alberta and Newfoundland provide for long-stops. In Alberta there is a long-stop period of ten years, commencing on the date when the relevant conduct, act or omission occurred.[321] The Newfoundland legislation contains a double long-stop. The first is a period of ten years from the relevant act or omission, and applies only to actions to which the discoverability provisions apply.[322] This may be overridden by postponing factors such as disability. But the second long-stop, of 30 years from the date of the event giving rise to the cause of action, applies to all claims and cannot be overridden.[323]

(6) Factors Postponing the Running of Time

10.101 Time will generally not run against a plaintiff where he or she is under a disability.[324] "Disability" has been defined most recently in the Limitations Act 1996, enacted in Alberta:

> (a) a minor who is not under the actual custody of a parent or guardian,
>
> (b) a dependent adult pursuant to the Dependent Adults Act, or

[317] See **Alberta** Limitations Act 1996, s 3(4).

[318] Unless they fall within categories to which no limitation period applies.

[319] **British Columbia** Limitation Act, RSBC 1979, s 8. A long-stop of 30 years is also in force in Manitoba: Limitation of Actions Act, RSM 1987, s 14(4). This long stop period runs from the date of the act or omission giving rise to the action.

[320] *Report on the Ultimate Limitation Period: Limitation Act, Section 8* (1990) LRC 112.

[321] **Alberta** Limitations Act 1996, s 3(1)(b).

[322] **Newfoundland** Limitations Act 1995, s 14(3). See para 10.93 above in relation to discoverability.

[323] *Ibid*, s 22.

[324] **Alberta** Limitations Act 1996, s 5; **British Columbia** Limitation Act, RSBC 1979, s 7(1); **Manitoba** Limitation of Actions Act, RSM 1987, s 7; **Nova Scotia** Limitation of Actions Act, RSNS 1989, s 5(1); **Newfoundland** Limitations Act 1995, s 15; **Ontario** Limitations Act, RSO 1990, ss 36 and 47; **Prince Edward Island** Statute of Limitations, RSPEI 1988, s 5; **Saskatchewan** Limitation of Actions Act, RSS 1978, s 6; **Northwest Territories** Limitation of Actions Act, RSNWT 1987, s 5; **Yukon** Limitation of Actions Act, RSY 1986 - 1990, s 5.

(c) an adult who is unable to make reasonable judgments in respect of matters relating to the claim.[325]

10.102 Time runs in Saskatchewan where the plaintiff is a mental patient in the custody of a legal guardian of his or her affairs, who is aware of the cause of action and is legally capable of commencing proceedings.[326] In British Columbia and Manitoba a potential defendant can set time running by serving notice on the plaintiff's guardian and the Public Trustee.[327] Alberta, British Columbia and Manitoba all have provisions which allow the suspension of a limitation period when the plaintiff becomes disabled after the limitation period has started running.[328]

10.103 Acknowledgement of a debt will generally restart the running of time, although in Ontario this only applies to an action on a specialty.[329] In British Columbia and Newfoundland, on the other hand, time will start to run again (provided that the limitation period has not already expired) if a defendant "confirms" any cause of action.[330]

6. THE UNITED STATES

10.104 Limitation periods[331] in the United States are generally stipulated by state legislation, although some federal statutes provide for limitation periods in certain circumstances.[332] Where a plaintiff has concurrent actions, different limitation

[325] Section 1(i). A similar definition has been adopted in Newfoundland, which states that a person is under a disability while that person is:

(a) less than 18 years of age; or

(b) incapable of the management of his or her affairs because of disease or impairment of his or her physical or mental condition; or

(c) for the purpose of an action for misconduct of a sexual nature not under section 8(2), incapable of commencing that action by reason of his or her mental or physical or mental condition resulting from that sexual misconduct: Limitations Act 1995, s 15(5).

In contrast, the definition of "disability" contained in **Ontario** Limitations Act, RSO 1990, ss 36 and 47 is derived from the English Real Property Limitation Acts of 1833 and 1874.

[326] **Saskatchewan** Limitation of Actions Act, RSS 1978, s 6.

[327] **British Columbia** Limitation Act, RSBC 1979, ss 7(6) - (11); **Manitoba** Limitation of Actions Act, RSM 1987, s 8.

[328] **Alberta** Limitations Act 1996, s 5(1); **British Columbia** Limitation Act, RSBC 1979, ss 7(3) and (4); **Manitoba** Limitation of Actions Act, RSM 1987, s 7(2).

[329] **Ontario** Limitations Act, RSO 1990, s 50.

[330] **British Columbia** Limitation Act, RSBC 1979, s 5; **Newfoundland** Limitations Act 1995, s 16.

[331] Some commentators have drawn a distinction between "statutes of limitation" and "statutes of repose": see, eg, S C Randell, "Comment: Due Process Challenges to Statutes of Repose" (1986) 40 Southwestern LJ 997, 997 - 998, 1002 - 1006. The main feature of a statute of repose is that it stipulates a period of time which commences on a designated event (eg the termination of a professional retainer) ascertainable with more certainty than, eg, the accrual of a cause of action: *Second Restatement - Torts* vol 4 para 899, comment (g); S C Randell, *op cit*, 997 - 998.

[332] For example, see para 10.108 below.

periods may apply for the different causes of action. So, for example, where a plaintiff has an action in both tort and contract, the limitation period for the action in tort may expire before the one in contract, and vice versa.[333]

(1) Actions in Contract

10.105 Historically the limitation period for actions founded on contract has been six years, but this has tended to be shortened in many states.[334] The limitation period will generally commence on the date of the breach, not the date of any damage consequent on the breach.[335] In some jurisdictions, actions to enforce contracts will have a longer limitation period where the contract is under seal. In others, a distinction is made between oral contracts and contracts in writing.[336]

(2) Actions in Tort

10.106 Time will generally not run against a plaintiff until the cause of action has accrued.[337] In the case of negligence, the cause of action is not complete until the plaintiff suffers actual damage, and the limitation period will not run until then.[338] As we shall see in the next section, the running of time may be delayed further if the damage is not immediately discoverable.[339]

(3) Latent Damage

(a) The general position

10.107 Latent damage has long been an issue in the American courts. The traditional view was that a lack of discoverability of a cause of action would not prevent a limitation period from running.[340] But the decision of the United States Supreme Court in *Urie v Thompson*[341] began a trend towards the recognition of a discoverability test. During the fifty years following *Urie v Thompson*, the courts have developed the use of a discoverability test, although this development has not been consistent, and discoverability is far from being universally applied.

[333] American Law Institute, *Second Restatement of the Law - Torts* (1979) (hereafter "*Second Restatement - Torts*"), vol 4 para 899, comment (b). See, eg, *Manning v Serrano* 97 So 2d 688 (Fla 1957); cf, eg, *Van Horn Lodge Inc v White* 627 P 2d 641 (Ak 1981) where the court applied the tortious rather than the longer contractual limitation period.

[334] *Williston on Contracts* (3rd ed 1978), para 2020.

[335] *Ibid*, para 2021A. See, eg, *Rufo v Bastian-Blessing Co* 207 A 2d 823 (Pa 1965).

[336] Eg, in California 4 years for an action on a written contract, 2 years for an oral contract: Californian Code of Civil Procedure, ss 337 and 339.

[337] *Second Restatement - Torts*, vol 4 para 899, comment (c). Cf, eg, *Dincher v Marlin Firearms* 198 F 2d 821 (1952): see para 10.113 n 351 below.

[338] See, eg, *Austin v Fulton Insurance Co* 444 P 2d 536 (Ak 1968). The plaintiff sued the defendant insurance company for negligently omitting earthquake damage from the policy which it issued to the plaintiff. The limitation period was held to begin on the date when the plaintiff suffered damage due to an earthquake, not the date when the policy was issued.

[339] See paras 10.107 - 10.112 below.

[340] See, eg, *Faulkner v Huie* 168 SW 2d 839 (Ark 1943).

[341] 337 US 163 (1949).

10.108 In *Urie v Thompson* the plaintiff commenced an action in 1940 against his former employer under the Federal Employers' Liability Act 1908, which provided for a limitation period of three years from the accrual of the cause of action. The plaintiff had been a fireman on trains operated by the defendant, and was alleging that the inhalation of sand in the course of his employment between approximately 1910 and 1940 had led to the gradual onset of disabling silicosis. Although the plaintiff had suffered from silicosis for many years the Supreme Court held that the appropriate starting date for the limitation period should be the date when the plaintiff could reasonably have been expected to discover the damage. Rutledge J said:

> We do not think the humane legislative plan intended such consequences [ie the barring of the plaintiff's claim] to attach to blameless ignorance. Nor do we think those consequences can be reconciled with the traditional purposes of statutes of limitations, which conventionally require the assertion of claims within a specified period of time after notice of the invasion of legal rights.[342]

10.109 There is currently no uniformity of approach in relation to the general problem of latent damage,[343] either among jurisdictions or, within some jurisdictions, across the range of possible tortious claims. A few states have a general statutory discoverability test. For example, in Missouri

> [a] cause of action [in tort or contract] shall not be deemed to accrue when the wrong is done or when the technical breach of duty occurs, but when the damage resulting therefrom is substantial and is capable of ascertainment ... so that all resulting damage may be recovered and complete relief obtained.[344]

10.110 But in the remaining jurisdictions discoverability is widely applied by the courts, though in varying degrees. In some of those jurisdictions the position has been altered by statute in relation to particular sorts of litigation, either to introduce discoverability or, in the case of recent "repose" legislation, effectively to abolish it.[345]

10.111 Although the courts have been ready to postpone, or "toll" the running of limitation periods because plaintiffs have been unable to discover the damage which they have suffered, and, to some extent, where plaintiffs have been unable to discover the cause of the damage,[346] they have been far less willing to do so where a plaintiff, though aware of the damage, has been unaware of the existence of a claim in law,[347] although there have been some exceptions.[348]

[342] *Ibid*, 170.

[343] *Second Restatement - Torts*, vol 4 para 899, comment (e).

[344] RSMo 1986, s 516.100.

[345] See paras 10.114 and 10.117 below.

[346] See, eg, *Stoleson v United States* 629 F 2d 1265 (US CA 1980).

[347] *United States v Kubrick* 444 US 111 (US Sup Ct 1979).

[348] Eg *Hamilton v Smith* 773 F 2d 461 (US CA 1985).

10.112 Below we shall examine three specific areas where latent damage has been especially problematic. Those areas are: product liability; professional (especially medical) negligence; and liability for sexual abuse. However the importance and scope of discoverability goes far beyond this. It has assumed increasing importance in cases involving chemical contamination,[349] and in at least one state discoverability has been applied in relation to defamation.[350]

(b) Product liability

10.113 The traditional approach to limitation in product liability cases in negligence has been for the limitation period to commence when the cause of action accrues, that is, when the injury is caused to the plaintiff.[351] But there has been an increasing tendency for the courts to apply discoverability.[352] Where an action has been brought on the basis of a breach of warranty, the general rule has been that the cause of action accrues on the date on which the goods are delivered, and the Uniform Commercial Code provides for a limitation period, for breach of warranty, of four years from the date of delivery.[353] But some courts have also applied a discoverability test to breaches of warranty and held that the cause of action accrues when the plaintiff knew, or ought to have known, of the breach.[354]

10.114 Several state legislatures, however, sought to contain the problems for defendants posed by the adoption of discoverability tests for limitation, by passing statutes providing for a limitation period[355] based either on the date when the product was manufactured, or when it was first sold to consumers.[356] This legislation, however,

[349] See, eg, *Daniels v Beryllium Corpn* 227 F Supp 591 (Pa 1964); *Stoleson v United States* 629 F 2d 1265 (US CA 1980); *Vispisiano v Ashland Chemical Co* 527 A 2d 66 (NJ 1987).

[350] *Manguso v Oceanside Unified School District* 88 Cal App 3d 725; 152 Cal Rep 27 (1979). The plaintiff, a teacher, sued the defendant in relation to allegedly defamatory remarks contained in a letter filed in a confidential file held by her employer. The limitation period was held to commence when the plaintiff could reasonably be expected to discover the contents of the letter.

[351] See, eg, *Cannon v Sears, Roebuck & Co* 374 NE 2d 582 (Mass 1978). Cf *Dincher v Marlin Firearms* 198 F 2d 821 (US CA 1952), where the statute provided that the limitation period should begin on the date of the act or omission complained of: this was construed to mean, at the latest, the date on which the goods in question were purchased, and so the injury to the plaintiff occurred after the limitation period had ended (but see the strong dissenting judgment in that case of Circuit Judge Frank).

[352] See, eg, *Franzen v Deere & Co* 334 NW 2d 730 (Iowa 1983); *Yustick v Eli Lilly & Co* 573 F Supp 1558 (US Dist Ct 1983); *Anthony v Abbott Laboratories* 490 A 2d 43 (RI 1985).

[353] Paras 2-725(1) and (2). See, eg, *Berry v G D Searle & Co* 309 NE 2d 550 (Ill 1974).

[354] See, eg, *Parrish v B F Goodrich Co* 207 NW 2d 422 (Mich 1973). Cf *Everhart v Rich's Inc* 194 SE 2d 425 (Ga 1972).

[355] Or period of repose: see para 10.104 n 331 above.

[356] See A R Turner, "The Counter-Attack to Retake the Citadel Continues: An Analysis of the Constitutionality of Statutes of Repose in Products Liability" (1981) 46 J of Air Law and Commerce 449; S C Randell, "Comment: Due Process Challenges to Statutes of Repose" (1986) 40 Southwestern LJ 997.

met with constitutional challenges on the basis of due process and equal protection.[357]

(c) Professional negligence

10.115 The general pattern in professional negligence has been a growing recognition of a discoverability rule.[358] Indeed, medical negligence was the area where discoverability first spread rapidly.

10.116 However, discoverability has been combined with measures designed to protect professional defendants. So, for example, medical negligence is subject to special statutory rules in some states. In Utah, for example, a limitation period is prescribed of two years from the date when the plaintiff discovers, or could with reasonable diligence have discovered, the injury, with a long-stop of seven years from the act or omission giving rise to the claim.[359] There are special statutory rules relating to other professions, for example attorneys.[360]

10.117 Limitation periods applying in respect of architects and other similar professionals may be affected by "statutes of repose" introduced to protect the construction industry against "long-tail" litigation involving latent defects.[361] These are comparable to the statutes introduced in the 1970s and 1980s in relation to

[357] Ie that a plaintiff suing a manufacturer had unequal protection compared with a plaintiff suing a defendant which did not have the benefit of a special limitation period. See S C Randell, "Comment: Due Process Challenges to Statutes of Repose" (1986) 40 Southwestern LJ 997, 1001 n 18, in which it was reported that, by 1986, the legislation had been upheld by the courts as constitutional in three states, and held unconstitutional in five, with the issue yet to be decided in several others.

[358] Compare, eg, the following:

Medical negligence *Peterson v Roloff* 203 NW 2d 699 (Wisc 1973) (cause of action accrued at time of act/omission); *Richardson v Orentreich* 477 NE 2d 210 (NY 1985) (cause of action accrued at time of act/omission, but this is construed to mean the end of the treatment). Cf *Toth v Lenk* 330 NE 2d 336 (Ind 1975) (cause of action accrued on discoverability).

Architects *Chrischilles v Griswold* 150 NW 2d 94 (Iowa 1967) (cause of action accrued on discoverability).

Accountants *Owyhee County v Rife* 593 P 2d 995 (Idaho 1979) (cause of action accrued at time of act/omission); *Wilkin v Dana R Pickup & Co* 347 NYS 2d 122 (1973) (cause of action accrued at time of act/omission, but the act/omission construed to continue up to the end of the professional relationship between accountant and client). Cf *Sato v Van Denburgh* 599 P 2d 181 (Ariz 1979) (cause of action accrued on discoverability).

Attorneys *Hoffmann v Insurance Co of North America* 245 SE 2d 287 (Ga 1978); *Boehm v Wheeler* 223 NW 2d 536 (Wisc 1974) (cause of action accrued at time of act/omission). Cf *Skidmore & Hall v Rottman* 450 NE 2d 684 (Ohio 1983); *Hendrickson v Sears* 310 NE 2d 131 (Mass 1974) (cause of action accrued on discoverability).

[359] Utah Code Ann s 78-14-4.

[360] See, eg, *Schoenrock v Tappe* 419 NW 2d 197 (1988) which concerned South Dakota legislation under which a limitation period of three years from the alleged "malpractice, error, mistake or omission" is prescribed for attorneys.

[361] See S C Randell, "Comment: Due Process Challenges to Statutes of Repose" (1986) 40 Southwestern LJ 997, 999 - 1001.

product liability,[362] although they are an earlier innovation[363] and more widespread, having been adopted at some time in nearly all American jurisdictions.[364] But they have been subject to constitutional challenges on similar grounds to the product liability statutes, and with similarly inconsistent results.[365]

(d) Sexual abuse

10.118 In the United States, especially during the past decade, the courts have considered how cases of sexual abuse should be treated for limitation purposes. This has centred mainly, but not exclusively, on whether a discoverability test should be applied in such cases,[366] and has had varying results. The cases can be divided into two main categories: those where the plaintiff was aware, and continued to be aware, of the abusive acts, but did not discover a causal connection between the abuse and the damage suffered until later, and those where the plaintiff's memory of the abusive acts has been repressed altogether, and not "discovered" until later. The courts have generally appeared more willing to postpone the running of time in the second of these types of case than in the first.

10.119 In *Johnson v Johnson*[367] the plaintiff alleged that she had been abused between the ages of three and thirteen. However, she had retained no memory of the abuse until recollections of abuse returned to her in the course of psychotherapy, nearly twenty years later. The court drew a sharp line between the two categories of case outlined above, and held that where a plaintiff claimed that due to the trauma of the experience he or she had delayed knowledge of the abuse itself, a discoverability test could legitimately be applied. This contrasts sharply with the approach taken by the Supreme Court of Washington in *Tyson v Tyson*,[368] where the court emphasised the need to prevent the bringing of stale claims, coupled with the possible unreliability of the memories of some plaintiffs and held that discoverability would only be applied in cases where "the objective nature of the evidence makes it substantially certain that the facts can be fairly determined even though considerable time has passed since the alleged events occurred."[369] There is

[362] See para 10.114 above.

[363] The first legislation was in Wisconsin in 1961.

[364] By 1985 they had been introduced in all jurisdictions except Arizona, Iowa, Kansas and Vermont: see S C Randell, *op cit*, 1000.

[365] A R Turner, "The Counter-Attack to Retake the Citadel Continues: An Analysis of the Constitutionality of Statutes of Repose in Products Liability" (1981) 46 J of Air Law and Commerce 449, 466 - 478.

[366] See para 10.121 below in relation to other factors. In at least one case the relevant statute has been construed so that no limitation period is applicable in cases where there is clear evidence of abuse: *Petersen v Bruen* 792 P 2d 18 (Nev 1990).

[367] 701 F Supp 1363 (US Dist Ct 1988).

[368] 727 P 2d 226 (1986) (Pearson J dissenting). Because of subsequent legislation in Washington it appears that a case on similar facts would now be decided differently: see para 10.122 n 378 below.

[369] 727 P 2d 226, 229, *per* Durham J.

division among jurisdictions as to which of the two approaches is the correct one.[370]

10.120 The other category of case discussed in *Johnson v Johnson* involves a delay in realisation, not of the facts themselves, but of their causal relationship with the damage experienced by the plaintiff. The Court of Appeals of Wisconsin took a liberal approach in *Hammer v Hammer*,[371] where the material facts were very similar to those in the English case of *Stubbings v Webb*,[372] in that the plaintiff did not claim to have repressed memories of the abuse, but did say that she had never understood the relationship between the abuse and her psychological difficulties in adult life until she entered counselling and therapy. The court was unimpressed with the arguments about stale and unreliable evidence, preferring to focus instead on the need to provide justice for abuse survivors and identifying the fact that in the absence of a discoverability rule for such cases few plaintiffs would ever be in a position to bring an action. But American courts have seemed reluctant to follow this approach in other cases. For example, in *EW v DCH*[373] the Supreme Court of Montana rejected the plaintiff's claim, emphasising that she had known for several years that she had been abused, and that she had experienced psychological problems, even if she was not aware of the causal connection between the two series of events. Sheehy J said:

> The law does not contemplate such discovery as would give complete knowledge before the cause of action accrues. ... Rather, the discovery doctrine only tolls the running of the statutory clock until such time as the plaintiff, in the exercise of reasonable care and diligence, should have been aware of the wrongful act and injury.[374]

10.121 The courts have also discussed whether factors other than lack of discoverability might be capable of postponing the start of the limitation period.[375] In the vast majority of cases the fact that the plaintiff was a minor at the time of the alleged abuse will serve to postpone the running of time. In some cases mental disorder caused by the abuse has been successfully pleaded as a further postponing factor.[376] But the courts have been generally unwilling to apply statutory rules relating to fraudulent concealment to situations where abusers have sought to

[370] See, eg, *Hoult v Hoult* 792 F Supp 143 (US Dist Ct 1992) (discoverability applied); cf, eg, *Ernstes v Warner* 860 F Supp 1338 (US Dist Ct 1994).

[371] 418 NW 2d 23 (1987).

[372] [1993] AC 498 (HL). See paras 3.32 - 3.35 above.

[373] 754 P 2d 817 (1988). See also, eg, *Hildebrand v Hildebrand* 736 F Supp 1512 (1990). Cf *Osland v Osland* 442 NW 2d 907 (ND 1989).

[374] 754 P 2d 817, 820.

[375] See para 10.124 in relation to postponing factors generally.

[376] See, eg, *Leonard v England* 445 SE 2d 50 (NC 1994) in which post-traumatic stress disorder (PTSD) suffered by the plaintiff, allegedly as a result of abuse by the defendant during the plaintiff's childhood, rendered the plaintiff "incompetent" and the limitation period did not run. Cf *Snyder v Boy Scouts of America Inc* 205 Cal App 3d 1318; 253 Cal Rep 156 (1988), where PTSD was held to be insufficient to toll the statute.

disguise the nature or the effect of their actions by misrepresenting them to their victims.[377]

10.122 Some states have now introduced legislation which expressly provides for discoverability in abuse cases. For example, in California the limitation period ends on the later of the date eight years after the plaintiff attains majority, or three years after he or she discovered, or reasonably should have discovered, that his or her psychological illness or injury was caused by sexual abuse.[378] This has the effect of removing the bar placed by the courts in many states on claims where the plaintiff is unaware of the causal link between the abuse and the resulting damage.

(4) Actions in respect of Land

10.123 The doctrine of adverse possession is recognised throughout the United States.[379] The limitation period formerly recognised in American common law was twenty years, although states now have different statutory limitation periods, and these vary widely between states. Most jurisdictions have limitation periods of 10, 15 or 20 years. The shortest is five years,[380] and the longest, applicable in Iowa, is forty years. Some states stipulate a shorter limitation period when the squatter can show "color of title", that is, written evidence of an apparent title which, because of a defect, does not confer actual title.[381]

(5) Factors Postponing the Running of Time[382]

10.124 It has been seen[383] that in many states time will not start to run against a plaintiff until the cause of action is discoverable. In most states, even where such a rule does not apply, fraudulent concealment of a cause of action will postpone the running of time.[384] But in some of those states fraudulent concealment will not prevent time from running unless the fraud is an essential part of the cause of action itself.[385] Where a plaintiff is unable to manage his or her legal affairs due to infancy or mental incapacity it is usual for the running of time to be postponed until the disability has ended.[386] It is not, however, usual for supervening disability

377 See, eg, *EW v DCH* 754 P 2d 814 (Mont 1988); Cf *Hildebrand v Hildebrand* 736 F Supp 152 (1990) where an alleged assurance by the defendant, a physician, to the plaintiff, his daughter, that her depression was caused by factors other than abuse was held to amount to fraudulent concealment.

378 **California** Code of Civil Procedure, s 340.1, See also, eg, **Washington** Revised Code, ss 4.16.080 and 4.16.100; **Missouri** RSMo Supp 1991, s 537.046.

379 See, generally, *Thompson on Real Property* (Thomas ed 1994) vol 10 ch 87.

380 California, Idaho and Montana.

381 Eg, in Illinois 7 years as opposed to 20 years, and in Texas 3 years as opposed to 10 years.

382 See also para 10.121 above in relation to sexual abuse.

383 See paras 10.107 - 10.112 above.

384 *Second Restatement - Torts*, vol 4 para 899, comment (e); *Williston on Contracts* (3rd ed 1978) para 2024A. See, eg, *Curtis v Metcalf* 259 F 961 (1919).

385 *Williston on Contracts* (3rd ed 1978), para 2024B.

386 *Second Restatement - Torts*, vol 4 para 899, comment (f); *Williston on Contracts* (3rd ed 1978), para 2021C.

to suspend the limitation period.[387] In some states the defendant's absence from the jurisdiction will stop the running of the limitation period if it would prevent the commencement of proceedings.[388]

7. FRANCE[389]

10.125 French law, as with all systems derived from Roman law, uses a concept of prescription, not limitation.[390] Prescription can be either extinctive or acquisitive.[391] Extinctive prescription eliminates obligations through the non-exercise of rights for a certain period; acquisitive prescription produces rights through the exercise of possession for a corresponding period.[392]

10.126 Extinctive prescription proper should be distinguished from presumptive prescriptions.[393] These are essentially presumptions that payment has been made after a certain period. They differ from prescription proper because the presumptions are subject to evidentiary rebuttal.[394]

10.127 Prescription should also be distinguished from other periods, called fixed time limits,[395] which do not have the same juridical nature. The justification of fixed time limits differs from that of prescription, as, while prescription is primarily concerned with the protection of the debtor,[396] the purpose of fixed time limits is to ensure that the creditor is diligent in the pursuit of his action. An example is the fixed period for claiming rescission of a contract for breach.[397]

10.128 The effect of prescription and of fixed time limits is the same in one central respect: they prevent actions after a certain point. The juridical distinction does, however, have some important practical consequences. Fixed time limits are matters of public policy[398] while prescription is usually a private matter. Thus, in

[387] See, eg, *Roelefsen v City of Pella* 96 NW 738 (Iowa 1903).

[388] *Ibid.*

[389] We gratefully acknowledge that in this section, and in the following section on German law, we have relied heavily on the papers by, respectively, V Bandrac and R Zimmermann in E H Hondius (ed), *Extinctive Prescription: On the Limitation of Actions, Reports to the XIVth Congress of the International Academy of Comparative Law* (1995) (hereafter "*Extinctive Prescription*").

[390] The central provisions are contained in the Code Civil, arts 2219 - 2283.

[391] The distinction has been condemned as a distortion of the Code but appears established: F Zenati and S Fourmier, *Essai d'une Théorie unitaire de la Prescription*, RTD civ (1996) 339, 341 - 3.

[392] Extinctive prescription roughly performs the same function as the English law of limitation, while acquisitive prescription deals with the issues addressed by adverse possession, and the law on the passing of title to goods. This survey will focus only on extinctive prescription.

[393] *Prescriptions présomptives.* See generally J-Cl Civil, arts 2270 - 2278.

[394] See F Terré, P Simler and Y Lequette, *Droit Civil - Les Obligations* (1996) (hereafter "*Les Obligations*"), nº 1376. J-Cl Civil, arts 2270 - 2278.

[395] *Delais préfix.*

[396] *Les Obligations,* nº 1373.

[397] See Vasseur, *Délais préfix, délais de prescription, délais de procédure*, RTD civ 1950, 459.

[398] *D'ordre public.*

general, parties cannot renounce fixed periods, nor are they subject to suspension or interruption.[399] Furthermore, only prescription (properly so-called) actually extinguishes obligations. The distinction is not, however, absolute. Some time limits do not fall neatly into one category rather than another.[400]

(1) General Principles

10.129 The basic period of prescription is 30 years.[401] This period is now generally considered to be excessive.[402] However, its negative effect is minimised since there are now so many exceptions to it that it should be considered the residual rather than the usual period.[403]

10.130 Time starts to run from the date of enforceability of the cause of action.[404] However, it is calculated in days, not hours.[405] Thus it runs from 00.01 in the morning of the next day after the starting point, and runs out only at 24.00 on the day of the termination of the period.

10.131 It is a general principle that time will not start to run against someone who is not capable of acting[406] until the day when this impossibility - which can be caused by anything whatsoever - has disappeared. This includes the situation where the interested party is not immediately aware of the facts on the basis of which his right arises.[407] Special commencement dates are provided for a number of particular prescription periods.[408]

10.132 There is no uniform rule as to whether both the right and the remedy[409] or merely the remedy are extinguished by prescription.[410] The first position attracts greater academic support.[411] However, the courts have made frequent exceptions, in particular where a defence to an action depends on the right in question. Thus, voluntary payment of a debt after expiry of the period for an action for its recovery

[399] Cass 1re civ, 23 nov 1964, Bull civ I, nº 513 D1965, somm 37; Cass com, 29 mai 1984, Bull civ IV, nº 181; 28 juin 1988, Bull civ IV, nº 220.

[400] The Code and other legislation is frequently silent on the question of classification.

[401] Art 2262 c civ.

[402] See, eg, P Souty, *La prescription trentenaire doit disparaître* Gaz Pal 1948, 1, doctr 43.

[403] See, eg, V Bandrac in E H Hondius (ed), *Extinctive Prescription* p 151.

[404] Cass civ, 21 oct 1908, S 1908, 1, 449; 11 déc 1918, S 1921, 1, 161. See also *Les Obligations,* nº 1389.

[405] Arts 2260, 2261, c civ.

[406] *Contra non valentem agere non currit praescriptio.*

[407] *Les Obligations,* nº 1392. See para 10.140 below.

[408] *Ibid.*

[409] A rough translation of *droit* and *action.* This is in contrast to German law; see para 10.144 below.

[410] See V Bandrac in E H Hondius (ed), *Extinctive Prescription*, pp 149 - 150.

[411] See V Heron, *Droit judiciaire privé,* (1991), nº 115; Marty, Raynaud and Jestaz, *Les Obligations*, nº 341. But cf V Bandrac, *La nature juridique de la prescription extinctive,* (1986) Economica.

does not give rise to an action in restitution, as the right to the debt persists; but suit for the debt itself will be barred.[412]

(2) Actions in Contract

10.133 The thirty year period remains the residual period for contractual and quasi contractual actions. However, there are numerous exceptions. Many of the shorter periods are presumptive prescriptions only.[413]

(i) A ten-year period is imposed for obligations incurred in the course of their business between businessmen, or between a businessman and a non-businessman, unless a shorter period is provided for elsewhere.[414]

(ii) A five-year period applies to actions for payment of periodic debts such as wages, rent, maintenance or interest.[415] This has been interpreted broadly.[416]

(iii) Five year periods also apply to many other specific contracts,[417] such as, for instance, advocates' fees for uncompleted cases.[418]

(iv) A four-year period applies to debts owed by the state and organisations with legal personality which come under public law.[419]

(v) Three-year periods apply to a large number of actions, such as, for instance, a number of company law actions.[420]

(vi) Two year periods are common and have been frequently been applied in recent legislation. These include actions for payment for visits, operations and medicines by doctors, surgeons, dentists, midwives and pharmacists;[421] any action against air carriers;[422] actions by businessmen for payment for merchandise sold to private individuals;[423] most actions founded in insurance contracts;[424] and many others.

[412] See V Bandrac in E H Hondius (ed), *Extinctive Prescription*, p 150.

[413] J-Cl Civil, arts 2270 - 2278.

[414] Art 189 c com.

[415] Art 2277 c civ.

[416] *Les Obligations*, nº 1379.

[417] *Ibid.*

[418] Art 2273 c civ. In respect of fees for completed cases the period is two years from judgment. This period is a presumptive prescription.

[419] L 31 déc 1968 art 1.

[420] Art 1844-14; J-Cl Civ, arts 2270 - 2278, nº 169 - 171. For other examples, see *Les Obligations*, nº 1381.

[421] Art 2272, al 3, c civ. These are presumptive prescriptions. J-Cl Civil, arts 2270 - 2278, nº 35 et seq.

[422] Art L 321-5, L 322-3 c aviat.

[423] Art 2272, al 4, c civ. This is a presumptive prescription. Cf J-Cl Civil, arts 2270 - 2278, nº 38 et seq.

(vii) A one-year period[425] applies, inter alia, to actions by bailiffs for their wages for the writs they serve and for commissions which they execute;[426] actions for the revocation of a gift on account of ingratitude,[427] and actions for damage, loss or delay arising out of contracts for maritime or terrestrial transport.[428]

(viii) Six-month periods apply to actions by teachers for lessons given on a monthly basis[429] and to actions by hoteliers and caterers for the supply of accommodation and food,[430] amongst others.[431]

(ix) Finally, two and three month periods apply to a few actions.[432]

10.134 A special regime applies to construction contracts. In French construction law, acceptance[433] terminates for most purposes the ordinary contractual obligations of the contractor.[434] Most obligations become covered by the three statutory guarantees specified in Article 1792 of the Code Civil.[435] These provide a broad range of protections for the client as well as to subsequent purchasers.[436] They extend for periods of one, two, or ten years,[437] which run from the date of the formal act of acceptance.[438] Thus, two years applies to claims in respect of hidden damage to items which are separate[439] from the building, while the ten year period applies to claims in respect of hidden damage to the structure and inseparable[440] fittings which renders them unsuitable for their purpose.[441]

[424] Art L 114-1, c assur. This is not a presumptive prescription; J-Cl Civil, arts 2270 - 2278, nº 103.

[425] See generally, *Les Obligations*, nº 1383.

[426] Art 2272, al 1er, c civ. This is a presumptive prescription. J-Cl Civil, arts 2270 - 2278, nº 12-13.

[427] Art 957, c civ.

[428] Art 108, c com.

[429] Art 2271, al 1, c civ. If the lessons are given on a termly basis then the five year period in art 2277 applies (Cass req 12 Janv 1820).

[430] Art 2271, al 2, c civ.

[431] *Les Obligations,* nº 1384. These periods are presumptive prescriptions. J-Cl Civil, arts 2270 - 2278, nº 5-11.

[432] *Les Obligations,* nº 1385 - 1386.

[433] *Réception.*

[434] P D V Marsh, *Comparative Contract Law: England, France, Germany* (1996), p 186.

[435] *Garantie de parfait achèvement*, *garantie décennale*, and *garantie biennale.* These guarantees are given by those termed *constructeurs*, who include architects, contractors, etc.

[436] See P D V Marsh, *Comparative Contract Law: England, France, Germany* (1996), p 186.

[437] Arts 1792-6, 2270 c. civ. They are technically not prescription periods, but *délais d'épreuve.*

[438] *Procès verbal de réception.*

[439] *Dissociable.*

[440] *Indissociable.*

[441] Different rules apply in the case of works for public authorities; see P D V Marsh, *op cit*, p 186.

10.135 Ordinary contractual obligations persist only in respect of hidden damage not covered by the guarantees. This could be either minor faults not affecting the solidity of the works or their suitability for what they were intended, or work which falls outside the classification of construction, such as renovation. The courts have held that the ten-year period applies to these obligations.[442] The starting point again appears to be acceptance.[443] In contrast, liability for any apparent damage is automatically eliminated by acceptance (unless the right to sue in respect of it has been reserved).

(3) Actions in Tort

10.136 Most claims analogous to tort claims in common law jurisdictions[444] are statute barred ten years after the damage in question becomes apparent.[445] However, certain actions are classified differently, such as defamation actions against the press, which have a prescription period of two months.[446]

(4) Interruption and Suspension

10.137 Interruption stops prescription completely. Time begins to run again from zero once the interruption ceases. This rule applies not only to extinctive prescription but also to fixed time limits. In relation to a debt, interruption occurs when the creditor attempts to exercise his or her rights in law against the debtor. This is considered to have occurred once the *citation en justice* (roughly equivalent to a valid writ) has been served.[447]

10.138 Interruption also occurs if the debtor acknowledges the creditor's rights.[448] Acknowledgement can be tacit; it has been held to include paying interest on a debt[449] and requesting a period of grace[450] or a rebate.[451]

10.139 Suspension halts but does not restart the operation of prescription. Time recommences running from the point where it stopped once the suspension ends.[452] Suspension does not apply to pre-fixed delays.[453] The Code lays down that

[442] Art 2270, c civ. Note that these limits do not apply in the case of *dol* (ie, roughly, fraud), which means that the 30 year period will apply. J-Cl Civil, arts 2260 - 2264, nº 29.

[443] Cass Civ 3e 11 juin 1981.

[444] *Responsabilité extra-contractuelle.*

[445] Art 2270-1, c civ.

[446] Art 85, L29 juill 1881. See *Les Obligations,* nº 1385-6.

[447] Art 2244 c civ, et seq. Cf J-Cl Civil, arts 2242 - 2250, nº 31.

[448] Art 2248 c civ.

[449] Cass req 7 juill 1910, S 1911, 1, 103.

[450] CA Montpellier 15 mai 1872, DP 1874, 2, 165.

[451] Cass Ass plén, 27 juin 1969, JCP 1969, II, 16029.

[452] Suspension operates on the principle of *Contra non valentem agere non currit praecipio*: see para 10.131 above.

[453] Cass 2me civ 12 mai 1955, préc, motifs; Cass soc, 5 mai 1977, Bull civ V, nº 303. There are, however, exceptions to this. see *Les Obligations,* nº 1395, and n 6.

prescription is suspended as against minors, and adults still under guardianship.[454] It is also suspended between spouses[455] and in certain circumstances during succession.[456]

10.140 The courts have also extended the ambit of suspension. The Cour de Cassation has held that prescription does not run against someone who is absolutely unable to act on account of an obstacle of any kind.[457] This includes cases of *force majeure* (such as war, natural disasters, epidemics and civil strife) or moral impossibility;[458] or if the creditor is ignorant of his rights for a legitimate reason.[459] However, inactivity due to isolation or to a low "socio-cultural" level is not sufficient.[460]

(5) Variation by Agreement

10.141 It is possible to shorten periods of prescription by agreement.[461] In contrast, it is in principle impossible to eliminate or lengthen prescription by agreement before its operation.[462] However, the same result can be indirectly achieved since the courts have accepted agreements which affect the method of calculation of the period, for example by the inclusion of additional grounds of suspension.[463] Moreover, once time starts to run the defendant can renounce prescription.[464] Renunciation can be tacit[465] and can result from any act or event which unequivocally manifests the defendant's intention to renounce the prescription.[466] Fixed time limits cannot be altered by agreement.[467]

[454] Art 2252 c civ.

[455] Art 2253 c civ. This is, however, subject to exceptions.

[456] Art 2258 c civ.

[457] Cass 1re civ, 22 déc 1959, JCP 1960, II, 11494, note PE.

[458] This was held to exist for a period of friendly negotiations between creditor and debtor: Cass req, 28 nov 1938, DH 1939, 99, Gaz Pal 1939, 1, 178.

[459] Cass com, 7 avril 1967, Bull civ, III, nº 125.

[460] Soc 26 avr 1984, Bull civ nº 159, RTD civ 1985, 176, obs Mestre.

[461] Civ 4 déc 1895: DP 1896 1. 241 (2me esp), note Sarrut. However, periods which are so brief that the creditor will find it impossible to act within them are not permitted: T civ Seine 26 fév 1929, DH 1929, 305, Gaz Pal 1929, 1, 783; T civ Périgueux 6 juill 1954, Gaz Pal 1954, 2, 278. Distinctions in this area turn on whether the provision which the agreement purports to alter is considered to be required by public policy *(d'ordre public)* or whether it is of merely private interest. See V Bandrac in E H Hondius (ed), *Extinctive Prescription*, p 156, J-Cl Civil, arts 2220 - 2225.

[462] Art 2220 c civ. *Les Obligations,* nº 1387.

[463] Civ 1re, 13 mars 1968: D 1968, 1626; JCP 1969, II, 15903, note Prieur.

[464] Note, however, that creditors, or any other person with sufficient interest, can raise prescription, even though the defendant purports to renounce it, if it would render him or her insolvent or worsen his or her insolvency: art 2225, c civ.

[465] Art 2221 c civ. Tacit renunciation does however require that the defendant be aware of the facts: Soc 24 nov 1982: Bull civ V n° 638.

[466] Civ 9 nov 1943: DA 1944, 37.

[467] V Bandrac in E H Hondius (ed), *Extinctive Prescription*, p 157, n 43.

(6) Developments

10.142 No general reform of the relevant provisions of the Code has been made since 1804. Particular problems have been dealt with by a mass of specific legislation. The consequence has been, as with German law, a large number of different periods. However, this appears to have excited much less adverse comment in France than in Germany and there appears to be little pressure for general reform.[468]

10.143 Current tendencies in French law have been towards expansion of the areas covered by extinctive prescription accompanied by a shortening of the periods applied. This increasing restrictiveness has been counterbalanced by the relaxation of the conditions under which exceptions can be made. Thus with shorter time limits has come both a later starting date and the expansion of the grounds of interruption and suspension.[469]

8. GERMANY[470]

10.144 The juridical nature of the concept of extinctive prescription[471] in German law is in some respects closer to its English equivalent than some of its Civil Law counterparts.[472] It does not extinguish a claim but instead gives the person claimed to be liable a countervailing right to refuse performance.[473] However, the particular rules and periods of prescription are deeply influenced by the Roman inheritance and are thus at points extremely similar to French law.

10.145 Book One of the German Civil Code, the Bundesgesetzbuch (BGB)[474] provides the general rules on prescription while a mass of specific provisions are found in the other four books of the BGB as well as in other statutes on private law. Prescription periods are laid down by reference to particular causes of action in

[468] Flaubert's hero Deslauriers, however, did not approve of the French law of prescription - or indeed the principle in general. See *L'Education Sentimentale*, Part II, ch I:

> By an ill fate, Deslauriers was given prescription as his subject for class. He was won over by the most shocking theories. He launched into hoary old disputes as if they were brand new: Why should an owner be deprived of his property just because he could not prove title after thirty one years ? It gave security fit only for an honest man to the heir of a thief. Every sort of injustice was cast in stone by this law: It was nothing but tyranny and the abuse of power. He was so furious that he blurted out: "We must abolish it; then the French will no longer lord it over the Gauls, the English over the Irish, the Yankees over the Redskins, the Turks over the Arabs, the whites over the blacks, and as for Poland ....." The President interrupted him: "All right! All right! We aren't concerned with your political opinions, you'll get to speak your piece another time!"

[469] V Bandrac in E H Hondius (ed), *Extinctive Prescription*, pp 148 - 149.

[470] See n 389 above.

[471] *Verjährung*.

[472] In Scottish law negative prescription has the effect of extinguishing the plaintiff's rights (see paras 10.9 and 10.18 above). This is also the general position (with exceptions) in French law (see para 10.125ff supra). In English law limitation in general bars the remedy only, except in the cases of title to goods and land.

[473] *Einrede der Verjährung*, Art 222(1) BGB.

[474] The general part or *Allgemeiner Teil.*

the same manner as under the Limitation Act 1980. However, as in France, the codificatory approach has produced a vast number of narrowly defined individual causes of action, in particular in contract. Consequently, a correspondingly wide variety of prescription periods has arisen.

10.146 The result is that the cases in which the law lays down a special period of prescription are so numerous that it is impossible to cite them all.[475] Unjustifiable distinctions are common, in particular where special regimes, such as the rules governing warranties for work and labour[476] interact with the general rules of prescription. In addition, problems of delimitation have caused "serious distortions" in the law and fostered unnecessary litigation.[477]

10.147 As a result, the rules relating to prescription are regarded as one of the least satisfactory features of the BGB and academics[478] and law reform bodies, such as the Commission for the Revision of the Law of Obligations,[479] have made proposals for its radical simplification.[480]

(1) Actions in Contract

10.148 The basic period of prescription is thirty years.[481] Time normally runs from the date when the claim becomes enforceable.[482] It is irrelevant that the damage was not discoverable.[483]

10.149 This period is considered by most commentators to be far too long.[484] It was the partial realisation of this even at the time of the drafting of the BGB which, by way of reaction, led to the beginning of the diversification of prescription periods.

[475] Witz, *Droit Privé Allemand* (1992), p 532.

[476] Art 638 BGB.

[477] R Zimmermann in E H Hondius (ed), *Extinctive Prescription*, pp 173 - 174.

[478] See, eg, F Peters and R Zimmermann, *Verjährungsfristen - Der Einfluß von Fristen auf Schuldverhältnisse: Möglichkeiten der Vereinhältlichung von Verjährungsfristen*, in Bundesminister der Justiz (ed), *Gutachten von Vorschläge zur Überarbeitung des Schuldrechts*, vol I (1981), pp 77ff.

[479] Bundesminister der Justiz (ed), *Abschlußbericht der Kommission zur Überarbeitung des Schuldrechts* (1992). See paras 10.168 - 10.173 below.

[480] None of the reform proposals support a large number of different prescription periods for different types of contracts.

[481] Art 195 BGB.

[482] Art 198 I BGB. See, eg, BGHZ 53, 222 (225); 73, 363 (365). For contract this will usually be when performance is due: G Dannemann, *Introduction to German Civil and Commercial Law* (1993), p 34.

[483] The lack of a subjective discoverability criterion has caused problems, in particular where a client suffers damage caused by an agent where only the agent understands that the damage has occurred. Thus, where a lawyer negligently allowed his client's claim to be lost through prescription and the three year period for this negligence elapsed without the client coming to realise that this had occurred, the courts were forced into the artificial construction of imposing a duty on the lawyer to alert the client to the claim against himself, producing an independent claim in damages: R Zimmermann in E H Hondius (ed), *Extinctive Prescription*, pp 195 - 196. See BGH VersR 1967, 979 (980).

10.150 Thus, a four year period is prescribed for claims for arrears of interest.[485] In addition, the BGB prescribes a period of two years for claims founded in a large number of "transactions of everyday life" such as claims against innkeepers, lawyers, notaries and medical practitioners.[486] A peculiarity of German law is that for these claims time runs from the end of the calendar year in which the action accrues.[487] The rationale for this is to avoid multiple prescription periods running in respect of a chain of minor transactions.[488]

10.151 Subsequent legislative action has created many further exceptions.[489] In turn, the courts have done their utmost to interpret claims as falling under the shorter periods. Consequently, the thirty year period is no longer the general period for most actions.

10.152 Excessive rigidity has, however, been replaced by arbitrary diversity. An example is the distinction between the claims of manufacturers, artisans, and other groups specified in Article 196 of the BGB - which face a period of two years - and the claims of their contractual partners against them, even when arising out of the same transaction - which generally come under the thirty year period.

10.153 Contracts for construction works can be either covered by the special regime laid down in Article 638 of the BGB,[490] the general provisions of the BGB, or by the detailed provisions contained in the German Standard Conditions for Construction Works (VOB).[491]

10.154 Both turn around the concept of acceptance.[492] After acceptance, all remedies in respect of defects of which the client was aware are barred unless they were reserved at the time.[493]

[484] See, eg, R Zimmermann in E H Hondius (ed), *Extinctive Prescription*, p 176, who considers that "it effectively constitutes an exemption from prescription." and says that "in view of the general 'acceleration of history' a thirty year period appears to be entirely unsuitable."

[485] Art 197 BGB.

[486] Art 196 BGB. The list contained in this section is now archaic.

[487] Art 201 BGB.

[488] German business people thus are relieved from constantly scrutinising all their outstanding debts for prescription. They can do this at the end of the year. See G Dannemann, *op cit*, p 34.

[489] For an overview, see F Peters and R Zimmermann, *op cit.* Zimmermann, in E H Hondius (ed), *Extinctive Prescription*, p 193, describes the multiplicity of rules as a "veritable maze".

[490] Zimmermann has described these sections as "among the most notorious and annoying troublemakers in the German law of obligations": *op cit*, p 183.

[491] *Verdiningsordnung für Bauleistungen.* Use of the VOB is compulsory for public construction works and it may be applied by agreement in the private sector: P D V Marsh, *Comparative Contract Law: England, France, Germany* (1996), p 222. The conditions under which it may be used are, however, restrictive; variation of its terms can lead to the BGB applying instead: *ibid*, p 223. See OLG Düsseldorf 13 December 1991.

[492] *Abnahme.*

[493] VOB, cl 12.5 (3).

10.155 In relation to hidden defects, Article 638 of the BGB provides for prescription periods of one year for work on land, five years for buildings, and six months in all other cases[494] of works contracts.[495] Time begins to run from the formal act of acceptance. This causes serious problems due to the total absence of a discoverability requirement combined with the relative shortness of the period.

10.156 The perceived injustices of this have driven the courts to interpret Article 638 narrowly.[496] However, this can produce highly arbitrary contrasts between the six month period under Article 638 and the general thirty year period.[497]

10.157 The courts attempt to draw the line by means of a distinction between damages pertaining to the work itself[498] and consequential loss.[499] The former come under Article 638, as well as consequential loss that is "closely related" to the defective performance.[500] However this test has proved wholly uncertain in practice.[501]

10.158 The periods prescribed by the BGB are, however, not mandatory. Under the VOB, they are generally reduced to two years, although there are special rules for particular types of construction.[502] In addition, reduction of the statutory prescription periods by agreement is permitted.[503]

(2) Actions in Tort

10.159 Claims for delict are barred in three years from the time at which the injured party has knowledge of the injury and of the identity of the person bound to make compensation, and without that knowledge, in thirty years from the doing of the act.[504]

10.160 The requirement of knowledge has caused difficulties. The courts have been unwilling to allow a plaintiff to rely on grossly negligent ignorance. Thus case law

[494] For instance, the construction of a ship.

[495] Problems are caused by the distinctions between these. The courts have tended to try to use the longer period but this has depended upon awkward interpretations. See BGHZ 37, 341 (344), BGH NJW 1980, 2081.

[496] Thus, fraudulent defects come under the thirty year prescription period and not Art 638. The courts have tended to relax the requirements of fraudulent behaviour.

[497] Thus the long prescription period is available where a defective bottling plant destroys the bottles it is supposed to fill; the short period applies to the damages caused by a shelf that was poorly installed and thus falls down. (OLG Köln, MDR 1974, 227; BGH JZ 1979, 569ff. See R Zimmermann in E H Hondius (ed), *Extinctive Prescription*, p 186.

[498] *Mangelschäden*.

[499] *Mangelsfolgeschäden*.

[500] Eg BGHZ 37, 341 (343); BGHZ 46, 238 (239).

[501] "The uncertainty as to how borderline cases will be decided could hardly be greater - in an area of law where legal certainty is more important than nearly anywhere else!": R Zimmermann in E H Hondius (ed), *Extinctive Prescription*, p 186.

[502] Thus for works undertaken for the highways department, the period is five years for bridges, four years for complete main roads, and two years for other works.

[503] Art 23(5) AGBG.

[504] Art 852(1) BGB.

has watered down the definition of knowledge from actual towards constructive knowledge. It is not necessary that a plaintiff knows all the individual details on which his or her claim may depend. Similarly it has been deemed sufficient that the plaintiff could have found out without much trouble the name and address of the defendant.

10.161 German law will usually prevent the use of a tortious claim to circumvent a contractual limitation period. Thus, Article 558 of the BGB lays down a six month period for claims between a lessor and lessee. Damage to the property by the lessee will generally found both an action for breach of the covenants of the lease and a tortious action under Article 558. The general principle in German law is that claims are to be assessed solely in terms of their own requirements. Nevertheless, it is widely recognised that the six month period of Article 558 has to be applied to the corresponding tortious claims to avoid violating the policy of the statute.[505] On the other hand, this policy has not been adopted consistently.[506] The reform proposals by the Commission for the Revision of the Law of Obligations recommends that where claims are concurrent, the prescription period relating to the contractual claim should generally prevail.[507]

(3) Interruption and Suspension

10.162 Time can be stopped from running in two different ways. Interruption[508] occurs in the conditions prescribed by Articles 208 to 216 of the BGB, the most important of which are interruption by acknowledgement[509] and by an action for satisfaction of a claim.[510] Time elapsed before an interruption is not taken into account and a new period of prescription must begin again once the interruption is over.

10.163 A weaker form of protection is provided by suspension, which is a concept alien to the English law of limitation. During suspension time ceases to run, but on the cessation of the suspension it restarts at the point where it stopped, rather than from zero.[511]

10.164 Suspension is frequently individually specified for particular limitation periods. The period of prescription for delict is suspended as long as the injured party and the person claimed to be liable are engaged in negotiations with each other aimed

[505] BGHZ 61, 227 (229ff); BGHZ 66, 315 (319ff); BGHZ 71, 175 (179). See R Zimmermann in E H Hondius (ed), *Extinctive Prescription*, pp 181 - 182.

[506] For example, the prescription periods under Articles 414, 423 and 439 of the HGB do not constrain the corresponding tortious claims. See, eg, BGHZ 9, 301 (304); BGH NJW 1992, 1679ff.

[507] Bundesminister der Justiz (ed), *Abschlußbericht der Kommission zur Überarbeitung des Schuldrechts* (1992), Art 200 BGB-DC. However, an exception is proposed for all claims for personal injury and liberty, which will always take the tortious period, whether arising from contract or tort: *ibid*, Art 201 BGB-DC.

[508] *Unterbrechung der Verjährung*.

[509] Art 208 BGB.

[510] Art 209 BGB.

[511] Art 207 BGB.

at achieving a settlement.[512] Similar, though slightly different, provisions exist in relation to some particular contracts.[513]

10.165 There are also a number of general conditions for suspension. For example, prescription is suspended between spouses during marriage and between parents and children during minority.[514] If a person is either incompetent or of limited competence to enter into legal transactions, prescription is suspended so that no period may expire until six months after he or she becomes fully competent or has received a legal representative.[515] Prescription is also suspended for as long as the debtor is granted indulgence.[516]

(4) Variation by Agreement

10.166 In principle, the parties can shorten prescription periods.[517] However, their ability to do this is restricted by consumer protection legislation.[518] In contrast, prescription can normally neither be excluded nor made more onerous by agreement.[519] In consequence, waiver of prescription is also prohibited.[520]

(5) Estoppel

10.167 Where it would be unfair for the plaintiff to rely on the full extent of the limitation period, the general principle of good faith[521] in German law will anticipate the statutory period. If the plaintiff's conduct over a period of time leads the debtor to believe that no claim will be made, the debtor's reliance will be protected.[522]

(6) Reform

10.168 The Commission for the Revision of the Law of Obligations proposes a greatly streamlined system which nonetheless retains considerable differentiation.[523] It recommends periods of three years for contractual claims; exceptional five year periods for particular contracts;[524] a ten-year period where the defendant has acted

[512] Art 852(3) BGB.

[513] See R Zimmermann in E H Hondius (ed), *Extinctive Prescription*, p 201.

[514] Art 204 BGB.

[515] Art 206 BGB. These provisions appear to be more flexible than the corresponding English provisions relating to disability.

[516] Art 202(1) BGB.

[517] Art 225(2) BGB.

[518] Art 11 no 10 f AGBG.

[519] Art 225(1) BGB. Exceptions are provided for the short prescription periods of, eg, Arts 477 and Art 638(2) BGB.

[520] However, the courts have used estoppel to assist plaintiffs who have relied on defendants' declarations of waiver: see, eg, BGH NJW 1991 974 (975).

[521] This has been compared to the role of equity in common law jurisdictions: N Horn, H Kötz and H G Leser, *German Private and Commercial Law* (1982), p 145.

[522] See N Horn, H Kötz and H G Leser, *op cit*, pp 144 - 145. See also BGHZ 25, 47 (51); BGHZ 43, 292.

[523] See R Zimmermann in E H Hondius (ed), *Extinctive Prescription*, p 194.

[524] Eg claims in relation to building defects: Art 195(2) BGB-DC.

fraudulently;[525] a ten year period for claims relating to title to land;[526] a three year period for periodic payments and maintenance claims;[527] and thirty years for claims based upon absolute rights and the law of succession.[528]

10.169 For contractual and other non-delictual claims the basic commencement date, according to the Commission's recommendations, will remain the time of enforceability. However, the Commission propose a number of exceptions to this. The rule applicable to "transactions of everyday life" and to periodic payments, whereby the prescription period for such claims commences at the end of the year in which the claim comes into existence,[529] is extended to cover all claims for the payment of money.[530] The date for claims for consequential damages due to the infringement of a contractual duty will be not the date of the damage but the date of the infringement of the duty.[531] The prescription period in respect of claims for defective goods or work will remain based on, respectively, the date of delivery and the dates of completion or acceptance.[532] The Commission rejected the introduction of a subjective discoverability criterion for contractual claims in general. But the prescription regime for delict (including an element of discoverability) would be extended to include contractual claims for compensation for death, personal injury or restriction of liberty.[533]

10.170 The rules relating to delict[534] are regarded as one of the more successful components of the German law relating to prescription.[535] The proposals by the Commission for the Revision of the Law of Obligations preserves their general basis.[536] However, the thirty year period is reduced to ten years, unless the claim is for death or personal injury or loss of freedom, in which case the thirty-year period is felt to remain appropriate.[537]

10.171 The Commission proposes the preservation of the distinction between interruption and suspension, and are essentially content with the existing conditions under which interruption will occur.[538] However, they propose a

[525] Art 195(4) BGB-DC.

[526] Art 195(5) BGB-DC.

[527] Art 202 BGB-DC.

[528] Bundesminister der Justiz (ed), *Abschlußbericht der Kommission zur Überarbeitung des Schuldrechts* (1992).

[529] Art 201 BGB.

[530] Art 196(2) BGB-DC.

[531] Art 196(3) BGB-DC.

[532] Art 196(4) BGB-DC; Arts 477, 638 BGB.

[533] Art 201 BGB-DC.

[534] Art 852 BGB: see paras 10.159 - 10.161 above.

[535] R Zimmermann in E H Hondius (ed), *Extinctive Prescription*, p 192.

[536] Art 199 BGB-DC.

[537] Art 201 BGB-DC.

[538] Arts 206, 207 BGB-DC.

revision and extension of the grounds of suspension, in particular to cover various steps taken to enforce the plaintiff's rights by law.[539]

10.172 Finally, the abolition of the rule prohibiting the lengthening of prescription periods by agreement is recommended.[540] However, the Commission maintain that the prescription period agreed should not exceed thirty years.

10.173 It has been pointed out that these proposals preserve some of the complexity of the old law without removing the hard cases that will always arise in a multiply differentiated system.[541] The original academic proposals for reform on which the Commission's work was based had recommended a more radical course, adopting a subjective discoverability criterion for commencement, and a period of two years for almost all actions.[542]

[539] Arts 208 - 210 BGB-DC. See R Zimmermann in E H Hondius (ed), *Extinctive Prescription*, p 202.

[540] Art 220(3) BGB-DC

[541] See R Zimmermann in E H Hondius (ed), *Extinctive Prescription*, p 198.

[542] See F Peters and R Zimmermann, *Verjährungsfristen - Der Einfluß von Fristen auf Schuldverhältnisse: Möglichkeiten der Vereinheltlichung von Verjährungsfristen*, in Bundesminister der Justiz (ed), *Gutachten von Vorschläge zur Überarbeitung des Schuldrechts*, vol I (1981). See also R Zimmermann in E H Hondius (ed), *Extinctive Prescription*, p 174.

SECTION C: OPTIONS FOR REFORM

PART XI
OPTIONS FOR REFORM I: INTRODUCTION

1. WHAT IS WRONG WITH THE PRESENT LAW?

11.1 We outlined in our Introduction[1] that the present law on limitations suffers from a number of defects: it is incoherent, needlessly complex, outdated, uncertain, unfair and wastes costs. Having seen the details of the present law in Parts II to IX above, we now return to the need for reform. Before seeking consultees' views we set out again - and in greater detail than in Part I - what is wrong with the present law.

(1) Incoherent

11.2 The current law on limitations has developed in an *ad hoc* way over a period of several centuries.[2] Little thought has been given to the overall coherence of limitations law. The desire to protect the interests of defendants, and to ensure certainty, which lay behind the adoption of a system of fixed limitation periods running from the date of accrual of the cause of action has given way in some areas, but not all, to a desire to ensure more justice for the plaintiff through discoverability regimes.

11.3 So the traditional six years from accrual of the cause of action in tort now applies to only a minority of tort actions.[3] Actions for personal injuries, defamation and malicious falsehood, negligent latent damage and under the Consumer Protection Act 1987 are all subject to separate and different regimes. Moreover the definition of the date of discoverability (or, in other words, the date of knowledge) is not identical for all the causes of actions to which it applies. Another glaring incoherence is that the limitation period applicable to actions for personal injury will depend on whether the injury was inflicted deliberately or negligently and, bizarrely, this can sometimes mean that a plaintiff is worse off, as regards limitation, by being the victim of an intentionally - inflicted injury than a negligently - inflicted one.[4] The incoherence of the present law is brought sharply into focus when, on the same facts, more than one cause of action may be brought. For example,[5] a claim for latent damage to property which results from a neighbour's use of land will have a limitation period of six years from accrual if

[1] See paras 1.1 - 1.5 above.

[2] See paras 1.6 - 1.21 above.

[3] See paras 3.12 - 3.119 above.

[4] *Stubbings v Webb* [1993] AC 498: see para 3.32 - 3.35 above.

[5] For another example, see para 13.42 below which draws a contrast between actions for defamation and malicious falsehood on the one hand, and negligence and conspiracy on the other.

pursued in the tort of nuisance[6] but three years from discoverability or six years from accrual, whichever is the later, if pursued in the tort of negligence.[7]

11.4 Other features of limitation law can be criticised for incoherence. For example, deliberate concealment can stop a period running but cannot suspend it once it has started to run.[8] Mental disability stops a period running but a mental disability that only arises subsequent to the running of the limitation period is normally ignored.[9] Acknowledgement of a liquidated claim starts time running again: acknowledgement of an unliquidated claim does not.[10]

(2) Complex

11.5 The incoherence of the present law in itself makes it complex. Take, for example, the position in tort. While the basic tort period is six years from accrual,[11] the limitation period for negligent latent damage to property or economic loss is three years from discoverability, subject to a long-stop of fifteen years, or six years from accrual, whichever period expires later.[12] Claims for personal injury are subject to a limitation period of three years from discoverability (which may be excluded at the court's discretion) but no long-stop.[13] Where however the personal injury was caused by the deliberate action of the defendant, the limitation period is only six years from the date of accrual of the cause of action, with no possibility of exclusion.[14] Actions for personal injury or damage to property under the Consumer Protection Act 1987 have a period of three years (extendible, in the case of personal injury, at the court's discretion) running from a subtly different discoverability starting date with a ten year long-stop.[15] Conversion has no limitation period in the case of theft.[16] Defamation has a one year period from publication, which may be excluded at the court's discretion.[17]

11.6 Unnecessary complexity also results from matters of detail in particular regimes. The provisions on, for example, breach of trust[18] and on the meaning of "knowledge" in actions for personal injury[19] and latent damage[20] and under the

[6] See paras 3.12 above.

[7] See paras 3.87 - 3.93 above.

[8] See paras 8.13 - 8.20 above.

[9] See paras 8.2 - 8.10 above.

[10] See para 8.32 above.

[11] See para 3.12 above.

[12] See paras 3.87 - 3.93 above.

[13] See para 3.29 above.

[14] See *Stubbings v Webb* [1993] AC 498: see paras 3.32 - 3.36 above.

[15] See paras 3.101 - 3.104 above.

[16] See paras 3.112 - 3.115 above.

[17] See paras 3.105 - 3.107 above.

[18] See paras 4.1 - 4.32 above.

[19] See paras 3.38 - 3.65 above.

[20] See paras 3.94 - 3.98 above.

Consumer Protection Act 1987[21] are very complicated. The leading judgments on the distinction between actual and constructive knowledge, particularly in claims for personal injury, are extremely difficult and are at points irreconcilable.[22] The approach to disability under the Latent Damage Act 1986 is hard to understand.[23] Simplification is both necessary and achievable.

11.7 The consequence of this complexity must inevitably be confusion for many practitioners. While, no doubt, specialist lawyers have got used to the complexity, the 'high street' solicitor can be forgiven for approaching the law of limitations with a considerable degree of trepidation. Certainly there are numerous pitfalls for the uninitiated.

11.8 If the law on limitations is difficult to understand for practitioners, it must be incomprehensible for members of the public. This is unacceptable, especially since the consequences of misunderstanding the law can be to eliminate valid claims.

(3) Outdated

11.9 The law on limitations is, in some respects, outdated. Some of the periods laid down may be thought to reflect assumptions about what time limits were reasonable from an age before computers, when methods of communication and retrieval of information were slow and cumbersome. The most familiar limitation period of six years originated in the limitation period set in the Limitation Act 1623, when documents sent by horse or ship were the sole means of communication other than face to face contact. The law has perpetuated traditional distinctions which have lost any relevance they once had. Examples include the restriction of the concept of acknowledgements to liquidated claims,[24] and that actions on a contract executed by deed have a twelve year limitation period while actions on a simple contract have a six year period.[25] In addition, the law of limitations cannot easily be applied to some causes of action which have been recently developed. In particular, the Limitation Act 1980 does not naturally apply to the newly-recognised law of restitution founded on unjust enrichment.[26]

(4) Uncertain

11.10 In some areas, the law lacks certainty. For example, the scope of certain causes of action which have been identified in the 1980 Act, such as actions for sums due under an enactment,[27] is unclear. The correct interpretation of the provisions on actual and constructive knowledge,[28] on conversion,[29] and on breach of trust[30] is

[21] See para 3.102 above.

[22] See paras 3.58 - 3.65 above.

[23] See paras 8.6 - 8.10 above.

[24] See para 8.32 above.

[25] See para 3.1 above.

[26] See Part V above.

[27] See paras 7.10 - 7.21 above.

[28] See paras 3.52 - 3.65; 3.94 - 3.98.

[29] See paras 3.108 - 3.115.

open to argument. It is also arguable that the reliance on a judicial discretion to override a limitation period (as in an action for personal injuries or defamation or malicious falsehood)[31] renders the law too uncertain. The existence of this discretion means that the defendant in such cases is exposed to the risk of legal proceedings for an indefinite period.

(5) Unfair

11.11 It would seem that the current law does not provide an acceptable balance between certainty and justice. The problem of latent damage has led to a discoverability starting date being adopted in some areas but not all areas so that, for some plaintiffs, a cause of action can be lost within six years of accrual even though they did not know, and could not reasonably know, of it. On the other hand, the complete lack of a long-stop in personal injury actions means that defendants can never be wholly sure that their liability is terminated.[32]

11.12 The different treatment afforded to personal injury claims where the injury is deliberately caused, compared to injuries which are negligently caused, means that a victim of childhood sexual abuse must bring an action for compensation for that abuse before the age of 24, against the perpetrator of that abuse.[33] Yet a victim of sexual abuse may have a longer period to bring a claim against a defendant who has negligently failed to prevent the abuse.[34] That the limitation period applicable to actions for personal injury may be less favourable where that injury is inflicted deliberately than if the injury is inflicted negligently cannot be justified.

(6) Wastes Costs

11.13 The complexity and uncertainty of the existing law means that in many cases the classification of a particular cause of action for limitation purposes, or whether the limitation period has expired or not, is disputed between the plaintiff and the defendant. These disputes need to be resolved in litigation which is subsidiary to the plaintiff's main claim, an expensive process for both the plaintiff (or the legal aid fund) and the defendant. It is also expensive in terms of the court resources which have to be made available. The giving of a wide discretion to the courts to extend a limitation period in respect of actions for personal injury (under section 33 of the Limitation Act 1980) and for defamation and malicious falsehood (under section 32A of the Limitation Act 1980) may be thought particularly wasteful of costs. For example, there have been over 115 appellate decisions on section 33 of the 1980 Act reported on Lexis.[35] To give defendants no long-stop in relation to personal injury claims means that they must retain records for many years for fear that they may be exposed to claims many years after the act or omission in

[30] See Part IV above.

[31] Sections 33 and 32A of the 1980 Act: see paras 3.66 - 3.76; 3.106 - 3.107 above.

[32] See eg *Headford v Bristol & District Health Authority,* [1995] PIQR P180. See para 8.4 above.

[33] *Stubbings v Webb* [1993] AC 498; see paras 3.32 - 3.35 above.

[34] *S v W* [1995] 1 FLR 862. See para 3.36 above.

[35] See para 12.194 below.

question. In short, the current law of limitations needlessly wastes costs for parties and the state.

(7) Summary

11.14 In our opinion, therefore, the existing law on limitations is unsatisfactory. At this stage in our thinking, we consider that it does not provide an even balance between the interests of plaintiffs in having a sufficient time to identify their claim and pursue it, the interests of defendants in having the certainty that after the expiry of a fixed period of time they are no longer exposed to liability, and the interests of the state in ensuring that there is an end to litigation, and in the efficient use of its resources.[36] The very nature of the problems identified leads us to the provisional view that minor reforms, producing further tinkering, are not what is required: only a comprehensive reform can produce a coherent scheme that is clear, certain, just, modern and cost-effective.

11.15 **It is therefore our provisional view that there should be a fundamental reform of the law of limitations in order to produce a modern code which is, so far as possible, simple, coherent, fair, up-to-date, clear and cost effective. We ask consultees whether they agree. If consultees disagree, we ask them what range of reforms, if any, they would favour.**

2. AN OUTLINE OF OUR MAIN PROVISIONAL PROPOSALS[37]

(1) A Core Regime[38]

11.16 We provisionally propose a core regime. The central features of the core regime would be as follows:-

(1) There would be an initial limitation period of three years that would run from when the plaintiff knows, or ought reasonably to know, that he or she has a cause of action. (But on this most fundamental of questions, we should stress at the outset that we seek consultees' views on whether they would prefer one of four other main options for reform).

(2) There would be a long-stop limitation period of 10 years, or in personal injury claims of 30 years, that would run from the date of the act or omission which gives rise to the claim.

(3) The plaintiff's disability (including supervening disability) would extend the initial limitation period (unless, possibly, there is a representative adult other than the defendant). Adult disability would not extend the long-stop limitation period (and we seek views as to whether minority should do so).

[36] See our discussion of the interests which must be served by the limitation system at paras 1.22 - 1.38 above.

[37] We here repeat paras 1.47 - 1.51 above.

[38] See Part XII below.

Deliberate concealment (initial and subsequent) would extend the long-stop. Acknowledgements and part payments should start time running again but not once the initial or long-stop limitation period has expired.

(4) The courts would *not* have a discretion to disapply a limitation period.

(2) The Range of the Core Regime[39]

11.17 We provisionally propose that the above core regime would apply (without any qualification) to the following actions:

(1) The majority of tort actions (including negligence claims, trespass to the person (including sexual abuse), defamation and malicious falsehood);

(2) contract claims (including on simple contracts and specialties);[40]

(3) restitutionary actions;[41]

(4) breach of trust and related actions, including actions in respect of the personal estate of a deceased person;

(5) actions on a judgment or arbitration award; and

(6) actions on a statute.

11.18 We also provisionally propose that the core regime would extend, but with some qualifications, to the following actions:

(1) Actions under the Law Reform (Miscellaneous Provisions) Act 1934 and the Fatal Accidents Act 1976;

(2) Conversion;

(3) Actions by a subsequent owner of damaged property;

(4) Actions for a contribution or an indemnity;

(5) Actions to recover land and related claims (a fundamental qualification here being that the initial limitation period would not apply to actions to recover land).

11.19 We further provisionally propose that actions against public authorities should not be subject to special (shorter) limitation periods; that the core regime should apply to applications under section 459 of the Companies Act 1985; that where the core regime applies to common law remedies for a cause of action, it should also apply to equitable remedies for that cause of action; and we set out a number of options for the treatment of the doctrine of laches. Subject to a few exceptions, we do not

[39] See Part XIII below.

[40] But for actions for a contractual indemnity or contribution see paras 13.93 - 13.98 below.

[41] But for actions for a restitutionary contribution or indemnity see paras 13.84 - 13.92 below.

propose to alter specific limitation periods laid down in enactments other than the Limitation Act 1980. We provisionally propose to include a "sweeping-up" provision, under which the core regime would apply to all actions unless excluded by another provision of the proposed Bill (or any other enactment).

(3) Additional Issues[42]

11.20 We provisionally propose that:

(1) Subject to the normal rules on the validity of contractual terms, parties would be free to alter the length or the starting date of the initial limitation period by contract. (We seek consultees' views as to whether they should be able to extend the long-stop or change the long-stop starting date).

(2) As under the present law, the limitation period would stop running when proceedings were issued by the plaintiff.

(3) Plaintiffs would be able to add new claims in existing actions where they were sufficiently related to the original cause of action, even where the limitation period had expired since the proceedings were started.

(4) With one exception relating to conversion, no change should be made to the present law on the effect of the expiry of the limitation period.

(5) Where the plaintiff's right to sue is subject to a restriction, the running of time for the purpose of the initial limitation period and the long-stop, should be suspended from the date the plaintiff has done all that he or she could do to lift that restriction.

(6) In general, the burden of proof on limitation should continue to be on the plaintiff.

(7) Our provisionally proposed legislation should apply to causes of action accruing before the legislation commences, except where the cause of action has been barred by the expiry of a limitation period under the provisions of a previous Act, or proceedings have been instituted in respect of a cause of action before the commencement of the provisionally proposed Act.

3. THE STRUCTURE OF SECTION C

11.21 Our discussion is divided into three parts. First, in Part XII, we propose a core limitation regime which will apply, in a uniform way, to at least the vast majority of causes of action in tort or contract. Secondly, in Part XIII, we examine the range of the core regime. In particular, we consider whether the core regime can sensibly apply to a number of "problematic" causes of action (for example, actions in restitution, for breach of trust, and land-related actions) and, if not, what the law on limitation should be for those causes of action. A final part (Part XIV) reviews the options for reform in respect of some of the additional issues identified in Part IX above.

[42] See Part XIV below.

11.22 In discussing the options for reform, we have derived particular help from the reports on the law on limitations by law reform bodies in other common law jurisdictions.[43] We refer extensively to those reports.

[43] See para 1.52, n 98 above.

PART XII
OPTIONS FOR REFORM II: A NEW CORE LIMITATION REGIME

12.1 In considering fundamental reform of the law of limitations, and the elements of a new core regime applicable to (at least the majority of causes of action in) contract and tort there seem to us to be five central issues.

(1) When should time start to run?

(2) How long should the limitation period be?

(3) Should there be a "long-stop"?

(4) What factors, if any, should postpone the running of time?

(5) Should the courts have a discretion to disapply or exclude a limitation period?

12.2 What we provisionally propose, subject to hearing the views of consultees, is a core regime applicable to (at least most causes of action in) contract and tort. The central features of the core regime would be as follows:-[1]

(1) There would be an initial limitation period of three years that would run from when the plaintiff knows, or ought reasonably to know, that he has a cause of action. (But on this most fundamental of questions, we should stress at the outset that we seek consultees' views on whether they would prefer one of four other main options for reform).

(2) There would be a long-stop limitation period of 10 years, or in personal injury claims of 30 years, that would run from the date of the act or omission which gives rise to the claim.

(3) The plaintiff's disability (including supervening disability) would extend the initial limitation period (unless, possibly, there is a representative adult other than the defendant). Adult disability would not extend the long-stop limitation period (and we seek views as to whether minority should do so). Deliberate concealment (initial and subsequent) would extend the long-stop. Acknowledgements and part payments should start time running again but not once the initial or long-stop limitation period has expired.

(4) The courts would not have a discretion to disapply a limitation period.

12.3 We believe that this core regime is simple and clear, and achieves a proper balance of justice and certainty. In particular, while the move to discoverability as the uniform starting date is designed to give greater justice to plaintiffs, by reducing

[1] We here repeat paras 1.47 and 11.16.

the chance of a limitation period expiring before they knew of their cause of action, the long-stop (and the removal of judicial discretion) gives defendants the certainty of knowing that no claims can be brought against them 10 (or, in personal injury claims, 30) years after the relevant act or omission.[2]

12.4 We now explore, through the five central elements outlined in paragraph 12.1 above, the features and details of a core regime. Throughout we shall be asking for consultees' views.

1 WHEN SHOULD TIME START TO RUN?

(1) Accrual, Discoverability, or Defendant's Act or Omission?

12.5 Currently, most limitation periods run from one of two dates: the date on which the cause of action accrues[3] or the date on which the cause of action is first reasonably discoverable by the plaintiff.[4] The date of discoverability was first introduced as a starting point in 1963 for actions for (unintentional) personal injury and has since been utilised in the reforms on negligently caused latent damage, and the Consumer Protection Act 1987. The introduction of the date of discoverability as the starting point is a response to the injustice of the plaintiff's cause of action becoming time-barred before he or she was aware that there was a cause of action.

12.6 The move to reasonable discoverability for personal injuries in the Limitation Act 1963 was a response to the House of Lords' decision in *Cartledge v E Jopling & Sons Ltd,*[5] in which it was held that the cause of action for personal injuries accrued, triggering the limitation period, when the plaintiff first suffered the injury, irrespective of whether he could have known of it. In the realm of latent damage (other than personal injury) it appeared that the courts, under Lord Denning's

[2] Where the plaintiff is enforcing European Community law rights in the English courts (which, in English law, are normally conceptualised as grounded on the tort of breach of statutory duty) we are satisfied that our provisional proposals do not infringe Community law which grants procedural autonomy to national legal systems so long as national rules do not discriminate between EC and domestic rights and do not make EC rights "excessively difficult" to enforce. Cf C-199/82, *Ammistrazione delle Finanze dello Stato v SpA San Giorgio* [1983] ECR 3595, para 14; C-430/93, 431/93, *Peterbroeck, Van Campenhout & Cie SCS v Belgium* and *Jeroen van Schijndel v Stichtung Pensionenfonds voor Fysiotherapeuten,* [1995] ECR I-4705. This doctrine of "qualified procedural autonomy" permits "reasonable limitation periods." See C- 33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland,* [1976] ECR 1989. See generally M Hoskins, "Tilting the Balance: Supremacy and National Procedural Rules" (1996) 21 ELR 365. However, it should be noted that, where a Member State has incorrectly implemented a directive creating directly effective rights, it cannot itself rely on national limitation periods: C-208/90, *Theresa Emmott v Minister for Social Welfare and the Attorney General,* [1991] 1 ECR 4269, and *Cannon v Barnsley MBC* [1992] IRLR 494.

[3] See para 3.1 (Contract); para 3.12 (Tort); para 3.105 (Defamation); para 4.1 (Breach of Trust); para 4.33 (Actions in respect of personal estate of a deceased person); para 6.4 (Land-related actions); para 6.45 (Recovery of Rent); para 7.1 (Actions on a judgment); para 7.10 (Specialties); para 7.10 (Money recoverable by statute); para 7.23 (Actions for a contribution).

[4] See para 3.29 (Personal Injuries); para 3.88 (Latent Damage); para 3.101 (Actions under the Consumer Protection Act 1987).

[5] [1963] AC 758.

influence, would themselves move to a reasonable discoverability test by treating that as the date of the accrual of the cause of action. In *Sparham-Souter v Town and Country Developments (Essex) Ltd*[6] the Court of Appeal held that the plaintiff's cause of action in negligence, in respect of the negligent approval by the council of building work on their houses, did not accrue until the damage manifested itself, so as to be reasonably discoverable by the plaintiffs. However, this approach was rejected by the House of Lords in *Pirelli General Cable Works Ltd v Oscar Faber & Partners*[7] (also a case of latent damage to a building), which held that the date damage became discoverable by the plaintiff was irrelevant. The cause of action accrued when damage was done to the building.[8] The Latent Damage Act 1986 has resolved the injustice revealed by this decision.

12.7 In considering what should be the appropriate starting date for limitation periods under a core regime, we think that there are five main options for reform: Option one: date of discoverability; Option two: date of discoverability or accrual of the cause of action; Option three: date of accrual of the cause of action; Option four: date of the act or omission giving rise to the cause of action; Option five: date of accrual of the cause of action for contract claims, date of discoverability for tort claims.[9] We look at each of these five options in turn.

12.8 Before doing so, we should emphasise two points. First, we do not favour an approach,[10] whereby it is left to the discretion of the court whether the limitation period running from the date of accrual of the cause of action should be overridden if the cause of action was not reasonably discoverable by the plaintiff. In our view, to rely on judicial discretion needlessly risks inconsistency and uncertainty on a fundamental policy issue which can be, and should be, decided once and for all. Secondly, we think that it is preferable, in avoiding confusion, to distinguish between the accrual of the cause of action and the discoverability of the cause of action, rather than adopting the solution put forward in *Sparham-Souter v Town and Country Developments (Essex) Ltd*[11] according to which the cause of

6 [1976] QB 858.

7 [1983] 2 AC 1.

8 *Pirelli General Cable Works Ltd v Oscar Faber & Partners* has not been accepted in other common law jurisdictions, as the decision of *Invercargill City Council v Hamlin* [1996] 1 AC 624 demonstrates. The Privy Council, hearing an appeal from the New Zealand Court of Appeal on a latent damage claim, accepted that *Pirelli* did not represent New Zealand law on limitations, and held that (under New Zealand law) in cases of latent defects, the damage suffered by the plaintiff was economic loss, and in consequence that the cause of action could only be said to accrue when the damage was discoverable by the plaintiff (See further paras 3.15 - 3.16, 3.19, and 10.74 - 10.75 above).

9 We consider the range of the core regime, beyond contract and tort, in Part XIII and there provisionally recommend that discoverability should apply to many other claims in addition to tort.

10 To some extent adopted in the Defamation Act 1996.

11 [1976] QB 858. This was also the approach taken for New Zealand in *Invercargill City Council v Hamlin* [1996] 1 AC 624 (see para 10.74 above), and is also adopted in Canada (see para 10.96). The courts in a number of US jurisdictions have also held that the cause of action only accrues when it is discoverable by the plaintiff, an approach which has in some cases been overturned by legislation. See paras 10.107 - 10.112.

action does not accrue until the facts relevant to it are reasonably discoverable by the plaintiff.

(a) Option one: date of discoverability

12.9 According to this option, time would not start to run until the plaintiff knows, or ought reasonably to know, that he or she has a cause of action (that is, that time should not start to run until the date of discoverability). The date of discoverability responds to the injustice to a plaintiff of the limitation period running before the plaintiff knew, or could reasonably have known, that he or she had a cause of action. To adopt it for (most) contract and tort claims would be to continue the developments in limitation law since the Limitation Act 1963. While the acceptance of discoverability in personal injury claims and in negligent latent damage claims has been in direct response to the injustice exposed by the House of Lords' decisions in *Cartledge v E Jopling & Sons Ltd*[12] and *Pirelli General Cable Works Ltd v Oscar Faber & Partners,*[13] the injustice of "latent damage" potentially remains for all claims where a discoverability test does not apply. A further advantage of a general move to discoverability is that it "swallows up" at least to some degree, the need for special "discoverability" exceptions based on mistake, fraud or concealment,[14] and thereby renders the law simpler.

12.10 Discoverability has been recommended as the basic test for limitation periods by other (common law) law reform bodies, most notably the Alberta Law Reform Institute,[15] the Ontario Limitations Act Consultation Group[16] and the Law Reform Commission of Western Australia.[17] And while the Law Commission of New Zealand has proposed the date of the act or omission giving rise to the cause of action as the date of commencement of the limitation period, it would still allow for an extension (as of right) where the plaintiff gains knowledge of a material fact relating to the claim after that date.[18]

12.11 But while a move to discoverability may be regarded as having the principal merit of producing greater justice to plaintiffs by overcoming the "latent damage" problem (under which a plaintiff might lose his or her action before he or she could reasonably have known of it), it might be thought to carry the disadvantage - in contrast to, for example, the "accrual" approach - of uncertainty. Although there are some areas where the law is not wholly certain as to when a cause of action accrues (in particular, for pure economic loss in the tort of negligence), it is

[12] [1963] AC 758.

[13] [1983] 2 AC 1.

[14] See paras 8.11 - 8.24 above.

[15] In *Limitations,* Report No. 55 (1989), a recommendation subsequently enacted in Alberta's Limitations Act 1996, c L-15.1.

[16] *Recommendations for a New Limitations Act, Report of the Limitations Act Consultation Group* (1991).

[17] *Report on Limitation and Notice of Actions,* Project No 36 - Part II (1997). See also the proposals of the Law Reform Commission of Ireland, *Report on the Statute of Limitations: Claims in Respect of Latent Personal Injuries,* LRC 21 (1987), discussed at para 10.38 above.

[18] *Report No 6, Limitation Defences in Civil Proceedings,* NZLC R6 (1988). See para 10.68 above.

accurate to say that, in general, the date when a cause of action accrues is certain. In contrast, the date of discoverability may vary from case to case depending on the particular plaintiff in question. It may require resolution through oral evidence and discoverability of documents which will affect the length and cost of hearings. Difficult questions may further arise as to when a corporate plaintiff has knowledge, that would not arise if time ran from accrual of the cause of action or from the defendant's act or omission.

12.12 The potential uncertainty of discoverability - and the danger of adding to the factual issues in dispute, increasing satellite litigation, and increasing legal costs - may be thought particularly problematic, and would represent a major change from the present law, in respect of actions for breach of contract. As we have seen, for breach of contract, and in sharp contrast to tort, there is a more or less uniform and well-established limitation regime of 6 years (or where a contract is made under deed, 12 years) running from the date of the breach of contract.[19] In claims for breach of contract, the date the plaintiff's cause of action accrues is usually (though not always) easy to establish. Consequently, both parties to a potential action for breach of contract will know with some certainty when the limitation period starts to run, and when it will expire. As certainty is particularly important in contract cases, starting the limitation period from the date of accrual of the cause of action (or, which would be the same in this context, the date of the act or omission giving rise to the claim) may be thought to have considerable advantages. As "accrual" is the traditional approach, one can also argue that it has the merit of familiarity.

12.13 However, while certainty should be an important goal of a limitations regime, it can be argued that the better way of achieving the necessary degree of certainty is by combining an initial limitation period running from discoverability with an overall "long-stop" limitation period running from the act or omission of the defendant. We discuss long-stops below.[20] Suffice it to say here that, if an initial limitation period of three years running from discoverability combined with a long-stop of 10 years (or 30 years under personal injury claims) is adopted, there would be absolute certainty that the plaintiff who issued proceedings in the 3 years from accrual of the cause of action would be within the limitation period; and, subject to factors such as disability and deliberate concealment, there would be absolute certainty that the plaintiff who issued proceedings more than 10 years (or for personal injury claims more than 30 years) from the relevant act or omission would be outside the "long-stop" limitation period. And in the interim period (more than 3 years from accrual and less than 10 years - or, for personal injury claims, 30 years - from the relevant act or omission) one can argue that justice to plaintiffs requires some sacrifice as to certainty.

(b) Option two: date of discoverability or accrual of the cause of action

12.14 Under this option, one would have a longer period of time (say, 6 years) running from accrual of the cause of action *as an alternative* to a shorter period (say, 3 years) running from discoverability. This, along with a long-stop, would be to

[19] See paras 3.1 - 3.11 above.

[20] See paras 12.97 - 12.113 below.

adopt the model of the Latent Damage Act 1986, which at present applies to latent damage claims in the tort of negligence other than for personal injury.[21] The great attraction of this approach is that it would render the core regime more certain in the sense that after, say, 3 years from accrual, there would be less need for plaintiffs to rely on discoverability than under option one. It also has the possible advantage of leaving in play the traditional limitation approach (especially in the contract sphere) with which lawyers are familiar. Even within the realm of personal injury, where the period of time running from accrual of the cause of action is the same as, rather than longer than, the period from discoverability, this option might be seen as a 'pro-plaintiff' move that compensates for the removal of the discretion to disapply the primary limitation period that we provisionally recommend below.[22]

12.15 But we are not convinced that the plaintiff, who knows or ought to know straightaway of his or her cause of action, should have an additional period to bring a claim beyond that considered appropriate from discoverability. And this option would not remove any uncertainty in the discoverability test, other than avoiding it during the chosen longer period running from accrual. In principle therefore - although it is questionable whether this is possible in practice - the better approach would seem to be to ensure that the test of discoverability is sufficiently certain. A further minor disadvantage of this option is that the precise date when a cause of action accrues (which has caused some problems in the past) would be of critical importance: and to have an additional period running from accrual, on top of discoverability and a long-stop, makes the law more complex than, perhaps, it needs to be.

(c) Option three: date of accrual of the cause of action

12.16 In respect of personal injury and latent damage in the tort of negligence, this would return the law to where it was before 1963 and 1986 respectively. It would constitute a general unwillingness to accept any degree of uncertainty associated with attempting to produce justice for plaintiffs in "latent damage" cases. Justice to plaintiffs might be dealt with instead by extending the limitation period from, say, three years or six years to ten years or much longer. But this would have the disadvantage of affording the plaintiff the opportunity to delay in bringing a claim. To allow a plaintiff, who knows the relevant facts from the outset, ten years or more to commence proceedings may be thought to permit an unacceptably long delay by the plaintiff.

(d) Option four: date of the act or omission giving rise to the cause of action

12.17 Under this option, time would run from, for example, the date of the breach of contract or, in a tortious negligence claim, the date of the negligent act or omission (irrespective of when damage is caused).[23] But while in most cases giving

[21] See paras 3.87 - 3.100 above.

[22] See para 12.196 below.

[23] In respect of construction liability claims, one might deem the date of the completion of the works to be the date of the defendant's act or omission. See para 12.106 below.

certainty, this approach may be thought objectionable in principle in that the initial limitation period might run before the accrual of the cause of action and hence before the plaintiff could sue. It may be thought preferable, therefore, to confine use of the date of the act or omission to being the starting date for the long-stop. However, consultees might favour this option on the basis that all one needs is a single long-stop limitation period and that allowing plaintiffs even as much as, say, 10 years from act or omission[24] is preferable to the uncertainty of a discoverability test. But where the act or omission gives rise to a known cause of action from the outset, allowing the plaintiff ten years to bring an action may be thought to permit an unacceptably long delay by the plaintiff.

(e) Option five: date of accrual of the cause of action for contract claims; date of discoverability for tort claims[25]

12.18 The attraction of this option is that it would leave undisturbed the certain and familiar present starting date for contract claims.[26] This would ensure that the limitation period for contract claims consisted of a fixed period starting from a fixed, and usually easily ascertainable, point in time.[27] Both plaintiff and defendant would be certain, in most cases, of the time available to the plaintiff for bringing a claim for breach of contract. On the expiry of this period, the defendant could be sure that he or she could no longer be held liable for any breach of contract which may have occurred. In consequence, there would be less chance of disputes on limitation questions, and in turn less satellite litigation on issues subsidiary to the main action. Moreover, in contrast to the discoverability test, the problematic issue of fixing the knowledge of corporate plaintiffs is irrelevant to the accrual test, and little oral or documentary evidence would be required to resolve the limitation question. This approach would also reduce the chance that actions might proceed to full trial only for the judge to hold that the plaintiff's claim was time-barred, after both parties had incurred substantial costs, and judicial resources had been wasted. Defendants, once sure that their potential liability had ended, would be able to destroy relevant records and reduce the amount of liability insurance held, so enjoying cost savings. It can also be argued that, given the Latent Damage Act 1986 - and the acceptance in *Henderson v Merrett Syndicates Ltd*[28] of concurrent

[24] On pre-consultation, representatives of the construction industry suggested that there should be a single limitation period for construction liability claims of 10 years running from the date of the completion of the works. See also Construction Industry Board, *Report from Working Group 10 on Liability Law* (1995) paras 51 - 58.

[25] See para 12.7, n 9, above.

[26] See also para 12.12 above.

[27] The advantages of certainty in respect of contract cases may be illustrated by the fact that many International Conventions regulating claims in relation to, for example, the international carriage of goods, have chosen a fixed, easily ascertainable, date as the starting point for the limitation period. (The Convention on the Contract for the International Carriage of Passengers and Luggage by Road 1974, and the International Convention on Liability and Compensation of Damage in connection with the Carriage of Hazardous and Noxious Substances by Sea are two exceptions to that rule, each relying on a date of discoverability). Similarly, jurisdictions such as Germany, and many states in the United States have adopted a fixed date as the starting point for the limitation period for actions for breach of contract.

[28] [1995] 2 AC 145.

liability in contract and tort - the accrual rule in contract causes little injustice: plaintiffs can generally frame their action in the tort of negligence so as to take advantage of the discoverability test introduced by that Act. Supporters of this option might also argue that there is no merit in uniformity in limitations law if it is achieved at the expense of certainty in contract law.

12.19 We should also point out that, because of the need to ensure certainty in relation to the ownership of land, we later take the provisional view that actions to recover land should not be subjected to a limitation period running from discoverability. Rather a single long-stop limitation period should be applied to them.[29] One can argue that the need for certainty in relation to contract claims means that they should be treated somewhat similarly so that for contract claims (as opposed to tort claims) there should be a single limitation period (of, say, ten years) running from the date of the breach of contract.

12.20 The disadvantage of this option is that a fixed starting point for a limitation period produces injustice where the plaintiff could not reasonably know of the breach of contract (that is, where the damage is latent). Although contract has not had a decision analogous to *Cartledge v E Jopling & Sons Ltd*[30] or *Pirelli General Cable Works v Faber (Oscar) & Partners,*[31] exposing the injustice of a limitation period running from accrual rather than discoverability, the possibility of such a decision is hard to ignore in reforming the law.[32] The provisions of the Latent Damage Act 1986 cannot help plaintiffs where the breach is non-negligent and so cannot be sued for in the tort of negligence (for example, the breach of a strict obligation to build to a proper standard). Moreover, one may think that the time has come to avoid encouraging reliance on 'tort' to overcome weaknesses in contract law. One can also argue that it would be unfortunate and, arguably, renders the law needlessly complex, to have a different starting date rule for contract than for tort. And one should not ignore the possibility that, subject to the normal rules on the validity of contractual terms, contracting parties can provide their own "more certain" limitations regime (for example, with time running from accrual of the cause of action rather than discoverability) should they so wish.[33]

(f) Provisional conclusion

12.21 While each of the above five options has advantages and disadvantages, our provisional preference, prior to hearing the views of consultees, is for option one (date of discoverability). While we are most anxious not to create needless uncertainty, at this stage in our thinking we believe that a reform of limitations law that ignored the injustice to plaintiffs of "latent damage" - including in contract claims - would be unacceptable. Moreover, we would hope that sufficient certainty could be achieved first, by spelling out in legislation the precise

[29] See paras 13.114 - 13.121 below.

[30] [1963] AC 758.

[31] [1983] 2 AC 1.

[32] And if one sought to counter this by choosing a long limitation period (say, ten years) one would, in contrast, be allowing a plaintiff who knows the facts from the outset a very long period to commence proceedings.

[33] See paras 14.1 - 14.6 below.

ingredients of the date of discoverability, including how to deal with corporate knowledge; and secondly, by combining discoverability with a long-stop. We deal with both these points in detail below. We provisionally believe that the goal of a simple, fair and uniform limitation regime is one worth striving for even if, in the short term, there are areas where the law is rendered less certain than at present.

12.22 **We ask consultees which, if any, of the above five options they prefer, and why. Before expressing their views we would urge consultees to consider the definition of the date of discoverability (including corporate knowledge) discussed at paragraphs 12.26 - 12.87 below. We would also ask consultees to bear in mind paragraphs 14.1 - 14.6 below where we indicate that, subject to the normal rules on the validity of contractual terms, contracting parties should be able to provide their own "more certain" regime should they so wish. We would be particularly keen to hear consultees' views as to whether option one should be rejected because of the danger that, in contrast to the present law, it would lead to satellite litigation and would increase legal costs. If consultees feel that none of the options discussed above is appropriate, they are requested to set out their preferred alternative.**

12.23 We should add three points. First, even if one were to move to the date of discoverability, it is discoverability of the *cause of action* that counts, so that the different rules as to when a cause of action accrues would continue to have some relevance to limitation of actions. This seems inevitable given that causes of action are different and accrue at different dates. In particular, we cannot ignore the difference between wrongs actionable per se and wrongs actionable only on proof of damage. To concentrate only on damage or loss would, for example, involve providing no limitation period for a claim for nominal damages for breach of contract. In contrast, to focus on the date of knowledge of the act or omission giving rise to the cause of action would mean that the date of knowledge might occur at a time when the plaintiff had no right to sue. That is, the initial limitation period might start to run before the plaintiff could sue, which would seem anomalous in principle. In the vast majority of situations, albeit not all, where a breach of contract causes the same damage as the tort of negligence, application of our proposed uniform scheme would produce the same limitation periods. That is, the discoverability date for the damage will coincide with the discoverability date of the breach of contract.[34] And, as we shall see, the running of long-stops would be identical as between contract and tort.[35]

12.24 A second (rather technical) point is that we have seen[36] that, where a loan did not provide for repayment by a particular date and where repayment was not conditional on a demand, the common law rule was that the cause of action accrued (and time therefore ran) from when the loan was made. Section 6 of the 1980 Act reverses this rule so that, where there is a demand in writing for repayment of the debt, the cause of action is deemed to accrue on the date on

[34] The emphasis under our proposals on the cause of action being significant - see below paras 12.33 - 12.44 - would also tend to produce assimilation in practice.

[35] See paras 12.105 - 12.113 below.

[36] See para 3.8 above.

which the demand was made. We would not wish to undermine section 6. We should therefore make clear that for the purposes of the core regime we intend to preserve the current law - including section 6 - governing the accrual of a cause of action to recover a loan repayable on demand.

12.25 Thirdly, in the case of continuing or recurring torts or breaches of contract the limitation regime chosen will affect the amount of damages that can be recovered.[37] Say, for example, D fails to pay an annual charge to P for the use of a product licensed to him in 1990 for twenty years. P discovers (and could only discover) the recurring breach of contract in 2002. P brings proceedings in 2004. Applying the present law, under which the limitation period for contract is six years from accrual, P would be able to recover charges for the period after, but not before, 1998. Applying a discoverability starting date (with, let us say, a three year initial period running from discoverability subject to a long-stop of ten years from breach) P would be entitled to recover charges for the period from 1994 (before then the long-stop would, we think, bite). If P ought to have discovered the recurring breach of contract in 1999, he would (under a three-year discoverability regime) be able to recover the charges for the period from 2001 onwards.[38]

(2) Definition Of The Date Of Discoverability

(a) Introduction

12.26 Our provisional recommendation for a move to "date of discoverability" as the general commencement point for limitation periods in a core regime renders it incumbent on us to define "date of discoverability", or the "date of knowledge" of the plaintiff. According to the current definition of the date of knowledge (used for personal injury and latent damage claims), account is taken of whether the plaintiff knows or ought to know particular facts: that is, that the injury or damage is significant (and significance is defined using the assumptions that the defendant does not dispute liability and is able to satisfy a judgment), that the damage or injury in question is attributable to the defendant's breach of duty, and the identity of the defendant.[39] However, the plaintiff's lack of knowledge that the acts or omissions of which he complains give rise to a cause of action at law is irrelevant.[40] The plaintiff is fixed with knowledge which he might reasonably have been expected to acquire including knowledge of those facts which are ascertainable with the help of expert advice which "it was reasonable for him to seek", unless he has taken all reasonable steps to obtain and if necessary act on the advice received.[41]

12.27 We discuss below first, what facts should be known before the initial limitation period is triggered (paragraphs 12.28 to 12.44). The subsequent two sections discuss what is meant by “actual knowledge” of those facts, and “constructive

[37] See paras 3.3 - 3.6, 3.24 - 3.28 above.

[38] For an example under the current law of the effect on quantum of damages of a discoverability approach to limitation, see para 3.28 above.

[39] See paras 3.40 - 3.51 and 3.94 - 3.98.

[40] Section 14(1); s14A(9). See paras 3.39; 3.95 above.

[41] Section 14(3); s14A(10). See paras 3.58 - 3.65; 3.95 above.

knowledge" of those facts (that is, when the plaintiff "ought to know" the relevant facts) (paragraphs 12.45 to 12.51 and 12.52 to 12.58 respectively). We then discuss whether knowledge of the law should be relevant (paragraphs 12.59 to 12.69). In the last section we examine corporate knowledge (paragraphs 12.70 to 12.87).

(b) Knowledge of which facts?

12.28 Recent proposals from law reform bodies in other common law jurisdictions have tried to simplify the definition of knowledge as much as possible. At the same time, it is felt to be essential to specify the information the plaintiff is expected to have on the date of knowledge in some detail. Some of the alternative definitions which have been proposed by law reform bodies in common law jurisdictions are:

(1) (a) A claimant who gains knowledge

(i) of the occurrence of the act or omission on which the claim is based; or

(ii) of the identity of the person to whom the act or omission is wholly or partly attributable, whether as principal, agent, employee or otherwise; or

(iii) of the harm suffered by the claimant as a result of the act or omission; or

(iv) that the harm is significant

after the date of the act or omission on which the claim is based, may bring the claim within the time extension described in subsection [b].

(b) The time extension is three years after the latest date the claimant gains knowledge of any of the facts described in subsection (1).

(c) In subsection [b], the phrase 'date the claimant gains knowledge' means the date the claimant gains knowledge of the facts described or any earlier date on which the claimant, in the claimant's circumstances and with the claimant's abilities, should have known of those facts. (Law Commission of New Zealand, section 6 of Model Limitations Act).[42]

(2) The date the claimant first knew, or in the circumstances ought to have known,

(a) that the injury for which the claimant seeks a remedial order had occurred,

(b) that the injury was attributable to the conduct of the defendant, and

[42] *Report No 6, Limitation Defences in Civil Proceedings,* NZLC R6 (1988).

(c) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding (Province of Alberta, Limitations Act c L-15.1 1996, section 3(1)(a)).[43]

(3) A claim is discovered on the earlier of

(a) The day on which the person with the claim first knew,

(i) that the injury, loss or damage had occurred,

(ii) that the injury, loss or damage was caused by or contributed to by an act or omission,

(iii) that the act or omission was that of the person against whom the claim is made, and

(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a). (Ontario Limitations (General) Bill 1992, clause 5(1)).

(4) The date on which the plaintiff first knew, or in the circumstances ought to have known, that:

(a) the injury in respect of which he brings proceedings had occurred;

(b) the injury was attributable to the conduct of the defendant; and

(c) the injury, assuming liability on the part of the defendant, warrants bringing proceedings. (Law Reform Commission of Western Australia).[44]

12.29 In the light of the above proposals of other law reform bodies - and in line with the present English provisions on discoverability - we consider that the definition of discoverability should focus on three main factual elements:-

(1) knowledge of the facts constituting the cause of action;

(2) knowledge of the identity of the defendant;

(3) knowledge that the cause of action is significant.

We shall look at each of the above three main factual elements of the definition in turn.

[43] This Act was assented to on 1 May 1996. It is not yet in force. It is based on the recommendations of the Alberta Law Reform Institute, Report No 55, *Limitations* (1989).

[44] *Report on Limitation and Notice of Actions,* Project No 36 - Part II (1997) para 7.21.

(i) Knowledge of the facts constituting the cause of action

12.30 As regards the first of the three main elements of the definition, we focus on knowledge that the facts constituting the cause of action have occurred, rather than on knowledge of "injury, loss or damage" which is the approach used by some of the law reform bodies cited above. This is because we wish our proposed definition to have general application. In many actions, where the plaintiff seeks compensation for damage suffered (such as an action for negligently caused personal injury) our criteria will be fulfilled when the plaintiff knows: first, of the damage or injury; secondly, of the act or omission which constituted the breach of a duty of care, and thirdly, that the act or omission is causally linked to the damage. This is similar to the tests currently in force for personal injury and for other negligently caused latent damage. However, in actions for breach of contract, torts actionable per se and claims for restitution, "injury" in the sense of loss suffered by the plaintiff is not a necessary element in the action: the plaintiff may not, indeed, have suffered any identifiable loss. In such cases the criterion would be fulfilled when the plaintiff knows, first, of a breach of a duty owed to him or her, or other infringement of his or her rights, and secondly, that the breach or infringement is attributable to the conduct of the defendant.

12.31 We discuss below the general question of whether greater weight should be attached to a lack of knowledge of the law than is the case under the present law.[45] But we should stress here that, in some contexts, it is hard to distinguish knowledge of the bare facts constituting a breach of duty from the legal significance of those facts. The clearest example is where the breach consisted of an omission to take a certain step. The existing law has been moving towards deferring knowledge of attributability, in the case of an omission, until the plaintiff is aware that there has actually been a failure to do something, and this is unlikely to arise until he or she knew that there had been negligence.[46] One can say, therefore, that, even adhering to the present law's view that facts alone are relevant, in some situations a plaintiff has no knowledge of the relevant facts until he or she knows (or ought to know) that something should have been done which was not done.

(ii) Knowledge of the identity of the defendant

12.32 The second of the three main elements - knowledge by the plaintiff of the identity of the defendant - is straightforward and self-explanatory. Although the plaintiff may know that the cause of action has occurred it would not be right for time to start to run until he or she has knowledge of the identity of the defendant. Without that knowledge no action can be commenced. In this respect, one can simply apply the existing statutory provision in English law which, as far as we are aware, has not given rise to difficulties.[47] We should add, however, that contrary to sections 14(l)(d) and 14A8(c) of the 1980 Act we do not see the need to complicate the reference to the identity of the defendant by including a special

[45] See paras 12.59 - 12.69 below.

[46] *Forbes v Wandsworth Health Authority* [1996] 3 WLR 1108 (CA); *Smith v West Lancashire Health Authority* [1995] PIQR P514 (CA). Cf *Dobbie v Medway Health Authority*[1994] 1 WLR 1234. See paras 3.45 - 3.49 above.

[47] See para 3.50 above.

provision for vicarious liability. The running of time should not be delayed simply because the plaintiff cannot identify the particular employee responsible where the action is being brought against the employer on the basis of vicarious liability.

(iii) Knowledge that the cause of action is significant

12.33 Much more problematic is the third main element of the basic definition: the 'significance' test. Under the present law, an injury is significant if the plaintiff would reasonably have considered it sufficiently serious to justify his instituting proceedings against a defendant who did not dispute liability and was able to satisfy a judgment.[48] As clarified in *McCafferty v Metropolitan Police Receiver,*[49] the test is partly subjective and partly objective: would this plaintiff, with this plaintiff's intelligence, have been reasonable in considering the injury not sufficiently serious to justify instituting proceedings?

12.34 The test is designed to ensure that the defendant's lack of resources and denial of liability do not delay the start of the limitation period. At the same time, it is intended to prevent an apparently trivial injury triggering the limitation period. In the Law Reform Committee's Report on Latent Damage, which recommended that the definition of knowledge for personal injury cases should be applied to other cases of latent damage, it was noted that:

> Latent damage is by definition hard to detect and may in many cases be heralded by defects that at first appear to be minor and isolated. It may not be until much later that the full significance of these early defects becomes apparent and it might be harsh if an extended period of limitation based on discovery or discoverability started to run against the plaintiff from the moment that the first apparently trivial damage appeared.[50]

12.35 The present test of significance has been criticised.[51] The assumptions relied on - that the defendant does not dispute liability and is able to satisfy a judgment - are unrealistic. On those assumptions, the significance threshold is very low. That is, very few injuries will be insignificant so that the definition works to the disadvantage of plaintiffs.[52] For example in *Horbury v Hall & Rutley*[53] it was held

[48] Section 14(2) of the 1980 Act, relating to personal injury. See paras 3.40 - 3.44 above. Cf s 14A(7) (latent damage). "Significance" for personal injury is tested by reference to whether the plaintiff would reasonably have considered it significant (that is the test combines both subjective and objective elements). For other latent damage "significance" is tested by reference to whether a reasonable person would have considered it "significant" (so that the test appears to be wholly objective). See further para 3.94 above.

[49] [1977] 1 WLR 1073, 1081.

[50] *Twenty-Fourth Report (Latent Damage)* (1984) Cmnd 9390, para 4.7.

[51] See PJ Davies, "Limitations of the Law of Limitation" (1982) 98 LQR 249; M A Jones, "Latent Damage: Squaring the Circle?" (1985) 48 MLR 564; N J Mullany, "Reform of the Law of Latent Damage" (1991) 54 MLR 349, 350 - 353 and Ormrod LJ in *Chappell v Cooper* [1980] 1 WLR 958, 967.

[52] It has been suggested that "it is almost every cough or sprain that will be sufficiently serious to justify an action": P J Davies, "Limitations of the Law of Limitation" (1982) 98 LQR 249, 257.

[53] [1991] CIIL 692. See also *Hamlin v Edwin Evans,* [1996] 2 EGLR 106; paras 3.96 - 3.98 above.

that time started to run against a purchaser of a house severely damaged by dry rot when she was informed of unsupported chimney breasts (which cost £132 to repair), not when the extent of the dry rot became apparent (remedial works for which cost £75,000*)*. In consequence her claim was time barred. As the judge noted:

> Many people would write off a claim which was for a maximum of £132 if it would be contested, but if the prospective Defendant did not dispute liability a reasonable person in the Plaintiff's circumstances and with 1984 money values would consider the loss sufficiently serious to institute proceedings.[54]

In reality the degree of damage which would lead a reasonable plaintiff to bring proceedings against a defendant who disputed liability, or whose resources to meet a claim are uncertain, is likely to be considerably greater than in cases where the defendant is solvent and admits liability.

12.36 On the other hand - and in support of the present English approach - if one feeds in all the realities that go into making a reasonable decision, as to whether a legal action should be brought, one risks making the test of discoverability too complex and uncertain. It would be particularly difficult for account to be taken of the plaintiff's prospects of success in the action. To do so would in effect require a trial of the substantive claim in order to fix the date of discoverability. Moreover, if one fed in the defendant's resources, one could produce a result that a very serious injury is not "significant" where the defendant is insolvent.

12.37 Knowledge of the "significance" of the injury is regarded as one of the essential criteria for a definition of knowledge by other law reform bodies.[55] The Law Reform Commission of Saskatchewan has chosen to recommend the full English formula.[56] The Alberta Law Reform Institute preferred to keep the assumption of 'no dispute on liability' but to dispense with the explicit assumption that the defendant has the resources to meet the claim.[57] The Western Australia Law Reform Commission does not discuss what "significance" means, but

[54] [1991] CIIL 692, 694. See also *Bristow v Grout, The Times,* 3 November 1986, and *McCafferty v Commissioner for Metropolitan Police* [1977] 1 WLR 1073, where though the plaintiff initially regarded the deterioration to his hearing as an "irritating nuisance" which was not worth bothering about, the court treated it as "significant" on the basis of the assumptions incorporated in the Act. The court also held in *McCafferty* that, in considering whether an injury was "significant", no regard could be had to circumstances affecting the plaintiff such a desire not to bring an action against his employer thus imperilling future job prospects.

[55] See para 12.28. An exception is the Newfoundland Law Reform Commission, which has recommended that the criteria for knowledge should be limited to "the identity of the defendant and the facts on which [the plaintiff's] action is founded", noting "We feel that each additional item of knowledge and definition will multiply problems." See *Working Paper on Limitation of Actions,* NLRC-WP1 (1985), p l99.

[56] *Proposals for a New Limitation of Actions Act, Report to the Minister of Justice* (1989) p 32 and s 10 (3) of the proposed Act.

[57] Alberta Law Reform Institute, *Limitations*, Report No 55 (1989), p 33. See Limitations Act 1996, c L-15.1, s 3(1).

recommended a definition of knowledge based on the Alberta definition.[58] In contrast in New South Wales and British Columbia the likely outcome of the proceedings has to be considered.[59] And in New Zealand the issue of significance has simply been left without further definition.[60] The Scottish Law Commission has recommended the adoption of a test for significance very similar to that in section 14(2) of the 1980 Act.[61]

12.38 We have found this issue difficult but have ultimately provisionally concluded that the present English approach of assuming that the defendant does not dispute liability and has the resources to meet the claim is to be preferred. Although that assumption is an unrealistic one, we think that it has to be made to avoid making the law complex and uncertain. For example, we wish to avoid the court having to determine the chances of the substantive action being successful in deciding the limitation issue: and we do not think that plaintiffs should be allowed to argue that the fact that their evidence was incomplete was a good reason for not issuing proceedings in time. We also consider that it is right to make the significance threshold a low one. After all, it must be remembered that the central alternative to discoverability as the starting date is the accrual of the cause of action and the triviality of the cause of action is irrelevant to the latter. Moreover, a court faced with the problem of a trivial injury becoming more serious assesses damages according to the likely future position. There is therefore no necessary reason why plaintiffs should delay to see if their position will worsen. In the sphere of personal injury, provisional damages are also now available. And in many situations of damage becoming more serious there is a continuing cause of action so that time can start to run afresh from the latest date of knowledge of the cause of action.

12.39 One might argue that the above arguments suggest that there should be no significance test at all. But we do think that there is a justification for the courts having the flexibility to decide what is so trivial that it excuses the plaintiff's delay

[58] Law Reform Commission of Western Australia, *Report on Limitation and Notice of Actions,* Project No 36 - Part II (1997), para 7.21.

[59] Namely:

"(i) that an action on the cause of action would (apart from the effect of the expiration of a limitation period) have a reasonable prospect of success and of resulting in an award of damages sufficient to justify the bringing of an action on the cause of action; and

(ii) that the person whose means of knowledge is in question ought, in his own interests, and taking his circumstances into account, to bring an action on the cause of action." (New South Wales S.N.S.W. 1969 Act no 31, s 57(c)) and

"(i) an action on the cause of action would, apart from the effect of the expiration of a limitation period, have a reasonable prospect of success; and

(ii) the person whose means of knowledge is in question ought, in his own interests, and taking his circumstances into account, to be able to bring an action." (Limitation Act 1979, R.S.B.C 1979 c 236 s 6(3)).

[60] New Zealand Law Commission, *Report No 6, Limitation Defences in Civil Proceedings,* NZLC R6 (1988), Model Limitations Act cl 6. See also Ontario Limitations (General) Bill 1992, clause 5(1), which lays down simply that the "having regard to the nature of the injury, loss or damage, a proceeding would be the appropriate means to seek to remedy it".

[61] Report on Prescription and Limitation of Actions (Latent Damage and Other Related Issues) (1989) Scot Law Com No 122, paras 2.17 - 2.25. See para 10.13 above.

in commencing proceedings. And we believe that the present English test does afford that flexibility, albeit that there is a danger that the courts may apply the test to produce too low a threshold of significance. *Horbury v Hall & Rutley*[62] may be an example of this. Furthermore, the existence of the rule precluding more than one claim for damages in respect of the same cause of action[63] may seem to exacerbate the prejudicial effect which this has on plaintiffs. It has been argued that section 14(2), as it has been interpreted by the courts, operates against the perceived intention of the subsection, to allow plaintiffs time for their injuries to manifest themselves fully,[64] and that the courts could in future interpret it differently.[65] But it could be counter-argued with some cogency that the function of section 14(2) is not to permit plaintiffs a possibly indefinite time for their injuries to become fully apparent, which would be unfair to defendants, but is merely to provide a threshold beyond which the injury will be considered serious enough to merit litigation, however it may develop in the future.

12.40 As our general approach is focused on the plaintiff's knowledge of the cause of action, rather than (as under the present law) on knowledge of injury or damage, the relevant test would be whether the plaintiff knew that the *cause of action* was significant. We do not foresee any problems with this shift and expect that, for practical purposes, the change would make little difference in areas such as personal injury and negligently caused latent damage, where a significance test currently applies with reference to damage or injury.

12.41 It should be emphasised that the significance test will only assist plaintiffs where there is some change in the plaintiff's circumstances. The usual situation is where the plaintiff's injuries worsen or he becomes aware that his injuries are worse than he thought they were. In contrast, a plaintiff who, after a long delay, brings proceedings for a trivial cause of action, where there has been no change of circumstances, cannot claim that the cause of action is insignificant so that the date of discoverability has not started to run. By starting proceedings in respect of a cause of action that is, and always has been, trivial, the plaintiff indicates that, in his eyes, the cause of action is, and always has been, significant.

12.42 As we take the view that it is knowledge of the facts constituting the cause of action that is relevant, including knowledge of the defendant's act or omission that constituted a breach of duty,[66] the problems that have arisen under the existing law in applying the significance test in situations where the plaintiff's awareness of injury or damage or injury sets in before he or she is aware that anything out of the ordinary has happened[67] would seem to fall away.

[62] [1991] CIIL 692. See para 12.35 above.

[63] As illustrated by *Bristow v Grout, The Times*, 3 November 1986; affirmed, *The Times*, 9 November 1987 (CA): see para 3.44 above.

[64] T Prime and G Scanlan, *The Modern Law of Limitation* (1993) p 155.

[65] See A McGee, *Limitation Periods* (2nd ed 1994) pp 129 - 130. See also T Prime and G Scanlan, *op cit*, p 155, n 24.

[66] See para 12.30 - 12.31 above.

[67] See paras 3.41 - 3.42 above.

12.43 A final question is the extent to which the test of significance should be subjective. We see no good reason to depart from the present law under which, as we have seen, the test is partly objective and partly subjective so that the plaintiff's intelligence is taken into account.[68]

12.44 **We ask consultees whether they agree with our provisional proposals that:**

(1) **the definition of the date of knowledge (or date of discoverability) should focus on three main factual elements:**

(a) **that the plaintiff has a cause of action**

(b) **against the defendant which is**

(c) **significant.**

(2) **A cause of action should be regarded as significant if a person with the plaintiff's abilities would have reasonably considered the cause of action sufficiently serious to justify instituting proceedings against the defendant, on the assumption that the defendant does not dispute liability and has the resources to meet the claim.**

If consultees do not agree with these provisional proposals, what proposals would they prefer?

(c) What is meant by actual knowledge (of facts)?

12.45 In general, the concept of actual knowledge of facts is straightforward. One is simply asking, did the plaintiff have personal knowledge of the relevant facts? As we have seen in Part III,[69] to which we refer consultees, the problems thrown up by the present law (in particular, by section 14(1) of the 1980 Act) have essentially concerned the relationship between belief and knowledge. That is, what level of belief by the plaintiff can be regarded as constituting actual knowledge?

12.46 The latest pronouncement on this was made by the Court of Appeal in *Spargo v North Essex District Health Authority*.[70] It was there laid down that a plaintiff would have actual knowledge (that an injury was attributable to an act or omission) when she

> so firmly believes that her condition is capable of being attributed to an act or omission which she can identify ... that she goes to a solicitor to seek advice about making a claim for compensation.[71]

[68] See para 12.33 above. We do not think that it should be relevant to the running of a limitation period against a plaintiff who knows all the facts that he or she could not initially afford to institute proceedings. We are unaware of any case on s 14(2) of the Limitation Act 1980 in which the question of the plaintiff's resources has been discussed.

[69] See paras 3.52 - 3.57 above.

[70] [1997] PIQR P235. See para 3.55 above.

[71] [1997] PIQR P235, P242.

12.47 There are two aspects to this. First, it is subjective and does not require that the plaintiff's actions should be judged against what a reasonable man would have done. This is welcome in avoiding a blurring of the distinction between actual knowledge and constructive knowledge, the latter of which does concern what the plaintiff ought reasonably to have known or to have inferred from the information available to him or her. Secondly, a plaintiff is regarded as having actual knowledge well before he or she has absolute certainty in relation to the facts. In our view, it is correct that the start of the limitation period should not be delayed until the plaintiff has absolute certainty.[72] In our view, therefore, the approach laid down in the *Spargo* case should be supported. It should be stressed, however, that *Spargo* dealt with the situation where the plaintiff had gone to a solicitor. We would not wish to deny that there can be other indicators that a person has such a firm belief as to constitute actual knowledge.

12.48 We further support the approach in the present law[73] whereby actual knowledge, once acquired, cannot be lost (so that subsequent negative advice does not stop time running); while, in contrast, negative advice can prevent actual knowledge being acquired.

12.49 **We ask consultees whether they agree with our provisional views that:**

(1) **"actual knowledge" should be treated as a straightforward concept and should not be defined in our proposed statute.**

(2) **the approach of the Court of Appeal in *Spargo* v *North Essex District Health Authority* should be supported. According to this, the courts should treat actual knowledge as a subjective concept; and a plaintiff, who so firmly believes that he or she has a significant cause of action against the defendant that he or she goes to a solicitor to seek advice about making a claim, should be regarded as having actual knowledge.**

(3) **as under the present law, once actual knowledge has been acquired, time should run irrespective of subsequent advice to the contrary.**

If consultees do not agree with our provisional views we ask them to explain why not, and what alternative approach they would prefer.

12.50 This seems an appropriate point to add that we would envisage normal rules of agency applying as regards the acquisition of information. This would mean that an agent's knowledge of facts would be imputed to the plaintiff where the agent's

[72] We tend to agree with the policy identified by Brooke LJ in *Spargo v North Essex District Health Authority*, "[T]he policy of Parliament, ... is to give the plaintiff who has the requisite low level of knowledge, three years in which to establish by inquiry whether the identified injury was indeed probably caused by the identified omission and whether the omission (identified initially in broad terms) amounted to actionable negligence. The judge's approach would be to stop the three years from even starting to run until a much more advanced stage of the investigation had been completed." [1997] PIQR P235, P244.

[73] See para 3.57.

actual knowledge of information was acquired within the agent's authority to act for the plaintiff.[74]

12.51 **We ask consultees whether they agree with our provisional view that it would be prudent to clarify in the proposed legislation that normal rules of agency would apply so that a plaintiff would be taken to have his or her agent's actual knowledge of information acquired within the agent's authority to act for the plaintiff.**

(d) What is meant by constructive knowledge (of facts)?

12.52 The present English provisions refer to knowledge which the plaintiff "might reasonably have been expected to acquire".[75] In recent cases the courts appear to have moved towards the view that this is an objective test and does not take account of the plaintiff's subjective characteristics.[76] The recommendations made by the law reform bodies in other common law jurisdictions cited above[77] have generally favoured a more subjective view. The New Zealand Law Commission noted:

> It is true that a departure from a purely objective test involves a greater degree of uncertainty for defendants, but an objective 'hypothetical reasonable man' test could well work considerable injustice - undermining the essential thrust of the discoverability extension - if not able to be related to the health, intelligence and social competence of a particular claimant. Further, in a society which is becoming increasingly conscious of the distinctions between different cultural groupings, any objective test invites criticism for being based on mono-cultural assumptions.[78]

12.53 The Ontario Limitations Act Consultation Group and the Law Reform Commission of Western Australia also favour a subjective standard.[79] The

[74] See *Bowstead and Reynolds on Agency* (16 ed 1996), p 529 ff; Ontario Limitations Act Consultations Group, *Recommendations for a New Limitations Act, Report of the Limitations Act Consultation Group* (1991), p 27; Institute of Law Research and Reform, Alberta: *Limitations,* Report for Discussion No 4 (1986), para 2.188; Alberta Law Reform Institute, *Limitations,* Report No 55 (1989), p 67; New Zealand Law Commission, *Report No 6, Limitation Defences in Civil Proceedings,* NZLC R6 (1988), para 217; Law Reform Commission of Western Australia, *Report on Limitation and Notice of Actions,* Project No 36 - Part II (1997), pp 198 - 199.

[75] Sections 14(3) and 14A(10) of the 1980 Act.

[76] Eg *Forbes v Wandsworth Health Authority* [1996] 3 WLR 1108; *Parry v Clwyd Health Authority* [1997] PIQR P1. Though see *Coban v Allen, The Times* 14 October 1996; *O'Driscoll v Dudley Health Authority* [1996] 7 Med LR 408. See paras 3.58 - 3.65 above.

[77] See para 12.28 above.

[78] *Report No 6, Limitation Defences in Civil Proceedings,* NZLC R6 (1988), para 204.

[79] See Ontario Limitations Act Consultations Group, *Recommendations for a New Limitations Act, Report of the Limitations Act Consultation Group* (1991), p 25: "The recommended standard is designed to create an expectation of reasonable diligence on the part of the plaintiff, while recognising that individual plaintiffs vary in their capacity to be diligent". The Law Reform Commission of Western Australia, *Report on Limitation and Notice of Actions*, Project No 36, Part II (1997), though recommending the same definition as the Alberta Institute for Law Reform (para 7.21), views this as a subjective test: "The test is

exception is the Alberta Institute for Law Reform, which, having recommended a subjective standard in its Report for Discussion, changed its view in the final report.[80]

12.54 As it is fairer to plaintiffs and would not create significant extra uncertainty, we also consider that the test for constructive knowledge should contain a large subjective element: what ought the plaintiff, in his circumstances and with his abilities, to have known had he acted reasonably? The question should not be what a reasonable person would have discovered, but what the plaintiff himself would have discovered if he had acted reasonably. The personal characteristics of the plaintiff, such as his or her level of education and intelligence, and the plaintiff's resources, would therefore be relevant to the question whether the plaintiff acted reasonably, in contrast to what now appears to be the position under the current law. A number of the employment-related personal injuries cases have involved plaintiffs in unskilled manual jobs having little education.[81] Our more subjective test would assist them. Conversely, in cases where the plaintiff has some degree of expert knowledge which should have caused him to appreciate facts at an earlier stage than would have been appropriate for the average person, that knowledge should be taken into account to advance the date of discoverability.

12.55 The question then arises whether the level of constructive knowledge which a plaintiff is expected to have should be further defined to deal with the obtaining of expert advice. We have seen in Part III,[82] to which consultees are referred, that the present provisions dealing with this (section 14(3) and 14A(10) of the 1980 Act) are not only complex but do not always achieve fair results. For example, where a plaintiff consults a solicitor, as opposed to any other expert, it appears that he or she may not be able to rely on the proviso to section 14(3) to avoid being fixed with knowledge of a fact which the solicitor failed unreasonably to discover.[83] This would suggest that the plaintiff is to be penalised for the shortcomings of the solicitor, even though the plaintiff may have acted reasonably in choosing the solicitor, and in all his or her dealings with the solicitor. The plaintiff is not penalised in a similar way for the shortcomings of other types of expert.

what the claimant knew or in the circumstances ought to have known, not what a fictional reasonable claimant ought to have discovered" (para 6.13).

[80] The Report for Discussion noted: "We do not think that it is fair to a defendant to begin a discovery limitation period when the claimant actually discovered the requisite knowledge if he could reasonably have discovered it sooner. However, because a discovery rule exists primarily for the benefit of claimants, we believe that the constructive knowledge test should be based on what the actual claimant in a case, in his circumstances and with his abilities, ought reasonably to have discovered." (Institute of Law Research and Reform, Alberta: *Limitations,* Report for Discussion No 4 (1986), para 2.132). No reason was given for the change (See Alberta Law Reform Institute, *Limitations,* Report No 55 (1989), p 34 and Limitations Act c L-15.1 1996, section 3(1)(a)).

[81] Examples include *Drinkwater v Joseph Lucas (Electrical) Ltd* [1970] 3 All ER 769 and *Smith v Central Asbestos Co Ltd* [1972] 1 QB 244 (CA) affirmed [1973] AC 518 HL.

[82] See paras 3.58 - 3.65 above.

[83] See dicta in *Simpson v Norwest Holst Southern Ltd* [1980] 1 WLR 968 and *Fowell v National Coal Board, The Times*, 28 May 1986. See also *Spargo v North Essex District Health Authority* [1996] 7 Med LR 219 (per Collins J) (the issue of constructive knowledge was left open by the Court of Appeal [1997] PIQR P235). See para 3.64 above.

12.56 We are of the view that a simpler approach to the link between constructive knowledge and the knowledge of agents is necessary and possible. Applying normal rules of agency,[84] an agent's actual knowledge will be imputed to the principal when the agent has received the information within his authority to act for the principal. However the normal rules of agency will not impute knowledge to the principal in two important situations. First, where the plaintiff has not sought any expert advice and, secondly, where the plaintiff has sought expert advice but the expert consulted has failed to make the necessary enquiries (or has failed to pursue the enquiries for a very long period of time). We believe that the general test set out above - what ought the plaintiff, in his circumstances and with his abilities, to have known had he acted reasonably - provides a satisfactory answer in these two situations. That is, a plaintiff who should have sought expert advice but did not, will have constructive knowledge of those facts that an expert would probably have acquired. On the other hand, a plaintiff who has sought expert advice but has been let down, has usually acted reasonably and should not be fixed with constructive knowledge of information which his adviser should have obtained but failed to do so.

12.57 **We ask consultees whether they agree with our provisional views that:**

(1) **constructive knowledge should include a large subjective element so that it should be defined as "what the plaintiff in his circumstances and with his abilities ought to have known had he acted reasonably."**

(2) **no more elaborate definition of constructive knowledge is required.**

If consultees do not agree with our provisional views we ask them to explain why not, and what alternative approach they would prefer.

12.58 For completeness, we should add that the question that was left open by the Court of Appeal in *Spargo v North Essex District Health Authority*,[85] of the careful but very slow solicitor, and which was expressly drawn to our attention by the Court of Appeal for the purposes of this review, would, we think, be solved by our provisional proposals. That is, applying our provisional proposals (instead of the tortuous proviso to section 14(3)), the plaintiff would not be regarded as having constructive knowledge provided she acted reasonably (which she presumably did by consulting the solicitor).[86]

(e) Should knowledge of the law be relevant?

12.59 Under the present law, lack of knowledge of the law is irrelevant to the date of knowledge. Hence the emphasis in section 14(1) and 14A (6-8) is on knowledge of facts. Moreover, it is specifically stated in section 14(1) that "knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant". An analogous provision, but confined to

[84] See para 12.50 above.

[85] [1997] PIQR P235. See para 3.64 and in particular n 143 above.

[86] Nor would knowledge be imputed to the plaintiff, through the normal rules of agency, unless and until the solicitor had actual knowledge of the facts: see para 12.50 above.

negligence (because this is all that the latent damage provisions concern) is contained in section 14A(9). On the other hand, in cases of personal injury or death the factors to be taken into account in deciding whether to exercise the discretion to disapply the limitation period, in section 33 of the 1980 Act, include "the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages" and "the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received".[87]

12.60 The present law on this issue is based on the recommendations of the Law Reform Committee,[88] in response to case law on the correct interpretation of section 7(3)(c) of the Limitation Act 1963. In a series of cases the courts had interpreted "the fact that the personal injuries so resulting were attributable to that negligence, nuisance or breach of duty" as meaning that matters of law were relevant to the test of knowledge.[89] These culminated in the Court of Appeal's decision in *Smith v Central Asbestos Co Limited*,[90] in which Lord Denning MR said that "time does not run against a man until he knows, actually or constructively, that he has a worthwhile cause of action against his employer."[91] But this interpretation was rejected on appeal by a majority of the House of Lords in *Central Asbestos Co Ltd v Dodd*.[92]

12.61 The Law Reform Committee agreed with the majority in *Central Asbestos Co Limited v Dodd*. It thought that knowledge of a legal remedy should not form part of the test of date of knowledge for two principal reasons. First, it would be difficult to introduce an exception for personal injuries to the principle that ignorance of the law is no excuse without making similar exceptions elsewhere in

[87] The courts have on a number of occasions held that the limitation period should be disapplied in favour of a plaintiff who has failed to act in time through lack of knowledge of his or her legal rights. See notably, *Halford v Brookes* [1991] 1 WLR 428; and *Coad v Cornwall and Isles of Scilly Health Authority* [1997] 1 WLR 189. See also s 32A(2) of the 1980 Act: para 3.106 above.

[88] Law Reform Committee, *Twentieth Report (Interim Report on Limitation of Actions: in Personal Injury Claims)* (1974) Cmnd 5630, paras 49 - 55.

[89] See *Pickles v National Coal Board* [1968] 1 WLR 997; *Skingsley v Cape Asbestos Co Ltd* [1968] 2 Lloyd's Rep 201; *Newton v Cammell Laird & Co Ltd* [1969] 1 WLR 415; *Drinkwater v Joseph Lucas & Co (Electrical) Ltd* [1970] 3 All ER 769; *Knipe v British Railways Board* [1972] 1 QB 361.

[90] [1972] 1 QB 244.

[91] *Ibid*, 258.

[92] [1973] AC 518. The majority comprised Lord Simon of Glaisdale and Lord Salmon, who both held that the defendant's appeal should therefore succeed, and Lord Pearson, who held that although knowledge of the defendant's legal liability was immaterial, knowledge that the defendant was at fault was relevant, and on that basis he joined the other two members of the court (Lord Reid and Lord Morris of Borth-y-Gest) in dismissing the defendant's appeal. For discussion of *Dodd* see the Law Reform Committee, *Twentieth Report (Interim Report on Limitation of Actions: in Personal Injury Claims)* (1974) Cmnd 5630, paras 42 - 46 and Appendix A.

the law of limitations and possibly in other fields as well.[93] Secondly, hardship could be caused to defendants if the plaintiff was able to obtain an indefinite extension of the limitation period through ignorance of the law.[94] Instead, the Committee recommended that the plaintiff's lack of knowledge of the availability of a legal remedy should be a factor which the court could take into account in the exercise of its discretion to disapply the limitation period. It noted that this would enable the court to do justice in those cases where the delay in bringing proceedings was wholly due to the plaintiff's ignorance of the available remedy.[95]

12.62 We are not wholly convinced by either of those two reasons. The fiction that everyone knows the law need not be slavishly adhered to across all aspects of civil law. Indeed we departed from it in our Report on Restitution in which we recommended reversal of the common law rule that payments made by mistake of law (as opposed to fact) cannot be recovered.[96] Moreover, unlike the Law Reform Committee, we are undertaking a general review of limitation periods and do not therefore face the problem of carving out an exception for personal injury limitation periods only.

12.63 At first sight, the second reason given (of creating hardship to defendants through the possibility of indefinitely extending the limitation period) has greater force. In particular, what if there were a Court of Appeal or House of Lords decision overruling past cases so that the law is now that the plaintiff had a substantive claim whereas previously the general understanding was that he did not?[97] Applying the "declaratory" theory of law (the common law is and always has been X) a plaintiff would not have knowledge of his rights until that later decision. However, our core regime, as we shall see below, has two important safeguards for defendants which might be thought to counteract effectively this risk of hardship to defendants. The first safeguard is that the knowledge of the plaintiff will include "constructive knowledge": what the plaintiff in his circumstances "ought to have known". In most circumstances,[98] time will run against a plaintiff who is ignorant of his or her legal rights because he or she ought to have consulted a solicitor or other legal adviser. The second safeguard is the imposition of a long-stop. This removes the risk of an indefinite postponement of the running of time.

12.64 Further arguments in favour of the general stance taken by the Law Reform Committee include: that taking account of knowledge of the law renders the date of discoverability less certain; that a plaintiff who has been badly advised may have

[93] Law Reform Committee, *Twentieth Report (Interim Report on Limitation of Actions: in Personal Injury Claims)* (1974) Cmnd 5630, para 53. See also *Central Asbestos Co Limited v Dodd* [1973] AC 518, 549, *per* Lord Simon of Glaisdale; 556, *per* Lord Salmon.

[94] Law Reform Committee, *Twentieth Report (Interim Report on Limitation of Actions: in Personal Injury Claims)* (1974) Cmnd 5630, para 53.

[95] *Ibid*, paras 56 and 69(5).

[96] See Restitution: Mistakes of Law and Ultra Vires Public Authority Receipts and Payments (1994) Law Com No 227, Cm 2731, para 3.12.

[97] See *Central Asbestos Co Limited v Dodd* [1973] AC 518, 549 - 550, *per* Lord Simon of Glaisdale.

[98] Although not where judicial decisions bring about a departure from the previously held view of the law.

a claim against the adviser; that it appears to be the case that other law reforms bodies have confined knowledge to knowledge of facts and have not recommended taking account of knowledge of the law;[99] and that the competing starting date to date of discoverability is accrual of the cause of action and ignorance of the law is plainly irrelevant to the latter.

12.65 On the other hand, the major positive argument in favour of taking account of lack of knowledge of the law is that this is only fair to plaintiffs. A plaintiff who has not commenced proceedings because he or she could not reasonably have known that he or she had a legal remedy ought not to fall foul of an initial limitation period. Furthermore, where a plaintiff has consulted a solicitor or other legal adviser but has been badly advised, or where there has been a delay in receiving the advice, it may be argued that the plaintiff should not lose his or her remedy against the defendant when any claim against the solicitor may be less satisfactory; for example, the quantum of damages may be lower to take account of added contingencies and indeed that claim may itself be time-barred.

12.66 In any case, in some circumstances one cannot make a sharp distinction between knowledge of law and knowledge of fact, so that it will be necessary for the plaintiff to have some knowledge of law before he or she can properly be described as having discovered the existence of the cause of action for the purposes of our test of discoverability. Knowledge of the law is in some cases implicit in the plaintiff's knowledge of the act or omission of the defendant giving rise to the cause of action, and the causal link between the act or omission and the loss suffered by the plaintiff.

12.67 This is illustrated by the case where the plaintiff has a claim against his solicitor for giving him negligent advice. The facts relevant to the cause of action (knowledge of which will trigger the limitation period) will be that the solicitor has acted

[99] See para 12.28. The issue has not received much discussion. The Alberta Institute for Law Reform commented in *Limitations,* Report for Discussion No 4 (1986):

> We take particular objection to deferring the commencement of the discovery period until the claimant acquires sufficient legal knowledge to know that a claim would have a reasonable prospect of success. Frequently this will be a very difficult and subjective issue for even the lawyers and judges involved in a case, and requiring a court to determine when a claimant, usually a non-lawyer, had sufficient knowledge of the legal consequences of factual events will further confound the matter. (para 2.125).

The same views were expressed by the New Zealand Law Commission, *Report No 6, Limitation Defences in Civil Proceedings,* NZLC R6 (1988), para 212. However the Ontario Limitations Act Consultations Group goes further:

> What determines the significance of the harm rests not in the quantum of damages being sought, but in the significance of the harm in the context of making a legal claim. In other words, the harm is significant when it is first apparent that legal action may be necessary or appropriate to remedy the harm. (*Recommendations for a New Limitations Act, Report of the Limitations Act Consultation Group* (1991), pp 24 - 25).

There is some Scottish authority to suggest that knowledge of the legal significance of an injury is necessary to start time running against the pursuer. The Scottish Law Commission has however recommended that the discoverability formula should exclude such knowledge. See para 10.14 above.

negligently, and that the plaintiff has suffered a loss in consequence. In practice, this implies some knowledge of the law - a plaintiff who was totally ignorant of the law would have no means of knowing that there was anything wrong with the solicitor's advice.

12.68 A similar problem arises where, exceptionally, one can recover money paid under a mistake of law and would arise more generally if the mistake of law bar were abolished.[100] Unless the plaintiff became aware of the correct law in respect of which the mistake had occurred, he or she would not have sufficient knowledge. It would seem, therefore, that it is not possible to exclude all knowledge of the law from the definition of discoverability.

12.69 We have found the question of the extent to which knowledge of the law should be relevant to be a very difficult one and, prior to hearing the views of consultees, we have not formed a provisional view on it. **We therefore ask consultees whether knowledge for the purposes of the date of discoverability:**

(1) **should always include knowledge of the law, including knowledge of one's entitlement to a legal remedy for what has occurred; or**

(2) **should include knowledge of the law only in so far as such knowledge is necessary for the plaintiff to know all the elements of his or her cause of action.**

If consultees do not agree with either of these options, we ask them what alternative proposals they would prefer.

(f) How would discoverability apply to corporate plaintiffs?

(i) Introduction

12.70 Companies, because they are non-human entities, can have no real knowledge. Applying a discoverability test thus means that either our proposed statute should specify rules for corporate knowledge in this context or the courts should be left to develop them. It might be argued that such rules ought to be a matter of simple common sense. However, the question of when a company knows becomes difficult whenever knowledge is partially or unevenly distributed within it. Actual knowledge might be possessed by one director, but not his colleagues; by junior but not senior management; by one junior employee with some decision-making responsibilities; by a trainee; or by a member of the cleaning staff. It is also conceivable that knowledge might be split between several employees of the company. In such circumstances, where to draw the line between those whose knowledge counts as the company's knowledge and those whose knowledge does not is a potentially difficult issue.[101]

[100] As we have recommended in Restitution: Mistakes of Law and Ultra Vires Public Authority Receipts and Payments (1994) Law Com 227.

[101] The same could be said for any non-human plaintiff which has legal personality. Though this discussion refers to "corporate plaintiffs" we consider that the same principles apply to other non-human plaintiffs such as the Crown. In contrast, organisations that do not have

12.71 Although this precise issue can arise under the present law of limitations - for example, where the plaintiff is a company and is relying on the discoverability test for negligent latent damage under section 14A of the 1980 Act[102] or is relying on the provisions postponing, until discoverability, the running of time for fraud, deliberate concealment or mistake under section 32 of the 1980 Act - it appears that it has not yet troubled the courts (although it is a well-known issue in other contexts). If our core regime were to be adopted, this question would assume far greater significance.

12.72 The traditional approach of the courts to corporate knowledge has been to apply the principles of agency or to resort to a doctrine of identification. The existing principles of agency apply awkwardly to the question of corporate knowledge for the purposes of limitation and it is not clear how the courts would apply them.[103]

12.73 The doctrine of identification has in some respects proved more flexible than agency. For example, in *El Ajou v Dollar Land Holdings*,[104] a director's knowledge was not imputable to his company via agency. However, he was sufficiently identified with the company for his knowledge to be attributed to it. Identification attributes to the company the knowledge of those of its employees who are sufficiently closely associated with its direction to be identified with it. The test of who counts was traditionally whether or not an individual is (part of) the "directing mind and will" of the company.[105] However, it proved difficult to provide

legal personality, such as partnerships, can be dealt with by the literal application of the concept of knowledge to individuals.

[102] In *Iron Trade Mutual Insurance v J K Buckenham Ltd* [1990] 1 All ER 808, one of the few cases where corporate plaintiffs have relied on the Latent Damage Act 1986, the court, refusing an interlocutory application to strike out the claim, stated that the question whether the plaintiffs possessed sufficient relevant knowledge was a question of fact which should be investigated at trial. In *Finance for Mortgages Ltd v Farley and Co* (unreported, 14 February 1996), the plaintiff sued its valuers after the mortgagors defaulted and the property turned out to be worth substantially less than the original value suggested. The question of when the plaintiffs received fresh valuations of the property and when they ought to have obtained a revaluation were live issues in the case. However, at no point was the question of attribution of knowledge to the company considered. It appears to have been assumed in the case that the knowledge of the residential underwriting manager was the knowledge of his company for limitation purposes.

[103] "When a question of notice, or knowledge, arises, we find ourselves overwhelmed by a sea of authorities, not altogether reconcilable with each other". *Taylor v Yorkshire Insurance Co Ltd* [1913] 2 IR 1, 21 per Palles CB. In general, an agent's knowledge is imputed to his principal when he is within his authority in receiving it. *Tanham v Nicholson* (1872) LR 5 HL 561. However it is difficult to define when - if at all - employees are authorised to know about, for instance, a noise that constitutes a nuisance. There is very little authority on analogous issues. Such authority as there is suggests that only those in some managerial position or with direct responsibilities for care of the problem would have knowledge: *Baldwin v Casella* (1872) LR 7 Ex 325, *Applebee v Percy* (1874) LR 9 CP 647, *Stiles v Cardiff Steam Navigation Co* (1864) 33 LJQB 310, *The Cawood III* [1951] P 270, *Re Holland, ex parte Warren* (1885) 1 TLR 430. See, generally, *Bowstead and Reynolds on Agency*, (16th ed 1996), pp 529 - 542; Fridman, *The Law of Agency*, (7th ed 1996), pp 348 - 352; *El Ajou v Dollar Land Holdings Plc* [1994] 2 All ER 685.

[104] [1994] 2 All ER 685.

[105] As first formulated in *Lennard's Carrying Co v Asiatic Petroleum Co Ltd* [1915] AC 705. See also *Tesco Supermarkets v Nattrass* [1971] AC 153, *El Ajou v Dollar Land Holdings* [1994] 2 All ER 685.

a definition of who within an organisation is the "directing mind and will", and case law has provided little prospective guide as to where the line would be drawn.

12.74 The authorities were reconsidered by the Privy Council in *Meridian Global Funds Management v Securities Commission.*[106] Lord Hoffman[107] stated that "the rule of attribution is a matter of interpretation or construction of the relevant substantive rule". "It is a question of construction in each case as to whether the particular rule requires that the knowledge that an act has been done, or the state of mind with which it was done, should be attributed to the company."

12.75 Consequently, there is no pre-established test of identification which would be applied to corporate knowledge for the purposes of limitation. Unless dealt with specifically in the limitation legislation, the courts would need to develop a test in the light of their view of the purposes of the limitation regime. As is noted in Gower's Principles of Modern Company Law:

> Welcome and more straightforward though the new approach is, it inevitably leaves uncertainty as to who will be regarded as the relevant person in the corporate hierarchy for the purposes of the identification rule in any particular case...Since, however, a precise answer to the question of whose acts and knowledge are to be attributed to the company depends *ex hypothesi* on an analysis of the context of the particular rule with which the court is dealing, it is doubtful whether more certainty can be provided at a general level.[108]

12.76 **Given the uncertainty of how the courts would apply the principles of agency and the identification test to discoverability by a corporate plaintiff - and given that this is already an issue of uncertainty under the present law of limitations[109] - it is our provisional view that we should lay down specific statutory provisions setting out how discoverability would apply to corporate plaintiffs. We ask consultees if they agree. If consultees disagree, we ask them how they believe the courts would, or should, apply the discoverability test to corporate plaintiffs.**

(ii) Actual knowledge

12.77 The key question for corporate knowledge is, at what level the knowledge of the employee should be considered to be the knowledge of the company: whether the company's knowledge should be confined to the knowledge of the senior management, or whether the knowledge of junior employees should also be taken into account. The identification principle (and to some extent the principles of agency) look to higher levels of management within a company, asking, for example, who within the company has the power to make decisions in respect of a particular transaction. In our opinion this sets a threshold which is too high for the purposes of the start of the limitation period. A company should not be able

[106] [1995] 2 AC 500

[107] *Ibid,* at 507, 511

[108] PL Davies, *Gower's Principles of Modern Company Law* (6th ed 1997), p 231.

[109] See paras 12.71 - 12.72.

to benefit from a longer limitation period simply because information given to its junior employees has not been passed on within the company.

12.78 A far clearer guide would result from a rule that any information within the actual knowledge of an employee of the company[110] should be considered to be within the actual knowledge of that company.[111] However, it may be unreasonable to say that what any employee knows, however junior, the company knows. Information relating to the company's cause of action may come only to an employee who would not, in the ordinary course of their employment, think of passing the information on to anyone else within the company, and who would not be expected by their superiors to do so. So, for example, if a cleaner at a company learnt that the company had a potential cause of action, it would be unlikely that that information could be attributed to the company, as, generally, cleaners are not expected, as part of their work, to pass information on to other employees of a company unless it relates to cleaning.

12.79 A balance may be achieved by providing *as a general rule* that information which is received by an employee or an officer of the company is within the knowledge of the company. But this general rule would not apply if the company could satisfy two conditions: first, by proving that the individual in question did not in fact communicate the information to anyone else within the company *and,* second, by showing that the individual would not be expected, in the course of his or her employment, or under a duty to the company, to communicate that information to a superior or anyone else within the company with the authority to act on the information. The relevant expectations would be the actual expectations held within the company.[112] Discounting "knowledge" where the two conditions are satisfied provides some protection for the company where it is no part of that individual's normal duties to pass information on. We appreciate that there is an element of uncertainty inherent in whether an employee would not "be expected" to communicate information to other people in a company. The answer will depend on the nature of the employee's job or function in the company.[113]

[110] In the following discussion the term "employee" should be understood to include officers of a company. The test would otherwise be too limited, as it would exclude the knowledge of officers of the company who do not have a contract of employment with the company (such as non-executive directors) from the knowledge of the company.

[111] We do not think that the knowledge of employees or senior management of another, albeit associated company, should be imputed to the original company. Companies also have agents who are not their servants. Under the general law of agency, their knowledge will only be imputed to the company when they are within their authority to receive the information. If our proposed corporate knowledge regime is implemented, there will thus be a contrast between the position of such agents and agents who are also employees. However, their relationship to the company is no different to their relationship to a human plaintiff. Furthermore, to say that the knowledge of all such agents is *prima facie* to be attributed to the company would be to stretch the net too wide. The purpose of setting up a special attribution rule for a company's employees is to circumvent the problem of the company's lack of real personality.

[112] We would wish to avoid requiring a court to judge what are the functions of comparable employees in companies in general.

[113] The following examples may be helpful in clarifying what we have in mind. (a) A railway engineer learns in the course of tests carried out on a new bridge that the wrong materials have been used in its construction, and in consequence it is not capable of supporting the required weight. He would be expected, as part of his job, to pass that information on

However, we do not believe that it is possible to avoid this degree of uncertainty without applying a rigid test (that what an employee knows, the company knows, with no exceptions) which will in many cases be unjust to corporate plaintiffs.

12.80 **We provisionally propose that:**

(1) **there should be a general rule that a company has actual knowledge, for the purposes of the discoverability test, where an employee or officer has that knowledge;**

(2) **but that this rule should not apply where the company can show that the employee or officer did not himself have authority to act on the information, and**

(a) the individual in question did not in fact communicate it to a superior or anyone else within the company with the authority to act on the information, ***and***

(b) the individual would not be expected, in the course of his or her employment or under a duty to the company, to communicate that information to a superior or anyone else within the company with the authority to act on the information.

(3) **"Communication" for these purposes would include not only direct personal communication with the superior or the person with the relevant authority, but indirect communication via another person in the company.**

(4) **To "act on the information" for these purposes would mean to initiate litigation or to take preliminary steps thereto.**

Consultees are asked if they agree with our provisional view and, if not, what alternative proposals they would prefer.

12.81 It is conceivable - although in practice likely to be rare - that a company could be regarded as having actual knowledge through the knowledge of different relevant facts of more than one employee or officer. For example, one employee, A (who could reasonably be expected to communicate the information to someone with

within the company so that action could be taken against those responsible. (b) A typist in one department of a company hears at a party information suggesting that a customer of another department of the company (of whom he has not previously heard) is insolvent. This means that the customer has obtained credit terms from the company on false pretences. The typist would not normally be expected to pass the information on, as he would not realise its relevance. If however, the typist worked in the relevant department, and was aware of the relevance of the information, he would be expected to pass it on. (c) A non-executive director is informed that a project in which his company has just invested several million pounds is a sham. He would be under a duty to communicate that information to his company, pursuant to his duty to act in the best interests of the company. (d) A secretary using software specially designed for a particular project realises that there are several bugs in the programme, and that it does not do what is was intended to do. He would be expected to pass the information on.

authority to act on it) may know of the facts constituting the cause of action and that it is significant; while another employee B (who could also reasonably be expected to communicate the information to someone with authority to act on it) may know the identity of the defendant but not that the cause of action is "significant".

12.82 We envisage that the test should operate to impute an employee's knowledge of complete elements of the discoverability test (that is, knowledge of the cause of action, knowledge of the identity of the defendant or knowledge of significance).[114] Consequently, the company can fall within the test even where no one person knows all three elements. However, where knowledge of the facts relating to any one element is divided among different employees, the company will not have the relevant knowledge.

12.83 A particular problem could arise where the company's action is against an officer or employee of the company who concealed the relevant facts about the action from others in the company, for example, where a director has been defrauding the company. In this situation, the test provisionally proposed in paragraph 12.80 above needs qualification in order properly to protect the company. **We therefore provisionally recommend that, in an action by the company against a defendant who has deliberately concealed relevant facts from the company, the defendant's knowledge should not count as the knowledge of the company. We ask consultees whether they agree, and, if not, to say why not.**

(iii) Constructive knowledge

12.84 There are two different circumstances in which it may be said that a company ought to have knowledge of the facts relevant to its cause of action. In the first most common situation, an identifiable employee of the company may have failed to make obvious enquiries which would have revealed the information, or to have appreciated the significance of the information he or she had. In the second situation, a company may not know the facts relevant to its cause of action because it has no procedures in place to collect that information. As no employee has been given that responsibility, it would not be possible to identify an employee who ought to have the relevant information.

12.85 In the first situation, the question arises whether it is reasonable to attribute the constructive knowledge of the particular employee to the company. We suggest that the same approach should be taken as with "actual knowledge". That is, the presumption that the company has constructive knowledge of any facts which its employee ought to know would be rebutted where the employee concerned would not, if he or she had had actual knowledge of the facts concerned, be expected either to act on the information themselves or to communicate that information to a superior or someone else within the company with the authority to act on the information.

12.86 The second situation - where the company has no knowledge of the facts because its procedures are deficient rather than because any identified employee has failed

[114] See paras 12.30 - 12.31; 12.32; 12.33 - 12.43.

to obtain the relevant information - is more complex. Any test for such "structural constructive knowledge" would require the court to assess the management structures of the company concerned, and make a judgment on what structures a "reasonable" company could be expected to have for gathering information.[115] In practice, such an argument by defendants would be likely to be rare. Normally defendants would be pointing to a particular individual or individuals within a company who ought to have known rather than to the company's defective information-gathering structures. Moreover, we are unconvinced that the litigation costs involved in a court assessing the management structures of a company are justified, in the context of the issue of limitation (which, after all, is not the substantive issue in the action). It seems preferable, therefore, not to try to develop a test in this context of "structural" constructive knowledge.

12.87 **It is therefore our provisional view that:**

(1) **there should be a general rule that a company has constructive knowledge of any fact relevant to its cause of action of which one of its employees or officers has constructive knowledge;**

(2) **but this rule should not apply where the company can show that the employee or officer concerned would not, had he or she had actual knowledge of that fact, be expected, in the course of his or her employment or under a duty to the company, to act on the information or to communicate that information to a superior or anyone else within the company with the authority to act on the information.**

(3) **No provision should be made for "structural constructive knowledge".**

Do consultees agree? If consultees do not agree, would they prefer to have no test for corporate constructive knowledge, so that the initial limitation period would start for a corporate plaintiff only on the date the company had actual knowledge of the facts relevant to the cause of action under the test set out in paragraph 12.80 above?

2 HOW LONG SHOULD THE LIMITATION PERIOD BE?

12.88 An initial question is whether it is right to have a uniform period for all claims or whether different periods can be justified for different classes of claim. In our view, with possible minor exceptions (such as, possibly, the limitation period for defamation actions which we discuss below),[116] the different periods which exist at present cannot be defended and are products of the ad hoc development of the law of limitations.[117]

[115] See the analogous test for corporate manslaughter contained in Clause 4 of the draft Bill on Involuntary Homicide contained in Legislating the Criminal Code: Involuntary Manslaughter (1996) Law Com No 237, at page 137.

[116] See paras 13.38 - 13.43 below.

[117] Discussed in detail at paras 1.6 - 1.21 above.

12.89 The advantage of a uniform limitation period is that it would increase the coherence of the law on limitation and make it more accessible (both to lawyers and the public). The existence of different periods creates additional and unnecessary confusion and gives plaintiffs an incentive to try to bring their right of action within one category rather than another. As a matter of principle, unless there are special characteristics of a particular cause of action which require exceptional treatment, a uniform period should be applied. **We therefore provisionally recommend the adoption within the core regime of a uniform period of limitation. We ask consultees whether they agree and, if not, to say why not.**

12.90 However, if a uniform limitation period is to be applied to all causes of action, the period chosen must take account of the need to do justice to the plaintiff for all causes of action. The limitation period must allow the plaintiff sufficient time, once the relevant facts are known, to consider their position, to take legal advice, and investigate the claim, and to attempt to reach a negotiated settlement with the defendant before issuing proceedings. Plaintiffs should also have sufficient time to start preparing their case (though it would be unreasonable to allow the plaintiff all the time which may be necessary to draft the pleadings required in the action).[118] Though little time may be required for the plaintiff to prepare the case and negotiate with the defendant in respect of a road traffic accident claim (particularly where no personal injury is involved), the limitation period must also allow the plaintiff sufficient time to prepare a complex contractual claim.[119]

12.91 It would therefore be unjust to set an unreasonably short limitation period. However, the length of the limitation period must also take account of the fact that, whatever period is chosen, time will run under our core regime, from the point of discoverability, not the date the cause of action accrues. This will in some cases (and, in particular, in the more complex cases where the facts are not immediately apparent to the plaintiff) give the plaintiff longer to prepare the action than, for example, the current period of six years running from the date of accrual in contract actions.

[118] Under the present rules of court, the plaintiff is never in a position where he or she must issue proceedings and then serve a statement of claim 28 days later giving full details of the case. The plaintiff has four months from the issue of proceedings before they must be served on the defendant. Though the time for service of the statement of claim is formally 14 days after the defendant gives notice of intention to defend, where the issues involved in an action are such that it is not practicable to draft the statement of claim in this time period, the plaintiff would be likely to be granted an extension of time, by agreement between the parties, or by order of the court. (This may change under the draft civil proceedings rules, as the plaintiff must have his or her claim form (including a "statement of the nature of the claim; and a statement of all the facts on which he relies") ready to initiate the action (see Lord Woolf, *Access to Justice: Draft Civil Proceedings Rules* (1996), para 7.4.)

[119] The split here is not so much between the time required for different causes of action, as between the time required for a straightforward claim and a more complicated case. Whatever the cause of action, there may be both simple cases which could be prepared with ease within a few months and highly complicated claims which require years of investigation.

12.92 It should also be remembered that an important function of limitation periods is to encourage the plaintiff to start proceedings against the defendant without undue delay. Setting a limitation period which is too long for the majority of actions will fail to provide the plaintiff with any incentive to move quickly against the defendant.[120]

12.93 Further, the trends in limitation reform in common law jurisdictions have been to shorter periods.[121] This is shown by the move to three years in this country for personal injury claims and the move to three years and then one year in actions for defamation and malicious prosecution.[122] It is also shown by the view of the common law reform bodies that a limitation period running from the date of discoverability should be, at most, three years (under the Alberta Limitation Act 1996 it is two years).[123] This may in part be explained by the fact that improved communications and information flows enable plaintiffs to discover the existence of causes of action more readily than was once the case.[124] This has lead to recognition that a limitation period of six years is too long (even where that period starts from the accrual of the cause of action).[125]

12.94 The exact period to be chosen is obviously to some extent arbitrary, but in our view it would be appropriate to pick a period which is shorter than the six-year period which is the basis of the general provisions on contract and tort of the 1980 Act. The three-year period currently found in personal injuries, latent damage and Consumer Protection Act 1987 actions has the benefit of familiarity. It may therefore be a suitable limitation period to be applied to causes of action which fall within the core regime, unless there are specific features about, for example, contract claims, which require a longer initial limitation period. As we have noted above, in our view it is more complex cases in any cause of action, rather than a

[120] Notably, in some civil law systems, the imposition of a limitation period is seen as being justified to punish the plaintiff for not acting within a reasonable time. See V Bandrac, Chapter 8, France, p 147, in E H Hondius (ed), *Extinctive Prescription on the Limitation of Actions: Reports to the XIVth Congress of the International Academy of Comparative Law* (1995).

[121] A three year period is applied to personal injuries actions (and in the case of the Northern Territories to all common law actions (Limitation Act 1981, s 12) by most Australian states (see Limitation Act 1969, s 18A(2) (New South Wales); Limitation of Actions Act 1974, s 11 (Queensland); Limitations of Actions Act 1936, s 36(1) (South Australia); and Limitation Act 1974, s 5(1) (Tasmania). In Canadian jurisdictions, a two year period is preferred (See eg Limitations Act 1996, s 3(1) (Alberta), Limitation Act RSBC 1979 s 3(1) (British Columbia) and Limitations Act 1995, s 5 (Newfoundland).

[122] See para 2.5 above.

[123] See s 3. See also Law Reform Commission of Western Australia, *Report on Limitation and Notice of Actions,* Project No 36 - Part II (1997), pp 183 - 185; Ontario Limitations Act Consultations Group, *Recommendations for a New Limitations Act, Report of the Limitations Act Consultation Group* (1991), pp 22 - 23; New Zealand Law Commission, *Report No 6, Limitation Defences in Civil Proceedings,* NZLC R6 (1988), pp 48 - 63, and in particular para 175.

[124] The six year limitation period which applies to most causes of action originated with the six years for actions on the case prescribed in the Limitation Act 1623. See para 1.8 above.

[125] See Law Reform Committee, *Twenty-First Report (Final Report on Limitation of Actions)* (1977) Cmnd 6923, para 2.51; New Zealand Law Commission, *Report No 6, Limitation Defences in Civil Proceedings,* NZLC R6 (1988), paras 132 - 136.

particular cause of action, which may require a longer limitation period.[126] There is little evidence to suggest that a three year limitation period running from discoverability would not be sufficient for all contract and tort claims. However, a change from six years to three years would represent a substantial reduction to the limitation period for contract claims: though the change in the starting date, from the accrual of the cause of action to the date of discoverability, will in many cases give the plaintiff longer to prepare the claim, in the majority of cases the plaintiff can be expected to know the relevant facts when the cause of action accrues or shortly thereafter. It may therefore be more appropriate to set the initial limitation period at four years.

12.95 Arguments could be made in favour of a shorter period than three years,[127] but it is unclear whether a period of two years has significant advantages over the three years period. A period of one year would in our opinion be too short.[128] **We provisionally recommend that the uniform limitation period within the core regime should be three years. We ask consultees:**

(1) **Do you agree with that provisional recommendation?**

(2) **Would you prefer a limitation period of four years? or**

(3) **What period (other than three or four years) do you consider is more appropriate?**

12.96 **What one considers to be an appropriate limitation period is likely to depend on one's preferred starting date. The above provisional recommendation assumes a discoverability starting date. We ask those consultees who have favoured a different starting date than discoverability (that is, who have favoured one of the options 2 - 5 in paragraphs 12.14 to 12.20 above) to say what limitation period they consider appropriate in respect of their preferred starting date.**

3 A LONG-STOP?

12.97 Questions arising here are:

(1) Is there a need for a long-stop period?

(2) If there is to be a long-stop, what should that period be, and from what date should it start?

[126] See para 12.90, n 119 above.

[127] As the preference of Canadian jurisdictions for the two year period demonstrates.

[128] Although a one year period currently applies to defamation actions, this is coupled with a judicial discretion to disapply the limitation period where it appears to the court that it would be equitable to do so (Limitation Act 1980 s 32A). We note that when the Alberta Law Reform Institute considered a general limitation period of one year, it decided that this was too short to permit settlement negotiations to take place (see Institute of Law Research and Reform, Alberta: *Limitations,* Report for Discussion No 4 (1986), para 2.143).

We discuss in a later section the interrelationship between postponement of actions and long-stops.[129]

12.98 A move to a limitation system where the limitation periods for all causes of action start on the date of discoverability, however defined, would change the balance in favour of the plaintiff, as opposed to the defendant, and, unless safeguards are adopted, it would expose defendants in some cases to the risk of liability for an indefinite period.[130] When an action is brought after many years, there is also a risk of serious injustice to the defendant, who may not have witnesses available and who may have little documentary evidence. Such a system can also lack certainty. For this reason, law reform bodies which have proposed increased use of the date of discoverability as the commencement point for the limitation period also propose that there should be one or more long-stops, or ultimate limitation periods, beyond which no action can be brought, regardless of the plaintiff's state of knowledge. For example, the Law Reform Committee, considering the advisability of a long-stop, concluded that

> We consider it important that the law should provide some degree of finality and we think that any concern lest the long-stop should operate to deprive plaintiffs of worthwhile cases of action can be met by selecting a sufficiently lengthy period.[131]

12.99 Though the Law Reform Committee had earlier decided that a long-stop limitation period was not desirable in the case of personal injury claims,[132] it has since been suggested that the lack of a long-stop limitation period for personal injury claims and claims by plaintiffs under a disability should be re-examined.[133] *Colegrove v Smyth*[134] illustrates some of the problems caused. In this case

[129] See paras 12.138 - 12.145, 12.149 - 12.150, 12.173 - 12.177 below.

[130] One result would be to increase the costs faced by all potential defendants, including the costs of storing records for an indefinite period, and the costs of maintaining liability insurance. The availability of insurance over an extended limitation period may well be limited. See the discussion in Law Reform Committee, *Twenty-Fourth Report (Latent Damage)* (1984) Cmnd 9390, para 2.6.

[131] *Twenty-Fourth Report (Latent Damage)* (1984) Cmnd 9390, para 4.11. The Law Reform Committee was very aware of the problems that would face defendants in the absence of a long-stop limitation period: that "Defendants may be confronted with allegations of negligence at an impossibly remote date and be quite unable to meet them either evidentially or financially. There is also the problem of whether they will have been able to insure themselves adequately".

[132] *Twentieth Report (Interim Report on Limitation of Actions: in Personal Injury Claims)* (1974) Cmnd 5630, para 37. The Law Reform Committee noted that "[The long-stop limitation period] is open to the objection ... that it is less favourable to plaintiff than [the 1963 Act]. It is also open to the objection that the long-stop limitation period itself will either be too long to serve any useful purpose in the majority of cases, or too short to cover those cases with which we are particularly concerned, namely insidious diseases."

[133] See *S v W* [1995] 1 FLR 862, 867 per Sir Ralph Gibson. See the same judge's comments in *Headford v Bristol & District Health Authority* [1995] PIQR P180, 185: "I agree that the present state of the statute law, in which no ultimate or long-stop period of limitation is provided, in any case with reference to a person under a disability, seems to call for consideration in the light of such cases as this." See also M Jones, "Limitation Periods and Plaintiffs Under a Disability - A Zealous Protection?" (1995) 14 CJQ 258, 269.

[134] [1994] 5 Med LR 111.

proceedings were issued some 28 years after the events in question. By this time one of the defendant doctors had died, one was over 80, and the medical notes of both these defendants had been destroyed. Margaret Puxon QC commented in a brief note on the case

> yet another medical negligence case brought years after the alleged breach of duty - 28 years in this case - underlines the injustice that can be done to defendants who have to rely on their memory of clinical facts long after they have retired from practice and have presumably put behind them their professional expertise and judgment. This is the fourteenth such case dealt with in these reports since 1989 when they began.....[135]

12.100 Related problems have been found in other causes of action in respect of which there is no limitation period. This is illustrated by *Re Coghlan*.[136] An application was made by the plaintiff to prove a will over 50 years after the death of the testator, the whole of whose estate, with one minor exception, had been distributed on the footing that he had died intestate. Despite the fact that the laches of the plaintiff (who had been aware of the terms of the will for over thirty years) would probably have proved a bar to any proceedings in equity to recover any of the distributed property, an application by the defendants to dismiss the action as frivolous, vexatious and an abuse of the process of the court failed.[137]

12.101 The long-stop proposals which have been made by law reform bodies in other common law jurisdictions (and in some cases enacted) are as follows:

(1) A period of 30 years from the day of the act or omission on which the claim is based for the majority of claims, reduced to 10 years for most cases against health facilities or health facility employees (save where the claim is based on a foreign object in the body of the plaintiff, for which the period is again 30 years);[138]

[135] [1994] 5 Med LR 111,119.

[136] [1948] 2 All ER 68.

[137] Evidence of the problems caused to defendants by long limitation periods, which would be multiplied by the lack of any long-stop period is also provided by submissions made to us by the Solicitor to the Commissioner of the Metropolitan Police. Though his comments only relate directly to actions alleging misfeasance by police officers, they have a wider application:

> While police are always expected to have documentation - indeed police officers, having to deal with many incidents, rely on notes to refresh their memories - there are considerable problems with retaining a vast amount of material. There is increasing pressure for the early destruction of records and documents. Many documents which might be relevant in civil proceedings are routinely destroyed before the six year limitation period expires. Not only is it very expensive to retain large quantities of documents, they also have to be retained in a manner so that they can be found when needed. Storage costs are met from public funds.

[138] Ontario Limitations (General) Bill 1992, s 15. See Ontario Limitations Act Consultations Group, *Recommendations for a New Limitations Act, Report of the Limitations Act Consultation Group* (1991), recommendation 13 and recommendation 15 (pp 34 - 38).

(2) A period of 30 years from the act or omission giving rise to the cause of action beyond which no action, except those which are subject to no limitation period at all, may be brought;[139]

(3) A period of 15 years after the act or omission giving rise to the cause of action or on which the claim is based;[140]

(4) A period of 10 years from the act or omission or breach of legal duty on the part of the defendant giving rise to a claim.[141]

12.102 There appears, therefore, to be a wide-ranging consensus among law reform bodies that there is a need for a "long-stop" period. In general, we agree with that consensus. We think that a long-stop does act as a fair counterbalance to the "discoverability" starting point. However, we have had some concerns about whether a long-stop should be applied to personal injury actions. Plaintiffs who have suffered personal injury can be regarded as meriting special concern simply on the ground that personal injury is a more extreme type of harm than property damage or economic loss. We particularly have in mind those who suffer industrial diseases, such as asbestosis and other forms of pneumoconiosis, where the symptoms may not become apparent for decades after the negligent conduct. In cases of latent personal injury the merits of cutting into the "discoverability" test are particularly questionable.

12.103 One strategy for dealing with personal injury claims would be to give the courts a discretion to override the long-stop. We consider this below but provisionally reject it on the grounds of the uncertainty and consequent wasted costs that it involves.[142] Another strategy would be to impose a much longer long-stop in personal injury

[139] This applies notwithstanding any disability, confirmation, or postponement of the running of time. Newfoundland Law Reform Commission, *Working Paper on Limitation of Actions,* NLRC-WP1 (1985) p 323 and see Newfoundland Limitations Act 1995, s 22. It should be noted that, under the proposals of the Newfoundland Law Reform Commission, though the limitation period running from the date of the damage suffered by the plaintiff will be extended as of right where the plaintiff does not know he has a cause of action, it will not be extended for more than ten years from the date of the act or omission on which the claim is based. In effect this is a shorter long-stop period. *Ibid,* p 204. See also Newfoundland Limitations Act 1995, s 14(3).

[140] New Zealand Law Reform Commission, Model Limitations Bill, 1988 s 5 (except in cases of fraudulent breach of trust by a trustee, or where there has been deliberate concealment by the defendant, or where the act or omission occurs where the plaintiff is an infant); Law Reform Commission of Western Australia, *Report on Limitation and Notice of Actions,* Project No 36 Part II (1997) paras 7.30 and 7.54; and Alberta Law Reform Institute, Model Limitations Act 1989, s 3(1) and s 3(3). (This was reduced to 10 years by the Limitations Act c L-15.1, passed by the Alberta Provincial Legislature in May 1996, but not yet in force). But it should be noted that the Law Reform Commission of Western Australia also recommends that the court should have a discretion to override the long-stop limitation period in exceptional cases (see para 7.55).

[141] Extended to 30 years from that date in the case of fraud, fraudulent breach of trust and cases of deliberate concealment by the defendant. Law Reform Commission of British Columbia, *Report on the Ultimate Limitation Period: Limitation Act, Section 8* (1990), pp 67 - 68. See also Alberta Limitations Act 1996, c L-15.1, s 3(1)(b): see n 140 above. See further paras 12.146 - 12.154 below and para 10.100 above.

[142] See paras 12.187 - 12.196 below.

cases than in other types of case. This is the view we provisionally prefer: we discuss below the length of the long-stop. A further strategy would be to reject any long-stop in personal injury cases. This would mean that the discoverability test would apply untrammelled by a long-stop so that a latent personal injury could be the subject matter of a claim many decades after the breach of duty. We note in this respect that, in Scotland, the period of 20 years "long negative prescription" (which the Scottish Law Commission has recommended should be reduced to 15 years)[143] fulfils the function of a long-stop, but that personal injury actions are excluded from long negative prescription.[144]

12.104 **We ask consultees whether they agree with our provisional view that, to counterbalance the "discoverability" starting point, there should be a long-stop, including for personal injury claims. If consultees disagree, we ask them whether they would favour a long-stop except for personal injury claims.**

12.105 If there were to be a long-stop, when should that period start running? The main general alternatives are the date of the act or omission of the defendant which gives rise to the claim, or the date of the accrual of the cause of action. The proposals from other jurisdictions which we cite above are to the effect that the long-stop period should start from the date of the act or omission of the defendant. A disadvantage of the "act or omission" date as the commencement date is that the plaintiff may be unable to bring an action at that date because the cause of action has not accrued (most notably in cases of tort). Where there is a considerable period between the time of the act or omission, and the time when damage is incurred, this could result in hardship to plaintiffs. One example of such hardship would occur where the plaintiff contracts a disease as a result of his or her employment, but that disease does not manifest itself until some years after the plaintiff has left that employment. Similarly, on a major construction project, the negligent act which actually causes damage may take place a considerable time before the building work is completed, and still longer before the plaintiff has any opportunity to uncover the damage. On the other hand, the date of the defendant's act or omission is likely to be the date which is most readily ascertainable by both the defendant and the plaintiff, and thus will provide the most certainty as the starting point for a long-stop limitation period.[145]

12.106 It has been suggested that for claims in "construction" cases, the date of "completion of the works" is the best starting point.[146] Indeed this is the starting date for the limitation period in respect of actions under the Defective Premises Act 1972. By section 1(5) "Any cause of action in respect of a breach of the duty imposed by this section shall be deemed ... to have accrued at the time when the dwelling was completed, but if after that time a person who has done work for or

[143] Scottish Law Commission, Report on Prescription and Limitation of Actions (Latent Damage and Other Related Issues) (1989) Scot Law Com No 122, Cm 790, para 3.46.

[144] See paras 10.18 to 10.21 above.

[145] The equivalent "act or omission" for claims in the law of restitution for unjust enrichment (by subtraction) would be the date on which the defendant receives the benefit.

[146] Construction Industry Board, *Report from Working Group 10 on Liability Law* (1995) paras 51 - 58.

in connection with the provision of the dwelling does further work to rectify the work he has already done, any such cause of action in respect of that further work shall be deemed for those purposes to have accrued at the time when the further work was finished". Such a starting point for these claims would assist the plaintiff, as it would in most cases be later than the date of the actual act or omission which gave rise to the defect. It would also avoid the need to investigate precisely when the relevant act or omission took place, and may provide more certainty for both the plaintiff and the defendant (though this may not be so if certificates of practical completion are not being used).[147] The Law Reform Committee considered the use of the date of completion of works as a trigger for the long stop period in all cases of latent damage (except personal injury), but noted "we can see formidable difficulties is adapting the concept of completion to all the types of circumstances ... where latent damage might arise".[148] It may be difficult to apply "completion of the works" as a starting point for the limitation period to any claims other than "construction liability claims". It would therefore be necessary to identify with precision what is meant by "construction liability claims". In general we foresee problems of demarcation if a special limitation provision is introduced for a particular industry. It would also detract from the uniformity of our core regime. However, we recognise the force of the argument that "completion of the works" may provide additional certainty in "construction liability claims" and, in terms of our proposals for a long-stop, it could be regarded as the deemed date of the defendant's act or omission for such claims.

12.107 Use of the date on which the cause of action accrues as the starting point for the long-stop period would reintroduce the incoherence and complexity caused by the different rules on the date of accrual for different causes of action. Moreover, it would appear to destroy the purpose of a long-stop in that defendants would not be protected where the cause of action accrues many years after the date of the defendant's act or omission, as where damage from negligence does not occur for a long period. The introduction of a long-stop limitation period is, we believe, necessary to balance the pro-plaintiff change implicit in the general adoption of the date of discoverability as the starting point for the initial limitation period. It is therefore appropriate that the interests of defendants should be preferred over those of plaintiffs in fixing the starting point for the long-stop limitation period.

12.108 **Our provisional view is that, if there is to be a long-stop under the core regime, it should run from the date of the act or omission of the defendant which gives rise to the claim. We ask consultees whether they agree. We also ask consultees whether, for construction liability claims, the date of the act or omission of the defendant should be deemed to be the date of completion of the works, and, if so, how "construction liability claims" should be defined.**

[147] We note that the Official Referee, consulted by the Law Reform Committee during the preparation of their Twenty-Fourth Report on Latent Damage did not favour the use of a completion date test. See R Merkin, *Richards Butler on Latent Damage* (1987) p 96.

[148] *Twenty-Fourth Report (Latent Damage)* (1984) Cmnd 9390, para 4.12.

12.109 What should be the length of the long-stop period? The few long stop periods currently adopted[149] range from 10 years (for actions under the Consumer Protection Act 1987), through 15 years (under the Latent Damage Act 1986), to 30 years for actions to recover land or money charged on land under the Limitations Act 1980, section 28(4). Other law reform bodies have proposed long-stops of 10, 15 or 30 years.[150]

12.110 A further alternative would be a long-stop period of 12 years, the period which is now applicable to most land-related claims. If this period was chosen, it would remove the need to consider having a separate long-stop period for land-related actions.[151] It would also have the benefit of familiarity, though it would be inconsistent with the long-stop periods of 15 years and 10 years currently adopted for latent damage claims, and claims under the Consumer Protection Act 1987.[152]

12.111 The argument for a long-stop of 10, 12 or 15 years is that it would significantly reduce the risk that defendants would be obliged to litigate extremely stale claims, at a time when they have no evidence with which to defend themselves (records may have been destroyed, witnesses' memories may have faded, or indeed the witnesses themselves may be dead or untraceable). At the same time, it would provide sufficient time for the majority of plaintiffs to learn of their claim.[153] However, we are concerned that a long-stop of this length would fail to protect numerous plaintiffs suffering injury with a long latency period, such as asbestosis or other forms of pneumoconiosis. In some cases the disease would not have developed within a long-stop period of 15 years from the act or omission of the defendant.[154] In addition, numerous victims of sexual abuse may not be in a position to bring claims against their abusers within this period.[155] To prevent such plaintiffs from bringing an action against defendants by subjecting their claims to a long-stop period of 15 years or less would risk serious injustice to them. We also think that it may be appropriate to give increased protection to personal injury claims, as opposed to claims for property damage or pure economic loss, because they are the most serious. Of course, even a longer period than 15 years would not

[149] See paras 3.103, 3.99, 8.3 above. See also the 30 year period applied to actions under the Nuclear Installations Act 1965, s 15(1), though this is the only limitation period for claims under the Act and is therefore, technically, not a long-stop.

[150] See para 12.101 above.

[151] See paras 13.114 - 13.121 below.

[152] In the case of actions under the Consumer Protection Act 1987, the long-stop period of 10 years is prescribed by the Consumer Protection Directive 85/374 EEC, and may not be altered by unilateral legislation by the United Kingdom.

[153] It is worth noting that the Law Reform Commission of British Columbia was reporting specifically on the ultimate limitation period of 30 years which had been adopted as long stop for all causes of action except against hospitals, their employees or other medical practitioners in the Limitation Act 1979. It concluded that 30 years was too long to use as a general period, and reduction to 10 years would not in practice bar many meritorious claims (Law Reform Commission of British Columbia, *Report on the Ultimate Limitation Period: Limitation Act, Section 8* (1990), p 31).

[154] As would have been the case in *Guidera v NEI Projects (India) Limited* (unreported, 30 January 1990) (CA), where the plaintiff did not develop symptoms of asbestosis until 23 years after he had been exposed to asbestos dust.

[155] See further paras 13.17 - 13.37 below.

always protect plaintiffs. But a line has to be drawn somewhere if one is to have a long-stop:[156] any long-stop must, at some point, cut across the "discoverability" starting point so as to prevent actions by those who could not reasonably know of their injury. We believe that a long-stop of 30 years may be more appropriate for personal injury claims so as to enable most, if not all,[157] cases of latent personal injury to proceed.

12.112 The main options therefore seem to be as follows:

(1) a long-stop limitation period of 15 years in all cases (including personal injury);

(2) a long-stop limitation period of 12 years in all cases (including personal injury);

(3) a long-stop limitation period of 10 years in all cases (including personal injury);

(4) a long-stop limitation period of 15 years in all cases except for personal injury which would be subject to a long-stop period of 30 years;

(5) a long-stop limitation period of 12 years in all cases except for personal injury which would be subject to a long-stop period of 30 years;

(6) a long-stop limitation period of 10 years in all cases except for personal injury which would be subject to a long-stop period of 30 years.

12.113 **Our provisional view is that, under our core regime, there should be a uniform long-stop period of 10 years, applicable to all actions other than for personal injury. We consider that personal injury claims should be subject to a long-stop period of 30 years. We ask consultees whether they agree. If not, we ask them whether they would prefer a long-stop of 12 years, or 15 years, for non-personal injury claims.**

4 FACTORS EXTENDING THE LIMITATION PERIOD

12.114 We should emphasise at the outset that, although we are considering factors extending the limitation period as part of our examination of a core limitation regime, the factors are such that we would wish our provisional recommendations regarding them to apply generally within the law of limitations.

[156] An alternative strategy is not to have a long-stop for personal injury claims: see para 12.103 above.

[157] A 30-year long-stop would have ruled out claims by the plaintiffs in *Arnold v Central Electricity Generating Board* [1988] AC 228 (mesothelioma); and *Keenan v Miller Insulation and Engineering Ltd* (unreported, 8 December 1987) (asbestosis). See NJ Wikely, "Industrial Disease and the Onset of Damage" (1989) 105 LQR 19.

(1) Disability

12.115 As we have seen, under section 28 and 28A of the Limitation Act 1980, disability extends the limitation period.[158] **As under the present law, our provisional view is that disability should extend an initial limitation period so that the period starts to run only when the plaintiff's disability has ceased. We ask consultees whether they agree.**

12.116 The more difficult issues which we consider in detail in this section are as follows:

(1) The definition of "disability"

(2) Should supervening disability count?

(3) Should disability count if the person under the disability has a representative adult?

(4) Should disability override a long-stop?

(a) Definition

12.117 By section 38(2) a person is under a disability while "an infant or of unsound mind;" and by section 38(3) the latter is defined as being incapable of managing and administering one's property and affairs by reason of "mental disorder" within the meaning of the Mental Health Act 1983.[159] The focus on mental disorder means that those plaintiffs who suffer from a physical disorder which leaves them incapable of managing their affairs are unprotected. For example, a plaintiff in a coma for several months following an accident falls outside the definition in section 38, yet there seems to be no reason why such a plaintiff should be denied the protection afforded by section 28.

12.118 It has also been suggested that a definition of "disability" which focuses on mental disorder and the plaintiff's ability to manage his or her property and affairs may be too narrow to cover the problems faced by victims of sexual abuse.[160] Though such victims may still not be in a position to commence proceedings for several years from the time when they reach their majority, they may well otherwise be capable of managing their affairs. The trauma of sexual abuse is said to give rise to psychological impediments to bringing an action which should be recognised as

[158] See para 8.2 to 8.10.

[159] "Mental disorder" is defined in s 1(2) of the 1983 Act as "mental illness, arrested or incomplete development of mind, psychopathic disorder and any other disorder or disability of mind". "Psychopathic disorder" is defined as "a persistent disorder or disability of mind (whether or not including significant impairment of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the person concerned".

[160] J Mosher, "Challenging Limitation Periods: Civil Claims by Adult Survivors of Incest" (1994) 44 U of Toronto LJ 169, though see ACL Mullis, "Compounding the Abuse? The House of Lords, Childhood Sexual Abuse and Limitation Periods" [1997] Med LR 22 for a contrary argument.

a form of "disability" sufficient to delay the start of the limitation period.[161] In many cases, victims of sexual abuse have been diagnosed as suffering from post-traumatic stress disorder.[162] It has also been suggested that there is a "post-incest syndrome" or "accommodation syndrome", and that those suffering from this syndrome will "persistently avoid any situation, such as initiating a lawsuit, that is likely to force them to recall and, therefore, to re-experience the traumas".[163] Even if those syndromes counted as "mental disorders" for the purposes of the Mental Health Act 1983, it is unlikely that such plaintiffs would be regarded as incapable thereby of managing their affairs.

12.119 The following definitions of adult disability have been proposed (and in some cases enacted) in other common law jurisdictions for the purpose of extending limitation periods:

(1) People who are unable by reason of mental disorder, intellectual handicap or other mental disability to make reasonable judgments in respect of their affairs (Western Australia Law Reform Commission).[164]

[161] The Ontario Limitations Consultation Group noted in their report that one of the consequences of sexual abuse was to render the victims psychologically incapable of taking proceedings against the abuser:

> [I]t is now recognised that in some circumstances the sexual assault will render the victim incapable of considering legal proceedings until many years after the event. These circumstances typically involve victims who were in a relationship of trust and dependency. Incest is a prime example, but recent experience reveals that other sexual abuses in relationships of trust have similar effects. A number of factors combine in these situations to render the victim incapable of initiating legal proceedings against the perpetrator: the nature of the act (personal violation), the perpetrator's position of power over the victim and the abuse of that position act effectively to silence the victim. Moreover, until recently, many victims of sexual assault were subject to social disapproval based on the perception that they were somehow to blame. In these circumstances, it is not uncommon for such a victim to cope with the violation by dissociating from the assaultive events, so that they are forgotten altogether or their emotional significance is denied. Many years of therapy may be required before the victim is able to confront the assailant. Where a victim was also physically, mentally or psychologically disabled at the time of the assault, another incapacitating factor is added to those above. (Ontario Limitations Act Consultations Group, *Recommendations for a New Limitations Act, Report of the Limitations Act Consultations Group* (1991), p 20).

[162] See J Mosher, "Challenging Limitation Periods: Civil Claims by Adult Survivors of Incest" (1994) 44 UTLJ 169, 179; G Hood, "The Statute of Limitations Barrier in Civil Suits brought by Adult Survivors of Child Sexual Abuse: A Simple Solution" (1994) UILR 417 at 423; ACL Mullis, "Compounding the Abuse? The House of Lords, Childhood Sexual Abuse and Limitation Periods" [1997] Med LR 22.

[163] See *KM v HM* (1992) 96 DLR (4th) 289, 306 (Can Sup Ct) per La Forest J. This is controversial. J Mosher noted that "Despite the Court's claim that there exists a consensus in the medical community, post-incest syndrome is not even mentioned in a number of recent articles on incest syndrome. To the contrary, a recent review article concludes that 'the evidence available does not yet justify the designation of a post-sexual abuse syndrome'. It is not a recognised psychiatric disorder, nor, apparently, is it a term used by experts in the field." *Op cit* at 214 (Footnotes omitted).

[164] *Report on Limitations and Notice of Actions,* Project No 36, Part II (1997), para 17.64. The current definition of disability in Western Australia is derived from the English Real Property Limitation Acts of 1833 and 1874. See para 10.62, n 179 above. For details of

(2) A person who is "in fact incapable of or substantially impeded in the management of his affairs" (British Columbia Limitation Act RSBC 1979, s 7(5)).[165]

(3) "An adult who is unable to make reasonable judgments in respect of matters relating to the claim" (Alberta Limitations Act 1996, c L-15.1, section 1(i)).[166]

(4) Incapacity by reason of "impairment of ... physical or mental condition, restraint of ... person, and ... war or warlike operations or conditions provided that the claimant proves that [the] incapacity resulted in his or her being actually incapable of (or substantially impaired in) managing their affairs in relation to the claim for a continuous period of 28 days or more" (New Zealand Law Commission).[167]

(5) A person "incapable of the management of his or her affairs because of disease or impairment of his or her physical or mental condition" (Newfoundland Limitations Act 1995, section 15(5)).[168]

(6) A person "incapable of commencing a proceeding in respect of a claim because of his or her physical, mental or psychological condition, or because of physical restraint, war or war-like conditions" (Ontario Limitations (General) Bill 1992, clause 9).[169]

12.120 Furthermore, the Ontario Limitations Act Consultations Group recommended that specific provision be made for victims of sexual abuse.[170] The draft bill introduced to implement its recommendations provided that

> The limitation period established by section 4 does not run in respect of a claim based on assault or sexual assault during any time in which the person with the claim is incapable of commencing the proceeding because of his or her mental or psychological condition.[171]

the current definition of "disability" in other Australian jurisdictions, see paras 10.62 - 10.65 above.

[165] Implementing the recommendations of the Law Reform Commission of British Columbia, *Report on Limitations Part 2 - General,* LRC 15 (1974), p 71.

[166] Implementing the recommendations of the Alberta Law Reform Institute, *Limitations,* Report No 55 (1989), p 41.

[167] *Report No 6, Limitation Defences in Civil Proceedings,* NZLC R6 (1988), para 258. Under s 2(2) of the New Zealand Limitation Act 1950, a person "shall be deemed to be under a disability while he is an infant or of an unsound mind". See further para 10.82 above.

[168] Implementing the recommendations in Newfoundland Law Reform Commission, *Report on Limitation of Actions,* NLRC-R1 (1986), Chapter VII, para 6.

[169] The current definition of "disability", under the Limitations Act 1990, is derived from the English Real Property Limitations Acts 1833 and 1874. See para 10.101, n 325.

[170] Ontario Limitations Act Consultations Group, *Recommendations for a New Limitations Act, Report of the Limitations Act Consultation Group* (1991), recommendation 9, pp 30 - 31.

[171] Ontario Limitations (General) Bill 1992, clause 9(1).

It is also provided that

> unless the contrary is proved, a person with a claim based on a sexual assault shall be presumed to have been incapable of commencing the proceeding earlier than it was commenced.[172]

12.121 Newfoundland also protects victims of sexual abuse, both by providing that in some circumstances there is no limitation period for actions arising from sexual misconduct,[173] and otherwise by extending the concept of disability to include those who are "for the purpose of an action for misconduct of a sexual nature not under section 8(2), incapable of commencing that action by reason of his or her mental or physical condition resulting from that sexual misconduct."[174]

12.122 Alberta gives limited protection to victims of sexual abuse by providing that minors are deemed to be disabled by minority in the case of actions against a parent, or, in the case of actions relating to sexual abuse or sexual misconduct, in actions against any person.[175] This relieves victims of sexual abuse from the presumption that minors in the actual custody of a parent or guardian are not under a disability,[176] but does not extend the disability beyond majority.

12.123 We have recently reviewed generally the concept of "mental disability"[177] in the context of an examination of the ways in which decisions may lawfully be made on behalf of those unable to make decisions for themselves.[178] It was recommended that the focus should shift from "mental disability" to a "lack of capacity", which could have causes other than mental disability. It was recommended that the following definition should apply:

> (1) A person is without capacity if at the material time:

[172] Ontario Limitations (General) Bill 1992, clause 9(3).

[173] Under s 8(2) of the Newfoundland Limitations Act 1995, where "a person who commits misconduct of a sexual nature against another person

> (a) is in a position of trust or authority with respect to that other person;
>
> (b) has a financial, emotional, physical or other dependent relationship with the other person; or
>
> (c) has charge of the other person,

the person against whom the sexual misconduct occurred is not governed by a limitation period and may bring an action arising from that sexual misconduct at any time."

[174] Newfoundland Limitations Act 1995, s 15(5)(c).

[175] Limitations Act c L-15.1 1996 s 5, as amended by the Justice Statutes Amendment Act 1997 (given the Royal Assent on 18 June 1997, but not yet proclaimed).

[176] See n 201 below.

[177] Used instead of "mental disorder" in part because of the derogatory implications felt to be attached to the concept of a "disorder" and to distinguish the review from the language of the Mental Health Act 1983. See Mental Incapacity (1995) Law Com No 231, paras 3.10 - 3.12.

[178] See Mental Incapacity (1995) Law Com No 231.

(a) he is unable by reason of mental disability to make a decision for himself on the matter in question or

(b) he is unable to communicate his decision on that matter because he is unconscious or for any other reason.[179]

"Mental disability" for the purposes of this definition is defined as "a disability or disorder of the mind or brain, whether permanent or temporary, which results in an impairment or disturbance of mental functioning."[180]

12.124 This definition would resolve many of the problems which have been identified with the definition now used in the 1980 Act. Although it does not deal specifically with the problem of sexual abuse victims, it is strongly arguable that a victim of sexual abuse, who was unable to make a decision relating to his or her claim as a result of a recognised disorder like post-traumatic stress disorder, would fall within the definition. On the other hand, it is not clear that all forms of "psychological disability" suffered by sexual abuse victims could be classed as forms of "mental disability" within the above definition. It may be thought therefore that one should follow the Ontario Limitations Act Consultation Group in creating a category of "disability" which would aim to cover all victims of sexual abuse so that the limitation period would not run against them until they could no longer be said to suffer from any psychological handicap to bringing an action against the defendant. It could however be difficult to produce an acceptable definition of the precise degree of "psychological incapacity" which would allow plaintiffs to benefit, in the light of academic disagreement as to the nature of the incapacity.[181]

12.125 **Consultees are asked**

(1) **whether they agree with our provisional view that the definition of "lack of capacity" in paragraph 12.123 above should be adopted as the definition of disability (other than minority) in the law of limitations, and**

(2) **whether, in addition, the definition of "disability" should make provision for the psychological incapacity suffered by victims of sexual abuse.**

[179] Clause 2(1) of the Draft Bill annexed to Law Com No 231.

[180] Clause 2(2) of the Draft Bill annexed to Law Com No 231.

[181] As Mosher notes with reference to the decision of the Supreme Court of Canada in *KH v MH* "the court's use of 'post-incest syndrome' as the basis for this presumption is problematic for a host of reasons. First, precisely what the court believes the constituent features of this syndrome to be, and thus what a plaintiff need show to claim its benefit, is not at all clear from the decision". She later notes that "In addition ... the reliance upon the notion of a 'syndrome' is problematic even in circumstances where its content is clear and uncontentious. As is apparent from the court's own discussion, if a survivor does not fit the syndrome - isn't in the court's words a 'typical survivor' - she will not be able to rely upon the presumption" "Challenging Limitation Periods: Civil Claims by Adult Survivors of Incest" (1994) 44 U of Toronto LJ 169, 214, 216. See also n 163 above. We discuss at paras 13.17 - 13.37 below other solutions for the problem of limitation periods and child sexual abuse which do not rely on the definition of "disability".

(b) Supervening disability

12.126 By section 28(1), the limitation period is only automatically extended in cases of disability where the plaintiff suffered from that disability on the day when the cause of action accrued. Supervening disability after that point is relevant only as a factor to be taken into account where the courts have a discretion to disapply a limitation period.[182]

12.127 Previous examination of this question by the Law Reform Committee[183] led to the conclusion that, in so far as hardship was caused to claimants by the rule, it was best dealt with in personal injuries cases by the court having regard to the duration of any disability of the plaintiff which arose after the cause of action accrued in considering the exercise of its discretion to disapply the period.[184] Although it was accepted that the rule could also cause hardship outside the area of personal injuries litigation, the Law Reform Committee felt that the difficulties involved in recognising subsequent disability outweighed the case for reform of the rule.

12.128 The difficulties which concerned the Law Reform Committee seemed to be primarily the difficulties of proving when the plaintiff first started to suffer from a disability after the cause of action accrued.[185] This may be problematic in some cases but does not seem to provide a good reason for denying plaintiffs the benefits of suspending the running of time for a supervening disability which can be proved. A number of jurisdictions (New South Wales, South Australia, Northern Territory and Australian Capital Territory, Alberta, British Columbia, Manitoba, Newfoundland and Saskatchewan) have provided that supervening disability should suspend the running of the limitation period.[186] **We therefore ask consultees whether they agree with our provisional view that supervening disability should suspend the running of time under the initial limitation period. If consultees do not agree, we ask them to say why not.**

[182] *Garner v Wingrove* [1905] 2 Ch 233, *Purnell v Roche* [1927] 2 Ch 142. See para 8.5 above. The only exception to this is contained in s 28A of the 1980 Act. See paras 8.6 - 8.10 above. For the relevance of supervening disability where the court has such a discretion, see para 3.72 above.

[183] See Law Reform Committee, *Twentieth Report (Interim Report on Limitation of Actions: in Personal Injury Claims)* (1974) Cmnd 5630, paras 91 - 96, and Law Reform Committee, *Twenty-First Report (Final Report on Limitation of Actions)* (1977) Cmnd 6923 paras 2.46 - 2.48.

[184] See s 33(3)(d) of the 1980 Act.

[185] See *Twentieth Report*, para 94. Interestingly, the Law Reform Committee seem to have thought that there would be no difficulty in a plaintiff demonstrating that he was under a disability when the cause of action accrued.

[186] New South Wales Limitation Act 1969 s 52; Northern Territory Limitation Act 1981 s 36(1); South Australia Limitation of Actions Act 1936 s 45(1); Alberta Limitations Act 1996 s 5(1); British Columbia Limitation Act 1979 s 7(3); Manitoba Limitation of Actions Act 1987 s 7(2); Newfoundland Limitations Act 1995 s 5(3); Saskatchewan Limitations of Actions Act 1978 s 6. See paras 10.65, 10.102 above. It is also noteworthy that supervening disability acts to extend the limitation period in Scotland. See para 10.26 above. This has also been recommended by the Western Australia Law Reform Commission, *Report on Limitations and Notice of Actions,* Project No 36, Part II (1997), para 17.65; and by the Ontario Law Reform Commission, *Report on Limitation of Actions* (1969), p 97.

(c) The person under a disability has a representative adult

12.129 Where the affairs of the plaintiff under a disability are managed by a third party (such as a parent or guardian in the case of minority, or a guardian appointed under the Mental Health Act 1983 in the case of other disability) there may be an argument for making an exception to the general rule that the limitation period is extended for plaintiffs suffering a disability. Where another person is able to act on their behalf the person under a disability may suffer no disadvantage by comparison to other plaintiffs. In practice many actions are brought on behalf of a person under a disability by a parent acting as next friend. A provision restricting the extension of time to those who could prove that they were not at the time the cause of action accrued in the custody of a parent (section 22(d))[187] was included in the 1939 Limitation Act.[188] However, the Law Reform Committee recommended in its Twentieth Report that this provision should be repealed and there is now no such provision in the 1980 Act.[189] The Committee noted that the rule as it stood had a number of defects.[190] It was concerned that the rule could not operate adequately when a parent was the tortfeasor,[191] but more importantly, it noted that the basic assumption underlying the rule, that "if the minor (or mental patient) is in the charge of a competent adult, that adult can be trusted to seek legal advice and, if appropriate, to institute legal proceedings on his behalf",[192] could be questioned. The experience of the Official Solicitor suggested that "there were many cases in which infants suffer a loss by default". Although the Committee noted that repealing the rule could be expected to increase the number of stale claims faced by defendants, it gave greater weight to the risk of injustice to those minors "whose parents and guardians have not properly discharged their responsibilities". This conclusion was influenced by the fact that there was no legal duty on parents to bring proceedings on behalf of their children (as still appears to be the case today). In any event, the Committee concluded that:

[187] Later s 22(2)(b) of the 1939 Act, following amendments made by the Law Reform (Limitation of Actions, etc) Act 1954. Strangely, "parent" did not include "guardian" or any other relation for the purposes of this provision.

[188] The provision in question was added to the Limitation Act 1939 by an amendment as the bill was going through Parliament. It was not recommended by the Law Reform Committee in the *Fifth Interim Report (Statutes of Limitation)* (1936) Cmd 5334, which gave rise to the 1939 Act.

[189] It was repealed by the Limitation Act 1975, s 2.

[190] Including the fact that a child with parents who were unwilling or unable to take steps on its behalf was at a disadvantage compared with a child with no parent or guardian, and that the rule made no provision for the circumstances where the parent or guardian was under a disability themselves, or died before bringing an action. Law Reform Committee, *Twentieth Report (Interim Report on Limitation of Actions: in Personal Injury Claims)* (1974) Cmnd 5630, see paras 97 - 109.

[191] See *Twentieth Report (Interim Report on Limitation of Actions: in Personal Injury Claims)* (1974) Cmnd 5630, para 103.

[192] *Ibid*, para 108.

> In practice a right of action against his parent would be a poor substitute for the child's own claim for damages against the original tortfeasor.[193]

Similarly, where the plaintiff's disability stems from mental disability, there does not appear to be any person or body under a duty to bring proceedings on the plaintiff's behalf.

12.130 The above reasons, and in particular the fact that the parent or guardian cannot be relied upon to bring an action on behalf of their child, have also led to provisions similar to section 22(d) being repealed, or their repeal being recommended, in most of those common law jurisdictions which have enacted them.[194] As noted by the Law Reform Commission of British Columbia,

> We would be loath to see the way open for a parent to seriously impair the rights of a child because he, for any one of a variety of reasons, might be unwilling to prosecute an action on behalf of that child.[195]

12.131 The introduction of a rule similar to section 22(d) has however been considered by the Newfoundland Law Reform Commission. The Newfoundland Law Reform Commission[196] recommended that no extension should be given where:

> (a) an infant is in the custody of a parent or guardian; or
>
> (b) the affairs of a person of unsound mind are being administered by a committee or the Public Trustee
>
> except where an action is being brought by the infant against such parent or guardian or by the person who was of unsound mind (or on his behalf if he is still of unsound mind) against such committee or the Public Trustee.[197]

[193] *Ibid*, para 108. The Law Reform Committee was also concerned that "such a change in the law would raise issues far beyond our terms of reference".

[194] Victoria in 1983, Ireland in 1991, New Zealand in 1963 (though the New Zealand Law Commission, *Report No 6, Limitation Defences in Civil Proceedings,* NZLC R6 (1988), recommended that with regard to incapacity (other than infancy) the plaintiff should have to prove such incapacity, and that "if the claimant had someone else managing his or her affairs, this criterion might not be satisfied" (para 258)). See further Law Reform Commission of Western Australia, *Report on Limitations and Notice of Actions,* Project No 36 - Part II (1997), paras 17.49 - 50.

[195] See *Report on Limitations, Part 2 - General,* LRC 15 (1974) p 70, a view endorsed by the Law Reform Commission of Saskatchewan, *Proposals for a New Limitation of Actions Act, Report to the Minister of Justice* (1989) p 35.

[196] Which added a recommendation that a limitation period should run against a person under a disability in the custody of a parent or guardian or whose affairs are being administered by a committee or the public trustee following public consultation: such a recommendation was not contained in its first Working Paper. See Newfoundland Law Reform Commission, *Working Paper on Limitation of Actions,* NLRC-WP1 (Supplement) (1986), pp 4 - 11; *Report on Limitation of Actions* NLRC-R1 (1986), Chapter VII, para 5.

[197] See *Report on Limitation of Actions,* NLRC-R1 (1986), Chapter VII, para 5.

This recommendation was however rejected by the government of Newfoundland.[198]

12.132 The Law Reform Commission of Western Australia also proposed that the extension given to minors should only apply if they proved that they were not in the custody of a parent or guardian, and that with respect to plaintiffs suffering from other disability, no extension should be given if an administrator had been appointed to look after their estate under the relevant legislation.[199] The Law Reform Commission acknowledged the interests of some minors might not be adequately protected under this provision, but felt that the residual discretion that they were giving to the courts could take care of such cases.[200]

12.133 Under the Alberta Limitations Act 1996, section 1, time runs against a minor who is in the custody of a parent or guardian.[201]

12.134 A mid position is proposed by the British Columbia Law Reform Commission and the Saskatchewan Law Reform Commission which have recommended that defendants should be able to start time running against a plaintiff under a disability by serving a "notice to proceed" on the person responsible for looking after the affairs of that plaintiff.[202] However, this proposal also has drawbacks. It assumes that defendants will be willing to make use of the provision,[203] and more importantly, that defendants will know of the potential claim against them, and can identify the plaintiff and his or her representative. In many cases a defendant's first knowledge of the claim against him will come when he is notified of the claim by the plaintiff. This applies particularly to cases of latent damage, and all cases

[198] "[The government] determined that it was not reasonable to expect children, or incompetents generally, if they recover competency, to sue their caregivers in cases where a limitation period has been missed. It noted that jurisdictions which had adopted the changes which the Commission proposed have recently reversed themselves." "The Limitations Act: A Nuts and Bolts Overview", a presentation by Chris Curran, Department of Justice (Limitations Act Seminar 28 March 1996).

[199] See *Report on Limitation and Notice of Actions,* Project No 36 - Part II (1997) para 17.59 and 17.64.

[200] *Report on Notice and Limitation of Actions,* Project No 36 - Part II (1997) para 17.61.

[201] By s 1(i) of the Limitations Act c L-15.1 1996, only a minor "who is not under the actual custody of a parent or guardian" is considered to be under a disability. In this, the Albertan legislature rejected the recommendation of the Alberta Law Reform Institute in *Limitations,* Report No 55 (1989) that all minors should be covered. This recommendation followed the earlier Report for Discussion in 1986, in which it was specifically said that "We are familiar with too many cases in which a parent, a committee, or a guardian, as the case may be, has permitted a limitation period to expire without bringing a claim, to the serious prejudice of a person under a disability" (*Limitations,* Report for Discussion No 4 (1986), para 6.16).

[202] Law Reform Commission of British Columbia, *Report on the Ultimate Limitation Period: Limitation Act, Section 8* (1990), p 42 (See also Limitation Act RSBC 1979 s 7(6)); Law Reform Commission of Saskatchewan, *Proposals for a New Limitation of Actions Act, Report to the Minister of Justice* (1989), pp 35 - 36.

[203] Which is doubtful: giving notice to the plaintiff would make it far more likely that the defendant would be sued, and, as the Manitoba Law Reform Committee commented "most defendants would rather have the sword of Damocles suspended overhead than falling upon them." *Limitation of Actions: Time Extensions for Children, Disabled Persons and Others*, Report No 27 (1979), p 14.

where the injury is known only to the plaintiff. A notice provision would be of no assistance in such cases. It might also be insufficient in some cases to ensure that action is taken on behalf of the person under a disability.

12.135 A reintroduction of the rule that time runs against a person under a disability where there is a representative adult who is capable of bringing proceedings on their behalf would leave some of those under a disability unprotected, through the inaction of their representative. The risk of this may be reduced by excluding cases where plaintiffs are claiming against their representatives, as recommended by the Newfoundland Law Reform Commission,[204] and as enacted in the Alberta Limitations Act 1996, section 5(2). However, it will not be eliminated. The crucial policy question is whether it is fair to penalise any person under a disability for the inactivity of their representative.

12.136 **Consultees are asked whether a limitation period should run against a person under a disability who has a representative adult capable of bringing proceedings on his or her behalf (except where the claim is against the representative).**

12.137 If it is decided that where there is a representative adult to act for the person under a disability, the limitation period should run against the person under a disability as it would run against a person who was not under a disability, the core regime would require modification to make it clear that the knowledge of the representative adult, and not of the person under a disability, would act as the reference point for the start of the limitation period.[205]

(d) Should disability override a long-stop?

12.138 The question that we are here examining is, if time would not be running against a person under a disability in respect of the initial limitation period, should it nevertheless run in respect of a long-stop? The practical importance of this will depend on how one answers the question at paragraph 12.136 above. If it were to be the law that time should run against a person under a disability who has a representative adult, then it is clear that a long-stop should apply in the normal way where there is a representative adult (and the claim is not being made against that adult). But if that were not to be the law, the question of whether a long-stop should run against a person under a disability would assume major practical importance.

12.139 Under the current law, a person under a disability is subject to a long-stop limitation period in respect of an action under the Consumer Protection Act 1987 which cannot be brought after the expiry of the ten year long-stop period;[206] and an action to recover land or money charged on land, which cannot be brought

[204] Though, as noted above (see para 12.131), this recommendation was not accepted: the Newfoundlands Limitation Act 1995 protects all minors, not just those who do not have a representative adult.

[205] Similarly, whether the defendant had been guilty of deliberate concealment of the relevant facts should be judged by reference to the knowledge of the representative adult.

[206] Section 28(7)(a) of the 1980 Act.

after thirty years after the accrual of the cause of action.[207] Disability will however override the fifteen year long-stop for a negligence action for latent damage, where the disability existed at the date the cause of action accrued, though not where the disability intervened between the date when the damage was suffered and the date of discoverability.[208]

12.140 The principle that those under a disability should be subject to a long-stop has been accepted (as regards adult disability but not minority) by the New Zealand Law Commission and the British Columbia Law Reform Commission and (as regards all disability) in Newfoundland.[209] This approach has also essentially been favoured by the Law Reform Commission of Western Australia, in recommending that the ultimate (or long-stop) limitation period should apply to adult disability. But an important difference is that this is made subject to the court's discretion to extend the period.[210]

12.141 The fundamentally different approach is to allow the disability to override the long-stop. The Law Reform Institute of Alberta recommended that (the initial and) the long-stop limitation period should be extended in the case of disability,[211] and this has been implemented in the Limitations Act 1996, section 5.

12.142 We believe that it is inappropriate for any category of plaintiff to have the benefit of an unlimited period of time within which to bring proceedings against defendants. As we have noted, where proceedings are brought after a substantial interval, serious injustice may be done to the defendants, who may not be able to defend their claim.[212] Granting unlimited protection to a person under a disability

[207] Section 28(4) of the 1980 Act, a long-stop period which in practice only applies to a person under a disability. The person under a disability is also subject to the limitation period of thirty years for an action under s 15 of the Nuclear Installations Act 1965 (though as this is the only limitation period applicable to such actions it is not a "long-stop" properly so-called).

[208] This appears to be the effect of s 28A of the 1980 Act, though the drafting of that section is far from clear. See paras 8.6 - 8.10 above.

[209] New Zealand Law Commission, *Report No 6, Limitation Defences in Civil Proceedings,* NZLC R6 (1988) (though the long-stop limitation period would not apply to infants (para 307) (see para 10.84 above); Law Reform Commission of British Columbia, *Report on the Ultimate Limitation Period: Limitation Act, Section 8* (1990), pp 36 - 42 and Newfoundland Limitations Act 1995, s 22 (Newfoundland Law Reform Commission, *Working Paper on Limitation of Actions,* NLRC-WP1 (1985), p 323).

[210] *Report on Limitations and Notice of Actions,* Project No 36 - Part II (1997), para 17.64.

[211] *Limitations,* Report No 55 (1989), p 41.

[212] As in *Tolley v Morris* [1979] 1 WLR 205, where the plaintiff was injured in a road traffic accident as a child. Proceedings were issued within three years of the accident, but followed by inexcusable delay by the plaintiff, so that the matter was eventually tried over fifteen years after the accident, when documentary evidence relating to the matter had been destroyed, and the memories of the available witnesses had seriously deteriorated. The House of Lords noted that as the plaintiff would be able to issue a fresh writ until such time as the limitation period had expired, no useful purpose would be served by dismissing the action for want of prosecution. See also *Headford v Bristol and District Health Authority* [1995] PIQR P180, where the delay was around 28 years (discussed at para 8.4 above), and *Turner v WH Malcolm Ltd* (1992) 15 BMLR 40, where a claim by the plaintiff in respect of brain damage suffered in a road traffic accident had not come to trial 12 years after the accident.

risks precisely this injustice, and this policy has been questioned.[213] **We consider that, at least in relation to adult disability - where in contrast to minority there is no necessary end to the disability - disability should not override a long-stop. Do consultees agree?**

12.143 The question then arises whether the same approach should apply to minority where, in contrast to adult disability, there is no possibility of an indefinite postponement of time: that is, the disability must end when the plaintiff is 18. The question does not raise any practical difficulty where a 30 year long-stop applies as we have provisionally recommended for personal injury claims: the minor who has been injured at birth will, on any view, still have 12 years before that long-stop bites. But what about a 10 year long-stop (for example, on our provisional view on long-stops above, where a minor suffers damage to property or, outside the realm of contract or tort, but particularly relevant here, where there has been a breach of trust in relation to assets held on trust for the minor)? In that situation, it may be thought harsh for a minor to lose his or her claim before he or she is regarded as having the capacity fully to understand it. On the other hand, the arguments in favour of a long-stop (for example, in preventing stale claims) apply irrespective of who the plaintiff is; and one would anticipate that the number of minors who have been victims of a non-personal injury wrong when very young - and yet for whom redress has not been sought by a next friend - would be very small indeed.

12.144 **We ask consultees which, if any, of the following three options they favour in relation to the question of whether minority should override a long-stop. These three options are all posited on the assumption that time would not be running against a person under a disability in respect of the initial limitation period (see paragraph 12.136 above).**

(1) **Option 1: Minority should override a long-stop (so that the running of time for any act or omission committed during the plaintiff's minority would not commence until the plaintiff is 18).** For example, if a trustee acted in breach of trust towards a minor (aged two) the long-stop period in respect of an action for breach of trust by the minor against the trustee would not start running until the minor reached the age of 18. The long stop would therefore end when the plaintiff was 28 (in the case of a 10 year long-stop period).

(2) **Option 2: Minority should not override a long-stop (so that a 10 year long-stop would potentially bar a non-personal injury claim even though the plaintiff is a minor).** This option is consistent with our provisional view on adult disability in paragraph 12.142 above. In the

[213] See M Jones, "Limitation Periods and Plaintiffs under a Disability - A Zealous Protection?" (1995) 14 CJQ 258. In *Turner v WH Malcolm Ltd* (1992) 15 BMLR 40, 48 Staughton LJ questioned whether a plaintiff under a disability who had started an action should then have a licence to delay indefinitely in bringing it to trial. In *Headford v Bristol & District Health Authority*, Ralph Gibson LJ said "I agree that the present state of the statute law, in which no ultimate or long-stop period of limitation is provided, in any case with reference to a person under a disability, seems to call for consideration in the light of such cases as this." [1995] PIQR P180, 185. See also the same judge's comments in *S v W* [1995] 1 FLR 862, 867. See para 1.4 above.

example above the long-stop period would therefore expire when the plaintiff was 12 (for a 10 year long-stop period).

(3) **Option 3: There should be a special long-stop for minors which would end on the later of two dates:**

(a) **the date the plaintiff reached the age of 21, or**

(b) **the date the long-stop would have ended in the absence of disability.**

12.145 The first option appears to over-protect the minor, in the sense that he or she is given far longer to bring the action than is actually required. The defendant, in consequence may be exposed to potential liability for a period greatly exceeding the long-stop which would apply in the case of a plaintiff who is not under a disability. In contrast, the second option appears to under-protect the minor. As the example demonstrates, the limitation period may well expire before the plaintiff attains majority and ceases to be under a disability. The third option represents a compromise position, allowing the minor plaintiff a long-stop of an additional three years following majority. This does not leave the defendant exposed to liability for as long as the first alternative, but does allow the plaintiff some time past the age of majority to bring the action.

(2) Deliberate concealment

(a) Relationship with discoverability

12.146 As with disability, an action can be indefinitely postponed under section 32 where the plaintiff's action is based on the fraud of the defendant, or is for relief from the consequences of a mistake, or where any fact relevant to the plaintiff's action has been deliberately concealed from the plaintiff.[214] Under the present law, these situations are exceptions to the limitation period running from the accrual of the cause of action and instead effectively apply a "discoverability" starting date. Our provisional recommendation that, within the core regime, a discoverability starting date should be applied generally, means that these exceptions are largely swallowed up. Indeed it is a further advantage of the general discoverability test that it largely obviates the need for "exceptions" in the case of mistake, fraud and deliberate concealment.[215]

12.147 Any point in drawing a distinction between initial and subsequent deliberate concealment is also rendered largely nugatory by moving to a discoverability, from an accrual, starting date. In general terms, therefore, a further advantage of the discoverability starting date is that it nullifies the decision in *Sheldon v RHM Outhwaite (Underwriting Agencies) Ltd.*[216]

[214] See paras 8.12 - 8.24 above. See Law Reform Committee, *Twenty-First Report (Final Report on Limitation of Actions)* (1977) Cmnd 6923, paras 2.22 - 2.25.

[215] See para 12.9 above.

[216] [1996] AC 102. See paras 8.17 - 8.20 above.

12.148 This leaves two issues for consideration. Should mistake, fraud or deliberate concealment override a long-stop, and if so, what should count as "deliberate concealment" for these purposes?

(b) Should mistake, fraud or deliberate concealment override a long-stop?

12.149 We have seen[217] that, under the present law, the fifteen-year long-stop under section 14B of the Limitation Act 1980 is overridden by deliberate concealment (although not by mistake or fraud),[218] but that the ten-year long-stop under section 11A(3) is not overridden by deliberate concealment (or by mistake or fraud).[219] In our view the arguments in favour of a long-stop are only overridden where the reason that the plaintiff does not discover the relevant facts is because of the defendant's deliberate concealment. Where, in contrast, the delay in the plaintiff's discovery of the relevant facts is not because of the defendant's deliberate concealment, we are of the view that the long-stop should apply. The fact that the action was for relief from the consequences of a mistake would not therefore override the long-stop. An action based on fraud would also not, of itself, override the long-stop (though the fraud may frequently - perhaps usually - include an element of deliberate concealment, as we define it below, which would have this effect).

12.150 The view that deliberate concealment should override the long-stop is supported by the conclusions of other law reform bodies. Both the Alberta Law Reform Institute[220] and the Ontario Limitations Act Consultation Group[221] recommended that the ultimate limitation period should be suspended in cases where the defendant has fraudulently concealed the cause of action from the plaintiff,[222] while the same protection was not to be given to the plaintiff where the plaintiff's lack of knowledge is not due to concealment by the defendant. The New Zealand Law Commission[223] and the Law Reform Commission of British Columbia,[224] in contrast, recommended giving additional protection to the plaintiff both where the defendant has deliberately concealed the cause of action from the plaintiff, and where the defendant has been guilty of fraud[225] (in the case of British Columbia by subjecting such claims to a long-stop period of 30 years in place of the normal 10 year long-stop period: in the case of New Zealand by indefinite extension).[226] A different approach was followed by the Law Reform Commission of Western

[217] See paras 8.25 - 8.26 above.

[218] Limitation Act 1980, s 32(5).

[219] *Ibid*, s 32(4A).

[220] *Limitations,* Report No 55 (1989) p 40. See Limitations Act 1996 c L-15.1 s 4(1).

[221] *Recommendations for a New Limitations Act, Report of the Limitations Act Consultation Group* (1991), p 37.

[222] Or in the case of the Ontario Limitations Act Consultations Group "wilfully conceals" see s 15(7)(b) of the Ontario Limitations (General) Bill 1992.

[223] *Report No 6, Limitation Defences in Civil Proceedings,* NZLC-R6 (1988) para 303, 306.

[224] *Report on the Ultimate Limitation Period: Limitation Act, Section 8* (1990) Chap IV, pp 43 - 44.

[225] In the case of New Zealand, only fraud by a trustee counts.

[226] See also the Prescription and Limitation (Scotland) Act 1973, s 6(4) and para 10.16 above.

Australia, which recommended that there was no need for a special rule providing that, for example, fraudulent concealment should override the ultimate limitation period, but that the court should be able to take any fraudulent concealment or fraud by a trustee into account in deciding whether to exercise its discretion to disapply the limitation period.[227]

(c) The meaning of deliberate concealment

12.151 Under the present law,[228] the primary requirement for deliberate concealment is that the defendant has concealed facts relevant to the plaintiff's cause of action, intending the plaintiff not to discover the truth or reckless as to whether the plaintiff discovers the truth or not. For example, where a builder is aware that the work he has done on the foundations of a building is poor, and yet goes on to complete the building, covering the foundations (so that the defect is concealed from the plaintiff), he would be guilty of deliberate concealment. In the same situation, if the builder was not aware that the work was poor, he would not commit deliberate concealment by simply continuing the work, even if this necessarily hides the earlier, faulty, work from the plaintiff. So where the defendant knowingly commits a breach of duty in circumstances where it is unlikely to be discovered for some time, he is guilty of deliberate concealment.[229] We take the view that the present law is broadly satisfactory, although it should be made clear that deliberate concealment includes deliberate omissions as well as acts, and that deliberate concealment may occur contemporaneously with the acts or omissions giving rise to the cause of action, or subsequent to them. In respect of subsequent concealment, the effect should be to suspend the running of the long-stop.

12.152 One must then ask, to what facts a deliberate concealment provision would apply; that is, what are the facts, deliberate concealment of which would postpone the limitation period? The present law refers to where "any fact relevant to the plaintiff's right of action has been deliberately concealed".[230] This is rather different from the wording used in the 1939 Act, which reads "the right of action is concealed by the fraud of [the defendant]", although it seems unlikely that Parliament intended any substantial change in the facts to which the provision refers.[231] So it would seem, for example, that under the present law the running of the limitation period will not be postponed where the defendant has merely concealed his or her identity from the plaintiff.[232] Because deliberate concealment is so closely related to discoverability, in that deliberate concealment involves a deliberate attempt by the defendant to impede the plaintiff from obtaining the knowledge that would enable him or her to commence proceedings, we take the

[227] *Report on Limitations and Notice of Actions,* Project No 36 - Part II (1997) paras 13.73 - 13.75.

[228] See paras 8.13 - 8.20 above.

[229] Limitation Act 1980, s 32(2).

[230] Limitation Act 1980, s 32(1)(b).

[231] See, eg, *Hansard* (HL) 25 June 1979, vol 400, col 1219 (Lord Hailsham LC).

[232] *RB Policies at Lloyds v Butler* [1950] 1 KB 76. This case concerned a theft, which is the most obvious example of a concealment of identity, but another example would be that of a driver who negligently injured another person in an accident, and then drove away without revealing his or her name.

view that deliberate concealment should apply to any of the facts which are relevant to the discoverability test.[233]

12.153 The long-stop would therefore be disapplied if the defendant had deliberately concealed the primary facts giving rise to the cause of action. But it would also be disapplied if the defendant deliberately concealed his or her identity. This would be relevant in nearly all cases of theft and many cases of fraud, where there is some degree of, at least implicit, concealment of identity.[234] Further, the long-stop would be disapplied where there was deliberate concealment of the significance of the damage caused to the defendant. Where, for example, a builder negligently caused serious damage to a house but disguised it (for example by papering over a cracked wall) so that some trivial damage was apparent, but the true nature of the damage was hidden, the long-stop would not apply.[235]

12.154 **Consultees are asked if they agree with our provisional views that:-**

(a) the long-stop limitation period should be inapplicable where the defendant has deliberately concealed from the plaintiff the facts relevant to the discoverability test under the core regime, that is

(i) the facts constituting the cause of action;

(ii) the identity of the defendant; and

(iii) that the cause of action is significant[236]

(whether by act or omission and whether the concealment took place contemporaneously with, or subsequent to, the act or omission giving rise to the cause of action). But, in the absence of deliberate concealment, the long-stop limitation period should apply where the cause of action rests on the mistake of the plaintiff or the fraud of the defendant.

(b) Concealment subsequent to the act or omission giving rise to the cause of action should suspend the running of the long-stop.

(c) As is the case under the present law, for deliberate concealment the defendant must conceal the relevant facts intending the plaintiff not to discover the truth or reckless as to whether the plaintiff discovers the truth or not.

[233] See paras 12.29 - 12.44 above.

[234] Examples of theft not involving a concealment of identity might include a robbery by someone personally known to the plaintiff without any attempt at disguise or (more far-fetched) a burglary where the burglar left a card giving his (correct) name and address. Deliberate concealment of the location of converted goods would also be relevant: see para 13.49 below.

[235] But this would only be the case if the *apparent* (as opposed to the real) damage fell short of the "significance" test (see para 12.44 above). If the damage visible despite the concealment was significant, then the plaintiff would have acquired knowledge that the damage was significant.

[236] And in the case of actions to recover converted goods, the location of the goods: see para 13.49 below.

If consultees do not agree with these provisional views, we ask them to say why not.

(3) Acknowledgement and Part Payment

12.155 Under the present law, a fresh right of action is considered to have accrued in certain cases where an acknowledgement or part payment has been made.[237] This applies to actions in respect of a liquidated pecuniary claim, or a claim to the personal estate of the deceased; and to actions to recover land and actions in respect of mortgages (whether of personal or real property).

12.156 The notion that acknowledgements and part payments restart the running of the limitation period has been a long-standing feature of English law, first at common law and then, after the Real Property Limitation Act 1833, in statute,[238] although there has been a subtle shift over time in the theoretical basis underpinning it.[239] We take the view that it remains a useful and fair rule, and becomes all the more necessary if, as we provisionally recommend in this paper, a core limitation regime were adopted which would have the effect of reducing the initial limitation period for the recovery of debts and for many other types of action. If a debtor acknowledges the existence of a debt, either by saying as much in writing, or by paying part of the debt, the creditor ought to be entitled to rely on the acknowledgement, in the sense that he or she should not be prejudiced if he or she refrains from enforcing the debt during the normal limitation period.[240] If creditors were allowed to be prejudiced in this way, it would lead inevitably to their commencing proceedings when there was no reason to do so, other than to protect themselves from becoming statute-barred.[241] The same comments apply, mutatis mutandis, to parties in land-related actions. **We therefore provisionally recommend that acknowledgement or part payment should continue to restart a limitation period in relation to, at least, the same actions for which this is presently the law. (And by limitation period, we mean to refer to both an initial limitation period and a long-stop). We ask consultees if they agree.**

12.157 The New Zealand Law Commission, however, whilst recommending the widening of the scope of the acknowledgement rule to all claims,[242] also recommended that in order for the limitation period to recommence after an acknowledgement or part payment, it should be necessary for the plaintiff to show that he or she relied on the acknowledgement or part payment.[243] We take the view that this additional

[237] See paras 8.27 - 8.48 above.

[238] See para 8.27, n 66, above.

[239] That is, away from the doctrine of an implied promise to pay: *ibid.*

[240] See, eg, the New Zealand Law Commission, *Report No 6, Limitation Defences in Civil Proceedings,* NZLC R6 (1988), para 272.

[241] *Ibid,* para 273.

[242] See para 12.167 below, where we make a similar provisional recommendation.

[243] "that, but for the acknowledgement / part payment the [plaintiff] would have taken steps to avoid the situation where a defendant becomes (otherwise) entitled to rely on a limitation defence." New Zealand Law Commission, *Report No 6, Limitation Defences in Civil Proceedings,* NZLC R6 (1988), para 273.

requirement is inappropriate. Whilst the argument for restarting the limitation period is strongest where a creditor, or other plaintiff, demonstrably relied on the acknowledgement or part payment, it is not the only situation in which it can be justified, and we feel that it is preferable to avoid the evidential problems which such a test would involve. **Therefore we are provisionally opposed to an additional requirement that a plaintiff should have to show that he or she relied on the acknowledgement or part payment. We ask consultees whether they agree.**

12.158 Assuming, then, that acknowledgements and part payments are at least to retain their current significance, three further major issues arise:

(1) Should the present approach to acknowledgement and part payments be extended to unliquidated claims and hence to all causes of action, or remain largely limited to liquidated claims?

(2) Should an acknowledgement or part payment bind anyone other than the person making the acknowledgement or payment?

(3) Should an acknowledgement or part payment be capable of reviving a claim if it is made after the limitation period has already expired?

(a) Should the law on acknowledgement and part payments be extended to all causes of action?

12.159 It can be argued that acknowledgements and part payments should be extended to unliquidated claims, so that the doctrine applies for all causes of action. Alternatively, the present approach, which largely limits the application of the doctrine to liquidated claims,[244] can be maintained. Both approaches have advocates in law reform bodies in those common law jurisdictions which have discussed this question.

12.160 The New South Wales Law Reform Commission proposed that acknowledgements and part payments should be effective to restart the limitation period for all causes of action.[245] It argued that the divide between liquidated and unliquidated claims was unsatisfactory, and capable of producing anomalous results:

> If a man steals a motor car he may be candid in making written acknowledgements of his liability [in damages] to the owner without risk that the statute of limitations will stop running in his favour.... If, however, the car is sold by the owner and the price is not paid, there is from the onset a debt within the rules of acknowledgement and part payment.[246]

[244] See paras 8.28 - 8.32 above.

[245] *First Report on the Limitation of Actions,* LRC 3 (1967), para 250. This recommendation has since been implemented in New South Wales (Limitation Act 1969, s 54). This is also now the law in Australian Capital Territory (Limitation Ordnance 1985, s 32); Northern Territory (Limitation Act 1981, s 41); British Columbia (Limitation Act 1979, s 5); and Newfoundland (Limitations Act 1995, s 16).

[246] *First Report on the Limitation of Actions,* LRC 3 (1967), para 250.

12.161 The New South Wales Law Reform Commission noted two possible objections to such a policy; first the complexity of claims for unliquidated damages in contrast to claims for liquidated damages and the probable lack of a written record and, second, the greater difficulties which would be involved in deciding whether a writing amounted to an acknowledgement in unliquidated claims.[247] However, they did not find either of these objections an insuperable obstacle to making acknowledgements and part payments effective to restart the limitation period for claims for unliquidated damages.[248] The Commission was also influenced by the decision in *Lubovsky v Snelling*.[249] That case held that an agreement between the plaintiff and defendant in a personal injuries case that liability in damages to the plaintiff's cause of action was "once and for all definitively accepted by the defendant and his insurers" prevented either the defendant or the insurer raising any defence which might contest that liability. The Commission regarded this as a move towards the recognition of acknowledgements in claims for unliquidated damages.

12.162 Similarly, the Law Reform Commission of Saskatchewan recommended that acknowledgements and part payments should be generally effective, on the basis that it is undesirable that reference should have to be made to the category of an action to decide whether the limitation period is restarted by an acknowledgement or part payment.[250] Like the New South Wales Law Reform Commission, it was unconvinced that an extension to unliquidated claims would cause insuperable difficulties. The New Zealand Law Commission also recommended that acknowledgements and part payments should be generally effective, subject to a requirement that the claimant be required to prove reliance on the acknowledgement or part payment.[251]

12.163 On the other hand recommendations against such an extension have been made by the Ontario Law Reform Commission, Alberta Law Reform Institute and the Western Australia Law Reform Commission.[252] The Ontario Law Reform

[247] *Ibid,* para 252.

[248] The Law Reform Commission noted that "On the first point, while it has a foundation in ordinary experience, we think that an acknowledgement, likely as it must be to encourage the claimant to defer taking proceedings, will in general not be given carelessly and, if given carelessly, should be the occasion of loss to the person giving the acknowledgement rather than to the claimant. On the second point, while it is indeed frequently a matter of difficulty to say whether, under the present law, a writing is or is not an acknowledgement, this difficulty has been significantly reduced by section 23 of the Imperial Act of 1939." paras 253 - 254.

[249] [1944] KB 44. See para 9.7 above.

[250] Law Reform Commission of Saskatchewan, *Tentative Proposals for Changes in Limitations Legislation, Part II: The Limitation of Actions Act* (1986) pp 82 - 83; *Proposals for a New Limitation of Actions Act, Report to the Minister of Justice* (1989), pp 38 - 41.

[251] *Report No 6, Limitation Defences in Civil Proceedings,* NZLC R6 (1988), paras 268 - 274. See paras 10.80 and 12.157 above.

[252] Ontario Law Reform Commission, *Report on Limitation of Actions* (1969) p 125, Alberta Law Reform Institute, *Limitations,* Report No 55 (1989), p 92 (now enacted in Alberta's Limitations Act 1996 c L-15.1. See s 8), Law Reform Commission of Western Australia, *Report on Limitation and Notice of Actions,* Project No 36 - Part II (1997), paras 18.36 - 18.41.

Commission felt that the difficulties involved in extending acknowledgements to unliquidated claims would outweigh the advantages to be gained, and noted that "the nature of the debtor-creditor relationship is entirely different from that of the tortfeasor to the injured party."[253] Although this reasoning was not entirely accepted by the other dissenting Law Reform Commissions, it was felt that the anomalous situations referred to in the New South Wales Report would only occur rarely and that the inability to acknowledge unliquidated claims was not a serious deficiency in the current law.[254]

12.164 The Alberta Law Reform Institute reviewed the principles behind the doctrine of acknowledgement and part payment. It noted that the justification for restarting the limitation period when the debtor has acknowledged his or her liability is that the debtor has by that conduct renounced the protection of the limitations system, and that a part payment by the debtor will in addition induce the creditor to believe that there is no need for prompt litigation. It was suggested that these principles explained why the doctrine of acknowledgement does not apply to a claim for unliquidated damages:

> [B]ecause until a duty to pay a certain or ascertainable sum has been imposed on a person, he will have no legal duty to admit, much less to perform by payment.[255]

12.165 The Law Reform Commission of Western Australia agreed with the justifications for not recommending an extension put forward by the Alberta Law Reform Institute and considered that there had not been shown to be any serious deficiencies in the present law, whereas the proposed change might give rise to a number of difficulties.[256]

12.166 As is apparent from the above discussion, there are arguments both for and against an extension of the doctrine of acknowledgements and part payments to unliquidated claims. The argument in principle against such an extension rests on the fact that, in contrast to liquidated claims, the defendant does not come under a duty to pay compensation to the plaintiff until the amount of the compensation has been quantified by the court (or agreed between the parties in a settlement, which, pre-empting the decision of the court, imposes a contractual duty to pay compensation on the defendant). This assumes that an acknowledgement given by the defendant can only be effective if it encompasses both liability and quantum. An acknowledgement will cover both elements with liquidated claims, as the quantum of damages owed to the plaintiff will not be in issue. With unliquidated claims, an acknowledgement may only extend to the liability of the defendant, who may wish to contest the quantum of the claim. But, even where quantum is contested, one can argue that the defendant who acknowledges the claim, or makes a part payment in relation to it, gives up the right to the protection

[253] Ontario Law Reform Commission, *Report on Limitation of Actions* (1969) p 125.

[254] See Law Reform Commission of British Columbia, *Report on Limitations, Part 2 - General,* LRC 15 (1974) pp 91-92; Newfoundland Law Reform Commission, *Working Paper on Limitation of Actions,* NLRC-WP1 (1985) pp 216 - 217.

[255] Alberta Law Reform Institute, *Limitations,* Report No 55 (1989), p 92.

[256] *Report on Limitations and Notice of Actions,* Project No 36 Part II (1997) para 18.41.

offered by the limitations system. Where the defendant admits liability, the courts have been prepared to find that the defendant is contractually bound not to raise, or estopped from raising, a limitation defence even where the issue of quantum remains unresolved.[257] If this is the case, the importance of the distinction between liquidated and unliquidated claims is considerably diminished, and there appears to be no reason in principle why acknowledgements should not be effective in the case of unliquidated claims.

12.167 It may well be more difficult for the courts to decide whether an acknowledgement or part payment by the defendant amounts to an admission of liability in an unliquidated claim, but in practice we do not believe that these difficulties are likely to prove insuperable. In any event, they would be minimised if the current requirements, that the acknowledgement must be in writing and signed by the person making the acknowledgement, are retained.[258] **We provisionally recommend that acknowledgements and part payments should start time running again for all claims, whether liquidated or unliquidated. Consultees are asked whether they agree and, if not, to say why not.**

(b) Should an acknowledgement or part payment bind anyone other than the person making the acknowledgement or payment?

12.168 For liquidated claims, the current rule is that, where there are a number of people liable in respect of the same claim, an acknowledgement made by one of them will bind only the acknowledgor, so that the other debtors may continue to benefit from the running of the limitation period.[259] However, where one of those liable makes a part payment in respect of the debt, all those liable are bound by that payment, and in consequence subject to a new limitation period, running from the time of the part payment.[260] This distinction was introduced by the Limitation Act 1939, on the recommendation of the Law Reform Committee which felt that, as all the co-debtors would receive the benefit of the part payment, it was right that they should also suffer the burden.[261]

12.169 The distinction introduced further complexity into this area of law, departing from the uniform treatment previously accorded to acknowledgements and part payments. The justification given for the change is questionable. It may be reasonable for the co-debtors to suffer the burden which follows a part payment, particularly where the payment made substantially reduces the amount owed by the co-debtors. However, where one debtor makes a nominal payment to the creditor, without the consent of the co-debtors, the benefit gained by the co-debtors would not seem to justify fixing them with the burden of being subject to an extended limitation period running from the date of the new payment. It also leaves open the possibility that a creditor may attempt to avoid the effect of the

[257] *Lubovsky v Snelling* [1944] KB 44; *Wright v Bagnall & Sons Limited* [1900] 2 QB 240; See paras 9.7 - 9.9 above.

[258] We discuss this question in paras 12.183 - 12.184 below.

[259] Section 31(6). See paras 8.44 - 8.48 above.

[260] Section 31(7).

[261] See Law Revision Committee, *Fifth Interim Report (Statutes of Limitation)* (1936) Cmd 5334, para 21.

limitation period by entering into a covert arrangement with one co-debtor.[262] Law reform bodies in other common law jurisdictions, who have considered introducing this distinction, have all recommended against it.[263] In our view, it is more beneficial to increase the level of uniformity in this area of the law than to retain the current distinction between the effect of acknowledgements and the effect of part payments.

12.170 The position of a surety when a part payment is made by the debtor is worth noting. Under the current law, a part payment in respect of "any debt or other liquidated pecuniary claim shall bind all persons liable in respect of the debt or claim".[264] Where the surety is liable in respect of the debt which is the subject of the guarantee, it appears that a part payment made by the debtor would bind the surety, and revive his or her obligations so that a fresh limitation period would run against the surety from the date of the payment.[265] If the rule is changed so that both acknowledgements and part payments bind only the acknowledgor or the person making the payment, a part payment by the debtor would not revive the surety's obligations: the surety's liability would depend only on the contract between the surety and the creditor, and whether the limitation period has expired in respect of that contract.[266]

12.171 The position with respect to actions for the possession of land, and in respect of mortgages is different. An acknowledgement of the title to any land, benefice or mortgaged personalty by any person in possession of it binds all other persons in possession of the property.[267] Similarly, a payment in respect of the mortgage debt by anyone who is liable for that debt will bind all other persons in possession of the mortgaged property.[268] An acknowledgement of title to land would arguably be ineffective unless it bound all in possession of the land. There is less reason to

[262] As the New South Wales Law Reform Commission noted, "Such a state of the law, apart from its incongruity, appears to us to be apt to encourage underhand transactions between a creditor and one of his co-debtors". *First Report on the Limitation of Actions,* LRC 3 (1967), para 259.

[263] See New South Wales Law Reform Commission, *First Report on the Limitation of Actions,* LRC 3 (1967), paras 258 - 259; Ontario Law Reform Commission, *Report on Limitation of Actions* (1969), pp 123 - 124; Law Reform Commission of British Columbia, *Report on Limitations, Part 2 - General,* LRC 15 (1974), pp 89 - 90; Institute of Law Research and Reform, Alberta: *Limitations,* Report for Discussion No 4 (1986) paras 8.40 - 8.43; Western Australia Law Reform Commission, *Report on Limitations and Notice of Actions,* Project No 36 Part II (1997), paras 18.48 - 18.50.

[264] Section 31(7) of the 1980 Act. See para 8.45 above.

[265] This interpretation is supported by Marks & Moss, *Rowlatt on the Law of Principal and Surety,* (4th ed 1985), p 195, though the authority cited in support of this proposition, *Re Powers* (1885) 30 ChD 291, is not precisely on point, given that the original limitation period in respect of the bond given by the sureties had not expired when proceedings were brought, and there is no suggestion in the case that payments made in respect of the principal debt restarted the limitation period in respect of the bond. We are unaware of any authority directly on point.

[266] The surety may well remain liable when the limitation period has expired against the debtor - see *Carter v White* (1883) 25 ChD 666.

[267] Section 31(1) of the 1980 Act. See para 8.47 above.

[268] Section 31(2) of the 1980 Act. See para 8.47 above.

make an exception in the case of payments in respect of mortgage debts. However, limiting the effectiveness of part payments so that only the payer was bound by the part payment, while the limitation period continued to run against the other occupiers of the property, could give an incentive to mortgagees to bring foreclosure proceedings sooner than would otherwise be the case. We are of the view that this justifies according separate treatment to part payments in respect of mortgages.

12.172 **Though we believe that separate rules should continue to apply to actions in respect of mortgages and for the possession of land, we provisionally recommend that, otherwise, there should be no difference in the effect on third parties of part payments as opposed to acknowledgements: both acknowledgements and part payments should only bind the acknowledgor or the person making the part payment (or their successor). We ask consultees whether they agree with this provisional recommendation.**

(c) Should an acknowledgement or part payment be capable of reviving a claim if it is made after a limitation period (whether an initial limitation period or a long-stop) has already expired?

12.173 The present position is that once a right of action has been barred by the expiry of a limitation period, no subsequent acknowledgement or payment operates to revive it.[269] The rule before the Limitation Amendment Act 1980[270] was that an acknowledgement or payment which was made after the limitation period expired revived the action provided that the effect of the expiry of the limitation period was to bar the remedy rather than extinguish the right. This rule was changed on the recommendation of the Law Reform Committee, on the grounds that it gave rise to considerable uncertainty, and could trap unwary defendants, as for example, the inclusion of statute barred debts in a company's balance sheet (required by law) could be effective to revive the debts, even though no such revival was intended. The Law Reform Committee commented that:

> We think the rule is somewhat unreal and serves no very useful purpose. If the debtor and creditor both wish to preserve the former's liability, they can do so more easily in some other manner and it seems to us better, and to make for a greater measure of certainty, that once a debt has become statute-barred it should remain irrecoverable by action.[271]

12.174 The question whether an acknowledgement or part payment should be capable of reviving a limitation period after its expiry has been vigorously debated among law reform bodies. Some take the view that the expiry of the limitation period should extinguish the plaintiff's rights as well as his or her remedy, and regard it as a necessarily consequence that acknowledgement or part payment cannot resurrect

[269] Section 29(7) of the 1980 Act.

[270] Limitation Amendment Act 1980, s 6.

[271] Law Reform Committee, *Twenty-First Report (Final Report on Limitation of Actions)* (1977) Cmnd 6923, para 2.71.

those rights.[272] We recognise the validity of this reasoning but, as we take the provisional view that expiry of a limitation period should, in general, not extinguish a plaintiff's right altogether,[273] we disagree with its basic premise. Nevertheless, it could still be said that permitting a plaintiff to commence proceedings following an acknowledgement or part payment after the expiry of a limitation period would be contrary to one of main objects of limitation statutes.[274] This is to allow defendants freedom from claims that might arise after a limitation period has expired.[275] Reverting to the position before the Limitation Amendment Act 1980 would expose defendants to considerable uncertainty, and lead to plaintiffs who have run out of time trying to read an acknowledgement into a statement of the defendant. For example, a corporate balance sheet showing debts owed by the company at the date of the balance-sheet, but issued after those debts had become statute-barred would serve to revive the plaintiff's claims to those debts (providing that the accounts were delivered to the plaintiff).[276]

12.175 The argument in favour of recognising an acknowledgement of the plaintiff's claim made by the defendant after a limitation period has expired is that the purpose of a limitation period is, inter alia, to protect the defendant. When the defendant himself admits the claim, the defendant is also indicating that the protection is unnecessary, so that there is no reason not to give full effect to the acknowledgement. Similarly, the defendant is, by the acknowledgement, providing fresh evidence of the claim, so that there need be no fear that the evidence has so deteriorated as to hinder a fair trial of the action in the future. Where therefore the effect of a limitation period is to bar the remedy, rather than to extinguish the right, it may be reasonable for an acknowledgement made after the expiry of a limitation period to revive the claim.

12.176 However, different issues apply where the limitation period extinguishes the claim.[277] In these circumstances, the plaintiff's claim has been destroyed by the expiry of a limitation period. Any purported acknowledgement is recognising a state of affairs which no longer exists. If such an acknowledgement is allowed to resurrect the claim, there could no longer be any certainty that the long-time

[272] See, eg, Ontario Law Reform Commission, *Report on Limitation of Actions* (1969), p 124; Newfoundland Law Reform Commission, *Working Paper on Limitation of Actions* (1985), p 217; *Report on Limitation of Actions* (1986), p 8.

[273] See paras 14.15 - 14.21 below.

[274] This is particularly clear in those cases where the expiry of the limitation period does extinguish the plaintiff's rights, that is, claims to recover land, and claims for conversion.

[275] See, eg, Law Reform Commission of Saskatchewan, *Tentative Proposals for Changes in Limitations Legislation, Part II: The Limitation of Actions Act* (1986), p 85. Cf the different approach taken by the Law Reform Commission of Western Australia, *Report on Limitation and Notice of Actions,* Project No 36 - Part II (1997), para 18.53. But the Law Reform Commission of Western Australia expressly took into account the existence, under their recommendations, of a discretion on the court's part to extend limitation periods. No such discretion would exist under the regime which we are provisionally recommending: see paras 12.187 - 12.196 below.

[276] *Re Gee & Co (Woolwich) Ltd* [1975] Ch 52. See para 8.33 and n 85 above.

[277] Illustrated by the fact that, prior to the Limitation Amendment Act 1980, the rule that an acknowledgement made after the expiry of the limitation period could revive the claim was confined to cases where the expiry of the limitation period only barred the remedy.

occupier of land had good title to that land as a result of the expiry of a limitation period. This would create uncertainty in an area of the law where certainty is particularly important, and where third parties are most likely to need to rely on the assumption that the defendant's title cannot be disturbed by a potential plaintiff after the expiry of a limitation period.

12.177 **We provisionally recommend that there should be no reform of the law to enable an acknowledgement or part payment to revive a claim notwithstanding the expiry of a limitation period. We ask consultees whether they agree, or whether they consider that acknowledgements made after the expiry of a limitation period should revive the plaintiff's cause of action (where the expiry of a limitation period serves only to bar the remedy rather than to extinguish the plaintiff's claim).**

12.178 The current position on acknowledgements can be contrasted with agreements not to rely on the expiry of the limitation period, or a unilateral waiver by the defendant of his right to plead the expiry of a limitation period. Either will prove effective to revive the cause of action.

12.179 The problematic relationship between acknowledgements and contracting out of, or waiving, limitation periods was demonstrated in *Colchester Borough Council v Smith.*[278] An acknowledgement of the title of the Council was made by the occupier of the land after the expiry of the limitation period which had extinguished the Council's title to the land. That acknowledgement was held to be effective by the Court of Appeal, on the basis that it formed part of an agreement to settle the dispute between the occupier and the Council, and that it was in the public interest to enforce such agreements.

12.180 The Court of Appeal was faced with a conflict between two principles: the need to uphold compromises of litigation, and the policy behind section 29(7) of the 1980 Act and the doctrine of adverse possession, that there should be certainty that, after the expiry of the limitation period, the possessor of the land is the actual owner. There are very good reasons to uphold agreements compromising litigation in cases of adverse possession, given that it is frequently very difficult to establish when the adverse possession began, so that any proceedings in respect of the plaintiff's claim to recover the land may be protracted, and very expensive. On the other hand, where the agreement purports to acknowledge the plaintiff's title after that title has been extinguished by the expiry of the limitation period, upholding it appears to undermine the policy behind section 29(7) of the 1980 Act. The decision appears to mean that, despite section 29(7), an acknowledgement of the plaintiff's claim after the expiry of the limitation period may revive the plaintiff's cause of action, even in cases where the expiry of the limitation period extinguishes the plaintiff's rights, rather than merely barring his or her remedy. The Court of Appeal did not have cause to examine what effect, if

[278] [1992] Ch 421. See para 9.11 above. The decision has been heavily criticised. See AHR Brierley, "Adverse Possession: a case of death and regrettable resurrection" [1991] Conv 397 - 404; M Dixon, "Title by adverse possession lost by estoppel" [1991] CLJ 234 - 236 (commenting on the decision of the court at first instance), and M Dixon, "Adverse Possession-Compromises and Estoppel" [1992] CLJ 420 - 422 (commenting on the decision of the Court of Appeal).

any, the acknowledgement would have on third parties,[279] though it is arguable that, after the agreement, the Council was free to deal with the land as its owner (subject to the rights granted to Mr Tillson by the agreement) just as if its title had never been extinguished.

12.181 **We ask consultees for their views as to whether a contract (for example, a contractual compromise) can be effective to revive a party's rights when those rights would otherwise have been extinguished by the operation of the law of limitations.**

(d) Other issues

12.182 We have discussed above the reform issues, in relation to acknowledgements and part payments, which seem to us to be the most important. We ought, however, to address briefly the question of whether any other rules relating to this area are in need of reform, or whether they are working satisfactorily.

12.183 An acknowledgement must be in writing if it is to restart the limitation period. This requirement has been in force since before the Limitation Act 1939 was passed. It could be argued that this requirement is now unnecessary. Very few contracts are required to be in writing to be effective, and it may be thought anomalous that a binding contract can be entered into by an oral agreement, but that a limitation period in respect of claims under that agreement can only be extended by an acknowledgement in writing delivered to the plaintiff. The argument for only recognising written acknowledgements is that they promote certainty. There are some circumstances in which an oral acknowledgement may be just as reliable as a written acknowledgement (as, for example, where a party to litigation acknowledges the validity of a debt in open court). However, oral statements made in less formal circumstances will be far more difficult to prove. A plaintiff, concerned to extend the limitation period for his claim, may seek to rely on an "acknowledgement" in an off-hand remark by the defendant made in circumstances where it may be quite difficult for the defendant, two or three years later, to remember what he was supposed to have said, still less to question it. Although we can see the force of the argument that an oral acknowledgement, as long as it can be proved, ought to have the same force as a written one, we tend to the view that the law here demands certainty, and that the requirement should remain.[280] Moreover, the need for certainty would be increased, and the argument in favour of a writing requirement strengthened, if our provisional recommendations was accepted so that the scope of the acknowledgement rule was widened to include claims for unliquidated damages.[281]

12.184 **We take the provisional view that the requirement that an acknowledgement must be in writing if it is to restart a limitation period**

[279] The original defendants to the Council's action, third parties who claimed to occupy the land pursuant to a licence granted by Mr Tillson, took no part in the proceedings after Mr Tillson had been joined as defendant.

[280] See also Law Reform Committee, *Twenty-First Report (Final Report on Limitation of Actions)* (1977) Cmnd 6923, paras 2.65 - 2.67.

[281] See Law Reform Commission of Saskatchewan, *Tentative Proposals for Changes in Limitations Legislation, Part II: The Limitation of Actions Act* (1986), p 84.

should remain. "Writing" for these purposes would include any recording by any means of a representation of words, symbols or numbers, whether recorded by the acknowledgor or the recipient of the acknowledgement.[282] **We ask consultees**

(1) **whether they agree with our provisional view that only acknowledgements in writing should be effective to restart a limitation period?**

(2) **whether they think that oral acknowledgements should in some, but not all, circumstances extend a limitation period, and if so, in what circumstances they would recognise an oral acknowledgement as having this effect?**

12.185 In Part VIII of this paper, we touched on some other aspects of the law on acknowledgements and part payments which could give rise to difficulty. These include:

(i) exactly what an acknowledgement must contain, and the extent to which a denial of liability will render a statement incapable of being an acknowledgement;[283]

(ii) the effect of an acknowledgement as to part only of an alleged debt, or a payment expressed to relate to part only of an alleged debt;[284]

(iii) the effect of an acknowledgement or part payment where the debtor is claiming a set-off or counterclaim;[285]

(iv) the extent of an agent's power to give an acknowledgement;[286] and

(v) the extent to which there is a payment, for limitation purposes, when a creditor is willing to treat the debtor as if a payment has been made, even though there has been no actual payment.[287]

12.186 We are doubtful whether these, or any other questions related to acknowledgements and part payments, give rise to serious problems. **Our provisional view is, therefore, that, other than the changes which we have provisionally recommended above, the law on acknowledgements and part payments is not in need of reform. We ask consultees if they agree. If consultees disagree, they are invited to tell us of any problems in the existing law and of the reforms which they consider desirable.**

[282] This definition of "writing" is derived from *Digital Information and Requirements of Form*, Report of the Legislative Working Party, Society for Computers & Law (May 1997).

[283] See paras 8.33 - 8.35 above.

[284] See paras 8.34, 8.37 above.

[285] See para 8.35 above.

[286] See paras 8.42 - 8.43 above.

[287] As in *Maber v Maber* (1867) LR 2 Exch 153. See para 8.40 above.

5 SHOULD THE COURTS HAVE A DISCRETION TO DISAPPLY OR EXCLUDE A LIMITATION PERIOD?

12.187 Under the Limitation Act 1980,[288] the courts are given a discretion to disapply the limitation period in an action for personal injuries[289] or for defamation,[290] if "it appears to the court that it would be equitable to allow an action to proceed" having regard to the degree to which the limitation period prejudices the plaintiff and a decision to disapply the limitation period would prejudice the defendant. The court is obliged to have regard to all the circumstances of the case, and in particular to the factors identified in sections 33 (for personal injuries) and 32A (for defamation and malicious falsehood). Although the discretion is "structured" by the factors specified to be taken into account, it is very wide, and has indeed been described as "unfettered".[291]

12.188 The advantage of including a judicial discretion to disapply or exclude the (initial) limitation period is that it allows flexibility. A discretion to disapply or exclude the limitation period (running from the date of discoverability) enables the court to take into account factors other than those allowed for in the definition of the date of discoverability which have prevented the plaintiff from bringing proceedings before the expiry of the limitation period.[292] Though the plaintiff may have had full knowledge of the facts giving raise to the proceedings, there may, perhaps, be circumstances where the plaintiff's conduct in not bringing proceedings before the end of the limitation period was excusable.[293] The existence of a judicial discretion enables the court to prevent injustice to plaintiffs in such a position. The argument for a discretion to exclude the long-stop limitation period is very similar but in particular, any long-stop period of limitation will in some cases mean that the plaintiff's case is time-barred before he or she is in a position to take proceedings against the defendant (in some cases because the plaintiff could not reasonably know of the facts constituting the cause of action). If there is a judicial discretion to exclude the long-stop period, it is possible to prevent injustice to such plaintiffs.

12.189 The primary disadvantages of a discretion to disapply or exclude the initial limitation period or the long-stop period are that any judicial discretion will to some extent subvert the purposes of a limitation system: there will no longer be certainty on the length of a particular limitation period. No potential defendant would be able to rely on the expiry of the limitation period as preventing further

[288] Discussed in paras 3.66 - 3.76; 3.106 - 3.107 above. We have also discussed provisions in other statutes which confer a judicial discretion to exclude a limitation period: see paras 7.28 - 7.39 above.

[289] Section 33 of the 1980 Act.

[290] Section 32A, inserted by the Defamation Act 1996.

[291] *Thompson v Brown* [1981] 1 WLR 744, 752 per Lord Diplock; *Donovan v Gwentoys Ltd* [1990] 1 WLR 472, 477.

[292] As is the case with the current discretion afforded to the courts under s 33 of the Limitation Act 1980, which permits the courts to take into account the plaintiff's lack of awareness of their legal remedy, or a supervening disability. See paras 3.68, n 155; 3.72 - 3.75.

[293] As in *Halford v Brookes* [1991] 3 All ER 559, where the reason the plaintiff had failed to bring proceedings earlier was because she had been advised by her solicitor and counsel that she did not have a claim.

proceedings. Additional uncertainty may result from the exercise of the discretion, as it is impossible to ensure consistency: inevitably, different judges may come to a different decision on the facts of any case. As noted in *Yates v Thakeham Tiles Ltd,*[294] citing Asquith LJ in *Bellenden v Satterthwaite*:[295]

> We are here concerned with a judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong, that an appellate body is entitled to interfere.

12.190 We are also concerned that giving the courts a discretion may be to opt out of making a firm policy choice (which can and ought to be made once-and-for-all) on certain admittedly difficult questions. We have in mind, for example, that it would be all too easy (but, in the long-run, unsatisfactory for the legal system) to steer clear of making a decision on the meaning of "significant cause of action" or the effect of lack of knowledge of the law.

12.191 Reviews of the law on limitation before the Law Reform Committee, Twentieth Report considered that a judicial discretion should not be introduced into the law of limitations, because of the uncertainty this would involve.[296] The Law Reform Committee itself, while accepting the view that "the matter cannot be left entirely to the court's discretion throughout the whole field of limitation in personal injury cases", nevertheless recommended that the court should have a discretion to weigh

[294] [1995] PIQR P135, P143 (per Wall J). The case concerned the discretion under s 33 of the 1980 Act.

[295] [1948] 1 All ER 343, 345.

[296] The Law Revision Committee, reporting on the matter in 1936 noted that:

> The exercise of such a discretion would no doubt present difficult problems to the court, and it would not be easy to foresee how it would operate. In so far as it came to be exercised along well-defined principles, its chief merit - flexibility - would tend to disappear. On the other hand, if it remained more or less impossible to predict from one case to another how the discretion of the court was going to be exercised, the fundamental benefit conferred by statutes of limitation, namely the elimination of uncertainty, would be prejudiced (*Fifth Interim Report (Statutes of Limitation)* (1936) Cmd 5334, p 11).

The Committee chaired by Mr Justice Edmund Davies which reviewed the law on limitation of actions in cases of personal injury in the wake of *Cartledge v E Jopling & Sons Ltd* also rejected the idea of conferring a wide discretion on the courts:

> From the practical point of view, an unfettered discretion would encourage optimistic claimants to institute proceedings which in truth had no chance of success and thus to waste their own, the defendant's and perhaps the taxpayer's money on pointless litigation. More serious is the objection based on the principle that the law should be certain and the area of judicial discretion therefore narrowed as far as possible. We were impressed by the practically unanimous opposition of the legal witnesses to the conferring on the courts of a wide discretion. We think this opposition is well-founded: however conscientiously they may attempt to exercise their discretionary powers, different judges are bound to have different approaches to cases of apparent hardship, and to leave their discretionary powers entirely unfettered would, in our view, lead to undesirable divergences of practice. (*Report of the Committee on Limitation of Actions in Cases of Personal Injury* (1962) Cmnd 1829 para 31).

the actual hardships to both sides "in a residual class of cases".[297] Despite this recommendation,[298] the limitation on the court's discretion contained in the Limitation Act 1980 is minimal. Lord Denning noted in *Firman v Ellis*:[299]

> Section 2D, as I read it, gives a wide discretion to the court which is not limited to a "residual class of case" at all. It is not limited to "exceptional cases". It gives the court a discretion to extend the time in all cases where the three-year limitation has expired before the issue of the writ.

This was approved by the House of Lords in *Thompson v Brown.*[300]

12.192 A common law jurisdiction where the proposals for reform of the limitation law have included a judicial discretion is Western Australia.[301] The Law Reform Commission of Western Australia has proposed that there should be a "very narrow discretionary power" which enables a court to disregard either the initial limitation period or the long-stop period:

> The court should be able to order that either period may be extended in the interests of justice, but should only be able to make such an order in exceptional circumstances, where the prejudice to the defendant in having to defend an action after the normal limitation period has expired, and the general public interest in finality of litigation, are outweighed by other factors. The plaintiff would have the burden of proving that the conditions for exercise of discretion in his favour had been met.[302]

12.193 It also recommends that the court should be able to take all the circumstances of the case into account, including a list of factors (which is rather more extensive than those included in section 33 of the 1980 Act). The aims of the discretion are to enable the courts to deal with the exceptional case where the plaintiff's claim would otherwise be defeated by a limitation period despite the fact that the damage only became discoverable after the expiry of the long-stop period and,[303] in

[297] Law Reform Committee, *Twentieth Report (Interim Report on Limitation of Actions: in Personal Injury Claims)* (1974) Cmnd 5630, para 56.

[298] Which the government appears to have accepted: see *Hansard* (HL) 1 May 1975, vol 360, col 7 - 14.

[299] [1978] QB 886.

[300] [1981] 1 WLR 744.

[301] Two Canadian jurisdictions, Nova Scotia and Manitoba, have enacted legislation providing for a judicial discretion to disapply the limitation period. Nova Scotia has largely adopted the provisions of s 33 of the Limitation Act 1980 (See Limitation of Actions Act 1982 RS c 258, s 3(2),(4)). However this provision applies beyond personal injury claims to most personal actions. See paras 10.94 - 10.95 above. Manitoba also gives the courts a discretion to grant the plaintiff leave to proceed out of time in some circumstances (subject to an overall long-stop of 30 years). See Limitation of Actions Act 1987, s 14(1) discussed at para 10.94 above.

[302] *Report on Limitation and Notice of Actions,* Project No 36 - Part II (1997), para 7.40.

[303] The Commission is clearly influenced here by the fact that the introduction of a long-stop period would bar claims which would otherwise not have been subject to an ultimate limitation period regardless of the amount of time which passed before the damage suffered by the plaintiff was discoverable. This would also be a factor in this country in the case of actions for personal injuries where there is currently no long-stop period.

relation to the initial period, with cases where factors other than the latency of the damage have prevented the plaintiff from instituting proceedings.[304] Despite the Law Reform Commission's expressed desire that the discretion should be very narrow, it is difficult to see how the discretion, as recommended, is restricted.[305]

12.194 We believe that the disadvantages of a judicial discretion discussed above outweigh the advantages. Experience with the discretion in section 33 of the Limitation Act 1980 demonstrates the difficulty of restricting the discretion. Moreover, the ability to ask a court to exercise its discretion or the Court of Appeal to review the exercise of the discretion by the court of first instance means a huge drain on court resources (as well as the costs for defendants in resisting such applications). There have, for example, been over 115 appellate decisions on section 33 of the 1980 Act reported on Lexis. It is very difficult for applications to be ruled out as raising no arguable case.

12.195 Removing the judicial discretion would also have the advantage of avoiding the artificial distinction produced by *Walkley v Precision Forgings Ltd.*[306] In that case it was held that where a writ is issued within the limitation period, but is not served in time because of subsequent delay by the plaintiff, the court has no discretion to disapply the limitation period in respect of a second writ.[307] To distinguish who can be assisted by the exercise of the judicial discretion between plaintiffs who delay before issuing the writ, and those who delay afterwards, who cannot be so assisted, seems harsh and artificial.

12.196 **We ask consultees whether they agree with our provisional view that within our core regime the courts should not have a discretion to disapply an initial limitation period or a long-stop. If consultees disagree, we ask them in what circumstances they consider that the courts should have a discretion to disapply limitation periods.**

[304] The Commission notes in particular the possibility in child abuse cases that the plaintiff may be psychologically unable to contemplate bringing proceedings against the defendant as a result of the damage suffered, and in relation to a case on AIDs infection, the fact that the plaintiff had physical and mental problems, was concerned at the effect of publicity on herself and her family and had been advised that no claim had ever succeeded (para 7.36).

[305] Those other law reform bodies which have considered introducing a judicial discretion to disapply a limitation period have rejected the idea. The Alberta Institute of Law Reform noted "We will not recommend a provision granting the courts discretion to extend a fixed limitation period beginning with discovery. ... If a discovery period is applicable, a claimant will not be exposed to the risk that his claim will be barred before he could have discovered it with the exercise of reasonable diligence. For claims subject to the discovery rule, we will recommend a limitation period of sufficient duration to give even a relatively unsophisticated claimant ample time in which to attempt to settle his controversy with the defendant and to bring a claim when necessary. We are not prepared to go further, for we believe that to do so would sacrifice the objectives of a limitations system." (*Limitations,* Report for Discussion No 4 (1986), para 2.154). See also the New Zealand Law Commission, *Report No 6, Limitation Defences in Civil Proceedings,* NZLC R6 (1988), para 126, the Law Reform Commission of Saskatchewan, *Tentative Proposals for Changes in Limitations Legislation, Part II: The Limitations of Actions Act* (1986), p 68. Scotland and the Republic of Ireland have also rejected the idea of a judicial discretion to disapply limitation periods. See paras 10.15, 10.19 and 10.38 above.

[306] [1979] 1 WLR 606. See para 3.76 above.

[307] See also *Deerness v John Keeble and Son Ltd* [1983] 2 Lloyd's Rep 260.

PART XIII
OPTIONS FOR REFORM III: THE RANGE OF THE CORE REGIME

13.1 We envisage that the core limitation regime we provisionally propose will apply, in a uniform way, to the vast majority of causes of action in contract and tort.[1] In other words, it will apply, for example, to an action for breach of a simple contract (that is, one supported by consideration); to an action in the tort of negligence for personal injury, property damage or pure economic loss; or to an action in tort for nuisance or breach of statutory duty.

13.2 What we discuss here is whether the core regime can sensibly apply to other actions falling within the Limitation Act 1980 (most of which have been "problematic" for the purposes of limitations) namely: -

(1) Actions on a specialty;

(2) Actions under the Law Reform (Miscellaneous Provisions) Act 1934;

(3) Actions under the Fatal Accidents Act 1976;

(4) Actions by victims of child sexual abuse;

(5) Actions for defamation or malicious falsehood;

(6) Actions for conversion;

(7) Actions by a subsequent owner of damaged property;

(8) Actions in restitution;

(9) Actions for a contribution or an indemnity;

(10) Actions for breach of trust and related actions;

(11) Actions to recover land and related actions;

(12) Actions on a judgment;

(13) Actions on an arbitration award;

(14) Actions on a statute;

(15) Actions against public authorities.

13.3 We also discuss in this Part:

[1] See para 11.17 above.

(1) Whether the core regime should apply to proceedings under s 459 of the Companies Act 1985;

(2) Whether the core regime should apply to equitable, as well as common law, remedies;

(3) The interrelationship between the core regime and the numerous specific limitation periods laid down in various statutes outside the Limitation Act 1980;[2]

(4) Whether there should be a "sweeping-up" or "default" provision.

1 ACTIONS ON A SPECIALTY

13.4 Under section 8 of the 1980 Act, actions on a specialty have a limitation period of 12 years.[3] This applies to a contract executed as a deed. It also applies to actions on a statute, but its importance here has been considerably diminished by section 9 of the 1980 Act, which provides that the limitation period applicable to any action for a sum recoverable by statute is six years.[4] We discuss actions on a statute below.[5]

13.5 There seems to be no good reason for maintaining the different limitation period applicable to specialties. Moreover, the existence of a different period for contracts executed as deeds, as opposed to simple contracts, can cause confusion. For example, it is commonplace in construction works for some contracts to be made by deed. Our discussions with representatives of the construction industry indicate that they find it needlessly complex and puzzling to have a different limitation period for contracts executed as deeds as opposed to simple contracts (let alone further different limitation periods running in tort). An additional advantage of assimilating specialties into the core regime would be in obviating the present difficulties in interpreting the relationship between sections 8, 9 and 2 in respect of actions for breach of statutory duty.[6]

13.6 An argument in support of there being a longer limitation period for specialties is that the parties should be free to contract for a longer limitation period by embodying their agreement in a particular instrument if they wish. However, there is under English law no restriction on the ability of the parties to contract for a longer limitation period if they can agree to do so, regardless of the type of

[2] See para 7.26 ff and Table 2 at pp 125 - 141.

[3] See paras 3.1, 7.10. Specialties have been treated differently from other contracts for historical reasons. A limitation period of 20 years was first applied to them by the Civil Procedure Act 1833 (s 3). This was reduced following the recommendations of the Law Revision Committee, *Fifth Interim Report (Statutes of Limitation)* (1936) Cmd 5334, p 9, to 12 years. When this was reviewed by the Law Reform Committee in 1977, it was thought that it was convenient to maintain a separate period for specialties to give parties to a contract a convenient way to increase the limitation period. See *Twenty-First Report (Final Report on Limitation of Actions)* (1977) Cmnd 6923, para 2.59.

[4] See paras 7.10 - 7.16 above.

[5] See paras 13.140 - 13.141 below.

[6] See paras 7.17 - 7.21 above.

instrument used (subject only to general rules governing the fairness of contracts such as those laid down in the Unfair Contract Terms Act 1977).[7] **Our provisional view is, therefore, that specialties should be subject to our core regime. We ask consultees whether they agree, and if not, to say why not.**

2 ACTIONS UNDER THE LAW REFORM (MISCELLANEOUS PROVISIONS) ACT 1934

13.7 Under the current law,[8] the death of a potential plaintiff does not extinguish any cause of action which accrued to that plaintiff. Instead the cause of action survives for the benefit of the estate. Unless the action includes a claim for damages for personal injuries suffered by the deceased plaintiff, the death will have no effect on the limitation period, which will run from the accrual of the cause of action. Where a claim is being made for damages for personal injuries, the limitation period will run from the date of death or the date of knowledge of the personal representative of the deceased, and the court will have a discretion to disapply the limitation period.

13.8 Under our core regime, the initial limitation period for all claims (not simply claims in respect of personal injuries) will start from the date the plaintiff - that is the personal representative of the deceased - knew or ought to have known of the cause of action. Should the limitation period run from the date of death where this is later than the date of discoverability, as under the current regime for personal injuries? The date of discoverability could in some cases precede the death, where, for example the personal representative has been told of the cause of action by the deceased. As the personal representative has no power to act on behalf of the estate until, at the earliest, the date of death - and as the long-stop would prevent indefinite liability - it would seem reasonable to postpone the start of the limitation period until the date of death.

13.9 Under our core regime the long-stop period would start from the date of the act or omission by the defendant which gave rise to the cause of action. This may in some cases mean that the personal representative has relatively little time to bring the action, for example where the deceased died after having contracted a latent industrial disease and the claim relates to this injury. However, this would be in line with the principle generally adopted by the current law that the estate of the deceased should not be able to bring an action where the deceased himself would have been time-barred. The alternative starting point for the long-stop period, the date of death, could considerably extend the length of time the defendant remains exposed to potential liability. We do not think that such an extension would be reasonable.

[7] See the discussion in the Law Reform Committee, *Twenty-First Report (Final Report on Limitation of Actions)* (1977) Cmnd 6923, paras 2.58 - 2.61. This is not the case in Scotland, where section 13 Prescription and Limitation (Scotland) Act 1973 invalidates any provision in an agreement which purports to exclude a prescription limitation period. See our proposals with respect to agreements to change the limitation periods, paras 14.1 - 14.6 below. See also paras 9.7 - 9.11 above.

[8] See paras 3.77 - 3.80 above.

13.10 **Our provisional view is that claims under the Law Reform (Miscellaneous Provisions) Act 1934 should be subject to the core regime, save that (as under the present law in relation to claims for personal injury) the initial limitation period should start from the later of the date the cause of action was discoverable by the plaintiff (that is, the personal representative) or the date of death. Do consultees agree?**

3 ACTIONS UNDER THE FATAL ACCIDENTS ACT 1976.

13.11 Under the current law,[9] where a death was caused by conduct which would have given the deceased a cause of action had he survived, a cause of action is created for the benefit of the dependants of the deceased under the Fatal Accidents Act 1976. A claim cannot be brought if a claim by the deceased would have been time-barred at the time of death. The limitation period for an action under the 1976 Act is three years from the date of death or the date of knowledge of the dependants for whose benefit the action is brought. The date of knowledge of the personal representative is irrelevant. Unlike claims under the Law Reform (Miscellaneous Provisions) Act 1934, a claim under the Fatal Accidents Act 1976 only arises on the death of the deceased, so that the date of the death will never be later than the dependant's date of knowledge of the action. The limitation period may be disapplied under the court's discretion embodied in section 33.[10]

13.12 Under our core regime, the initial limitation period would run from the date of discoverability by the plaintiff, that is, the personal representative (or, where the personal representative failed to bring proceedings, the dependant). Should this be the law or, in contrast, should the date of discoverability of the dependants (for whose benefit the action is brought) be decisive, as under the present law? Furthermore, as under the present law, should the claims of the dependants be judged separately for the purposes of limitation, so that the time-barring of one dependant's claim does not bar the claim of another? We believe that the approach of the present law on these questions is to be preferred. The following example may be of assistance in appreciating this.

13.13 A man dies from lung cancer in January 2000 caused, though he did not know it, by exposure to asbestos. He leaves a wife and two children aged two and eight. His wife was aware of his previous exposure to asbestos, and learns when he dies that a number of his workmates had also contracted asbestos-related diseases and been successful in claiming compensation from the employer. His executors were not aware of this, until she mentions it to them twelve months after the death. A claim under the Fatal Accidents Act 1976 would be brought by the executors, as personal representatives of the deceased. A claim on behalf of the wife would be time-barred in January 2003 (assuming a limitation period of three years) if, as we consider ought to be the law, the date of discoverability is to be decided by reference to the knowledge of the dependants. But taking the view that time does

[9] See paras 3.81 - 3.86 above. See Claims for Wrongful Death, Law Commission Consultation Paper No 148 (1997) para 1.5 where we explain that we deal with limitation of Fatal Accident Act claims in this paper.

[10] Though the possibility that the deceased may have successfully applied for the disapplication of the limitation period under this section may not be taken into account. See s 12(1).

not run during minority,[11] the initial limitation period for a claim brought on behalf of the elder child would run until December 2013, and on behalf of the younger child until December 2019 (three years after each of the children reaches the age of 18).

13.14 If, in contrast, the date of discoverability is to be decided by the knowledge of the personal representatives, claims on behalf of the wife and both children would be time-barred in January 2004, three years after the date of knowledge.

13.15 Under the core regime, the long-stop limitation period will start running at the date of the act or omission of the defendant which gave rise to the claim. The same considerations apply to actions under the Fatal Accidents Act 1976 as to actions under the Law Reform (Miscellaneous Provisions) Act 1934, and we do not consider that the long-stop period for such claims should be extended by postponing the start of the long-stop limitation period until death.

13.16 **We provisionally consider that claims under the Fatal Accidents Act 1976 should be subject to our core regime save that, as under the present law, the date of discoverability should refer to the knowledge of the dependants for whom the action is brought. Do consultees agree?**

4 ACTIONS BY VICTIMS OF CHILD SEXUAL ABUSE

(1) Problems with the Current Law

13.17 Victims of sexual abuse, and in particular child victims, raise particular problems for the law of limitations. The House of Lords' decision in *Stubbings v Webb*[12] led to an application to the European Court of Human Rights by the plaintiff on the grounds that English limitation law with respect to such causes of action was contrary to the European Convention on Human Rights ("the Convention").[13] Although, the European Court found that there had been no breach of the Convention, it also noted that:

> There has been a developing awareness in recent years of the range of problems caused by child abuse and its psychological effects on victims, and it is possible that the rules on limitation of actions applying in Member States of the Council of Europe may have to be amended to make special provision for this group of claimants in the near future.[14]

13.18 It will be recalled[15] that in *Stubbings v Webb*[16] and *S v W*[17] a different limitation regime applied depending on whether the cause of action was for the tort of trespass to the person or for the tort of negligence. In *Stubbings v Webb*, the cause

[11] See paras 12.129 - 12.136 above.

[12] [1993] AC 498.

[13] See para 3.35 above.

[14] (1997) 23 EHRR 213, 234.

[15] See paras 3.32 - 3.36 above.

[16] [1993] AC 498.

[17] [1995] 1 FLR 862.

of action was an intentional trespass, which meant that the relevant limitation period was given by section 2 of the 1980 Act, namely six years from the accrual of the cause of action, which began to run when the plaintiff reached her majority. In *S v W* the cause of action was in respect of personal injuries caused through negligence and not intentional trespass. This meant that the relevant limitation period was that given by section 11 of the 1980 Act, so that a limitation period of three years ran from the date of discoverability and could, in any event, be disapplied by the courts in exercising their discretion under section 33 of the 1980 Act.

(2) Should there be a Limitation Period in Sexual Abuse Cases?

13.19 We have discussed above the purpose of limitations law.[18] Limitation periods counter the unfairness that would attach to a defendant if a claim was enforceable for an indefinite period. In addition, with the passage of time it may become difficult either to prove or disprove a claim and, moreover, it is thought proper that a plaintiff should act promptly to enforce a claim. Limitations law balances issues of fairness to the plaintiff and fairness to the defendant, by giving the plaintiff a limited amount of time within which to bring a claim, and affording the defendant protection from proceedings by the plaintiff after that time has expired. When it comes to sexual abuse cases, however, there are persuasive arguments that the balance should be adjusted in favour of the plaintiff, and it has been argued that no limitation period should apply to such claims.

13.20 The Ontario Limitations (General) Bill 1992, incorporating the recommendation of the Ontario Limitation Act Consultation Group in their 1991 report, provided that no limitation period should be applied where the proceedings arise "from a sexual assault if at the time of the assault one of the parties to it had charge of the person assaulted, was in a position of trust or authority in relation to the person or was someone on whom he or she was dependent, whether or not financially".[19] A number of reasons were given by the Consultation Group for this recommendation. It thought that the imposition of a limitation period would reward assailants who had traumatised and silenced the victim.[20] Moreover, it thought that in the case of sexual assault public policy would be better served by allowing the plaintiff to bring an action against the defendant rather than putting an end to the venting of old disputes. The defendant was unlikely to be prejudiced by loss of evidence as it was his or her conduct that was in issue:

> the plaintiff [was] more likely to face evidentiary problems, because the assault will often have taken place when the plaintiff was young or otherwise vulnerable.[21]

[18] See paras 1.22 - 1.38 above.

[19] See clause 16(h) of the Ontario Limitations (General) Bill 1992.

[20] Ontario Limitations Act Consultations Group, *Recommendations for a New Limitations Act, Report of the Limitations Act Consultation Group* March 1991 ("Ontario Report (1991)"), p 20.

[21] Ontario Report (1991), p 20.

In addition, it thought that it was unlikely that the plaintiff would delay in bringing the claim as it was essential to the healing process.

13.21 Furthermore, in its decision in *KM v HM,*[22] the Supreme Court of Canada said that although

> there are instances where the public interest is served by granting repose to certain classes of defendants... there is absolutely no corresponding public benefit in protecting individuals who perpetrate incest from the consequences of their wrongful actions. The patent inequity of allowing these individuals to go on with their life without liability, while the victim continues to suffer the consequences, clearly militates against any guarantee of repose.[23]

As to the argument that the evidence may be stale, La Forest J (with whom the other judges agreed) said that this was a characteristic of most childhood sexual abuse cases and, in any case, much of the evidence will be direct evidence from the parties themselves rather than corroborative.[24] Finally, with respect to the argument that a plaintiff must act diligently and not sit on their rights, the Court thought that this was not persuasive here because the damage remains latent until adulthood, and even when the damage is apparent the connection between the incest and the injuries may not be made, and social forces discourage victims from coming forward.[25]

13.22 These arguments suggest that in the case of sexual abuse there may be no justification for protecting the interests of the defendant.[26] However, there are other considerations. Ultimately, limitation periods give effect to the principle that at some point, regardless of the merits of the case, litigation should be stifled, as it will no longer be possible to give a fair trial to the dispute. Concerns about the quality of evidence available for the court to reach its decision lie behind this. As noted by La Forest J, in sexual abuse cases there is unlikely to be much corroborative evidence available; instead the evidence will depend on the qualities of the memories of the parties. A complicating factor may be introduced where the plaintiff claims to have recovered a repressed memory. It has been suggested that the very nature of the trauma of sexual abuse leads some victims not only to forget the abuse but to repress all memory of it so thoroughly that it cannot be recalled by conscious thought. Indeed such a repressed memory may only be recovered after intensive therapy.[27] The extent to which such a memory is reliable

[22] (1992) 96 DLR (4th) 289. See para 10.98 above, and paras 13.22 and 13.33 below.

[23] (1992) 96 DLR (4th) 289, 302.

[24] (1992) 96 DLR (4th) 289, 302.

[25] (1992) 96 DLR (4th) 289, 303 - 4.

[26] See J Mosher, "Challenging Limitation Periods: Civil Claims by Adult Survivors of Incest (1994) 44 U of Toronto LJ 169.

[27] See Julie Schwartz Silberg, "Memory Repression: Should it Toll the Statutory Limitations Period in Child Sexual Abuse Cases?" (1993) 39 Wayne L Rev 1589 and Gary M Ernsdorff & Elizabeth F Loftus, "Let Sleeping Memories Lie? Words of Caution About Tolling the Statute of Limitations in Cases of Memory Repression" (1993) 84 Jnl of Criminal Law and Criminology 129.

is the subject of some controversy.[28] Ultimately, it will be up to the courts to determine, whether to accept evidence of repressed memory, how much weight to give it and whether it must be corroborated. However, a defendant facing a false memory may have substantial difficulty in producing evidence to counter it, particularly where the plaintiff brings proceedings several years, or decades, after the events in question.

13.23 We note that the Law Reform Commission of Western Australia commented with respect to the proposal that in certain circumstances there should be no limitation period for claims by sexual abuse victims that, "the arguments advanced in favour of such a provision are in essence the same arguments as those put forward in *KM v HM* to support the view that the limitation period should not begin to run until the discoverability requirement is satisfied. In most cases, the plaintiff's right to sue will be preserved by the discoverability period...".[29] We agree. Courts in the United States have also generally applied limitation periods to claims by sexual abuse victims on the basis that they start to run when the cause of action becomes discoverable.[30]

13.24 Further support for applying a limitation period to claims by victims of child sex abuse can be found in the decision of the European Court of Human Rights in *Stubbings v United Kingdom*.[31] Here the Court held that the result in *Stubbings v Webb* did not breach the European Convention on Human Rights. In particular, the limitation period of six years from the age of majority was not unduly short and the limitation rules were proportionate to the aim of securing finality and legal certainty, protecting defendants from stale claims, and preventing the injustice which might arise if the court was required to decide upon events which took place in the distant past on the basis of unreliable evidence.[32]

[28] It has been suggested that such memories may be the result of suggestions made in therapy. Monica L Hayes, "The Necessity of Memory Experts for the Defence in Prosecutions for Child Sexual Abuse Based Upon Repressed Memories" (1994) 32 American Crim L Rev 69; Julie Schwartz Silberg, "Memory Repression: Should it Toll the Statutory Limitations Period in Child Sexual Abuse Cases?" (1993) 39 Wayne L Rev 1589; Gary M Ernsdorff & Elizabeth F Loftus, "Let Sleeping Memories Lie? Words of Caution About Tolling the Statute of Limitations in Cases of Memory Repression" (1993) 84 Jnl of Criminal Law and Criminology 129.

[29] Law Reform Commission of Western Australia, *Report on Limitation and Notice of Actions,* Project No 36 - Part II (1997), para 9.44

[30] See paras 10.118 - 10.122 above. Courts in some jurisdictions in the United States have also considered whether factors other than the lack of discoverability should postpone the start of the limitation period (see para 10.121 above).

[31] (1997) 23 EHRR 213.

[32] The Personal and Medical Injuries Law Letter criticises as unconvincing the European Court of Human Right's reasoning, in respect of Article 14, to the effect that "it may be more readily apparent to victims of deliberate wrongdoing that they have a cause of action" ((1997) 23 EHRR 213, 239). The Personal and Medical Injuries Law Letter notes "the very point of the criticism made is that the ongoing, and possibly insidious, nature of sexual abuse or psychological abuse of any kind is its capacity to cloud judgment as to what is ordinary, and what is actionable. In this respect the European Court of Human Rights appears simply to be compounding the error of humanity committed by the House of Lords in the final domestic appeal". See P&MILL 1997, 13(1) pp 7 - 8. The decision has

13.25 **We are therefore provisionally of the view that claims by victims of child sexual abuse should continue to be subject to a limitation period. We ask consultees whether they agree and, if not, to say why not.**

(3) Approaches to Dealing with Sexual Abuse

13.26 If it is accepted that a limitation period should apply to claims by victims of child sexual abuse, it must then be asked whether such claims require a separate regime, or can properly be dealt with under the core scheme we propose.

(a) Separate regime

13.27 As was noted above, the Ontario Limitations (General) Bill 1992, which incorporated the recommendations of the Ontario Limitation Act Consultation Group in their 1991 report, provided that in certain instances of sexual assault there should be no limitation period.[33] In addition, it also provided that in sexual assault claims outside relationships of trust or dependency and for claims of non-sexual assault in relationships of trust and dependency, a rebuttable presumption should be created to the effect that the plaintiff was "incapable of commencing the proceeding because of his or her physical, mental or psychological condition" until the proceeding was commenced.[34] In relation to the presumption the Group said:[35]

> In such circumstances, it does not seem unreasonable to assume that most victims will be unable to commence civil proceedings within two years of the attack. The focus should be on the validity of the claim, and not on the condition of the plaintiff. Thus, instead of compelling every victim to prove inability to pursue the claim, the limitation period should be postponed unless the defendant can prove that the victim was capable of bringing the proceedings within the relevant two year limitation period [that is the primary limitation period recommended by the group].
>
> The class of defendants who would have to prove the plaintiff's capability is drawn more narrowly than in the cases of sexual assault in [relationships of trust or dependency] because the defendant will be dealing with claims in respect of any assault. The broad compass of assault includes not only the most vicious or persistent beating but also the non-consensual administration of medical treatment and a shove by a teacher or police officer. It would be unduly onerous for a doctor

also been characterised as "disappointing" by Elizabeth Palmer in a brief report on the case [1997] EHRLR 164.

[33] See further para 13.20 above.

[34] See Limitations Bill 1992 cl 9(3). It was intended that these provisions be retrospective: Ontario Report (1991) p 51. In light of this Report, British Columbia and Saskatchewan abolished limitation periods for sexual misconduct where the plaintiff was a minor when the misconduct occurred. Prince Edward Island removed all limitation periods where injury occurred due to sexual misconduct in relationships of intimacy or dependency. See Law Reform Commission of Western Australia, *Report on Limitation and Notice of Actions,* Project No 36 - Part II (1997), para 9.40.

[35] Ontario Report (1991), pp 31 - 32.

or police officer to prove 10 years after the event that the plaintiff was in a position to commence the proceedings two years earlier.

However, in the case of sexual assault, or a non-sexual assault of a person in a personal and intimate relationship or a relationship of dependency, the defendant will have direct knowledge of the circumstances and will not have significant problems about the loss of evidence.

13.28 The use of the presumptions recommended by the Ontario Limitations Act Consultation Group was considered in *KM v HM*[36] which was decided after the Group's report. Two members of the majority in that case were against the use of presumptions. In giving the judgment for the majority, La Forest J held that there was a presumption that a victim of incest will only discover the connection between the injuries and the abuse when they have started therapy. Two members of the Court, Sopinka and McLachlin JJ, distanced themselves from this reasoning preferring that the burden of proof be left as it is with the issue being decided as a matter of fact in each case.[37]

13.29 The Western Australia Law Reform Commission[38] also rejected the use of a presumption noting that it would make it necessary to inquire when the plaintiff recovered which in turn focuses on the position of the plaintiff rather than the alleged misconduct of the defendant. They rejected the Ontario proposals for special provisions to deal with sexual abuse. Instead the two general limitation periods they proposed would apply, namely, a three year period running from the date on which the plaintiff first acquired or in his or her circumstances ought to have acquired, the necessary knowledge together with a fifteen year long-stop running from the date on which the claim arose, that is, the date of the abuse. There would also be a judicial discretion to extend the period.

13.30 Our provisional view is that a separate regime for sexual abuse should only be adopted if such claims cannot be properly dealt with by our core regime. Minimising the number of exceptions to our core regime would assist in achieving a major aim of this review, that is, to reduce the categories and variances in limitations law and to promote uniformity and reduced technicality. We therefore now turn to consider how our core regime would apply to actions by victims of child sexual abuse.

(b) Applying our core regime

(i) The initial limitation period

13.31 A key proposal of our core regime is that the initial limitation period should run from the date when the plaintiff knows the facts constituting the cause of action (that is, he or she knows the injury suffered, and that it was attributable to the conduct of the defendant), the identity of the defendant, and that the injury is

[36] (1992) 96 DLR (4th) 289.

[37] (1992) 96 DLR (4th) 289, 338 per Sopinka J and 339 per McLachlin J. A similar approach was followed in *S v G* [1995] 3 NZLR 681, discussed in para 10.75 above.

[38] *Report on Limitation and Notice Actions,* Project No 36 Part II (1997), para 9.45.

significant. In the case of sexual abuse claims, the limitation period will therefore not start to run until such time as the plaintiff knows, or when the plaintiff in his or her circumstances and with his or her abilities ought to have known, of the harm that he or she has suffered, and that it is attributable to the conduct of the defendant. Applying this discoverability test to claims by sexual abuse victims will resolve many of the problems which the current accrual method can cause in this area. It has been suggested that plaintiffs claiming for compensation for child sexual abuse fall into two categories. First, those who were aware of the sexual abuse at the time it occurred, but who are unaware for several years that the subsequent physical and psychological problems they suffer can be attributed to the abuse. Secondly, those plaintiffs who claim that the trauma of the abusive experience has caused them to repress their memories of abuse entirely so that they are unaware of what they have suffered until a later event triggers their memory.[39] The extent of the knowledge required by our definition of discoverability should protect plaintiff in both categories. For example, if a plaintiff had knowledge of the abuse, the injury and who the perpetrator was this would still not constitute relevant knowledge if he or she did not know (and in his or her circumstances and with his or her abilities could not reasonably have known) that his or her injury resulted from the abuse.

13.32 Some guidance on how the courts would apply a discoverability test can be found in the Court of Appeal judgment (later overturned by the House of Lords) in *Stubbings v Webb*.[40] The Court of Appeal held that the limitation period applicable to the claim was governed by section 11 of the 1980 Act, and therefore ran from the date of knowledge of the plaintiff. In this case, although the plaintiff was aware of the acts which had been committed against her (so that it was not a case of "repressed memory"), she did not appreciate that the psychiatric problems she suffered throughout her minority, and on into her adult life, were caused by the abuse until nearly ten years after she attained her majority. The court accepted her evidence to this effect, and further found that she could not reasonably be expected to acquire knowledge of the causal link

> since mental impairment caused as this allegedly was almost necessarily produces a lack of insight and during the period in question there was not that general awareness among the public of the psychological effects of child abuse which certain well-publicised events since then have caused.[41]

It should be noted that the court suggested that a plaintiff coming of age in the late 1980s would find it very difficult, if not impossible, to establish that she had acted reasonably in not starting proceedings within three years of majority, as a result of the heightened public awareness of the effects of such abuse.[42] Under our core regime, this would depend on the circumstances of the individual plaintiff. Where, for example, a plaintiff has reacted to the abuse by denying its

[39] See N Clevenger, "Statute of Limitations: Childhood victims of sexual abuse bringing civil actions against their perpetrators after attaining the age of majority." (1992) 30 JFL 447, 453.

[40] [1992] 1 QB 197.

[41] [1992] 1 QB 197, 207 *per* Bingham LJ.

[42] [1992] 1 QB 197, 208, 212.

consequences, or has been led to believe that the abuse is entirely their own fault,[43] it may well be "reasonable" for that plaintiff to have failed to appreciate the causal link between the action of the abuser and the harm they have suffered until they have received some form of therapy, irrespective of the state of public opinion. In short, the reasonableness of the plaintiff's conduct will be assessed by reference to what the plaintiff has experienced.

13.33 Another example of how a discoverability test can operate can be seen in the Supreme Court of Canada's decision in *KM v HM*.[44] In this case the appellant was a victim of incest between the ages of 8 and 17. The abuse ceased when she left home in 1974. She had tried to tell her mother of the abuse when she was 11 and later she told her husband. This was not a case of the victim having no recollection at all, she knew she had been assaulted and she knew that incest was wrong. She suffered psychological problems but it was not until 1984 that she discovered, through therapy, that these problems were caused by the abuse.[45] She commenced an action in 1985. The Supreme Court held that the cause of action did not accrue, and therefore the limitation period did not start to run, until the victim could reasonably discover her cause of action in the sense of having a substantial awareness of the harm, its likely cause and who was responsible for it.[46] Mere knowledge of the assault without knowledge of the psychological problems caused by them is not enough. The victim must make the connection between the assault, the damage and who is responsible. Although the Court phrased the result in terms of the time of accrual, the result in the case shows how a discoverability test can lead to a just result.

(ii) The long-stop

13.34 Under our core regime, claims by victims of sexual abuse, being claims for personal injury, would be subject to a long-stop limitation period of 30 years running from the date of the act or omission giving rise to the claim. The length of this long-stop period means that it is unlikely that many victims of sexual abuse would find their claims barred by it.[47]

13.35 It may be asked why it is necessary to subject claims by victims of sexual abuse to any long-stop limitation period. We suggest elsewhere that it is preferable and in keeping with the modern development of limitation law to have a long-stop

[43] Two of the strategies highlighted by J Mosher as methods developed by child abuse survivors to survive the abuse. See "Challenging limitation periods: civil claims by adult survivors of incest." (1994) 44 U of Toronto LJ 169. In New Zealand, it has been held that deceit by the defendant as to the nature of the acts carried out amount to "fraud" sufficient to postpone the running of the limitation period. See para 10.81 above.

[44] (1992) 96 DLR (4th) 289. See also paras 10.98 and 13.21 above.

[45] In evidence it was suggested that she had made an intellectual connection between the abuse and the injury but not an emotional one and therefore she was unable to assess her situation rationally: (1992) 96 DLR (4th) 289, 296.

[46] (1992) 96 DLR (4th) 289, 305, 312. See also *Gray v Reeves* (1992) 89 DLR (4th) 315; *S v G* [1995] 3 NZLR 681 and *Evans v Eckelman* 265 Cal Rptr (3rd) 605 (1990).

[47] Neither the plaintiff in *Stubbings v Webb* [1993] AC 498 nor the plaintiff in *S v W* [1995] 1 FLR 862 would have been time-barred by such a limitation period.

provision.[48] We also discuss whether there should be any discretion to override a long-stop.[49] If a long-stop provision is adopted and it is intended to apply uniformly to all causes of action it may in certain circumstances lead to a harsh result. Clearly, a sexual abuse case may be one situation where such a harsh result may occur. For example, there may be a case where the defendant could not reasonably discover the cause of action by the time the long-stop period has run its course. This is an inevitable consequence of a long-stop limitation period. However, as discussed above[50] our provisional view is that the benefits of a long-stop period outweigh the disadvantages. After a certain period of time, it is no longer possible to give a fair trial to disputes. The decision of the European Court of Human Rights in *Stubbings v United Kingdom*[51] suggests that the application of a time bar to a sexual abuse claim is not of itself unjust.

(iii) Disability

13.36 In some cases, the psychological problems suffered by the victim of sexual abuse might amount to a "lack of capacity" within our definition of disability, which would postpone the commencement of the (initial) limitation period (unless, possibly, there is a representative adult other than the defendant).[52] We have discussed this fully above.[53] The victim of child sex abuse will also not have a limitation period running against them until they have reached the age of 18 (unless, possibly there is a representative adult other than the defendant).

13.37 **Our provisional view is that our core regime (in essence, three years from discoverability with a long-stop of 30 years from the date of the abuse and postponement - unless, possibly, there is a representative adult other than the defendant - for minority and adult disability) should apply, rather than a separate regime, to claims by victims of child sexual abuse. We ask consultees whether they agree and, if not, to say why not.**

5 ACTIONS FOR DEFAMATION OR MALICIOUS FALSEHOOD

13.38 The limitation period for defamation actions is currently one year, subject to a discretion for the court to disapply this limit where it appears to the court that it would be equitable to allow the action to proceed.[54] These provisions, implemented by section 5 of the Defamation Act 1996,[55] constitute the second

[48] See para 12.102 - 12.104 above.

[49] See paras 12.187 - 12.196 above.

[50] See paras 12.97 - 12.104 above.

[51] (1997) 23 EHRR 213. See para 3.35 above.

[52] See paras 12.129 - 12.137 above.

[53] See paras 12.118 - 12.125 above.

[54] See paras 3.105 - 3.107 above.

[55] Inserting new sections 4A and 32A into the 1980 Act, following the recommendations of the Supreme Court Procedure Committee ("the Neill Committee") *Report on Practice and Procedure in Defamation*, July 1991. See para 1.16 above.

reduction in recent years to the limitation period for defamation actions.[56] The concern was that the original period of six years was "unjust and oppressive to defendants who have the anxiety, expense and inconvenience of a possible defamation action hanging over them for many years after the publication of the matter complained of."[57] In addition, the nature of the claim was felt to justify a reduction in the limitation period, as "a plaintiff is or should be concerned to vindicate as speedily as possible the reputation which he claims has been damaged by defamatory material and to obtain compensation for any injury he has sustained."[58] Similar considerations moved the Neill Committee to recommend the further reduction to one year.[59]

13.39 The question must be whether an action for defamation is sufficiently distinct from other actions to justify special treatment, if a general limitation period of three years from the date of discoverability were to be introduced. Some factors may be thought peculiar to defamation actions. If the defendant wishes to defend the action on a plea of justification, the burden of proof that the publication in question is justified rests on the defendant - the plaintiff does not have to prove that the defamatory statement is false. The defendant may therefore suffer greater prejudice through evidentiary difficulties than the plaintiff if the plaintiff is able to issue proceedings just before the end of a long limitation period. However, there are also reasons why a short limitation period would be unjust to plaintiffs. As the Neill Committee recognised, the fact that legal aid is not available for defamation actions can prevent a plaintiff bringing proceedings against the defendant until the plaintiff has managed to save the necessary money. A plaintiff may also be unable to start proceedings until disciplinary proceedings against him or her in relation to the matters which are the subject of the defamatory publication have been resolved.[60]

13.40 No law reform body in the other common law jurisdictions which have recently reported on limitations has recommended that such actions should receive special treatment.[61] The reasons given in the Faulks Report and the Neill Report for

[56] The Administration of Justice Act 1985 reduced the period from six years to three years, implementing one of the recommendations of the *Report of the Committee on Defamation* (1975), Cmnd 5909 ("The Faulks Report"). See para 1.15 above.

[57] The Faulks Report, para 536.

[58] The Faulks Report, para 536.

[59] "We have canvassed opinion and found a wide measure of agreement (not surprisingly) among media representatives that the same reasoning would justify an even shorter period. Memories fade. Journalists and their sources scatter and become, not infrequently, untraceable. Notes and other records are retained only for short periods, not least because of limitations on storage": Supreme Court Procedure Committee, *Report on Practice and Procedure in Defamation*, July 1991, p 81, para VIII 2.

[60] These financial difficulties and the possible impact of disciplinary proceedings were cited as the main reasons for opposing the reduction of the limitation period when the Defamation Bill was debated in Parliament. See, for example, *Hansard* (HL) 16 April 1996, vol 571, col 639 - 640.

[61] Though the Law Reform Committee of Western Australia did not feel it appropriate to abolish the rule applying in that jurisdiction that the limitation periods for actions against newspapers should be limited to one year because of the scope of its terms of reference, it did note that one year was too short a period. See *Report on Limitation and Notice of Actions,*

reducing the limitation period seem equally applicable to other causes of action. The problems the Neill Report identified with a fixed period of one year (which influenced the recommendation that the court should have a discretion to disapply the limitation period) could be dealt with equally by the extension of the period to match the period of limitation applicable to other causes of action and removing the court's discretion. Indeed, if the court's discretion to disapply the limitation period is to be removed, a longer limitation period than one year (from accrual) would seem essential. From 1986 to 1996, the limitation period for defamation claims was three years, and we are unaware that the three year period was causing any difficulty.

13.41 Changing the point from which the limitation period runs from the date of publication to the date of discoverability is potentially a much greater increase of the limitation period, as in defamation actions the date of discoverability will in nearly all cases be later than the date of publication. On the other hand, if our core proposals were to apply, the law would be made far more certain for defendants by the abolition of a judicial discretion to disapply the period, and the imposition of a long-stop (of 10 years running from the date of publication). While it is unfortunate that we feel bound to propose a new approach here when the law in this area has very recently been changed, it is our provisional view that there are insufficient grounds for making actions for defamation a special case outside the core regime we are proposing for limitation periods.[62]

13.42 We should add that the current "special" limitation period appears to give rise to a number of anomalies. If the defendant has made an incorrect statement of fact about anyone to whom the defendant owes a duty of care in negligence, and that statement causes loss, the plaintiff may sue in defamation, malicious falsehood and/or negligence.[63] The limitation period will differ according to the action chosen, between one year for defamation and malicious falsehood (possibly extendible by the court at its discretion), and three or six years for negligence. The fact that a shorter limitation period applies to actions in respect of malicious statements than to actions for negligent statements looks particularly odd. Similarly, in *Lonrho v Fayed (No 5),*[64] the Court of Appeal held that although the plaintiffs would have to sue in defamation in order to claim damages for injury to reputation or feelings, defamatory statements made by the defendants, causing actual pecuniary loss, could also give rise to an action in the tort of conspiracy - which is subject to a limitation period of six years. Bringing actions for defamation under the core regime would remove these apparent anomalies.

13.43 **We ask consultees whether they agree with our provisional view that defamation and malicious falsehood should be subject to our core regime.**

Project No 36 - Part II (1997), para 12.26. Note also that a three-year period from knowledge of the defamation is the limitation period in Scotland: see para 10.27 above.

[62] We drew the Lord Chancellor's Department's attention to the dangers of a further ad hoc piece of reform but it was felt preferable to proceed with the limitation clause included in the Defamation Bill 1996 even if it had to be "unwound" in a later bill, consequent on our general review of limitation periods.

[63] See *Spring v Guardian Assurance plc* [1995] 2 AC 296.

[64] [1993] 1 WLR 1489.

If consultees do not agree, we ask them what, if any, reform to the present law they would prefer.

6 ACTIONS FOR CONVERSION

(1) Introduction

13.44 The current law provides that there is a limitation period of six years from a conversion but that there is no limitation period in respect of theft, or in respect of any conversion which is related to the theft (that is any conversion following the theft) other than a purchase of the stolen property in good faith.[65] This gives the owner of the stolen property limited protection: as soon as the property is purchased by someone in good faith, the limitation period will start to run, and the original owner's title to the property will be extinguished, and with it all opportunity to recover the property. The current law tries to reconcile two conflicting principles: first, that to protect the owner of stolen property, there should be no limitation period for actions to recover stolen property; second, that a bona fide purchaser of stolen property should be protected.[66] On balance, the bona fide purchaser is favoured.[67]

13.45 Before the enactment of section 3 of the Limitation Act 1939 the limitation period in respect of a second conversion did not begin to run until the ultimate holder of the chattel had refused a demand for the return of the chattel from the original owner. In consequence, even if the limitation period in respect of the first conversion had expired, the original owner might still be able to bring an action for the recovery of the chattel if it passed to another holder. This rule attracted considerable criticism, and was replaced by the rule that no action could be brought for the conversion or detinue of a chattel more than six years after the initial conversion.[68]

13.46 The 1939 Act did not contain an exception where the chattel had been stolen. This was introduced in the 1980 Act following the recommendations of the Law

[65] See Limitation Act 1980 ss 2 - 4 and paras 3.108 - 3.115 above.

[66] Note that the burden of proving that the property was the subject of a bona fide purchase after the theft lies on the defendant in any action to recover the property. See Law Reform Committee, *Twenty First Report (Final Report on Limitations of Actions)* (1977) (Cmnd 6923), para 3.8 and *Preval v Adrian Alan Ltd* (unreported, 24 January 1997).

[67] This could be said to accord with the insurance position - it is far more likely that the owner of the stolen property is insured against the loss caused by the theft of that property than the purchaser is insured against the risk that the purchased property is stolen and so has to be returned.

[68] See the discussion in Law Reform Committee, *Twenty First Report (Final Report on Limitations of Actions)* (1977) (Cmnd 6923), paras 3.1 - 3.18. This reform has been followed in most of the common law jurisdictions. All the modern Australian Acts provide that no action may be brought in respect of a subsequent conversion once the limitation period for the first conversion has expired. See New South Wales Limitation Act 1969 s 21, Victoria Limitation of Actions Act 1958 s 6(1), Queensland Limitation of Actions Act 1974 s 12(1); Tasmania Limitation Act 1974 s 6(1), Northern Territory Limitation Act 1981 s 19(1); Australia Capital Territory Limitation Act 1985, s 18. The same applies in New Zealand (Limitation Act 1950 s 5(1), and the Canadian jurisdictions (see British Columbia Limitation Act 1979 s 10, and Manitoba Limitation of Actions Act 1987 s 54(1).

Reform Committee.[69] Although the 'theft exception' introduced in 1980 does provide some protection to the original owner, that protection ceases as soon as the stolen object finds its way into the hands of a bona fide purchaser. That purchaser will receive good title to the object six years after the purchase. So will any subsequent purchaser (whether or not in good faith). In practice, therefore, there is a limitation period for actions to recover stolen goods - namely, the time it takes for the article to be sold to a bona fide purchaser plus six years. If the owner does not locate the article before this time limit has expired, title to the stolen article will be lost.

13.47 We are aware that the protection given by the law on limitations in this area to the bona fide purchaser has created particular difficulties in the international art market. It has been argued that the protection offered by most limitation systems to buyers increases the profitability of art theft, and so encourages more theft.[70] Given the amount of art which is stolen[71] this is a serious problem, and arguably the protection given to buyers should be limited. Growing concern over this problem has led to developments both internationally,[72] and in the European Union.[73]

[69] See para 13.52 below.

[70] Stephanos Bibas "Statutes of Limitations for Stolen Art" (1996) 5 IJCP 73 - 109.

[71] The market in stolen art is said to be second in turnover only to drug-trafficking (National Heritage Committee, Export of Works of Art, First Report (Draft Directive on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State and Draft Regulation on the Export of Cultural Goods) HC Session 1992-1993, November 1992, para 21), cited in N Palmer "Recovering Stolen Art" [1994] CLP 215 - 254 at 217. In January 1994, the Arts and Antiques Unit at New Scotland Yard estimated that the annual value of stolen art stands at around £300 million nationally and £3 billion across the world (N Palmer, *op cit*).

[72] International Developments are reflected in the work of UNIDROIT. Following on from the work of UNESCO which resulted in the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970), UNIDROIT has prepared the Convention on the International Return of Stolen or Illegally Exported Cultural Goods (adopted 23 June 1995 and opened for signature 24 June 1995). It should be noted that the United Kingdom is not a party to either the UNESCO Convention or the UNIDROIT Convention). Article 3 of that Convention provides as a general principle that the possessor of a cultural object which has been stolen shall return it (Article 3(1)). Under Article 4 of the Convention, the possessor required to return the object is entitled to payment of fair and reasonable compensation provided that the possessor neither knew nor ought reasonably to have known that the object was stolen and can prove that it exercised due diligence when acquiring the object. The Convention sets a time limit on claims for restitution of the stolen object of three years from the time "when the claimant knew the location of the cultural object and the identity of its possessor, and in any case within a period of 50 years from the time of the theft" (Article 3(3)). This is modified where the "cultural object" claimed forms part of a national monument or archaeological site or belonging to a public collection, in which case no long-stop period applies (unless a Contracting State has already provided in its law for a long-stop period of 75 years or longer for such actions) (Article 3(4)).

[73] The European Union has also taken measures to allow a Member State to reclaim Cultural Objects which have been illegally exported to the territory of another Member State. The Council Directive 93/7/EEC on the Return of Cultural Objects unlawfully removed from the territory of a Member State (Implemented in the United Kingdom in The Return of Cultural Objects Regulations 1994 (SI 1994 No 501)) gives Member States (not private

(2) To What Extent should the Core Regime Apply?

(a) Are modifications to the core regime needed for conversion generally?

13.48 Applying our core regime, the initial limitation period would be three years from the date of discoverability of the conversion (with discoverability defined to refer to knowledge of the conversion, of the identity of the defendant, and that the conversion is significant) with a long-stop of 10 years which would run from the date of the conversion in issue. It is arguable that two modifications to this core regime need to be made for all conversion actions.

13.49 The first possible modification relates to the date of discoverability. Given the scope for goods to be moved (including from jurisdiction to jurisdiction) and hidden, we think it strongly arguable that the location of the goods should be treated as knowledge which a plaintiff (who wishes to recover converted property) should have before the initial limitation period starts running. Indeed the provisions on limitation contained in both the EU Directive and the UNIDROIT convention specify knowledge of the identity of the possessor of a stolen object *and of its location*.[74] While knowledge of the identity of the defendant is required under our proposed definition of the date of discoverability, knowledge of the location is not required for the limitation period to start running. **We therefore provisionally propose that for actions to recover converted property - and, possibly, for all actions for conversion[75] - the definition of discoverability should require knowledge of the location of the property in addition to the other three elements (knowledge of the facts constituting the cause of action, the identity of the defendant and the significance of the cause of action) to start time running. We ask consultees for their views on this issue.**

13.50 The second possible modification relates to the long-stop. We provisionally believe that the 10 year long-stop should run from the date of the first conversion. If the

individuals within that State) the right to take action against the possessor of a cultural object which has been unlawfully removed from the territory of that Member State within

> One year after the Member State became aware of the location of the Cultural Object and of the identity of its possessor or holder; or ... after the expiry of the special limitation period. (Para 6(6) of the Return of Cultural Objects Regulations 1994 ("RCOR 1994")).

Where the objects are part of a public collection or ecclesiastical goods subject to special protection arrangements under the national law of the Member State, the special limitation period is 75 years commencing with the date on which the object was unlawfully removed from the territory of the requesting Member State. Otherwise the special, or long-stop, limitation period is 30 years (RCOR 1994, para 6(7)(8)). These limitation periods take precedence over any other rules on limitation (see para 6(9) of RCOR 1994). The Directive is not designed to deal only with stolen property - in many cases it may be the owner of the cultural property in question, rather than a thief, who is responsible for its illegal export from the territory of a Member State.

[74] See Directive 93/7, Article 7, and UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects, 1995, Article 3(3).

[75] Although, if viewed in isolation, there is no good reason why a claim for damages (or other monetary remedy) for conversion should require knowledge of the goods' location, it may be practically inconvenient to have different starting dates for different remedies for the same conversion.

long-stop were to start running from every fresh conversion it would be deprived of most of its purpose. Starting the long-stop at the date of the first conversion increases the risk of the plaintiff losing the right of action before discoverability but, at least where the conversion is not theft-related, this does not seem unreasonable. **We ask consultees whether they agree with our provisional view that, at least in respect of actions for conversions that are not thefts or theft-related, the long-stop under our core regime should run from the date of the first conversion.**

(b) Are further modifications to the core regime needed for conversions constituting, or related to, theft?

(i) The initial limitation period

13.51 The "theft exception" currently in force (according to which conversions constituting, or related to, theft are not subject to a limitation period)[76] seeks to protect the owner of property that has been stolen. On the other hand, the qualification of the "theft exception", whereby there is a limitation period running from when the conversion takes place where a sale has been made to a bona fide purchaser, protects the bona fide purchaser in preference to the owner of the stolen property.

13.52 The theft exception was introduced on the recommendation of the Law Reform Committee.[77] The primary rationale behind the recommendation seemed to be the fact that in theft cases it was especially hard for a plaintiff to discover the identity of the thief:

> Our examination of [section 3 of the Limitation Act 1939, the predecessor of section 3 of the Limitation Act 1980] has, however, led us to the conclusion that it can produce an unacceptable result where a valuable object has been stolen and the owner is unable to trace it more than six years after the date of the theft. The fact that the identity of the thief is unknown and undiscoverable is not enough to bring the case within section 26 [of the Limitation Act 1939] (and therefore to postpone the running of time in the thief's favour) [note: *RB Policies at Lloyds v Butler* [1950] 1 KB 76]. Thus, the owner of the stolen property may have no effective opportunity to sue the thief in time and may yet lose his title to what might be an object of great value ....[78]

13.53 As a solution to this problem, the Law Reform Committee considered[79] the extension of section 26 of the Limitation Act 1939 to a case in which the identity of the converter was unknown and undiscoverable.[80] But it took the view that even

[76] Limitation Act 1980, s 4(1), formerly Limitation Amendment Act 1980, s 2. See paras 3.112 - 3.115 above.

[77] *Twenty-First Report (Final Report on Limitation of Actions)* (1977) Cmnd 6923, paras 3.3 - 3.18.

[78] *Ibid*, para 3.3.

[79] *Ibid*, para 3.7.

[80] An option which it also expressed as a reversal of *RB Policies at Lloyds v Butler* [1950] 1 KB 76.

if a thief's identity and whereabouts (and, presumably, those of anyone else into whose possession the goods came) were discovered during the limitation period, as extended, it was still possible that the goods themselves would be hidden, and they thought that it was inappropriate to expect a plaintiff to commence proceedings against a defendant who was not in possession of the goods and therefore might not be worth suing, so they rejected this approach, deciding instead that time should not run at all in theft cases, except against a bona fide purchaser. We do not find this reasoning persuasive. Where a discoverability test is applied, we do not regard knowledge about the defendants' means as being knowledge which the plaintiff must have before the limitation period can start to run, and we see no reason to make an exception to this general rule in theft cases. We have already suggested, however, that our proposed discoverability test should here include knowledge of the location of the goods as well as knowledge of the defendant's identity. It would seem, therefore, that the problems that have in the past been thought to necessitate a theft exception are solved by the discoverability test and that there is no need for theft to be treated specially, at least as far as the primary limitation period is concerned.[81]

13.54 But, it might instead be argued that the need for theft to have special limitation rules arises from the moral iniquity of theft, and the feeling that it would therefore simply be wrong to allow a thief to claim the benefit of a limitation defence.[82] This begs the question why such an argument should apply uniquely to theft. A person carrying out a fraud, which does not constitute a theft and a conversion of goods, may possess the same degree of moral turpitude as a thief, yet under the current law a limitation period will apply to such a fraud, albeit one whose commencement is postponed until the fraud is discoverable.[83] We are inclined to take the view that what matters to the plaintiff, in this context, is not so much the degree of wrongdoing involved in the defendant's actions, but that the plaintiff has sufficient time to discover the defendant's identity and the location of the goods and to take action.

13.55 Applying our provisional proposals, therefore, a claim for conversion against anyone receiving the goods would be subject to an initial limitation period of three years from discoverability.

Example D1 steals a painting from P in 2000. D1 sells it on to D2, who knows that it is stolen, in 2001. D2 sells it to D3, who does not know that it is stolen, in 2002. D3 sells it to D4, another bona fide purchaser, in 2003. P discovers[84] D1's identity in 2003, D2's identity in 2004, D3's identity in 2005 and D4's identity in 2006. If the "core" initial limitation period were applied to all

[81] See paras 13.58 - 13.64 below, in relation to the long-stop period.

[82] See, eg, Law Reform Committee, *Twenty-First Report (Final Report on Limitation of Actions)* (1977) Cmnd 6923, para 3.4.

[83] Under Limitation Act 1980, s 32(1)(a). This does not apply to fraudulent breaches of trust, to which no limitation period applies: s 21(1)(a).

[84] It is assumed that P has not acquired constructive knowledge, and has actual knowledge of all other relevant facts, including (at least where delivery up of the property is sought) the location of the painting.

these claims, the limitation period against D1 would expire in 2006, against D2 in 2007, against D3 in 2008, and against D4 in 2009.[85]

13.56 We appreciate that the introduction of a limitation period for an action in conversion against a thief or a receiver of stolen property might be perceived as making life easier for thieves and their accomplices. However, it should be borne in mind that the abolition of limitation periods in such actions was a comparatively recent development, and we believe that the discoverability problem, in response to which the Law Reform Committee recommended the "theft" exception,[86] is solved by the application of our proposed discoverability test. Further, the difference in the treatment of theft of goods and other forms of fraud under the current Limitation Act seems an illogical one.

13.57 **We ask consultees whether they favour the retention of the theft exception, whereby conversions constituting, or related to, theft (other than a claim against a bona fide purchaser) are not subject to a limitation period; or whether, on the contrary, they agree with our provisional view that the initial limitation period under the core regime (that is, three years from the date of discoverability) should apply to conversions constituting, or related to, theft. If consultees support the retention of the theft exception we ask them to explain why.**

(ii) The long-stop limitation period

13.58 Assuming that the date of discoverability is to apply to conversions constituting, or related to, theft, should there be a long-stop for such actions? To apply the long-stop limitation period to all actions founded on conversion might, in some cases, be seen to cause injustice to the owner of stolen property. If the initial limitation period has not expired at the end of ten years - that is, if the owner of the stolen property does not, having acted reasonably, have the information to bring proceedings - it would appear to be unreasonable to deprive the owner of any later chance to recover property from the thief or a receiver of the stolen property. Unlike actions to recover land, where there will be very few occasions where the plaintiff lacks the information to bring an action against a squatter at the end of the limitation period (or indeed any good reason why the plaintiff's right of action should be preserved after a decade or more of inactivity), the plaintiff may, at the end of the long-stop limitation period, still have failed to locate his or her property or to identify the defendant.[87]

[85] Under the current law, there would be no limitation period for the actions against D1 and D2. D3's and D4's limitation period would both expire in 2008, 6 years after the first bona fide sale in 2002.

[86] See para 13.52 above.

[87] As demonstrated by *Autocephalous Greek Orthodox Church of Cyprus v Goldberg and Fine Arts, Inc* 717 F Supp 1374 (SD Ind 1989) upheld on appeal (917 F 2d 278 (7th Cir 1990), where the plaintiffs, despite strenuous efforts, only located their property after around 20 years; *Solomon R Guggenheim Foundation v Lubell* 569 NE 2d 426, in which a Chagall Gouache was stolen from the Guggenheim Museum in the late 1960s, but only located by the Solomon Guggenheim Foundation in 1986, and *O'Keefe v Snyder* (NJ) 416 A 2d 862, in which three pictures painted by O'Keefe were stolen from an art gallery in 1946, and located by the artist in September 1975.

13.59 It can be strongly argued, however, that if (as we provisionally recommend) the long-stop will be disapplied in all cases where the defendant has deliberately concealed the facts relevant to the starting of the limitation period under the discoverability test, including the defendant's identity and, at least where delivery of the goods is claimed, the location of the goods, this should mean that in cases of theft, the long-stop will be disapplied without any need for a special exception for theft.[88]

13.60 This would leave the more problematic question of how the long stop would affect persons into whose possession the stolen property came subsequent to the theft. These can be divided into three categories: (i) persons who receive the property knowing that it is stolen; (ii) bona fide purchasers; and (iii) innocent volunteers (that is, persons who receive the property in good faith other than for value). Any application, or disapplication, of the long-stop should strike a fair balance between the rights of the original owner of the goods, on the one hand, and the subsequent possessor, on the other. Our provisional view is that the long-stop should operate to bar claims against a bona fide purchaser, but not against anyone else who has converted the goods. This is analogous to the position under the present law, where a limitation period will run against a bona fide purchaser but not against others.[89]

13.61 Another question which arises is when, in relation to successive bona fide purchases following a theft, the long stop date should commence. If it were to commence on the date of the first conversion, that is, the theft, the thief could hide the goods for eleven years after the theft, and then sell them to a bona fide purchaser, against whom any action would be statute-barred. This seems an unjust result from the original owner's point of view. Alternatively, a fresh long-stop period might commence on the date of each purchase, in respect of actions against each successive purchaser. Therefore, if D1 stole the goods from P in 2000, and sold them to D2 in 2009, D2 sold them to D3 in 2018, and D3 sold them to D4 in 2027, there would be a ten-year long stop period, as regards actions against D4, which would expire in 2037, some 37 years after the original theft, and 28 years after the goods first came into "honest" hands. This would seem unduly to favour the plaintiff. A third option, which we provisionally prefer, is that there should be a single long-stop period, commencing on the date of the first bona fide purchase, which would be the long-stop period for all claims against subsequent purchasers.[90] Where an item, for example a work of art, has been stolen and sold to a bona fide purchaser, or a succession of bona fide purchasers, this would represent an improvement in the owner's position, compared with the present law, on the assumption that the owner took all reasonable steps to trace the defendants, because under the present law the owner's claim against those purchasers will

[88] Just as it can be argued that the general application of a discoverability test obviates the need for a special exception to the primary limitation period.

[89] See para 3.114 above. For the reasoning behind this provision see Law Reform Committee, *Twenty-First Report (Final Report on Limitation of Actions)* (1977) Cmnd 6923, paras 3.8 - 3.11.

[90] So that, in the example mentioned previously in this paragraph, the long-stop period for an action against D2, D3 and D4 (and any subsequent purchasers) would expire in 2019.

become statute-barred once six years have elapsed after the first bona fide purchase.

13.62 It would seem that our provisional preferred views could be neatly achieved by a provision relating to deliberate concealment containing wording similar, mutatis mutandis, to that in section 32(1), (3) and (4) of the 1980 Act.[91] Deliberate concealment by a person would disapply the long-stop, not only in relation to actions against that person, but also against his or her successors in title, but with an exception protecting bona fide purchasers. Bona fide purchasers would be able to rely on the long stop, whilst the long-stop would be disapplied for everyone else receiving the goods, in good faith or otherwise. It would need to be provided that, for a defendant who was a bona fide purchaser of converted goods, the long-stop period would commence on the date when the defendant purchased the goods, unless the defendant could trace his or her title to the goods back to one or more previous bona fide purchasers, in which case it would commence on the date of acquisition by the first of those purchasers.

Example D1 steals a painting from P in 2000. He then hides it and sells it on to D2, who knows that it is stolen, in 2011. D2 sells it to D3, who does not know that it is stolen, in 2012. D3 sells it to D4, another bona fide purchaser, in 2013. P discovers[92] D1's identity in 2023, D2's identity in 2024, D3's identity in 2025 and D4's identity in 2026. The long-stop period for an action against both D1 and D2 will be disapplied by virtue of D1's, and perhaps D2's, deliberate concealment of their identity, and D2 will not be entitled to claim the "bona fide purchaser" exception. The limitation period for a claim against D1 will therefore be three years from P's date of knowledge with regard to D1, ending in 2026, and the limitation period for a claim against D2 will be three years from P's date of knowledge with regard to D2, ending in 2027. Since D3 and D4 are both bona fide purchasers, D1's deliberate concealment will not disapply the long stop. This will run for 10 years from 2012.[93]

13.63 **We ask consultees whether they agree with our provisional views that where goods have been stolen:-**

(a) The long-stop period should apply in relation to actions for conversion against bona fide purchasers of the goods, and that the long-stop period should commence on the date of the purchase or, where there has been more than one purchase, on the date of the first bona fide purchase.

(b) The long-stop period should be disapplied in relation to actions for conversion against anyone other than bona fide purchasers of the goods.

[91] See paras 8.23 - 8.24 above.

[92] It is assumed that P has not acquired constructive knowledge, and has actual knowledge of all other relevant facts, including (at least where delivery up of the painting is sought) the location of the painting.

[93] So it will have expired before P discovers that the property has been in D3's and D4's possession.

If consultees do not agree, we ask them what alternative they would prefer.

13.64 **We further ask consultees, who agree with our provisional views in the previous paragraph, whether they consider that the desired result can be achieved by a provision on deliberate concealment analogous to the present section 32(1), (3) and (4) of the 1980 Act or whether, on the contrary, they consider that special rules on long-stops are necessary to deal with claims for conversions constituting, or related to, theft.**

(3) The Effect of the Expiry of the Limitation Period

13.65 Under the present law once the limitation period for a conversion has expired, the plaintiff's title to the property is extinguished.[94] We believe that, in principle, this should continue, since it would be anomalous if a plaintiff was unable, through limitation, to bring an action in conversion against any defendant, yet was still regarded as the owner of the goods. We have seen that, under the current law, even where a limitation period is running against several defendants, it will expire at the same time in respect of all those defendants, and that is the time when the plaintiff's title is extinguished.[95] The position under the regime which we have provisionally recommended is slightly more complicated because the operation of discoverability will mean that there may be a different limitation period in respect of actions against different defendants.[96] There will be no one date as at which one may say with certainty that the plaintiff's claim against all potential defendants has been statute-barred.

13.66 This can be illustrated by an example. Suppose D1 steals goods from P in 2000, and sells them on to bona fide purchaser D2 in 2005, who sells them on to D3, also a bona fide purchaser, in 2010. P acquires knowledge in relation to D2 in 2006. So the limitation period for an action in conversion by P against D2 will end in 2009. But under our scheme P will get a fresh three-year limitation period in relation to D3 from whenever he acquires the relevant knowledge in relation to D3. For example, P could acquire the knowledge about D3 in 2010, soon after D3 has bought the goods, so that the limitation period for an action by P against D3 ends in 2013. The long-stop period for D2 and D3, and for any successive bona fide purchasers, expires in 2015, and one could argue that this should be the time when the owner's title to the goods is extinguished. But if D3 sold the goods in 2011 to D4, who was well aware that they were stolen, there would be no long-stop period in respect of a claim against D4. So it is not possible to stipulate, for the extinguishment of P's title, the date when actions against all defendants, actual or potential, become time-barred as a matter of certainty.

13.67 One can strongly argue that the owner's title should be extinguished once time has run against one defendant and the limitation period in respect of that defendant has expired while the goods are still in his or her possession. This would avoid a

[94] See s 3(2) of the 1980 Act, and para 3.109 above.

[95] That is, where the goods are stolen from the plaintiff, 6 years from the date of the first bona fide purchase, and, where the goods have been "honestly converted" from the plaintiff, 6 years from the date of the original conversion: see para 3.110 - 3.115 above.

[96] See Example, para 13.55 above.

hiatus within which a defendant could no longer be sued for conversion, because the plaintiff's claim was time-barred, yet the plaintiff still owned the goods. So, in the example in the previous paragraph, P's title to the goods would be extinguished in 2009, when P's claim against D2 became statute-barred.[97] P, having lost title to the goods before D2 sold them on, would never have a claim against D3 or against D4. Is this a just result? We think provisionally that it is not unduly harsh on the plaintiff, who has allowed more than three years to elapse without taking any action to recover the goods.

13.68 The same approach could be applied to long-stops.

Example D1 steals goods from P in 2000, and sells them on to bona fide purchaser D2 in 2005, who sells them on to D3, also a bona fide purchaser, in 2020. P discovers the facts about D2 in 2016, but the long stop (of ten years) expired in 2015. P's title to the goods will therefore be extinguished in 2015, and P will have no claim in damages against D3.

13.69 **Our provisional view is that where goods have been converted (whether there has been a theft or not) the plaintiff's title should become extinguished when both the following conditions are satisfied: (i) the limitation period (whether the initial period or the long-stop) has expired in relation to the plaintiff's claim in conversion against a defendant; and (ii) at the time when that limitation period expired the goods remained in the possession of that defendant. We ask consultees whether they agree and, if not, to say why not.**

(4) Summary of our Preferred Approach to Conversion

13.70 It may help consultees, in deciding on the issues we have raised in relation to this difficult area, to see an outline summary of our provisional preferred views on limitation periods for conversion.

(i) The core regime (three years from discoverability[98] and with a long-stop of ten years running, however, from the date of the first conversion) would apply to actions for conversion.

(ii) The long-stop would be disapplied for deliberate concealment by the defendant, or in relation to anyone taking title through the deliberate concealer except a bona fide purchaser (and anyone taking title through the bona fide purchaser). The long-stop for a bona fide purchaser (and anyone taking title through him or her) would run from the date of the first bona fide purchase.

(iii) The plaintiff's title to goods would be extinguished when the initial limitation period or the long-stop for conversion expired as against a defendant in possession of the goods.

[97] Assuming that P never acquired actual or constructive knowledge in relation to D1.

[98] We have provisionally recommended that the definition of the date of discoverability should be amended to include knowledge of the location of the goods at least in relation to actions to recover converted property.

7 ACTIONS BY A SUBSEQUENT OWNER OF DAMAGED PROPERTY

13.71 Property may change hands after the cause of action has accrued to the person owning the property at the time of the damage. This raises two issues: first, whether the subsequent owner has a cause of action against the person responsible for the damage; and, secondly, whether the limitation period in respect of that cause of action starts running against the subsequent owner when the previous owner has or ought to have the necessary knowledge, or not until the subsequent owner has acquired an interest in the property.

13.72 Under section 3 of the Latent Damage Act 1986, a fresh cause of action is treated as accruing to the subsequent owner on the date he acquires the property, if that precedes the date when the material facts became known, or ought to have become known, to a person with an interest in the property.[99] In other words, if the original owner of the property knew or could reasonably have been expected to acquire knowledge of the damage, the subsequent owner will not have a cause of action, unless it has been assigned to him. For limitation purposes, the "new" action is treated as having accrued on the date when the original action accrued. This is achieved by a double fiction, first that the cause of action is based on a duty owed to the original owner, and second that it accrued when the original cause of action accrued. The subsequent owner then has three years from the date he learns of the cause of action, or six years from the date the cause of action accrued, to bring an action.

13.73 The Act has been criticised on the grounds that the "relation back" theory adopted conflicts with the principle that time cannot run against a plaintiff lacking a proprietary interest: "It simply should not be possible for a cause of action to accrue in favour of a person until some interest in the property in question has been acquired by that person".[100] It has also been suggested that the purchaser's rights should not be determined solely by the state of knowledge of persons previously interested in the property.[101]

13.74 Law reform bodies in other common law jurisdictions have adopted two different approaches as alternatives to the one followed in England. They both differ from the English model in that the original owner's actual or constructive knowledge of the material facts will not automatically prevent a cause of action from arising in favour of the successor, although, according to one approach, the original owner's knowledge will be relevant to the limitation period.[102] To avoid new limitation

[99] See para 3.100 above.

[100] See N Mullany, "Reform of the Law of Latent Damage" (1991) 54 MLR 349, 357.

[101] "It may prove difficult for a purchaser to show that there was nothing whatsoever to alert a previous owner that damage had been suffered during his tenure or that any manifestation of damage that had occurred was so minimal that no reasonable person would have attempted to seek an uncontested judgment." N Mullany, "Reform of the Law of Latent Damage" (1991) 54 MLR 349, 358.

[102] It is implicit in both these alternative approaches that the subsequent owner will have a cause of action in respect of damage that occurred before he or she acquired an interest in the property, that is, the rule in *Perry v Tendring District Council* (1984) 3 Con LR 74, which s 3 of the Latent Damage 1986 was intended to remedy, does not apply. See para 3.100 above.

periods being triggered each time the property is sold, both the Alberta Law Reform Institute and the Ontario Limitations Act Consultations Group recommended that the discovery period should begin against a subsequent owner of a claim when either the subsequent owner or the prior owner acquired or ought to have acquired the necessary knowledge.[103] The New Zealand Law Commission in contrast recommended that time should only run against a subsequent owner of the property when he discovered the cause of action. This might be before or after the subsequent owner acquired an interest in the property. The New Zealand approach was also favoured by the Law Reform Commission of Western Australia, which recommended that the initial limitation period should begin against a subsequent owner when he or she acquires an interest in the property (unless the subsequent owner had the necessary knowledge before that date).[104]

13.75 We can see advantages to extending the principle that a fresh cause of action accrues to subsequent owners to cover not only cases where the previous owner had no knowledge of the material facts, but cases where he did learn of the cause of action, but took no action against the defendant. Under our core limitation regime, the limitation period would run from the date when the subsequent owner had, or ought to have had, the relevant knowledge of the cause of action. In addition, where the date the subsequent owner acquires an interest in the property is later than the date of discoverability, we consider that that should be the starting date for the limitation period (though we do not anticipate there being many cases where this will occur). The long-stop limitation period would, as usual, run from the act or omission of the defendant giving rise to the cause of action. This would be sufficient to prevent a long-running series of fresh limitation periods in respect of the same cause of action.

13.76 **Our provisional view is therefore that (a) contrary to the present law, a fresh cause of action should accrue to a subsequent owner of damaged property even where the previous owner had knowledge of the material facts; and (b) the core regime should apply subject to the minor modification that the initial limitation period should start on the date when the plaintiff acquires an interest in the property, where this is later than the date of discoverability. Do consultees agree?**

8 ACTIONS IN RESTITUTION

13.77 We have seen[105] that, under the present law, limitation of actions in relation to the law of restitution is plainly in need of reform. In the central area of restitution (formerly "quasi-contract"), the 1980 Act does not naturally apply at all, albeit that the courts have "filled the gap" by artificially calling in aid section 5. Where the 1980 Act does explicitly apply to restitutionary actions, it does so over a wide

[103] Alberta Law Reform Institute, *Limitations*, Report No 55 (1989), p 67 (See s 3(2) of Alberta Limitations Act 1996 c L-15.1); Ontario Limitations Act Consultations Group, *Recommendations for a New Limitations Act, Report of the Limitations Act Consultation Group* (1991) Recommendation 7, p 26; Ontario Limitations (General) Bill 1992 cl 11(1).

[104] New Zealand Law Commission, *Report No 6, Limitation Defences in Civil Proceedings,* NZLC R6 (1988), paras 216 - 225; Law Reform Commission of Western Australia, *Report on Limitation and Notice of Actions,* Project No 36 - Part II (1997), paras 8.30 - 8.31.

[105] See paras 5.1 - 5.19 above.

range of disparate sections: and important aspects of equitable restitution fall within the tortuous section 21. The reason for all these difficulties is clear. The law of restitution has only recently been authoritatively recognised[106] and the 1980 Act (and the earlier enactments on which it was based) pre-dates a true understanding of this area of the law.

13.78 Can one apply our core regime to restitutionary claims? We see no reason why not and, in terms of effecting a significant simplification of the law, every reason why one should.

13.79 Applying the core regime, the plaintiff would have an initial limitation period of three years from the date of discoverability of the cause of action. The plaintiff will therefore need to know the facts which constitute the unjust enrichment of the defendant at the plaintiff's expense. So, for example, where the plaintiff claims restitution of money paid for a total failure of consideration, he will need to know that money has been paid to the defendant and that the agreed return has not been forthcoming. A plaintiff who seeks rescission of an executed contract for undue influence will need to be aware that, at the time of the contract, he was not exercising independent judgment before time will start to run.[107] Again, where money has been paid under a mistake of fact, or has been paid away without the plaintiff's knowledge,[108] time will not start to run until the plaintiff knows the true facts.[109]

13.80 A more difficult question is how the discoverability test would apply to restitution for wrongs as opposed to autonomous unjust enrichment.[110] Does knowledge of the facts constituting the cause of action mean that the plaintiff needs to know merely of the wrong (that is of, for example, the tort or breach of trust)? Or does the plaintiff also need to know of the benefit acquired by the wrongdoer? The answer to this rests essentially on whether it is the wrong, or the wrong plus the benefit, that is the cause of action. This appears to be unresolved under the present law,[111] and it is unnecessary for the purposes of this paper to resolve it. Our tentative view, however, is that the former answer is to be preferred, so that it is knowledge of the wrong alone that is relevant. In the context of limitation

[106] In *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548.

[107] We have considered whether a qualification needs to be made in respect of restitution grounded on duress, to the effect that time should not start to run until the plaintiff is free of the pressure. But this raises a more general issue, analogous to 'disabled plaintiffs', of 'terrified plaintiffs'. The law would be rendered too uncertain if plaintiffs were able to argue that time does not run while they are too frightened to issue proceedings.

[108] 'Absence of knowledge' or 'ignorance' as a ground for restitution includes equitable claims for 'knowing receipt and dealing' that now fall within ss 21 - 22 of the Limitation Act 1980. See, generally, P. Birks, "Misdirected Funds: Restitution from the Recipient" [1989] LMCLQ 296; A Burrows, *The Law of Restitution* (1993), Chapter 4.

[109] By s 32 of the 1980 Act, a discoverability test would here already apply to mistake claims. But under our proposals that discoverability test would be "swallowed up" by our central starting date. For restitution grounded on a mistake *of law,* see para 12.68 above.

[110] For this distinction, see para 5.4 above.

[111] See para 5.19 above.

periods, a danger otherwise would be that a fresh limitation period would be triggered by every new benefit arising from the same wrong.

13.81 Under our core regime the long-stop (of 10 years) will start from the date of the relevant act or omission of the defendant. In autonomous unjust enrichment, this will be the same date as the defendant's unjust enrichment. In respect of restitution for wrongs, whether actionable per se or actionable only on proof of damage (for example, the torts of nuisance or negligence), the relevant act or omission should be the date of the breach of duty so that the same long-stop should apply whether the plaintiff claims restitution or compensation for the wrong.

13.82 A final point is that (non-contractual) actions for contribution or an indemnity are best viewed as restitutionary, with the benefit being the discharge of the defendant's liability: an analogous action is that for money paid to the defendant's use.[112] The problem of there being a chain of such actions is dealt with in paragraphs 13.86 - 13.92 below.

13.83 **We provisionally propose that restitutionary actions should be subject to our core regime (with the qualification expressed at paragraph 13.91 below). We also ask consultees whether they agree and, if not, to say why not.**

9 ACTIONS FOR A CONTRIBUTION OR AN INDEMNITY

(1) Contribution under Section 1 of the Civil Liability (Contribution) Act 1978

13.84 Under section 10 of the 1980 Act, an action to recover a contribution (under section 1 of the Civil Liability (Contribution) Act 1978) towards any damages which a defendant is liable to pay, or agrees to pay in settlement of his liability, must be brought within two years from the date of the judgment against the defendant, or the date on which agreement is reached on the amount of the payment included in the settlement.[113]

13.85 Applying our core regime, the initial limitation period applicable to actions for contribution under section 1 of the 1978 Act, would be three years running from the date on which the defendant discovers the facts relevant to his or her cause of action for contribution. Discoverability for these purposes will include knowledge of the fact that the defendant is liable to make payment to the plaintiff in the main action (whether in the form of damages or of an agreed settlement), and of the fact that the potential contributor is liable to contribute towards that sum. In many cases, the starting point for the limitation period will therefore coincide with the date judgment is given in the main action, or the amount of the settlement is agreed, as under the present law.[114] Although the defendant may have become aware of the potential liability earlier, when served with proceedings in the main

[112] See Goff and Jones, *The Law of Restitution* (4th ed 1993), chapters 12 - 14.

[113] See paras 7.22 - 7.25 above.

[114] Similarly, the long-stop period would run from the date the cause of action accrued under our core scheme.

action, no loss can have occurred until he or she is adjudged liable or reaches settlement. In some cases the defendant may be able to argue that he or she was not aware of the identity of the contributor until some time after being found liable to the plaintiff in the main action, which may delay the start of the limitation period. However, in the majority of cases, a defendant who becomes aware of potential liability can be expected, from that point, to investigate how to limit that liability and who else is to blame.[115] In consequence changing the starting point from the date of judgment or settlement to the "date of discoverability" may not have much impact in practice. The same can be said of extending the period from two to three years.

13.86 Some circumstances could potentially give rise to a chain of contribution actions arising out of the same facts, as for example where an injury has been caused by faulty machinery. An initial action by the injured victim against the operator of the machinery may be followed by a contribution action by the operator against the seller of the machinery, who in turn may sue the manufacturer, who may have an action against the firm which made one of the component parts. Under the current law - and, unless modified, under our core regime - a fresh limitation period would be triggered with each new contribution judgment or settlement. This could lead to contribution claims being decided many years after the events which gave rise to the main liability.

13.87 To overcome this problem of a chain of contribution actions, it has been suggested that there should be a single limitation period applicable to all contribution actions arising out of the same facts.[116] Cast in terms of our core regime, this is in effect a call for a modification of the long-stop.

13.88 The initial query in applying our core long-stop proposals is the appropriate date at which the long-stop would start to run. The relevant liability of "the defendant" is the liability of the contributor to make contribution to his or her co-obligor and this is triggered not so much by an act or omission of the contributor as by the judgment or settlement giving rise to the contribution action. The appropriate starting date for the long-stop in this context - analogous to the act or omission of the defendant giving rise to the claim in actions in tort or contract - would therefore be the date of the judgment or settlement giving rise to the contribution action.

13.89 But such a long stop would not overcome the chain of contribution problem because a fresh long-stop would arise with every new judgment or settlement. The modification required, therefore, would be for the long-stop to be a single

[115] As the Alberta Law Reform Institute noted "When any tortfeasor is made a defendant in a civil proceeding which originated in a tort claim, it is in his interest to make all reasonable efforts to discover all other tortfeasors liable for the damages, to join them in the proceeding, and to bring claims for contribution as soon as possible". See *Limitations,* Report for Discussion No 4 (1986), para 2.21. The Law Reform Committee noted that "it is rarely necessary to invoke section 4(2) of the 1963 Act [the predecessor of s 10 of the 1980 Act], because well-advised plaintiffs in practice sue all likely defendants, and if one only is sued, he is quick to suggest that others are really to blame". See *Twenty-First Report (Final Report on Limitation of Actions)* (1977) Cmnd 6923, para 3.34.

[116] Construction Industry Board: *Consultation Report from Working Group 10 on the Reform of Liability Law:* 19 April 1995, para 39.

long-stop running from the date of the judgment or settlement *in the original action* to which the contribution claims relate.

13.90 What should be the length of such a long-stop? A case can be made for shortening the long-stop in this context on the basis that claims for contribution are parasitic on a main action and are particularly problematic for defendants who seek to close their books after a reasonable length of time. On the other hand, there is the merit of simplicity afforded by a uniform long-stop period.

13.91 **We ask consultees whether they agree with our provisional view that the core regime should apply to actions for contribution under section 1 of the Civil Liability (Contribution) Act 1978 subject to the modification that, to avoid the problem of a chain of contribution claims, there should be a single long-stop running from the date of the judgment or settlement in the original action to which the contribution claim relates. We also ask consultees whether they would favour shortening the length of the ten year long-stop in this context and, if so, what length of long-stop they would favour.**

13.92 For the purpose of completeness, we should add that an analogous approach should apply to restitutionary actions (for the recovery of money paid to the defendant's use or a non-contractual indemnity) where the plaintiff has discharged the defendant's liability under, for example, legal compulsion or necessity.

(2) Contractual Indemnity

13.93 An action for a contractual indemnity is treated like any other contractual action so that, under section 5 of the 1980 Act, the limitation period is six years from the accrual of the cause of action. In general, the cause of action for an indemnity accrues when the extent of the liability to which the indemnified party is entitled is established, if necessary by legal proceedings.[117]

13.94 Under our core regime, the initial limitation period cannot start until the plaintiff is aware, or ought to be aware, of (the facts relevant to) his cause of action. In most cases, this will not be until any proceedings between the indemnified party and the original plaintiff have concluded, as it is not until this time that the indemnified party will know whether or not he is liable to the original party. The long-stop will start from the act or omission of the defendant which gives rise to the action, but, as with contribution,[118] we consider that the liability of the indemnifying party is triggered, not so much by his or her act or omission as by the judgment or settlement giving rise to the indemnity; and that this should prima facie be the starting date of the long-stop. In consequence, both the initial limitation period and the long-stop limitation period would start afresh in relation to each separate indemnity action, and, as under the current law, and analogously to the problem of a chain of contribution actions considered above, the limitation period could be extended for many years under a chain of indemnities.

[117] See para 3.10 above.

[118] See para 13.88 above.

13.95 So, for example, in a construction related matter, a main contractor might be sued by his client, near the end of the relevant limitation period. If the action related to liability for which the contractor was covered by an indemnity from a subcontractor (who in turn might have the benefit of a further indemnity in respect of that liability from a sub-sub-contractor), the limitation period in respect of an action by the contractor against the sub-contractor under the indemnity would not commence until the main proceedings had finished. The limitation period for an action by the sub-contractor against the sub-sub-contractor would not start until both sets of proceedings had been concluded.[119]

13.96 The solution should be analogous to that given above in relation to actions for a contribution under the Civil Liability (Contribution) Act 1978, namely to change the starting point of the long-stop limitation period so that all actions under an indemnity in respect of the same liability (regardless of the point in the chain at which they arise) are subject to the same long-stop. This would mean that there could no longer be an indefinite series of limitation periods, each later than its predecessor in respect of the same liability: rather successive limitation periods could not run beyond the long-stop starting from the date of the judgment or settlement in the original action to which the indemnity claim is related.

13.97 **We ask consultees whether they agree with our provisional view that actions for a contractual indemnity should be subject to our core regime subject to the modification that, to avoid the problem of a chain of indemnities, there should be a single long-stop running from the date of the judgment or settlement in the original action to which the indemnity claim relates. We ask consultees whether they would favour shortening the length of the ten year long-stop in this context and, if so, what length of long-stop they would favour.**

13.98 For the purpose of completeness, we should add that the same should apply to an action for contribution under an express contractual term. Section 7(3) of the Civil Liability (Contribution) Act 1978 preserves such a form of contribution which is therefore separate from the implied obligation to make contribution under section 1(1) of the 1978 Act.

10 BREACH OF TRUST AND RELATED ACTIONS

13.99 Under the current law,[120] the limitation period for actions for breach of trust depends on the classification of the breach. Fraudulent breaches of trust, and actions to recover trust property or its proceeds from the trustee are not subject to any limitation period. All other actions for breach of trust are subject to a limitation period of six years. Precisely what is meant by "trust" and "breach of trust" has in the past been subject to dispute. If our core regime were to be applied, all actions for breach of trust would be subject to a limitation period of three years running from the time when the breach of trust was discoverable by

[119] For an example of such indemnities, contained in standard form contracts, see JCT 80, clause 20, and the JCT nominated sub-contract NSC/C clause 6.

[120] See Part IV above.

the plaintiff, and to a long-stop limitation period of ten years from the date of the breach of trust.

13.100 The major difficulty in applying the core regime relates to actions for breach of trust involving fraud on the part of the trustee, or the recovery of trust property from the trustee, where no statutory limitation period currently applies (though the trustee may in some circumstances be able to rely on the equitable doctrines of laches and acquiescence). This reflects the policy that trustees who have breached their trust or have been fraudulent should remain indefinitely exposed to actions by the beneficiaries seeking to remedy this.[121] But are (fraudulent) breaches of trust so grave that they deserve exceptional treatment, given the merits, in terms of certainty and simplicity, of having a universal statutory limitation regime, which is subject to as few exceptions as possible?

13.101 Different positions have been taken on this question in other common law jurisdictions. The Newfoundland Law Reform Commission proposed in 1986 that breaches of trust involving fraud, conversion and retention claims should be brought within the legislation proposed for limitations and subjected to a limitation period of 10 years (as opposed to the shorter limitation periods of 6 and 2 years proposed for other actions).[122] This was subsequently enacted in the Newfoundland Limitation Act 1995, section 7(c). Similarly, in British Columbia an action against a trustee in respect of fraud or to recover trust property or its proceeds is subject to a ten year limitation period, rather than the shorter two year period.[123] The Alberta Law Reform Institute and the Law Reform Commission of Western Australia treat breaches of trust (whether or not fraud is involved) on the same basis as other causes of action.[124] In contrast, the New Zealand Law Commission has proposed that actions for fraudulent breach of trust or for the conversion of trust property should not be subject to the long-stop limitation period.[125]

13.102 As the above demonstrates, no one solution has been adopted by all common law reform bodies. Our provisional view is that all breaches of trust should be subject to our core proposals, and that the initial limitation period, running from the date

[121] In 1977, the Law Reform Committee noted that all who submitted evidence on limitation periods for trusts were opposed to the introduction of any statutory limitation period for claims based on the trustee's fraud. (Law Reform Committee, *Twenty-First Report (Final Report on Limitation of Actions)* (1977) Cmnd 6923, para 3.82).

[122] Newfoundland Law Reform Commission, *Report on Limitation of Actions,* NLRC-R1 (1986), p 5

[123] Limitation Act RSBC 1979, s 3(2).

[124] Alberta Law Reform Institute, *Limitations,* Report No 55 (1989), pp 36 - 37. (The Alberta Limitations Act 1996 c L-15.1 accordingly does not treat claims for breach of trust separately). The Western Australian Law Reform Commission notes that, in cases where the initial and the ultimate, or long-stop, limitation periods have expired, and there has been a fraudulent breach of trust by the trustee, the court can take that fact into account in the exercise of its discretion. (See *Report on Limitation and Notice of Actions,* Project No 36 - Part II (1997), paras 13.74 - 13.75).

[125] New Zealand Law Commission, *Report No 6, Limitation Defences in Civil Proceedings,* NZLC R6 (1988), para 306.

of discoverability, offers sufficient protection to beneficiaries. The date of discoverability "swallows up" any need for a separate approach to fraudulent breaches of trust, as regards the initial limitation period. The question remains however whether the long-stop provision should be overridden where the claim is for a fraudulent breach of trust. The arguments for exempting actions in respect of fraudulent breaches of trust from the long stop period are stronger, where the beneficiary's failure to discover the cause of action may be the direct result of the fraud of the trustee.[126] This reflects the larger issue - is it acceptable to impose the long-stop limitation period even where the plaintiff's failure to discover his cause of action is the result of deliberate concealment by the defendant? Our proposals on deliberate concealment apply with equal force to such actions.[127] Our provisional view is that there is no need to make further separate provision for actions in respect of fraudulent breaches of trust, and that the "core regime" approach to deliberate concealment overriding a long-stop should apply equally to fraudulent breaches of trust.

13.103 We have dealt so far in this section with breaches of trust to which section 21 of the 1980 Act applies. Although the 1980 Act incorporates the broad definition of "trust" and "trustee" from section 68 of the Trustee Act 1925[128] and section 21 accordingly has a wide application,[129] there are still matters that are analogous to breaches of trust, to which section 21 does not, or may not, apply. These include breaches of fiduciary duty which do not constitute a breach of trust,[130] breaches by a trustee of the "self-dealing" and "fair dealing" rules,[131] and dishonestly assisting or procuring a breach of fiduciary duty.[132] We take the view that, in so far as equity does not regard them as actually constituting breaches of trust, these breaches or wrongs are analogous to breaches of trust, and they should therefore be treated, for limitation purposes, similarly to breaches of trust, so that the core regime applies to them.

13.104 **Consultees are asked whether they agree with our provisional view that the core regime should apply to actions for breach of trust and to recover trust property, and that the core regime, which includes provisions dealing with deliberate concealment, obviates the need for separate provisions in respect of fraudulent breaches of trust. We also ask consultees whether they agree with our provisional view that the core regime should apply in the same way to actions for breach of fiduciary duty, for breach by a**

[126] The same does not appear to apply to actions for the recovery of the trust property from the trustee. It is suggested by the Alberta Law Reform Institute that such actions are examples of a continuous or repeated breach of duty, and may therefore be protected by defining the point at which the long stop limitation period accrues as the point of the last act or omission. (See *Limitations,* Report No 55 (1989), p 75 and s 3(3)(a) of the Limitation Act 1996 c L-15.1).

[127] See paras 12.146 - 12.154 above.

[128] See para 4.2 above.

[129] See paras 4.1 - 4.13 above.

[130] See para 4.7 above.

[131] See para 4.6 above.

[132] See para 4.13 above.

trustee of the "self-dealing" and "fair dealing" rules, and for dishonestly assisting or procuring a breach of fiduciary duty, in so far as these do not constitute a breach of trust.

13.105 We similarly consider that the core regime should be applied to claims against personal representatives claiming a share in a deceased person's estate. At present, unless the facts are such that section 21(1) of the 1980 Act applies,[133] the limitation period in relation to a claim to the personal estate of a deceased person or to any share or interest in the estate, is twelve years from the date on which the right to receive the share or interest accrued (that is, from the date of the death).[134] We take the view that this period is too long, when applied to all claims for legacies or shares in an estate, and believe that the core regime should apply, as it should to breaches of trust. We consider that doing so would result in limitation periods which would be fair, both from the point of view of the beneficiary and from that of the personal representative (or other defendant). We see no reason why, once a beneficiary is able to discover the existence of a claim, he or she should not be expected to commence proceedings within the three years which the core regime would provide. The long-stop of ten years would run from the breach of duty by the personal representatives.

13.106 For similar reasons, we take the view that the core regime should be applied to claims against an estate for arrears of interest on a legacy, for which the limitation period is currently six years from the date on which the interest became due.[135]

13.107 As well as being fair, application of the core regime would have other advantages. For example, it would eliminate the need, which has sometimes been problematic, to decide whether the persons against whom the claim is brought are acting as personal representatives or as trustees.[136]

13.108 **We ask consultees whether they agree with our provisional view that the core regime should apply to actions in respect of the personal estate of a deceased person (including any claims to arrears of interest on legacies).**

11 ACTIONS TO RECOVER LAND AND RELATED ACTIONS

(1) Introduction

13.109 Actions to recover land are currently governed by a separate limitations regime to other actions. The general rule provides for a limitation period of twelve years,[137] which starts from the time when the plaintiff's right of action accrued. This will

[133] That is, fraudulent breaches of trust (section 21(1)(a)), and actions to recover trust property or its proceeds from the trustee (section 21(1)(b)), in which case there is no limitation period: see paras 4.14 - 4.23 above.

[134] See para 4.33 above.

[135] See para 4.33 above.

[136] See para 4.35 above.

[137] Extended to thirty or sixty years in certain circumstances. See paras 6.42 - 6.44 above.

usually be the time when the land came to be in adverse possession, as defined in the 1980 Act.[138]

13.110 The difference in the present limitation treatment accorded to such actions reflects the substantive differences in the nature of land-related actions compared to other actions. This is illustrated by the different consequences of the expiry of the limitation period for land and other actions. In actions not related to land, though the expiry of the limitation period will sometimes leave the underlying right unenforceable, this will not usually be the case. Where a limitation period has expired in respect of an action for personal injury, though the victim cannot recover damages in respect of that injury, the underlying right not to be subjected to negligently caused harm is unaffected. The victim can take action to protect that right if anyone in future causes him harm. Where a limitation period has expired in respect of a breach of contract, although the victim can take no further action in respect of that breach, he has not necessarily lost all his contractual rights (particularly if the contract required the performance of a series of obligations over a period of time). The position with respect to actions for the recovery of land is totally different. Where the limitation period has expired, and the landowner has lost the rights to possession of the land, he has lost all rights in respect of that land.[139] Title to the land will have been lost.

(2) Reform Proposals in Other Jurisdictions

13.111 The approach adopted by other law reform bodies to the reform of limitation periods for land-related actions has varied widely, reflecting the different land registration systems adopted in each jurisdiction. In British Columbia, once land has been registered, and a certificate of indefeasible title has been received in respect of that land from the registrar, that title cannot be defeated by someone in adverse possession, no matter how long the period of that adverse possession.[140] In New Zealand, the possibility of obtaining land by adverse possession once that land has been registered has been severely limited.[141] In contrast, the systems of

[138] Schedule 1, para 8.

[139] This distinction does not depend on the categorisation of the consequences of the expiry of the limitation period as "barring the remedy" or "extinguishing the right". Even if we were to propose that in all cases the expiry of the limitation period should extinguish the right, the distinction between actions to recover land and other actions would remain. It reflects the differences in the character of the rights involved.

[140] See Limitation Act RSBC 1979, s 12 and para 10.99 above. This enacted the recommendation of the Law Reform Commission of British Columbia, which noted in their 1974 Report "In British Columbia, the system of registration of title has long prevailed over that of acquisition of title by adverse possession. The implementation of the recommendation to formally abolish the latter system is little more than a tidying up exercise." (*Report on Limitations, Part 2 - General,* LRC 15 (1974) p 50).

[141] Under s 64 of the Land Transfer Act 1952, no title or interest in land can be acquired adversely to or in derogation of the rights of a registered proprietor. This is subject to the Land Transfer Amendment Act 1963, which, in limited circumstances, allows a person in adverse possession for not less than 20 years (in practice normally 30 years) to seek a certificate of title despite the existence of a registered proprietor. However, the application can be defeated by proof of a better legal or equitable title. See the New Zealand Law Commission, *Report No 6, Limitation Defences in Civil Proceedings*, NZLC R6 (1988) paras 348 - 352, and para 10.79 above.

land registration adopted in Alberta and Western Australia (variants of the Torrens registration system adopted throughout Canada and Australia)[142] do allow for the acquisition of title by adverse possession.

13.112 British Columbia has abolished,[143] and New Zealand has recommended the abolition, of the doctrine of adverse possession.[144] Alberta[145] and Western Australia[146] have recognised that actions related to land are substantively different to other actions, and so should be governed by their own limitations regime. Reform proposals in these jurisdictions have been more limited. There has been a move to regard mortgages as no different from other debts, so that the general provisions on limitations can be applied to them, subject to only two exceptions (namely an action by a mortgagee in possession to foreclose on the loan, and an action by a mortgagor in possession to redeem the loan).

(3) Options for Reform

13.113 It does not seem to us to be appropriate here to adopt the route followed by some of the other common law jurisdictions which have recommended that actions to recover land should not be subject to any limitation period, so abolishing the doctrine of adverse possession. In contrast to British Columbia and New Zealand, in England a possessory title is recognised, under section 75 of the Land Registration Act 1925, even where the land occupied is registered with title absolute. The squatter's ability to be registered as proprietor of the occupied land as of right was introduced by the Land Registration Act 1925.[147] We do not believe that fundamental reform of the system of adverse possession is within the scope of an investigation of the law on limitations. Instead we shall focus on whether the current regime of limitation law for land-related actions should be harmonised with our core regime.

(a) Actions to recover land

13.114 If limitation periods for actions to recover land are to be harmonised with the core regime, then the first question to ask is whether the core regime should be applied

[142] See Alberta Law Reform Institute, *Limitations*, Report No 55 (1989), p 74 and Alberta Limitations Act 1996 c L-15.1, s 3(4); Law Reform Commission of Western Australia, *Report on Limitation and Notice of Actions,* Project No 36 Part II (1997), paras 14.26, 14.28.

[143] Limitation Act RSBC 1979, s 12. See n 140 above.

[144] New Zealand Law Commission, *Report No 6, Limitation Defences in Civil Proceedings,* NZLC R6 (1988), para 361.

[145] Institute of Law Research and Reform, Alberta: *Limitations,* Report for Discussion No 4 (1986), paras 3.63 - 3.78; Alberta Law Reform Institute, *Limitations*, Report No 55 (1989), p 39.

[146] Law Reform Commission of Western Australia, *Report on Limitation and Notice of Actions,* Project No 36 - Part II (1997), paras 15.25 - 15.35.

[147] Under the Land Transfer Act 1875 (which introduced the system of registration of title in England), a squatter could not obtain a registered title by dispossessing a registered proprietor unless the registered proprietor only had a possessory title. This was changed by the Land Transfer Act 1897 to allow the squatter to apply for rectification of title in his favour, but this remedy lay in the discretion of the court, and did not apply where the land had been sold for valuable consideration. See further E Cooke "Adverse possession - problems of title in registered land" (1994) 14 LS 1.

in full to such actions. This would mean that there would be an initial limitation period of three years from the date on which the plaintiff acquired the requisite knowledge, subject to a long-stop period of ten years from the act or omission giving rise to the cause of action.

13.115 We do not, however, think that it would be appropriate to apply the core initial limitation period to land-related actions. In many cases the defendant's trespass will be discoverable immediately, or very soon thereafter. This would mean that in such cases the limitation period would have been reduced from twelve years to three. We believe that this would be unacceptably short. On the other hand, in cases where there was an issue as to whether the plaintiff had knowledge of the adverse possession, there would often be enormous uncertainty. For example, in the frequently occurring case where the adverse possession consisted of a minor encroachment over the plaintiff's boundaries, it would be necessary to ascertain not only when the adverse possession began, but when the plaintiff knew (and ought to have known) that the defendant was in possession of the piece of land in question, and that the piece of land belonged to the plaintiff. The difficulty which this would involve might mean that, in such difficult cases, the only time when a defendant would be certain of having obtained title to the land would be on the expiry of the long-stop period, and this would remove the usefulness of applying the initial limitation period based on discoverability.

13.116 We have of course made it clear elsewhere in this paper that, in most contexts, the degree of uncertainty inherent in applying a discoverability test is a price worth paying for the fairness of the result.[148] But in relation to adverse possession, and its effect on the ownership of land, we consider the need for certainty[149] to override any considerations which might justify the application of a discoverability test. Moreover, discoverability would seem to sit uneasily with the rule that time runs against an owner regardless of the owner's knowledge or intention in relation to the adverse possession,[150] and we are reluctant to do anything, by applying a discoverability test, which might be seen to alter the nature of adverse possession.[151]

13.117 However, we believe that actions to recover land should be subject to the long-stop period of ten years which we are advocating as part of our core regime. The commencement date that we are proposing for the long-stop period is the date of the act or omission giving rise to the plaintiff's claim, rather than the date on which the plaintiff's cause of action arose.[152] When applied to claims for the recovery of land, this would translate into the date on which the defendant first began adverse possession of the property.

[148] See paras 12.9 - 12.13; 12.21 above.

[149] Under the present law there will seldom be absolute certainty as to when the limitation period began because it will often be unclear exactly when adverse possession began, and because the limitation period may have been postponed by factors such as an acknowledgement of title or by the disability of the owner. This degree of residual uncertainty would remain if our provisional recommendations became law.

[150] See paras 6.23 - 6.25 above.

[151] See paras 6.19 - 6.35 above.

[152] See paras 12.105 - 12.108 above.

Example 1 D starts squatting on P's land in 1998. The limitation period in respect of an action by P to recover the land would be ten years from the date of adverse possession, ending in 2008.[153]

Example 2 D starts squatting on P1's land in 1998. P1 sells the land to P2 in 2003. The limitation period in respect of an action by P2 to recover the land would again be ten years from the date of adverse possession, ending in 2008.[154]

13.118 This general rule would, however, require modification where the plaintiff's interest does not fall into possession until a later date. Those interests include a reversion expectant on the determination of a life interest and, most importantly, the reversion to a lease. In both cases time will generally not run at present until the interest falls into possession.[155] We do not think it appropriate, in the course of this review, to change the law so as to accelerate the running of time against such interests, and so we would intend to make an exception to the general rule so that where the plaintiff's interest did not become an interest in possession until a later date, the long-stop period would not begin until that later date. This exception would itself be subject to the exceptions which currently allow time to run against a plaintiff with a future interest.[156]

Example 3 P2 lets land to P1. D starts squatting on the land in 1998. The lease comes to an end in 2003 and P1 leaves. The limitation period in respect of an action by P2 to recover the land would be ten years from the date on which P2's interest becomes an interest in possession, ending in 2013.[157]

Example 4 P1 has a life interest in land, remainder to P2.[158] D starts squatting on the land in 1998. P1 dies in 2003 and P2's interest falls into possession. The limitation period in respect of an action by P2 to recover the land would be ten years from the date on which P2's interest becomes an interest in possession, ending in 2013.[159]

13.119 This reform would help to achieve the purpose for which the core regime was designed, of limiting the number of different limitation periods applied to different

[153] If a 12-year long stop period were adopted under the core regime (see para 12.110 above) the limitation period would be 12 years from 1998, expiring in 2010, as it would under the current law.

[154] With a 12-year long stop period the limitation period would, again, be 12 years from 1998, expiring in 2010, as it would under the current law.

[155] See paras 6.10 - 6.13 above. There are exceptions in relation to (i) an interest expectant on the determination of an entail which could have been barred (s 15(3)) and (ii) future interests held by a person who also has an interest in possession (s 15(5)).

[156] That is, under ss 15(3) and 15(5). See para 6.11 above.

[157] With a 12-year long stop period the limitation period would be 12 years from 2003, expiring in 2015, as it would under the current law.

[158] It is assumed that the circumstances are such that s 15(3) does not apply.

[159] With a 12-year long stop period the limitation period would be 12 years from 2003, expiring in 2015. But under the current law the limitation period (under s 15(2)) ends on the later of (i) 12 years from the date on which P1's right of action accrued, and (ii) 6 years from the date when P2's right of action accrued, that is, in 2010.

actions, and increasing the coherence of the limitation system. We acknowledge, however, that although the Law Reform Committee, in the last examination of limitation periods for land-related actions, felt that there was no obstacle to a reduction of the limitation period to ten years,[160] this could be criticised on the ground that it would make it easier to obtain title by adverse possession, and thereby encourage squatters to occupy property, especially residential property.[161] It is unclear whether a two-year reduction in the limitation period would make a significant difference in practice, but the risk would be present.

13.120 This criticism would not apply if a long-stop period of twelve years were to be adopted. It might be argued that even if the core regime included a ten-year long-stop, as we provisionally recommend, the need to refrain from doing anything that might encourage squatting is so great that actions to recover land should form an exception to the general rule, so that a twelve-year long stop would here apply. In nearly all cases this would leave limitation periods unchanged.[162] But the creation of exceptions to the core regime detracts from the regime's uniformity and coherence. The piecemeal nature of current limitation law was a major reason behind the undertaking of this project[163] and we would be reluctant to support exceptions which are not felt to be wholly justified. On the other hand, it might be argued that a justification for a special rule is supplied by the distinctive role played by limitation periods in relation to land. An important - many would say the paramount - justification for limitation periods in this context can be found in the need to ensure that apparent and paper ownership of land coincide, and thereby to facilitate conveyancing.[164] And the doctrine of adverse possession, with the emphasis that it places on the intentions of the defendant, is unique to claims to recover land.

13.121 **We accordingly provisionally recommend that, while the core regime's initial limitation period of three years from the date of discoverability should not apply to actions to recover land, a long-stop limitation period (commencing on the date of adverse possession or, if later, the date on which the plaintiff's interest becomes an interest in possession) should apply to, and be the sole limitation period for, actions to recover land. We ask consultees whether they agree. We also ask consultees whether they consider that the length of the long-stop period applicable to actions to recover land should be the same as the length of the long-stop period under the core regime, that is, ten years. Alternatively we ask consultees**

[160] Although as they felt that there was insufficient reason for making that change, it did not form part of their recommendations. See Law Reform Committee *Twenty First Report, Final Report on Limitation of Actions* (1977) Cmnd 6923, para 3.38.

[161] See, eg, "Mackay keeps loophole that lets 'ghosts' cash in" *Daily Mail,* 9 July 1996, which reported the sale of a house in London by squatters who were reported to have begun adverse possession in 1977, and successfully applied to the Land Registry for possessory title in 1991.

[162] But not where the plaintiff's interest is, eg, a reversion expectant on a life interest: see para 13.118 (Example 4) and note 159 above.

[163] See paras 1.6 - 1.21 above.

[164] See M Dockray, "Why Do We Need Adverse Possession?" [1985] Conv 272; and para 1.34 above.

whether they would support a twelve-year long-stop period applicable only to actions to recover land.

13.122 At present[165] the limitation period for actions to recover land is extended to 30 years[166] in the case of an action by the Crown[167] or by a spiritual corporation sole within the Church of England.[168] Where the action is brought by the Crown to recover foreshore, the period is further extended to 60 years.[169]

13.123 The Law Reform Committee considered the abolition of the extra protection given to the Church of England and the Crown in 1977.[170] At that time the reform was rejected, on the grounds that the Crown was "peculiarly likely to own or acquire land the existence or extent of which is unknown to it, and in respect of which it is, therefore, not readily in a position to assert its title." The Law Reform Committee also referred to the difficulty faced by the Church of England in keeping track of all the land in its ownership.

13.124 We do not consider that the amount of land held by either the Crown or by the Church of England gives sufficient reason to qualify either of them for special protection, given that there are other landowners in both the public and the private sector with extensive holdings which might justify similar treatment.[171] It is probably true to say that much of the land owned by the Crown is of a nature which makes it inherently difficult to manage, and unsuitable to manage with the intensity which would ensure speedy detection of encroachments. It might be said in reply that, again, the Crown is not unique in having to manage large tracts of open rural land. On the other hand, the Crown owns and manages extremely large expanses of foreshore and territorial sea bed.[172] This does involve difficulties - due to, for example, the shifting nature of the boundaries of foreshore and the concealed nature of sea bed - which might make a stronger case for a special rule. It is also true that there are difficulties applicable only to the Crown, where it acquires land as bona vacantia,[173] which may involve a delay of some years before the Crown becomes aware of its interest in the property.

[165] See paras 6.42 - 6.44 above.

[166] See s 15(7) and Schedule 1, Part II to the 1980 Act.

[167] Or by the Duchy of Cornwall or the Duchy of Lancaster: s 37.

[168] Or by an eleemosynary corporation sole.

[169] See Schedule 1, para 11.

[170] See the Law Reform Committee, *Twenty First Report (Final Report on Limitation of Actions)*, 1977, Cmnd 6923, para 3.41 - 3.42.

[171] We note that, for example, the additional limitation periods provided for in Schedule 1, Part II to the 1980 Act do not apply to the Church in Wales. See Welsh Church Act 1914, s 2(1), which dissolved every ecclesiastical corporation in the Church in Wales with effect from 31 March 1920 (the date of disestablishment provided for in the Welsh Church (Temporalities) Act 1919, s 2).

[172] The extent of territorial sea, and therefore of the territorial sea bed, was increased to 12 miles by the Territorial Sea Act 1987 s 1(1)(a).

[173] Eg the property of a dissolved company, under Companies Act 1985, s 654(1); or the estate of an intestate person without statutory beneficiaries, under Administration of Estates Act

13.125 The situation should also be viewed in the context of conveyancing practice. The limitation period for actions by the Crown or the Church of England was reduced from 60 years to 30 years in the Limitation Act 1939, on the recommendation of the Law Revision Committee. The reason was that the period for which a purchaser could investigate title to unregistered land had been reduced from 60 years to 30 years by section 44(1) of the Law of Property Act 1925. In the words of the Law Revision Committee:

> We suggest that it may cause hardship if claims can be enforced in respect of a cause of action which arose before the period during which a purchaser is entitled to investigate title.[174]

The period for investigation of title was further reduced from 30 years to 15 years when section 44(1) of the Law of Property Act 1925 was amended by the Law of Property Act 1969.[175] Although limited to unregistered land, the reasoning of the Law Revision Committee could be applied, mutatis mutandis, to support a shortening of the current special limitation periods.

13.126 **Our provisional view is that the additional protection for spiritual and eleemosynary corporations sole and for the Crown, in respect of actions to recover land, should be abolished. Consultees are asked whether they agree. Consultees are also asked whether, as an alternative, they consider that it would be justified to retain a special limitation period for the Crown in certain circumstances, for example, claims relating to foreshore or sea bed, or claims to property acquired as bona vacantia or by escheat. If so, they are asked to comment on the circumstances in which the special limitation period should apply, and the length of the period.**

13.127 We have noted above[176] that section 17 of the 1980 Act, in providing for the extinguishment of an owner's title, could be construed as affecting the Crown's ultimate interest in all land. Whilst there does not seem to be any genuine uncertainty as to its intention, we take the view that any future limitation legislation should be clearer on this point. **We provisionally recommend that where a person has been in adverse possession of land as against the Crown and the limitation period expires: (i) in the case of unregistered land the Crown's title to the land should be extinguished so far (but only so far) as its continued existence would be inconsistent with the squatter's acquisition of an estate in fee simple and (ii) in the case of registered land the trust under section 75(1) of the Land Registration Act 1925 should take effect in relation to the Crown's estate in the land so far (but only so far) as its continued existence would be inconsistent with the squatter's acquisition of an estate in fee simple. We ask consultees whether they agree.**

1925, s 46(1)(vi). The Crown may in rare circumstances acquire property by escheat (see *Halsbury's Laws* vol 39 para 597), in which case similar considerations apply.

[174] *Fifth Interim Report (Statutes of Limitation)* (1936) Cmd 5334, para 8.

[175] Law of Property Act 1969, s 23.

[176] See para 6.43 above.

(b) Other land-related actions

13.128 Consideration needs to be given to whether there is any justification for treating actions to recover arrears of rent, or moneys secured by a mortgage, differently from actions to recover other debts, which would be covered by our core limitation regime.

13.129 Law reform bodies in several jurisdictions have taken the view that the obligations created by mortgages of real and personal property should be subject to the same limitation regime, and that as far as possible the treatment of actions to recover debts should be the same whether the debts are secured (by, inter alia, a mortgage) or unsecured.[177] If we were to take this reasoning to its logical conclusion so that the core regime which we are proposing applied to such actions, the limitation period in respect of failure to pay sums due under the loan agreement would effectively be reduced to three years, as it can only be rarely, if at all, that the cause of action, arising on non-payment of the moneys due, is not immediately discoverable.

13.130 There may appear to be no fundamental difference, so as clearly to justify the application of a different limitation scheme to actions in respect of mortgages, between a debt secured by a mortgage and a debt secured by other collateral, and indeed an unsecured debt. But we are concerned that in practice the result of reducing to three years the limitation period for actions based on mortgages, from twelve years, in the case of actions to recover principal moneys, or from six, in the case of actions to recover interest, would be to increase pressure on mortgagees to take action to recover the debt far sooner than they otherwise would have done, and lead to an unacceptable increase in the number of repossessions.[178] It can also be argued in this respect that an action to enforce a debt secured by a mortgage is more akin (though not identical) to an action to recover land than an action to recover an unsecured debt. We would not differentiate, in this respect, between an action to recover the principal secured by a mortgage or an action to recover arrears of interest, because both involve the realisation of the security. In any case, where arrears of both principal and interest are claimed, they are generally treated in practice as an aggregate sum, and there does not appear to be any cogent justification for treating them differently for limitation purposes.

[177] It is however recognised that a different treatment should be accorded to the mortgagee's right to foreclose when he is in possession, and the mortgagor's right to redeem the mortgage while he is in possession. See generally New Zealand Law Commission, *Report No 6, Limitation Defences in Civil Proceedings,* NZLC R6 (1988), para 363; Newfoundland Law Reform Commission, *Report on Limitation of Actions,* NLRC-R1 (1986) p 6; *Working Paper on Limitation of Actions,* NLRC-WP1 (1985), pp 133-136; Law Reform Commission of British Columbia, *Report on Limitations, Part 2 - General,* LRC 15 (1974) pp 53 - 57; Law Reform Commission of Saskatchewan, *Proposals for a New Limitation of Actions Act, Report to the Minister of Justice* (1989) pp 25 - 28; *Tentative Proposals for Changes in Limitations Legislation, Part II: The Limitation of Actions Act* (1986) pp 42 - 44. The core regime proposed by the Alberta Law Reform Institute, in *Limitations,* Report No 55 (1989) also included both secured and unsecured debts. The recommendations in relation to British Columbia, Newfoundland and Alberta have been implemented: see British Columbia Limitation Act 1979, s 3(4) and (5); Newfoundland Limitations Act 1995, s 6; Alberta Limitation Act 1996.

[178] This view was also taken by the Western Australian Law Reform Commission. See *Report on Limitation and Notice of Actions,* Project No 36 - Part II (1997), paras 15.31 - 15.33.

13.131 If such actions are to be brought within the core regime, we therefore suggest that this can only be to the extent of subjecting them to the long-stop period, running from the date when the borrower's obligations were broken, rather than the initial period (as suggested above in respect of actions to recover land). This would have the advantage of limiting the number of different periods applied to different actions. **We ask consultees whether they agree with our provisional view that the limitation period for actions to recover principal or interest relating to a loan secured by a mortgage should not be three years from the date of discoverability but should be the long-stop period of 10 years (or, under our alternative proposal for land-related actions, 12 years) running from the date when the money in question should have been paid and was not.**

13.132 Nor would we seek to differentiate between the mortgagee's action to enforce the security and the mortgagee's right to sue the mortgagor personally under the covenant to repay contained in the mortgage deed or loan agreement. If the reform outlined in the previous paragraph were to be introduced in relation to actions to enforce the security, but the core regime were to be applied in full to the mortgagee's personal action, the results would, in our view, be anomalous, in that the mortgagee would lose the ability to sue under the mortgagor's personal covenant some seven years before it ceased to be able to enforce the security. This might lead to lenders enforcing their powers against the property where, but for the limitation period, they might have sued under the personal covenant.

13.133 Keeping the limitation periods for the two types of action in line with each other as we provisionally propose might seem to represent a substantial increase in the limitation period for personal actions against the mortgagor, but in practice this effect may be more apparent than real. In respect of an action to recover principal, there would actually be a reduction if a ten-year long-stop were adopted. There would, however, be an increase in the limitation period for actions to recover arrears of interest. Suppose, for example, mortgagor B fails to pay mortgagee L all the instalments of interest due in the year 2000. Under the present law, L must commence proceedings to recover the arrears, either against B or against the security, by 2006. Under our provisional proposals the limitation period for both types of action would expire in 2010.[179] This would mean that if L exercised the power of sale at the beginning of 2002, but the sale realised only enough proceeds to pay off the principal sum and L's costs, L would have another eight years to recover the arrears of interest, whereas at present it would only have another four years. The prolonged uncertainty that this could cause, especially to residential borrowers who have had their homes repossessed, does cause us some concern, but we are unsure whether this scenario, as opposed to one involving arrears of both principal and interest,[180] occurs frequently in practice.

13.134 We also take the view that it would be anomalous for the full core regime to be applied to an action by a mortgagor not in possession to redeem a mortgage. A limitation period of only three years would be insufficient, and could be viewed as

[179] Or 2012 if a 12-year long-stop was adopted.

[180] If any principal were left outstanding then, under the present law, a 12-year limitation period would apply to the arrears of principal.

seriously cutting down the effectiveness of the mortgagor's equity of redemption.[181] As with a mortgagee's action to enforce its security a redemption action can be seen as analogous to an action to recover land from a third party. **We provisionally recommend that the long stop period under the core regime should apply to a redemption action brought by a mortgagor who is not in possession of the property, so that the limitation period for such an action would be 10 years (or, under our alternative proposal for land-related actions, 12 years) running from the date on which the mortgagor ceased to be in possession. We ask consultees whether they agree.**

13.135 Where a mortgagor brings a redemption action, it is established that the mortgagee is entitled to retain arrears of interest from the sale proceeds which would have been statute barred if the mortgagee had sued the mortgagor for them.[182] This is because the mortgagee receives the arrears of interest, not as a result of an action brought by the mortgagee, which would fall within section 20(5), but rather as a result of the conditions which general equitable principles impose on the exercise by the mortgagor of the equity of redemption. We consider that the question whether this should remain the state of affairs belongs properly to a review of mortgage law rather than one of the law of limitation periods.[183] Accordingly **we make no provisional recommendation as to whether a mortgagee should continue to be entitled to deduct from the proceeds of sale of the mortgaged property arrears of interest whose recovery is statute barred. We ask consultees whether they agree that we should make no such recommendation in this project.**

13.136 What about actions to recover rent? There seems less reason to depart from the core regime in respect of such actions as opposed to other land-related actions. If the core regime were applied this would reduce the limitation period from six years to three years in normal cases. We appreciate that this could, in some circumstances, accelerate action by landlords to enforce their rights by forfeiting leases, but the availability of relief from forfeiture would mitigate this effect. We take the provisional view that, on balance, the disadvantages of such a change are less than the disadvantages of the alternatives, which would be either to apply a ten or twelve year long-stop alone to the recovery of rents, which we would regard as excessively long, or to create a special exception to the core regime (for example, by retaining the current limitation period of six years), which would reduce the uniformity of the core regime's applicability. **Consultees are asked whether they agree with our provisional view that actions to recover arrears of rent should fall within our core regime (that is, there would be an initial limitation period of three years from discoverability with a long-stop of 10 years from when the rent should have been paid).**

[181] See the Law Reform Commission of Western Australia's *Report on Limitation and Notice of Actions,* Project No 36 - Part II (1997), para 15.31.

[182] *Holmes v Cowcher* [1970] 1 All ER 1224. See also, eg, *Edmunds v Waugh* (1866) LR 1 Eq 418; *Dingle v Coppen* [1899] 1 Ch 726; *Re Lloyd* [1903] 1 Ch 385.

[183] Although if (contrary to our provisional view: see para 14.21 below) the law were reformed so that the expiry of the limitation period barred not only the remedy but the plaintiff's right this question would not arise because the mortgagee would lose all rights to the arrears.

12 ACTIONS ON A JUDGMENT

13.137 Under the current law, the limitation period applicable to actions on a judgment is six years from the date on which the judgment becomes enforceable.[184] Under our core regime, such actions would be subject to an initial limitation period running from the date of discoverability that the judgment was enforceable. As in nearly all cases, a plaintiff knows or ought to know of an enforceable judgment as soon as it becomes enforceable, there will rarely be any practical difference in starting date from the present law. The action would also be subject to a ten year long-stop period, running from the date of the defendant's act or omission which, in this context, can be taken to correspond to the date the judgment becomes enforceable (that is, the defendant has an immediate obligation to comply with a judgment as soon as it is enforceable). In practice the long-stop will nearly always start from the same date as the initial limitation period and will therefore rarely be relevant. We therefore provisionally believe that the application of the core regime to actions on a judgment will not present any difficulties.

13.138 **Our provisional view is that actions on a judgment should be subject to the core regime. We ask consultees whether they agree and, if they do not, to say why not.**

13 ACTIONS ON AN ARBITRATION AWARD

13.139 Under the current law actions on an arbitration award are subject to a limitation period running from the date on which the cause of action accrued.[185] This is the date on which the defendant fails to honour the arbitration award when called upon to do so. Under our core regime, the initial limitation period will start from the date on which the defendant's failure to do so is discoverable by the plaintiff. The long-stop limitation period will start from the date the defendant fails to comply with the arbitration award. As with actions on a judgment, in most cases the initial limitation period will expire long before the long-stop period becomes relevant. We do not believe that the application of our core regime to actions on an arbitration award would be problematic. **We therefore provisionally recommend that actions on an arbitration award should be subject to the core regime. Consultees are asked if they agree and, if they do not, to say why not.**

14 ACTIONS ON A STATUTE

13.140 Under the current law,[186] actions on a statute are subject to (at least)[187] two different regimes. Where the action is for any "sum recoverable by virtue of any enactment" the limitation period is six years from the date the cause of action accrued.[188] Where the relief sought is something other than the payment of a sum

[184] Section 24 of the 1980 Act. See paras 7.1 - 7.2 above.

[185] Section 7 of the 1980 Act. See para 7.3 above.

[186] See paras 7.10 - 7.21 above.

[187] A further theoretical complication is the overlap between actions on a statute and statutory torts (which fall under s 2 of the 1980 Act) and actions on a statute and actions founded on simple contract (which fall under s 5 of the 1980 Act). See paras 7.17 - 7.21 above.

[188] Section 9 of the 1980 Act. See paras 7.10, 7.12 - 7.14 above.

of money, the limitation period is 12 years from the date the cause of action accrued, on the grounds that a statute is a form of specialty.[189] We have provisionally recommended that our core regime should apply to specialties[190] and if our core regime were also to apply to actions for "any sum recoverable by virtue of any enactment" no distinction would be made between the two types of action. This would be advantageous because there seems no reason to differentiate between actions on a statute where the plaintiff is seeking money and those where he or she is not seeking monetary relief.[191] The initial limitation period would then run from the date of discoverability of the cause of action in each case. This would vary according to the provisions of the statute providing for the action - adapting the test given in *Coburn v Colledge,*[192] the plaintiff would need to know of every fact which was necessary for the plaintiff to prove to obtain the relief sought. As under the present law, this would be a matter of statutory construction. The starting point for the long-stop period, the date of the act or omission of the defendant giving rise to the action, would also depend on the construction of the relevant statute.

13.141 A further advantage of applying the core regime to actions on a statute would be that the present theoretical problem of distinguishing between actions on a statute as opposed to actions founded on simple contract or tort would no longer arise.[193] **We ask consultees whether they agree with our provisional recommendation that actions on a statute should be subject to our core regime. If consultees do not agree, we ask them to say why not.**

15 ACTIONS AGAINST PUBLIC AUTHORITIES

13.142 Between 1893 and 1954, actions against public authorities were subject to shorter limitation periods than actions against other defendants. Under the terms of section 1 of the Public Authorities Protection Act 1893:

> Where any action, prosecution or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance or execution or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such act duty or authority ... the action, prosecution or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect or default complained of, or in the case of a continuance or injury or damage, within six months next after the ceasing thereof.

[189] Section 8 of the 1980 Act. See paras 3.1 and 7.10 - 7.11 above.

[190] See para 13.6 above.

[191] We note, for example, that the Law Reform Committee recommended in 1936 that the limitation period for all actions arising by virtue of statutory provisions should be reduced from the period applicable to specialties to six years without distinguishing between actions where the plaintiff sought payment under the enactment, and those where he or she did not. See Law Revision Committee, *Fifth Interim Report (Statutes of Limitation)* (1936) Cmd 5334, p 9.

[192] [1897] 1 QB 702. See para 7.16 above.

[193] See paras 7.17 - 7.21 above.

13.143 This protection was not complete - although the statute applied to criminal prosecutions and most actions for civil wrongs it did not, for example, apply to actions for breach of contract.[194] In addition, the Act did not apply to cases under the Workmen's Compensation Act 1897[195] (and its successors which provided compensation for industrial injuries before the advent of the National Insurance (Industrial Injuries) Act 1946), and it appears that it did not apply to actions under the Fatal Accidents Act 1846 (and its successors).[196]

13.144 The operation of the 1893 Act was reviewed by the Law Revision Committee.[197] It noted that

> We have carefully considered how far it is advisable to interfere with the policy of the Public Authorities Protection Act. That policy is quite clear, namely, to protect absolutely the acts of public officials, after a very short lapse of time, from challenge in the courts. It may well be that such a policy is justifiable in the case of important administrative acts, and that serious consequences might ensue if such acts could be impugned after a long lapse of time. But the vast majority of cases in which the Act has been relied upon are cases of negligence of municipal tram drivers or medical officers and the like, and there seems no very good reason why such cases should be given special treatment merely because the wrongdoer is paid from public funds.[198]

13.145 Though the Report did not recommend the repeal of the Public Authorities Protection Act 1893, it did recommend that its effects should be mitigated in two respects, namely that the limitation period should be extended from six months to one year, and that the period should run from the date of the accrual of the cause of action, rather than the date of the "act, neglect or default complained of." These recommendations were implemented in section 21 of the Limitation Act 1939.

13.146 The Public Authorities Protection Act 1893 was given further consideration in the Report of the Committee on the Limitation of Actions in 1949.[199] It said:

> We approach the problem from the point of view that the special period of limitation and the special provisions as to the payment of costs which were fixed for the benefit of public authorities by the Act of 1893 are a curtailment of the rights of the individual and can only be justified if it is

[194] See *Sharpington v Fulham Guardians* [1904] 2 Ch 449, though see also *Lyles v Southern Corporation* [1905] 2 KB 1.

[195] See *Fry v Cheltenham Corporation* [1911] 81 LJKB 41.

[196] See *British Electric Company, Ltd v Gentile* [1914] AC 1034 and *Venn v Tedesco* [1926] 2 KB 227.

[197] In the *Fifth Interim Report "Statutes of Limitation"* 1936, Cmd 5334.

[198] See para 26.

[199] Chaired by Lord Justice Tucker, Cmd 7740.

> clearly established that there is a real likelihood of injustice on a considerable scale resulting in the event of the repeal of the Act.[200]

13.147 It was of the view that the special protection given to public authorities could not be justified, if its recommendations shortening the general limitation period applicable to personal injuries from six years to two years,[201] were accepted.[202] It noted a number of problems in the operation of the Act:

(1) The manifest injustice to individuals.[203]

(2) The difficulty in deciding whether any particular act was within the protection afforded. This depended on "a fine distinction" between acts done in pursuance of duties and acts done in pursuance of incidental powers.[204]

(3) The difficulty in deciding whether a particular body was covered by the provisions of the Act.[205]

(4) Difficulties arising with regard to actions for a contribution when there were joint tortfeasors of whom one was a private individual and one was a public authority.[206]

(5) The view taken by public authorities that they had no discretion as to whether to rely on the Act or not, but that they were bound to plead it when it applied.[207]

13.148 In consequence the Tucker Committee recommended that the Act should be repealed, a recommendation which was implemented in the Law Reform (Limitation of Actions, etc) Act 1954. Since this time, the limitation period for actions against public authorities has been the same as for any other defendant. As said by Lord Bridge of Harwich

> The philosophy which was once thought to justify the distinction between public and private defendants in this regard had fallen wholly into disrepute

[200] See para 6.

[201] Subject to a judicial discretion to grant leave to bring an action after two years but before six years from the accrual of the cause of action in exceptional cases: see para 1.13 above.

[202] The Committee noted that public authorities were most apprehensive about claims for personal injuries, and indeed that the majority of evidence they had heard related to these claims. See para 16. In the event their recommendations were not accepted. The limitation period was reduced to three years.

[203] See paras 7 and 12.

[204] See para 8.

[205] See paras 8, 9, 11.

[206] See para 10.

[207] A view which was noted to have some judicial authority. See para 13.

when the distinction was swept away in 1954, and, so far as I am aware, has never subsequently regained any reputable currency.[208]

13.149 The position in other jurisdictions is worth noting. A number of Australian States, and New Zealand had at one time provisions protecting public authorities.[209] These have now been in large part repealed.[210] Similarly, equivalent rules have been abolished in Canada,[211] or their abolition recommended.[212] As in England and Wales, a major factor in the decision to repeal the special protection for public authorities was concern that the injustice to the individual outweighed the advantages of the provisions to the public authorities.[213] The arguments for and against such protection for public authorities were reviewed in most detail recently by the Law Reform Commission of New South Wales.[214] The grounds on which public authorities argued for the retention of the protection included the following considerations:

(1) Financial considerations, and the difficulty authorities would face in preparing their budgets. The Law Reform Commission noted that it was unfair for plaintiffs to be disadvantaged to assist the budgeting of large authorities, and pointed to the existence of alternative means of financing claims, such as insurance.

(2) Difficulty of keeping records. The Law Reform Commission noted that similar difficulties were faced by many large commercial and industrial

[208] *Arnold v CEGB* [1988] AC 228 at 269.

[209] Which, apart from a shorter limitation period, required plaintiffs to give special notice of their claim to the relevant authority. See for example Limitation Act 1935, s 47A (Western Australia). See also Crown Suits Act 1947, s 6.

[210] See Limitation of Actions Act 1954 s 3 and 2nd Schedule (Tasmania); Law Reform Limitation of Actions Act 1956, s 4 and Limitation of Actions Act 1974 s 4 and the schedule thereto (Queensland); Limitation of Actions Act 1955 s 34, and Limitation of Actions (Notice of Action) Act 1966, s 2 (Victoria); Notice of Actions and Other Privileges Abolition Act 1977 (New South Wales). The repeal of similar protections for public authorities and the Crown is being recommended in Western Australia (See Law Reform Commission of Western Australia, *Report on Notice and Limitation of Actions*, Project 36 Part II (1997), paras 10.12, 23.7). See also Limitation Amendment Act 1962, s 3 (New Zealand).

[211] An Act to Amend the Law Respecting Limitation of Actions in Tort (SA) 1966, c 49, s 4 (Alberta); SBC 1975 c 37 s 16, re-enacted in Limitation Act RSBC 1979 s 15 (British Columbia); SM 1967 c 32 s 3C, now re-enacted in Limitation of Actions Act 1987 s 4 (Manitoba).

[212] See Ontario Law Reform Commission, *Report on Limitation of Actions* (1969), pp 74 - 79, 84 - 90; Newfoundland Law Reform Commission, *Working Paper on Limitation of Actions,* NLRC-WP1 (1985), pp 253-263); Law Reform Commission of Saskatchewan, *Proposals for a New Limitation of Actions Act, Report to the Minister of Justice* (1989) pp 54 - 57.

[213] See for example Report from the Statute Law Revision Committee on Limitation of Actions (Victoria), *Votes and Proceedings* (Legislative Assembly, Victoria) 1950-51 (1), 947 clause 4, where the committee expressed themselves to be "more concerned with injustices to the individual which had occurred and will occur ... than with the disadvantages which possibly may be experienced by public authorities if the protection is removed", quoted in Law Reform Commission New South Wales, *Third Report on the Limitation of Actions - Special Protections*, LRC 21 (1975), paras 64, 74.

[214] *Op cit*, paras 72 -123.

organisations which do not benefit from the protection formerly accorded to public authorities.

(3) The element of risk. It was suggested that public authorities were under a risk of liability to the public because they are not free to choose the activities that they undertake. The view of the Law Reform Commission was that the use of unreasonably short limitation periods for that reason merely forces injured plaintiffs to subsidise government activity.

13.150 The conclusions of the New South Wales Law Reform Commission are an example of a general move away from granting special protection to governments or other public authorities as defendants. It may however be argued that the potential liability faced by public authorities has now increased to a level which justifies reinstating the protection previously given to public authorities. The government's potential liability under European law for claims relating to legislation (or failure to legislate) contrary to European law could be said to have introduced a new factor into the equation. The decisions of the European Court of Justice in *Francovich v Italy*[215] and the *R v Secretary of State for Transport ex parte Factortame and others (No 4)*[216] have demonstrated the extent of this potential liability.

13.151 However, this cannot be considered in isolation, as any attempt to grant the government protection against this class of action alone would appear to be contrary to European law.[217] If shorter limitation periods are to be allowed for claims against public authorities they must be introduced on a more general basis. This would be open to the objections cited above which have led to the repeal of such measures throughout the common law world: that it is unjust to plaintiffs to bar meritorious claims against the state, where claims against another defendant would be allowed to proceed. The financial arguments in favour of such protection may be strengthened by the increased potential liability facing the government, but it is not clear that they are overwhelming. It could be argued that using a shorter limitation period to bar meritorious claims against the government appears to transfer the financial burden of such claims from a group with substantial resources (taxpayers) to potential plaintiffs (a group with limited resources).

13.152 We considered an analogous issue in the context of our report "Restitution: Mistakes of law and Ultra Vires Public Authorities Receipts and Payments",[218] namely whether there should be shorter time limits for claims for the recovery of money paid to public authorities under a mistake of law or in response to an ultra vires demand. We suggested in the consultation paper that though the ordinary limitation period might not be appropriate for claims against central governmental

[215] (1991) ECR 1-5357

[216] Case C-48/93, [1996] QB 404.

[217] Which holds that national law governing liability for community law damages must not be less favourable than it is for equivalent domestic claims. See *Rewe Handelsgesellschaft Nord mbH v Houptzollamt Kiel* (Case 158/80) [1981] ECR 1805 (see in particular p 1838) and Case 199/82, *Amministrazione delle Finanze dello Stato v SpA San Giorgio* [1983] ECR 3595.

[218] Law Com No 227 (1994) Cm 2731.

authorities and bodies levying charges pursuant to statute, there might be an argument for a shorter time limit for claims against local authorities and others with more limited resources.[219] On consultation, concern was expressed that such time limits would favour those with access to legal advice, rather than the smaller tax payer and businessman who is most likely to need the assistance of recovery provisions. Our recommendation in the Report was that short time limits should not be enacted for claims for the repayment of tax overpaid as a result of a mistake or an ultra vires demand.[220]

13.153 **Our provisional view is that, as under the present law, no special protection in limitations law should be given to public authorities. Where the core regime would apply to any other defendant, it should therefore apply in the same way to actions against public authorities. Do consultees agree?**

16 SHOULD THE CORE REGIME APPLY TO PROCEEDINGS UNDER SECTION 459 OF THE COMPANIES ACT 1985?

13.154 Applications under section 459 of the Companies Act 1985 (a shareholder's remedy for unfair prejudice) are not subject to a statutory limitation period, albeit that it appears that the equitable doctrine of laches does apply.[221] We have recently produced a Report on Shareholder Remedies[222] in which we recommended that there should be a time limit for bringing claims under section 459 but that the length of the period and the other relevant details (such as the date from which the period should run) should be considered in the context of this paper. If claims under section 459 of the Companies Act 1985 are to be subject to our core regime, the shareholder would have three years to bring the application from the date when he or she knew of the facts constituting the alleged unfairly prejudicial conduct. This would be subject to a long-stop (of ten years) from the date of the act or omission of the defendant alleged to constitute unfairly prejudicial conduct.

13.155 These provisions (and particularly the operation of the long-stop) might give rise to difficulties in certain cases. A claim under section 459 may be based on a series of facts which together constitute unfairly prejudicial conduct (for example, non-payment of dividends over a period of time, or a series of acts of failure to give information, or exclusion from important decisions); the earliest act or omission may not on its own be sufficient to justify a remedy. The potential difficulties are illustrated by *Re Macro (Ipswich) Ltd.*[223] In *Re Macro (Ipswich) Ltd* the claim included allegations of mismanagement of the company going back over a period of some 40 years, as well as allegations of exclusion from management going back some 20 years. In such cases, it may be difficult to determine when the cause of action actually accrues, and in consequence, when the plaintiff knows or ought reasonably to know that he or she has a cause of action.

[219] See Restitution of Payments made under a Mistake of Law, Consultation Paper No 120, pp 113 - 114.

[220] Law Com No 227, paras 10.40 - 10.41.

[221] See para 9.13, n 38 above.

[222] Shareholder Remedies (1997) Law Com No 246; Cm 3769, para 4.22.

[223] [1994] 2 BCLC 354.

13.156 Another factor to be considered in the case of section 459 proceedings is that shareholders may in many cases have difficulty in obtaining the information relevant to their claim. Many claims are brought in respect of small (often owner-managed) companies. In those types of companies, it is often the case that little information is available from the accounts or other documents made available to a shareholder.

13.157 Where the claim depends on a series of incidents, it may also be difficult to determine the point from which the long-stop period commences. Where each of the incidents relied on would, of itself, be sufficient to found a claim under section 459, the long-stop limitation period would start from the first such incident. Where only the cumulative effect of the whole series of incidents gives rise to the claim for unfair prejudice, the long-stop period will start from the date of the first incident which gives the plaintiff grounds to make a claim for unfair prejudice.[224]

13.158 **Our provisional view is that the core regime should apply to proceedings under section 459 of the Companies Act 1985.[225] However, we would welcome consultees' views on this in the light of the difficulties highlighted above. If consultees do not consider that the core regime should apply to section 459 proceedings:**

(1) Do they consider that a longer initial limitation period should apply, and if so what period?

(2) Do they consider that the initial limitation period should run from some starting point other than the date of discoverability and, if so, what starting point?

(3) **Do they consider that a different length of long-stop should apply?**

17 SHOULD THE CORE REGIME APPLY TO EQUITABLE, AS WELL AS, COMMON LAW REMEDIES?

13.159 In understanding the present law on limitation in relation to equitable remedies - and possible reform of it - one must take account of both the doctrine of laches (which we regard as distinct from acquiescence or waiver or estoppel or affirmation) and section 36 of the Limitation Act 1980.[226] Section 36(1) lays down that the time limits in the Act for contract, tort, defamation and malicious falsehood, specialties, enforcement of arbitration awards and judgments, and the recovery of sums recoverable by statute, shall not apply to claims for specific

[224] This, of course, would not prevent the applicant calling evidence of an earlier event (outside the limitation period) to explain, eg, why the incident relied on as founding his or her claim to relief constitutes unfairly prejudicial conduct. An analogous situation may arise with a claim for defamation, where the publication the plaintiff alleges is defamatory took place inside the limitation period. If the defence is that the allegation of which the plaintiff complains is fair comment, the plaintiff may wish to call evidence of earlier publications, outside the limitation period, to prove that the defendant was actuated by malice.

[225] We would envisage that the approach to s 459 proceedings would apply also to analogous proceedings, such as a contributory's petition to wind up a company on just and equitable grounds.

[226] See paras 9.12 - 9.22 above.

performance, injunctions, or other equitable relief: but this is then subject to the proviso 'except in so far as such time limit may be applied by the court by analogy in like manner as the corresponding time limit under any enactment repealed by the Limitation Act 1939 was applied before 1st July 1940'. By section 36(2), nothing in the Act is to affect any equitable jurisdiction to refuse relief on the ground of acquiescence or otherwise.

13.160 The first part of section 36(1) means that, for example, the standard six-year limitation periods for tort and contract in sections 2 and 5 of the 1980 Act do not apply to equitable remedies, for example, specific performance or injunctions. The exception in section 36(1) is where the limitation period can be applied by analogy but, although the authorities are in conflict on this,[227] the better view is that, for example, specific performance for breach of contract would not fall within the 'by analogy' exception. In his masterly and comprehensive examination of this question in "Limitation Periods and Specific Performance," Jack Beatson concludes,[228] "[T]he statutory limitation period does not apply either directly or 'by analogy' to claims for specific performance, but, if it did apply 'by analogy', it would not be applied dispositively: a court considering ordering specific performance would have regard to the statutory period as one of the factors in the exercise of its discretion in considering whether the claim was barred by laches or acquiescence." Indeed it seems unclear whether the statutory limitation period for tort and contract will *ever* be applied by analogy to equitable remedies, including an account of profits[229] or equitable damages (that is, damages in lieu of an injunction) for a tort.

13.161 If there is no direct or by 'analogy' statutory limitation period applicable to specific performance or an injunction or an account of profits for a breach of contract or tort, laches can be applied without contradicting Wilberforce J's view in *Re*

[227] Statements favouring application of the statute to specific performance are made in, eg, *Redgrave v Hurd* (1881) 20 Ch D 1, 13; *Firth v Slingsby* (1888) 58 LT 481, 483. The contrary view is most clearly stated by Dixon CJ and Fullagar J in *Fitzgerald v Masters* (1956) 95 CLR 420, 428; and is also supported by the reasoning (ignoring the statutory limitation period) in, eg, *MEPC v Christian-Edwards* [1977] 1 WLR 1328, 1333 (reversed on another point, [1978] Ch 281, [1981] AC 205); see also the early case of *Talmash v Mugleston* (1826) 4 LJOS 200, 201. Commentators who consider that the statute can be applied by analogy to specific performance include Prime & Scanlan, *The Modern Law of Limitation* (1993) p 225; McGee, *Limitation Periods* (2nd ed 1994) p 17; Spry, *Equitable Remedies* (4th ed 1990), pp 241 - 242, 410. The contrary view is taken by, eg, Jones & Goodhart, *Specific Performance* (2nd ed 1996) p 109; *Hanbury & Martin* (15th ed 1997) p 718; *Snell's Principles of Equity* (29th ed 1990) pp 34, 36. See, generally, J Beatson, "Limitation Periods and Specific Performance" in Lomnicka and Morse (eds), *Contemporary Issues in Commercial Law* (1997), pp 9 - 23.

[228] Lomnicka and Morse (eds), *Contemporary Issues in Commercial Law* (1997), p 20.

[229] A further problem in relation to an account of profits is s 23 which lays down that "An action for an account shall not be brought after the expiration of any time limit ... applicable to the claim which is the basis of the duty to account". The relationship between this and s 36 was regarded as confusing by Megarry V-C in *Tito v Waddell (No 2)* (1977) 1 Ch 106, 250 - 252. It would seem that where s 36(1) applies, s 23 does not. But s 23 would apply, eg, to equitable accounting for a breach of trust because s 36(1) is inapplicable to actions for breach of trust.

Pauling's Settlement[230] that laches cannot be invoked where there is a statutory limitation period.

13.162 As we understand it, therefore, under the present law laches (as opposed to any statutory limitation period) applies to, for example, the following: specific performance for breach of contract; injunctions for torts (or breach of contract); account of profits for torts; equitable damages (in lieu of specific performance or an injunction) for breach of contract or tort; equitable compensation or an account of profits for, or in relation to, a breach of trust where no statutory period is laid down by section 21 of the 1980 Act; equitable compensation or an account of profits for breach of confidence; rescission of a contract for undue influence misrepresentation or duress.

13.163 In general, where the core regime applies to common law remedies for the cause of action, we see no good reason why the same regime should not apply to equitable remedies for that cause of action. Common law and equitable remedies should be assimilated as far as possible. As Jack Beatson writes, "[I]t is important that the Commission does not neglect the effect of lapse of time and delay on equitable remedies, and in particular those equitable remedies which, like specific performance, are an alternative to damages or, like claims for equitable compensation, are an alternative to claims in tort. The case for doing so is strong, since any investigation into the effect of lapse of time in equity still takes one back into the pre-Judicature Act law, and, as the example of specific performance will show, there is great uncertainty as to what that law is. Any comprehensive and rationalising review of limitation must address and deal with equitable relief."[231] And he later goes on to write, "It is submitted that the wider scope of specific performance as an alternative to damages for breach of contract makes differences in the operation of the limitation periods more visible and also makes the rationale for having a different approach to lapse of time in the two types of claim more fragile".[232] It should also be pointed out that our proposal that the initial limitation period should run from the date of discoverability rather than accrual of the cause of action may be regarded as "borrowing" a central feature of the laches doctrine.

13.164 We have considered whether it makes a difference that actions for specific performance or injunctions can succeed before accrual of the cause of action. But this does not create a difficulty because claims made before the accrual of the cause of action will plainly be unaffected by our core regime. That is, the plaintiff who has three years from discoverability of the cause of action cannot be out of time before the cause of action accrues; and, similarly, the long-stop does not start to run until the relevant act or omission of the defendant.

13.165 In our view therefore, the core regime should apply (subject to the question dealt with below in paragraphs 13.166 - 13.167) to equitable remedies (for example, specific performance for breach of contract, an account of profits for an intellectual property tort, or an injunction to restrain a nuisance) as well as to

[230] [1962] 1 WLR 86 at 115, approved by the Court of Appeal [1964] 1 Ch 303 at 353. See para 9.14 above.

[231] "Limitation Periods and Specific Performance" in Lomnicka and Morse (eds), *Contemporary Issues in Commercial Law* (1997), pp 9 - 10.

[232] *Ibid*, p 21.

common law remedies.[233] This approach is supported in other jurisdictions.[234] It would also have the merit of avoiding the need to decide the question - on which, as we have seen, there is some confusion - of the extent to which statutory limitation periods are to be applied by analogy. **We ask consultees whether they agree with our provisional view that (subject to the question dealt with in the next two paragraphs) where the core regime applies to common law remedies for a cause of action, it should also apply to equitable remedies for that cause of action. If consultees do not agree, we ask them how they think such equitable remedies should be dealt with for limitation purposes.**

13.166 However a difficulty with applying the core regime is that, in some contexts, specific performance will not be denied for laches however long the delay by the plaintiff. This appears to be a result of the maxim "equity treats as done that which ought to be done" so that the plaintiff is treated, in equity, as having already obtained what was promised.[235] In other words, the rationale appears to be that the transference of legal title is treated as a technicality that should not be barred by delay. A classic illustration is *Williams v Greatrex*[236] where the plaintiffs had gone into occupation under an agreement for a lease and were awarded specific performance of a contract to convey legal title despite a delay of 10 years from breach of contract. And presumably under the present law, if specific performance were not available, neither would be damages in lieu of specific performance (despite the obvious contrast to common law damages which would be barred by limitation).

13.167 **We incline to the view that, so as to avoid any question of our proposals affecting the long-established rule that a contract to transfer a legal interest is as good as a transfer of that interest, a limitation period for specific performance should not be introduced where under the present law (as exemplified by *Williams v Greatrex*) laches does not operate to bar specific performance of a contract. We ask consultees for their views on this issue. If consultees are against the introduction of a limitation period**

[233] A contrary rule would go against the developments of the past century, which have gradually applied statutory limitation periods to equitable claims (such as for breaches of trust, from the Trustee Act 1888, and actions for an account, from 1939). See J Beatson, "Limitation Periods and Specific Performance" in Lomnicka and Morse (eds), *Contemporary Issues in Commercial Law* (1997), pp 9 - 23.

[234] See Ontario Law Reform Commission, *Report on Limitation of Actions* (1969) paras 22 - 23; Alberta Law Reform Institute, *Limitations,* Report No 55 (1989) pp 36 - 37, New Zealand Law Commission, *Report No 6, Limitation Defences in Civil Proceedings,* NZLC R6 (1988), paras 335 - 337, Newfoundland Law Reform Commission, *Working Paper on Limitations of Actions* NLRC - WP1 (1985), p 321, Law Reform Commission of British Columbia, *Report on Limitations, Part 2 - General,* LRC 15 (1974), p 14. Law Reform Commission of Western Australia, *Report on Limitation and Notice of Actions,* Project No 36 - Part II (1997), para 13.67.

[235] The classic manifestation of this is the proposition in *Walsh v Lonsdale* (1882) 21 Ch D 9 that "an agreement for a lease is as good as a lease". We understand that such agreements are not uncommon. The same approach is the basis of some equitable mortgages: see *United Bank of Kuwait plc v Sahib* [1997] Ch 107.

[236] [1957] 1 WLR 31. See also, for example, *Sharp v Milligan* (1856) 22 Beav 606, 52 ER 1242 (where the delay was 18 years).

for specific performance in this situation, we ask them whether they would nevertheless favour, in this situation, a limitation period being introduced for damages in lieu of specific performance so as to produce assimilation, for the same breach of contract, with the limitation period applicable to an action for common law damages.

13.168 The next question is if, in accordance with our provisional view, the core regime (subject to what has been said in paragraph 13.167) is to apply to equitable remedies, what role should there be for the doctrine of laches. For example, if specific performance for breach of contract is subject to a 3-year initial limitation period from discoverability, should the court be free to deny specific performance for laches within that 3-year period? Or if an account of profits for breach of trust or an intellectual property tort, is subject to a 3-year initial limitation period from discoverability, should the courts be free to deny an account of profits because of laches within that 3-year period?

13.169 We should emphasise that nothing that we here say is intended to affect the operation of the equitable doctrine of acquiescence (or the linked doctrines of waiver, estoppel, or affirmation). Rather we are talking about laches in its distinctive sense of a remedy being denied because of the plaintiff's delay plus, probably, prejudice to the defendant (or others). In contrast, acquiescence requires a representation, albeit by active or passive conduct, that the plaintiff will not insist on his or her rights and that the defendant has detrimentally relied on that representation.[237]

13.170 Nor is anything we here say intended to affect laches in so far as the doctrine may be applied to rule out a remedy because of the plaintiff's delay in prosecuting, rather than instituting, an action.[238] Limitation of actions - the subject matter of this paper - is concerned with delay in *starting* actions and not subsequent delays by the plaintiff.

13.171 In *Re Pauling's Settlement*,[239] as we have noted, Wilberforce J held that laches cannot be invoked where there is a statutory limitation period. Adopting that approach there would be no role for laches where the core regime applies. There is much to be said for this approach. The core regime attempts to balance carefully, in a clear and certain way, the interests of the defendant, the plaintiff, and the state. Having fixed the appropriate balance, it may be thought contradictory to override it by the discretionary laches doctrine.

13.172 On the other hand, most other common law reform bodies which have recommended that a uniform limitations regime should apply to all causes of

[237] See para 9.20 above.

[238] It is not clear whether laches can apply to delay in prosecuting rather than instituting an action. *Du Santoy v Symes* [1967] Ch 1146, 1168 suggests that it is only where the plaintiff has lulled the defendant into a belief that he is going to ask for damages and not specific performance that delay in bringing an action to trial defeats specific performance. Brunyate, *Limitation of Actions in Equity* (1932) appears to deal only with instituting an action. Cf Hanbury & Martin, *Modern Equity* (15th ed 1997), p 719.

[239] [1962] 1 WLR 86 at 115, approved by the Court of Appeal [1964] 1 Ch 303 at 353. See 13.161 above. See also *Archbold v Scully* (1861) 9 HLC 360, 11 ER 769, 778.

action have recommended that (contrary to Wilberforce J's approach) specific provision should be made to preserve the doctrines of laches (and acquiescence).

(1) The Alberta Law Reform Institute proposed a clause:

> Nothing in this Act precludes a court from granting a defendant immunity from liability under the equitable doctrines of acquiescence or laches, notwithstanding that the defendant would not be entitled to immunity pursuant to this Act (Now section 10, Limitations Act 1996, c L-15.1).

(2) The Law Reform Commission of Western Australia recommended the adoption of a similar clause.[240]

(3) The Newfoundland Law Reform Commission has recommended that laches should be available, but only "with respect to those claims for equitable relief which are in aid of a legal right that may now be defeated by laches."[241] In consequence the Newfoundland Limitation Act 1995 provides that

> Nothing in this Act affects (a) a rule of equity that denies relief because of acquiescence or undue delay, to a person whose cause of action is not barred by this Act, (b) a rule of equity that denies relief because of laches to a person who claims equitable relief with respect to a right in law or equity and whose cause of action is not barred by this Act.[242]

(4) A similar view was taken by the Law Reform Commission of British Columbia,[243] and enacted in section 2 (b) of the Limitation Act RSBC 1979:

> Nothing in this Act interferes with ... (b) a rule of equity that refuses relief, on the ground of laches, to a person claiming equitable relief in aid of a legal right, whose right to bring the action is not barred by this Act.

Only the New Zealand Law Commission and the Ontario Limitations Act Consultants Group have not recommended providing specifically for the doctrine of laches.[244]

[240] See *Report on Limitation and Notice of Actions,* Project No 36 - Part II (1997), para 13.78.

[241] See *Working Paper on Limitation of Actions,* NLRC - WP1 (1985), p 321.

[242] Section 3.

[243] The reason given for preserving laches where equitable relief is claimed in support of a legal right is so that it can be applied, for example, to applications for specific performance or rescission of a contract, where it is felt that the equitable relief should not be available to the plaintiff for the same period of time as an award in damages. British Columbia Law Reform Commission *Report on Limitations, Part 2 - General,* LRC 15 (1974), p 14. See also Newfoundland Law Reform Commission, *Working Paper on Limitation of Actions,* NLRC-WP1 (1985), p 320 n 21.

13.173 Moreover, laches has historically performed a useful role in relation to equitable remedies and one might take the view that there is no compelling practical reason to remove this traditional weapon in the discretionary armoury of the court. It ensures that judges have a continuing flexibility to achieve finely-tuned justice in relation to equitable remedies. It may also be thought difficult to separate acquiescence from laches.

13.174 It may further be argued that, even if there is no good reason to preserve laches in respect of monetary remedies (that is, equitable compensation and an account of profits should be subject to the same limitation regime as common law damages) the draconian nature of equitable *specific* remedies (for example, specific performance or injunctions) means that the courts should retain their discretion to refuse them after shorter periods than would otherwise apply. Certainly in the 19th century delays of more than a few months were thought unacceptable in a claim for specific performance.[245]

13.175 If one were to take the radical view that the approach to delay for common law and equitable remedies should be assimilated by removing laches, one qualification that would have to be made is in relation to interlocutory relief (for example, interlocutory injunctions). In relation to interlocutory relief any delay by the plaintiff in applying for the interlocutory relief (and whether before or after the issue of a writ in the main action) generally precludes the interlocutory relief sought. Certainly we would not want to disturb the present law requiring a plaintiff to act expeditiously if he or she wishes to be granted interlocutory relief.[246] At the very least, therefore, we consider that the doctrine of laches must continue to apply to applications for interlocutory relief.

13.176 **We ask consultees which of the following three options, if any, they prefer. In each, by laches we do not mean to include either acquiescence, or delay in prosecuting, rather than instituting, an action.**

(1) Option 1: Laches should not apply to final equitable remedies where the relevant cause of action is governed by the core regime but should continue to be relevant to applications for interlocutory relief (for example, interlocutory injunctions).

(2) Option 2: Laches should not apply to (final) equitable monetary remedies where the relevant cause of action is governed by the core

[244] See New Zealand Law Commission, *Report No 6, Limitation Defences in Civil Proceedings,* NZLC R6 (1988), paras 335 - 337 and Ontario Limitations Act Consultations Group, *Recommendations for a New Limitations Act, Report of the Limitations Act Consultations Group,* (1991).

[245] See, eg, *Pollard v Clayton* (1855) 1 K & J 462; 69 ER 540 (11 months); *Huxham v Llewellyn* (1873) 28 LT 577 (5 months); *Glasbrook v Richardson* (1874) 23 WR 51 (31/2 months). Cf *Lazard Bros & Co Ltd v Fairfield Properties Co (Mayfair) Ltd* (1977) 121 SJ 793 (delay of 2 years did not bar claim for specific performance).

[246] Nor is anything we here propose intended to alter the law that a plaintiff's failure to apply, or delay in applying, for an interlocutory injunction can be relevant - albeit not a necessary bar - in deciding whether to grant a final injunction. See, eg, *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798; *Oxy Electric Ltd v Zainuddin* [1991] 1 WLR 115.

regime but should continue to apply to equitable specific remedies (for example, specific performance or injunctions) whether interlocutory or final.

(3) Option 3: Laches should continue to apply to all (interlocutory or final) equitable remedies (including specific performance, injunctions, an account of profits, equitable damages, equitable compensation, and rescission) as opposed to common law remedies.

If consultees feel that none of the options discussed above is appropriate, they are requested to set out their preferred alternative.

18 THE INTERRELATIONSHIP BETWEEN OUR PROPOSED CORE REGIME AND STATUTORY LIMITATION PERIODS OUTSIDE THE 1980 ACT

13.177 Many statutes have their own specialised limitation periods. A sample of these provisions, including what appear to us to be the most important limitation periods outside the 1980 Act, was set out in Table 2 at pages 125 - 141 above. It is necessary to consider the interrelationship between those statutory limitation periods and our core regime.

13.178 We start with the assumption that a specific statutory provision (that is, one laid down outside the 1980 Act) should override the core regime. We are carrying out a general review of limitation periods and it would be wrong to ride roughshod over a limitation period that has been carefully constructed for a specific context. Prima facie, therefore, existing statutes which provide more specialised limitation periods should be left intact. This would correspond to the present approach in section 39 of the 1980 Act.[247]

13.179 Having said that, we have felt it incumbent on us to scrutinise what appear to be the most important limitation provisions in other statutes to see whether they do merit a specialised limitation regime or whether, on the contrary, they can straightforwardly be assimilated within our core regime.

13.180 In some cases the limitation rules are derived from an international convention. The Hague Visby Rules, for example, are incorporated into the Carriage of Goods by Sea Act 1971. In such cases it is plainly outside the scope of this project to recommend amendments. On the contrary, it is not possible under international law for this country to make a unilateral change to the periods prescribed by the relevant convention.[248]

13.181 In other areas, the issues dealt with raise sensitive policy and political questions which it would be unwise for us to deal with in this project. We include in this

[247] See para 7.26 above.

[248] See for example the Carriage by Air Act 1961, the Carriage of Goods by Road Act 1965, the Uniform Law on International Sales Act 1967; the Carriage of Goods by Sea Act 1971, the Carriage of Passengers by Road Act 1974, the Merchant Shipping Act 1995, and the Nuclear Installations Act 1965 (which was in part enacted to comply with the United Kingdom's obligations under the Convention on Third Party Liability in the Field of Nuclear Energy, 1960).

category, for example, claims for sex, race and disability discrimination,[249] a taxpayer's challenge to a tax assessment,[250] claims under social security legislation[251] and claims for unfair dismissal.[252]

13.182 In yet other areas, assimilation to our core regime would not be a straightforward matter simply because the specialised limitation regime is very different (whether in terms of starting point, length of period, or discretion to extend) from our core regime. We include here an action or application which affects personal or corporate status,[253] or which questions the validity of an election or local government action,[254] or which seeks to give special protection to particular defendants[255] or to restrict a particular power,[256] or which governs the distribution of assets,[257] or where delay would cause particular hardship to a defendant.[258]

13.183 On the other hand, there are a few limitation periods in statutes outside the Limitation Act 1980 relating to claims directly analogous to claims which are subject to the limitations regime in the 1980 Act, and which could, on the face of it, be straightforwardly assimilated within our core regime. Examples are the limitation period for claims for the repayment of overpaid rent under section 94 of the Rent Act 1977; claims for compensation under the Vaccine Damages Payments Act 1979; questions of disputed compensation under the Compulsory Purchase (Vesting Declarations) Act 1981; and claims for the delivery-up of goods under the Copyright, Designs and Patents Act 1988.

13.184 **We ask consultees whether they agree with our provisional view that, analogously to section 39 of the Limitation Act 1980, the core regime we are proposing should not apply where a limitation period is prescribed in another enactment. We also ask consultees whether they agree that the limitation periods in the following statutes do not merit special treatment and should be brought within the core regime: the Rent Act 1977, section**

[249] Such as the Sex Discrimination Act 1975, the Race Relations Act 1976, the Disability Discrimination Act 1995.

[250] See for example Taxes Management Act 1970, s 33.

[251] See for example the Social Security (Claims and Payments) Regulations 1987 (SI 1968/1987), governing claims to sickness benefit, disablement benefit, income support and family credit among others.

[252] See Employment Rights Act 1996, s 111.

[253] As for example with the Matrimonial Causes Act 1973, s 13, the Solicitors Act 1974, s 54, the Company Directors Disqualification Act 1986, and the Companies Act 1985, ss 651, 653.

[254] See the Local Government Act 1972, s 92, and the Representation of the Peoples Act 1983, ss 122 and 129.

[255] As with the Post Office Act 1969, s 30, and regulations made under the Riot (Damages) Act, 1886.

[256] See the Compulsory Purchase Act 1965, s 4, Highways Act 1980, s 59 and the Town and Country Planning Act 1990, s 94.

[257] See especially the Inheritance (Provision for Family and Dependants) Act 1974. Other statutory limitation periods within this category include the Companies Act 1985, s 92.

[258] As with the Common Law Procedure Act 1852, s 210; the Landlord and Tenant Act 1954, s 29; Solicitors Act 1974, s 70.

94; the Vaccine Damages Payments Act 1979, section 3; the Compulsory Purchase (Vesting Declarations) Act 1981, section 10; the Copyright, Designs and Patents Act 1988, sections 113 and 203. We would also ask consultees for their views as to whether there are other limitation periods in other statutes that ought to be brought within the core regime.

19. A "SWEEPING-UP" OR "DEFAULT" PROVISION?

13.185 Should our core regime extend to all other causes of action that we have not so far dealt with in our provisional recommendations? In other words, should there be a "sweeping-up" or, as one might otherwise term it, a "default" provision according to which the core regime should apply unless specifically excluded? Such an approach would have the merit of rendering the drafting of a new Limitation Bill easier in that it would not be essential to draw up a comprehensive list of actions falling within the ambit of the core regime. A 'sweeping-up' clause would also mean, for example, that for the purpose of the law on limitation, there would be no need to determine whether 'bailment' is a cause of action separate from an action in tort, contract or restitution.[259]

13.186 But the major practical consequence of such a provision would be that those few causes of action for which there is no statutory limitation period - and which would not be covered by any other of our recommendations - would for the first time be subject to a statutory limitation period. Examples[260] include equitable wrongs that are not covered by our provisional recommendations on breach of trust and related actions (for example, breach of confidence); actions for pronouncing for or against a will in solemn form, actions contesting the title under which a grant of probate or letters of administration is made, and actions for the revocation of a grant of representation;[261] actions arising out of the exercise of the royal prerogative;[262] claims by Her Majesty the Queen or the Duke of Cornwall to gold and silver mines under the royal prerogative right to such mines;[263] proceedings by the Crown for the recovery of any tax or duty or interest on any tax or duty;[264] and forfeiture proceedings under the Customs and Excise Acts.[265] The

[259] See paras 3.116 - 3.118 above.

[260] We are not aware of any other causes of action for which there is no statutory limitation period, and which are not covered by any other of our provisional recommendations. Consultees are invited to inform us if they are aware of any.

[261] See *Tristram & Coote's Probate Practice* (28th ed 1995), pp 606 - 613, *Re Coglan; Briscoe v Broughton* [1948] 2 All ER 68, *Re Flynn, Flynn v Flynn* [1982] 1 WLR 310.

[262] Such as an action seeking compensation for the destruction of property pursuant to the prerogative (*Burmah Oil v Lord Advocate* [1965] AC 75 HL).

[263] See s 37(6) of the 1980 Act. At first sight, one might think that there would be a close analogy between the exercise of this prerogative right and land-related claims, so that applying our provisional proposals, a single 10 year limitation period would be appropriate. But we tend to the view that the prerogative right is likely to be exercised in respect of the product of the mining rather than by claiming the land: see *Attorney-General v Morgan* [1891] 1 Ch 432.

[264] Limitation Act 1980, s 37(2)(a). See *Hunt v Commissioners of Customs & Excise* [1992] VATTR 255; *Lord Advocate v Butt* [1992] STC 122. Contrast the time limits for the assessment of tax (see Table 2 above at pp 127 - 128).

[265] Limitation Act 1980, s 37(2)(b).

fact that most of these causes of action have no limitation period is due largely to historical accident with little if any rational justification, and we believe that they should mainly be brought within the ambit of the core regime. In contrast, there are, arguably, good policy reasons not to restrict by a limitation period the Inland Revenue's right to recover assessed tax and certainly this could not be contemplated as a recommendation without specifically consulting on it.

13.187 **We therefore ask consultees:**

(1) whether they agree with our provisional view that a new Limitations Bill should include a "sweeping-up" or "default" clause stating that the core regime applies to all causes of action unless excluded by another provision in the Bill (or any other enactment);

(2) whether they consider that a limitation period (and if so what limitation regime) should apply to proceedings by the Crown for the recovery of any tax or duty or to forfeiture proceedings under the Customs & Excise Acts.

PART XIV
OPTIONS FOR REFORM IV: ADDITIONAL ISSUES

1 AGREEMENTS TO CHANGE THE LIMITATION PERIOD

14.1 The 1980 Act is silent on the issue whether it is possible for parties to contract out of a statutory limitation period by agreeing to extend or shorten the limitation period. There is authority to suggest that such agreements will be recognised by the courts, but the position is not entirely clear.[1] Few issues are raised by an agreement between the parties to apply a shorter limitation period to a dispute than would be permitted by statute: providing that the terms of the agreement comply with the Unfair Contract Terms Act 1977,[2] there is no reason to limit the power of the parties to enter into such an agreement. The position with respect to agreements to lengthen a limitation period may be different. As noted above[3] it is not in the interests of the public or the legal system for disputes to be brought to trial years after the events giving rise to the claim, when the available evidence may have deteriorated to the point where it is no longer possible to give a fair trial to the issues. However, unless the agreed extension is considerably greater than the statutory limitation period, there may be no adverse implications for the public interest. It may assist the parties to a dispute to extend a limitation period sufficiently to allow for further negotiations to settle a dispute, and to avoid incurring the costs associated with litigation until this is essential.[4] Moreover it may be argued that the defendant's agreement to an extension of time - so that there is no obvious unfairness to him or her in allowing the action to proceed - outweighs any public interest in ensuring a "fair" trial.

14.2 Law reform bodies in other common law jurisdictions which have discussed this issue have been influenced by the nature of the limitation defence. The New Zealand Law Commission noted:

> We see no reason why parties to a dispute should not be able effectively to agree that a limitation defence not be taken for a particular period (or at all). This also follows from the nature of the limitation defence, which does not extinguish the underlying right, and may be waived by a defendant by simply choosing not to plead passage of the limitation period as an affirmative defence.[5]

14.3 Similarly, the Alberta Law Reform Institute commented:

[1] See paras 9.7 - 9.11 above.

[2] See para 14.6, n 8, below.

[3] See Part I.

[4] Particularly where the parties are complying with the terms of a "pre-action protocol" adopted in accordance with recommendations made by Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996), Chapter 10.

[5] *Report No 6, Limitation Defences in Civil Proceedings,* NZLC R6 (1988), para 266.

If a defendant can waive a limitation defence by not asserting it, we can see no reason why he and a claimant should not be permitted to make a binding agreement extending an otherwise applicable limitation period. The effect of such an agreement may be to relieve the claimant from the necessity of bringing an action which, in the course of events, may prove to be unnecessary. It will frequently be mutually advantageous to the parties if more time is available for settlement negotiations or if the defendant is granted additional time to perform his obligations, with litigation expenses postponed until they become essential. For these reasons, we believe that agreements extending limitation periods for the convenience of the parties should be encouraged.[6]

14.4 We tend to agree with these views and we are inclined to think that an agreement to extend the limitation period should be valid. On the other hand, we recognise that the strength of the case for arguing that the parties' agreement should not be respected is greatest where the agreement would override a long-stop (as opposed to an initial limitation period). In this respect, we note that under section 13 Prescription and Limitation (Scotland) Act 1973, any provision in an agreement which purports to exclude a negative prescription is invalid.[7]

14.5 A linked question is whether the parties should be free to change the starting point of a limitation period by agreement. There appears to be no authority on this question. The advantage of allowing this is that parties could ensure that there was absolute certainty as to the date of the limitation period (by, for example, saying that the limitation period should run from a fixed date), whereas under the "discoverability" starting date within our core regime, there is no such absolute certainty.

14.**6** **We ask consultees whether (assuming the agreement is otherwise valid)[8] they agree with our provisional view that it should be possible, by agreement:**

[6] See *Limitations,* Report for Discussion No 4 (1986), para 8.3 (See also *Limitations,* Report No 55 (1989), p 42), and Alberta Limitations Act 1996, c L-15.1, s 7. Similarly, the Ontario Limitations Act Consultation Group recommended that a limitation period should be capable of being overridden by an agreement in writing (See *Recommendations for a New Limitations Act, Report of the Limitations Act Consultation Group* (1991), p 46), and the Law Reform Commission of Western Australia recommended that it should be possible to extend or reduce a limitation period. See *Report on Limitations and Notice of Actions,* Project No 36 Part II (1997), para 18.3.

[7] See Scottish Law Commission, Reform of the Law relating to Prescription and Limitation of Actions (1970) Scot Law Com No 15, para 141.

[8] An agreed limitation period (for "business liability") that is shorter than the normal period of limitation would be caught by the Unfair Contract Terms Act 1977 and would either be automatically void (eg in relation to claims for negligently caused personal injury) or void if unreasonable (eg in relation to claims between businesses for breach of statutory implied terms). For the application of the reasonableness test to agreed time periods, see *Green v Cade Bros Farms* [1978] 1 Lloyd's Rep 602, *Rees Hough v Redland Reinforced Plastics* [1985] 2 Con LR 659. But an agreement *to extend* the statutory limitation period is not caught by the Unfair Contract Terms Act 1977. Nor even if the Act applies (which it may not do in relation to a clause that could both extend and shorten the limitation period) do we regard it as at all likely that an agreement between parties of equal bargaining power to replace

(1) to reduce the initial limitation period or long-stop;

(2) to extend the initial limitation period; and

(3) to change the starting date for the initial limitation period.

We also ask consultees for their views as to whether, by agreement, a long-stop period may or may not be extended or a long-stop starting date may or may not be changed.

2. WHAT THE PLAINTIFF NEEDS TO DO TO PREVENT THE EXPIRY OF THE LIMITATION PERIOD: ISSUE OR SERVICE OF PROCEEDINGS?

14.7 Under the current law, the limitation period will stop running when the plaintiff issues proceedings against the defendant rather than at the point of service of the proceedings.[9]

14.8 The disadvantage of this rule is that some time will inevitably elapse before the issue of proceedings comes to the notice of the defendant. In practice the plaintiff has the benefit of an extension to the limitation period equivalent to the time within which the writ remains valid.[10] As we have seen,[11] this rule can also cause problems in relation to the discretion under section 33 of the 1980 Act. As Lord Diplock said in *Thompson v Brown:*

> It may seem anomalous that a defendant should be better off where, unknown to him, a writ has been issued but not served than he would be if the writ had not been issued at all; but this is a consequence of the greater anomaly too well-established for this House to abolish that, for the purposes of a limitation period, an action is brought when a writ or other originating process is issued by the central office of the High Court and not

discoverability with an accrual starting date (in order to give the parties greater certainty) would be struck down as unreasonable; although if made with a consumer and the claim was for breach of statutorily implied terms, such an agreement would be void if the 1977 Act applied. If contained in a consumer contract, clauses altering the normal limitation period might also be struck down as unfair under the Unfair Terms in Consumer Contracts Regulations 1994.

[9] See *Thompson v Brown* [1981] 1 WLR 744, 752 - 753; *Dresser UK Ltd v Falcongate Freight Ltd* [1992] QB 502, 517 and para 9.6 above.

[10] A fact which led the Review Body on Civil Justice to recommend that the law should be changed so that limitation periods continued to run until proceedings were served on the defendant. This is the position in Scotland. See Report of the Review Body on Civil Justice (1988) Cm 394, para 204. See also New Zealand Law Commission, *Report No 6, Limitation Defences in Civil Proceedings,* NZLC R6 (1988), para 174. The time allowed for service has been reduced, since the Law Reform Committee and the Review Body considered the issue, from 12 months to, for most writs, 4 months. RSC, O 6, r 8. See also rule 7.11, Lord Woolf, *Access to Justice: Draft Civil Proceedings Rules* (1996), which requires a claim to be served within 4 months of being issued (unless the claimant requires permission to serve it out of the jurisdiction, in which case the time is extended to six months from service).

[11] See para 3.76 above.

when it is brought to the knowledge of the defendant by service upon him.[12]

The rule further means that, under English law, a limitation period stops running before an English court is seised of the proceedings under the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968.[13]

14.9 The advantage of the present rule is that the date of issue is unmistakable, so that there can be no argument as to whether the relevant step has been taken and it is simple, so that the plaintiff is able to act quickly if necessary to preserve his rights. These arguments led the Law Reform Committee to recommend that the issue of proceedings should remain the point at which the limitation period stops running.[14] Changing the rule so that the limitation period only stops running when the defendant is served could in many cases create uncertainty as to whether the limitation period had or had not stopped running. In addition it would create difficulties where the defendant deliberately tried to evade service, by moving and leaving no address, or going abroad.[15]

14.10 **We are provisionally of the view that, as under the present law, the limitation period should stop running when proceedings are issued by the plaintiff. Consultees are asked if they agree.**

3. ADDING NEW CLAIMS IN EXISTING ACTIONS

14.11 The current provisions, as encapsulated in section 35 of the Limitation Act 1980 and rules of court, lay down the general rule that new claims should not be permitted after the expiry of a limitation period applicable to that claim, but provide for a limited number of exceptions to the rule.[16]

14.12 The object of the rule is to prevent a party from being able to circumvent the provisions of the Limitation Act and its protection for defendants by instituting proceedings in respect of a time-barred claim in the guise of an amendment to an existing claim. However, there is a conflicting principle, namely that when an action has been brought, it should be possible for all matters relating to that claim to be resolved in the same proceedings (provided that they were not time-barred

[12] [1981] 1 WLR 744, 752-753.

[13] *Dresser UK Ltd v Falcongate Freight Ltd* [1992] QB 502. See para 9.6 above.

[14] See *Twenty-First Report (Final Report on Limitation of Actions)* (1977) Cmnd 6923 paras 2.72 - 2.83. A proposal to alter the rule for limitation purposes in the Courts and Legal Services Bill 1990 was withdrawn.

[15] Both the date of issue of the proceedings and the date of service of the proceedings have drawbacks as the time when the limitation period stops running in respect of multi-party actions. Lord Woolf noted in *Access to Justice: Final Report to the Lord Chancellor on Civil Justice System in England and Wales* (1996) that, if his recommendations for "Multi-Party Situations" are accepted (enabling individual claimants to participate in the action by entering their names on a register of claimants), it may be necessary to provide that the declaration of a multi-party situation by the court is sufficient to suspend the running of the limitation period in respect of all potential claimants in the action. See pp 229, 236.

[16] See paras 9.28 - 9.33 above.

when the original action was started).[17] A balance has to be struck. The approach adopted by section 35[18] of narrowly defining the situations in which a new claim can be made after the expiry of the limitation period does not allow this. It restricts the ability of the court to deal adequately with new situations as they arise.

14.13 In other common law jurisdictions a different approach has been adopted. The Alberta Law Reform Institute recommended that claims related to the conduct, transaction or events described in the original pleading should be permitted after the expiry of the limitation period, subject only to further requirements designed to give the defendant alternative protection to the limitation period.[19] The New Zealand Law Commission, has recommended that provided that new claims are properly related to the subject matter of the claims in the original action, they should be permitted, notwithstanding the fact that the limitation period has expired since the start of the original proceedings.[20] It rejected the proposal that there should be a further requirement that the defendant should have received adequate notice of the claim on the grounds that this would introduce further complications, and "may produce results (where notice is not given) which conflict with common sense".[21] We agree with the New Zealand Law Commission's approach.

14.14 **We are provisionally of the view that new claims should be permitted provided that they are sufficiently related to the original cause of action, even where the limitation period has expired since the proceedings were started. Whether the addition of a new claim is so related will be a question of fact for the courts. Consultees are asked if they agree and, if they do not, to say why not.**

4 THE EFFECT OF THE EXPIRY OF THE LIMITATION PERIOD

14.15 The rule now is that, except in the case of land-related actions, actions for conversion, and actions barred by the long-stop under the Consumer Protection Act 1987, the expiry of a limitation period under the 1980 Act operates to bar the remedy, rather than extinguish the right.[22] It would not be practicable to change

[17] See for example the Ontario Law Reform Commission, *Report on Limitation of Actions* (1969), p 113 "The purpose of the Statute [of Limitations] should be to ensure that matters be litigated in a reasonable time. Once an action has been started, then all matters which were not statute-barred when the [original] writ was issued and which might be dealt with at the trial of that action, should be capable of being brought before the court."

[18] Described by A McGee as "one of the most convoluted provisions in the entire law of limitations". See *Limitation Periods* (2nd ed 1994) p 384.

[19] Including, for example, the requirement that the defendant must have received sufficient notice of the added claim that he will not be prejudiced in maintaining a defence to it on the merits. See Alberta Law Reform Institute, *Limitations,* Report No 55 (1989), pp 41 - 42 and s 6 of the Limitations Act 1996 c L-15.1. The Law Reform Institute's proposals were based on a model suggested by GD Watson, "Amendment of Proceedings after Limitation Periods" (1975) Can Bar Rev 237.

[20] New Zealand Law Commission, *Report No 6, Limitation Defences in Civil Proceedings,* NZLC R6 (1988), paras 430 - 433.

[21] *Ibid* para 430.

[22] See paras 9.1 - 9.5 above.

the rule in land-related actions so that the expiry of the limitation period merely bars the remedy, as this would undermine the title to the land acquired by adverse possession after the expiry of the limitation period. The same argument applies, though to a lesser degree, to conversion. As regards adopting a uniform "expiry bars the remedy" rule, English law has therefore gone as far as it can: the expiry of the limitation period bars the remedy, save where this would affect title to property, or is ruled out by European law (as in relation to the Consumer Protection Act 1987). But should English law go the other way and move to a uniform rule that expiry of the limitation period extinguishes the right?

14.16 This general rule was examined by the Law Revision Committee in 1936[23] and by the Law Reform Committee in 1977.[24] In 1936 it was concluded that no general case could be made in favour of changing the current law, so that rights were more generally extinguished, and that certain of the remedies available to a potential plaintiff which did not involve court action (and so would remain available after the expiry of the limitation period) were worth preserving.[25] In 1977, the Law Reform Committee agreed, finding that a change in the law would have very little practical effect, and that there was no significant demand for such a change.[26]

14.17 A different position has been taken in some other common law jurisdictions. The New South Wales Law Reform Commission, the Ontario Law Reform Commission and the British Columbian Law Reform Commission recommended that the expiry of the limitation period should extinguish the right in all causes of action.[27] Similarly, the Newfoundland Law Reform Commission recommended that the expiry of the limitation period should extinguish the right, but felt that the requirement for the defendant to plead a limitation defence should be retained.[28] Section 17(1) of the Newfoundland Limitations Act provides that all causes of action are extinguished on the expiry of the limitation period.[29]

14.18 The New Zealand Law Commission in contrast recommended that the expiry of the long-stop or of the initial limitation period should only afford a defence to the defendant rather than extinguishing the rights (giving as the reason for their decision in respect of the long stop, the fact that the long-stop would not be an

[23] *Fifth Interim Report (Statutes of Limitation)* (1936) Cmd 5334, para 24 (pp 32 - 35)

[24] *Twenty-First Report (Final Report on Limitation of Actions)* (1977) Cmnd 6923, paras 2.84 - 2.91.

[25] See the *Fifth Interim Report,* para 24. The most important of these "self-help" remedies was the solicitor's lien over his client's papers. See para 9.2 above.

[26] See the *Twenty First Report,* paras 2.90 to 2.91.

[27] New South Wales Law Reform Commission, *First Report on the Limitation of Actions,* LRC 3 (1967), paras 306 - 323; Ontario Law Reform Commission, *Report on the Limitation of Actions* (1969), paras 126 - 133; Law Reform Commission of British Columbia, *Report on Limitations, Part 2 - General,* LRC 15 (1974), p 96, and s 9, Limitation Act 1979.

[28] See Newfoundland Law Reform Commission, *Working Paper on Limitation of Actions,* NLRC-WP1 (1985), p 329 and *Report on Limitation of Actions,* NLRC-R1 (1986), pp 10 - 11.

[29] Though the Act also provides in s 17(2) that where an order is made under another Act extending the limitation period after that period has expired, the order will revive the cause of action.

absolute bar but would be subject to qualifications).[30] The Alberta Institute for Law Reform also recommended that the expiry of the proposed long-stop period should bar the remedy rather than extinguish the right, on the ground that extinguishing rights is not the objective of a limitations system (though they also noted that a right without a legal remedy is not a right at all).[31] Consequently the Alberta Limitation Act 1996 provides that on the expiry of the limitation period the defendant is entitled to immunity from liability.[32] It makes no provision for the extinction of the plaintiff's rights. Finally, the Western Australia Law Reform Commission has recommended that the expiry of the limitation period should continue to bar the remedy rather than extinguish the right, on the grounds that this would preserve the principle that the defendant could choose not to plead the limitation defence but to defend on the merits of the case.[33]

14.19 It appears that there has been a move away from recommending that the expiry of a limitation period should extinguish the right. That is, the latest reports from Alberta, New Zealand and Western Australia, as opposed to the earlier reports from New South Wales, Ontario, British Columbia and Newfoundland, do not recommend that the expiry of a limitation period should extinguish the right. In part this rests on certain presumptions as to the purpose of a limitations system, namely that it is not the purpose of limitation law to extinguish rights.[34] Another important factor is the desire to preserve the requirement that a limitation defence must be specifically pleaded by the defendant. Though Newfoundland Law Reform Commission felt able to combine this requirement with a recommendation that rights should be extinguished, this is not logically consistent. If the plaintiff's right has been extinguished by the passage of time, the fact that the defendant does not plead the defence should not be sufficient to restore that right.

14.20 The area where maintenance of the principle that the expiry of the limitation period bars the remedy rather than extinguishing the right caused most problems was in private international law. Given that the limitation period merely barred the remedy, English courts regarded the English law on limitation as procedural, and in consequence applicable as part of the *lex fori,* even where a foreign substantive law applied. The problems this created have been rectified by the Foreign Limitation Periods Act 1984.

14.21 Otherwise, a change to limitation extinguishing rights would abolish a number of rules of law, examples of which we have set out in paragraph 9.2 above. We see no

[30] New Zealand Law Commission, *Report No 6, Limitation Defences in Civil Proceedings,* NZLC R6 (1988), para 308.

[31] See Institute of Law Research and Reform, Alberta: *Limitations,* Report for Discussion No 4 (1986) Chapter 9; Alberta Law Reform Institute, *Limitations,* Report No 55 (1989) and Alberta Limitations Act 1996.

[32] See s 3(1).

[33] See *Report on Limitation and Notice of Actions,* Project No 36 - Part II (1997), paras 7.65 - 7.67.

[34] See Institute of Law Research and Reform, Alberta, *Limitations,* Report for Discussion No 4 (1986), para 9.1.

great advantage in abolishing these rules.[35] Moreover, we feel that making "extinction" the general rule could create difficulties (notably in the case of actions for a contribution, where the limitation period for an action by the plaintiff in the original action against the defendant to the contribution action may have expired before the right to bring a contribution action has accrued). **Our provisional view is that (with the exception explained in paragraphs 13.65 - 13.69 above) no change should be made to the present law on the effect of the expiry of a limitation period. Consultees are asked if they agree.**

5 THE "SEVCON PROBLEM": RESTRICTIONS ON THE PLAINTIFF'S RIGHT TO SUE.

14.22 We have seen that it is possible for a cause of action to accrue, and hence for a limitation period to commence, before the plaintiff is legally entitled to bring an action.[36] The classic illustration is *Sevcon Ltd v Lucas CAV Ltd*.[37] English law has not taken the view that, as the plaintiff is not in a position to pursue the claim, time should not run in such cases just as it does not run in cases of disability. Rather time runs irrespective of any restrictions on the plaintiff's right to sue which do not form part of the cause of action. Although the cases have concerned the time at which the cause of action arose, rather than the time at which the cause of action was discoverable (which would be the starting-point for the limitation period under our core regime), the same problem could arise under our core regime, unless specific provision is made to deal with it. That is, the plaintiff may know of his cause of action but be unable to sue for it because of the existence of a restriction on his or her right to sue.

14.23 We are of the view that the plaintiff in this position should be protected from the risk that the limitation period expires before he or she is ever able to bring proceedings. This could be done by enacting a rule that the limitation period should not start to run until the restriction on the plaintiff's right to sue had been removed. However, the plaintiff should not be given over-generous protection. For example, in certain circumstances the plaintiff must obtain the leave of the court before he or she may issue proceedings. This could be described as a restriction on the plaintiff's right to sue. However, the plaintiff can apply for the leave of the court when he or she thinks fit, and, if leave is granted, there would be unlikely to be a significant delay between the making of the application and the grant of leave. It would be inappropriate for the limitation period to start only when leave to bring the action had been granted. To decide otherwise would allow the plaintiff to determine when the limitation period would expire.

14.24 A more satisfactory solution would be to suspend the limitation period from the point where the plaintiff has taken the necessary steps to remove any restriction.

[35] Cf the New South Wales Law Reform Commission which noted, "We think it a useful reform to extinguish the right when the cause of action for its enforcement is barred and thus abolish a number of complicated rules of law which have little practical importance but stand merely as an occasional embarrassment to the student, the lawyer and the citizen" (*First Report on the Limitation of Actions)*, LRC 3 (1967), para 323.

[36] See paras 9.26 - 9.27 above.

[37] [1986] 1 WLR 462.

Where the plaintiff must obtain leave before proceedings may be issued, the initial limitation period would start running when the plaintiff has the knowledge required by our definition of discoverability. It would be suspended from the date when the plaintiff applied for leave to bring the proceedings, but would start running again when leave is granted. The same rule would be applied to the long-stop period.

14.25 *Example 1:* Where the plaintiff wishes to sue an insolvent defendant, having acquired the relevant knowledge in January 2000, the initial limitation period would start to run from that point. The plaintiff would need leave to bring the proceedings. If the plaintiff applied for leave in December 2000, the limitation period would be suspended from that point. It would start to run again when leave was granted: so that, if leave was given at the end of June 2001, the plaintiff would then have a further two years from that point before the limitation period expired.

14.26 *Example 2:* The plaintiff applies for a patent in January 2000. That patent is then infringed by the defendant in January 2001. The plaintiff immediately learns of the infringement, but is unable to bring proceedings because the patent has not been granted. This finally happens in January 2010. As the plaintiff had already taken the necessary steps to remove the restriction by applying for the patent, and pursuing that application, the limitation period would immediately be suspended - and would in practice only start to run from January 2010, the date of the grant of the patent. The plaintiff would therefore have three years from that date to bring the action for patent infringement.

14.27 **We ask consultees whether they agree with our provisional view that, where the plaintiff's right to bring the action is subject to a restriction, the running of time, for the purposes of the initial limitation period and long-stop, should be suspended from the date the plaintiff has done all that he or she could do to lift that restriction. If consultees do not agree with this, we ask them to say why they do not agree.**

6 THE BURDEN OF PROOF

14.28 Under the current law it is not entirely clear who has the burden of proof on limitation.[38] However, it seems to be the case that the burden of proof is on the plaintiff: that is, the plaintiff has the burden of disproving a limitation defence where the defendant has pleaded one. The point is one of some practical significance, for there will inevitably be cases where the action is fairly old, but there is some dispute as to whether time has run or not, and the evidence on the point is inconclusive. In such cases the outcome is likely to depend ultimately on the incidence of the burden of proof.

14.29 Arguably it is more logical that the burden of proving that a limitation defence applies should rest on the defendant: this would be consistent with viewing limitation as a "defence" and with the rule that the defendant must plead a limitation defence if he intends to raise one. Further, it is not an essential part of the plaintiff's cause of action that the limitation period has not expired, a point

[38] See paras 9.23 - 9.25 above.

which was considered determinative by the Victorian Supreme Court in its decision that the defendant should bear the burden of proof in *Pullen v Gutteridge, Haskins & Davey Pty Ltd.*[39]

14.30 On the other hand, it would seem particularly inappropriate to recommend a change in the present law on the burden of proof when we are proposing a core regime under which the limitation period runs from the date of discoverability of the plaintiff. The date of discoverability is concerned with the knowledge of the plaintiff rather than the defendant (although there will be many cases where both plaintiff and defendant are immediately aware of the plaintiff's cause of action). In consequence it will commonly be more difficult and expensive for the defendant to provide evidence of the knowledge of the plaintiff at a particular date, than for the plaintiff to provide such evidence.

14.31 **We therefore provisionally propose that, in general, the burden of proof on limitation should continue to be on the plaintiff.**

14.32 A possible exception relates to the long-stop. The long-stop represents a protection for defendants and the defendant is best placed to know the date of the relevant act or omission which we provisionally propose as the starting date for the long-stop. **We ask consultees whether they would favour placing the burden of proving that the plaintiff's claim is barred by the long-stop on the defendant.**[40]

7 COMMENCEMENT AND RETROSPECTIVITY

14.33 One option is to provide that the new Act would apply only to causes of action accruing after its commencement date. This has the merit of clarity and certainty. However, it would mean that the 1980 regime would continue in tandem with the new regime for a period of time. The continuance of the old regime might be of particular concern in relation to victims of sex abuse, where the shortcomings of the current law are very evident and delay in correcting them may be thought unacceptable. Moreover, it is hard to see how this approach can work given that under the 1980 Act the courts have a discretion to disapply the limitation periods for personal injuries and defamation. This would mean that, if the old regime is to continue to apply to causes of action accruing before our new Act commences, the old regime could continue for an indefinite period.[41]

14.34 Another approach would be to follow the approach of the Limitation Acts 1963 and 1975[42] so that the new Act would apply retrospectively to actions arising before its commencement, though not to actions where a final order or judgment was given before the Act was passed. But in the context of our provisionally

[39] [1993] 1 VR 27, 71 - 76. See also N Mullany, "Australian Limitation Law - Relieving the Burden" (1993) 109 LQR 215.

[40] A split burden of proof, with the burden of proof on the long-stop being on the defendant, is laid down in the Alberta Limitations Act 1996, s 3(5).

[41] This would also be an obstacle to adopting the approach adopted in the Law Reform (Limitation of Actions, etc) Act 1954 (see para 9.39 above).

[42] See para 9.39 above.

proposed wide-ranging Act, we think this approach inappropriate in that defendants could suddenly find themselves deprived of an accrued limitation defence.

14.35 The preferable approach would appear to be to follow the example of the Limitation Act 1939, the Limitation Act 1980 and the Latent Damage Act 1986:[43] the new Act would apply to causes of action arising before its commencement except where the cause of action had been barred by the expiry of a limitation period imposed by a previous Act, or where proceedings had been commenced in respect of that cause of action prior to commencement. This, though slightly more complex than the first alternative, would allow for the more rapid implementation of the new Act's provisions. One should recognise, however, that where the limitation period would be reduced under our proposals,[44] the effect would be to deprive plaintiffs of an existing right to bring an action.

14.36 **Our provisional view is that the proposed new Act would apply to causes of action accruing before it commences, except where the cause of action has been barred by the expiry of a limitation period under the provisions of a previous Act or proceedings have been instituted in respect of a cause of action before the commencement of the Act.[45] Consultees are asked if they agree.**

[43] See para 9.39 above.

[44] Eg actions for breach of contract, conversion, breach of trust, actions on a statute or judgment, and possibly actions to recover land.

[45] The Law Reform Advisory Committee for Northern Ireland has suggested that legislative action should be taken to overturn the decision in *Arnold v Central Electricity Generating Board* [1988] AC 228 (See its Fourth Annual Report (1992 - 93), p 11 and Discussion Paper on Actions Arising out of Insidious Diseases (July 1992)). However, we believe that it is of very limited effect, as it only affects causes of action arising before 1954, and we do not recommend overruling it by legislation. See para 9.38, n 107, above.

PART XV
SUMMARY OF PROVISIONAL PROPOSALS AND ISSUES FOR CONSULTATION

15.1 In this Paper we have raised a large number of questions and have formed a provisional view on many of them. We summarise here our provisional conclusions and proposals, and the other issues on which we seek respondents' views. More generally, we invite comments on *any* of the matters contained in, or the issues raised by, this paper, and any other suggestions that consultees may wish to put forward. For the purposes of analysing the responses it would be very helpful if, as far as possible, they could refer to the numbering of the paragraphs in this summary.

15.2 It is our provisional view that there should be a fundamental reform of the law of limitations in order to produce a modern code which is, so far as possible, simple, coherent, fair, up-to-date, clear and cost effective. We ask consultees whether they agree. If consultees disagree, we ask them what range of reforms, if any, they would favour. (Paragraph 11.15).

A NEW "CORE" LIMITATION REGIME

1 WHEN SHOULD TIME START TO RUN?

(1) Accrual, Discoverability, or Defendant's Act or Omission?

15.3 We ask consultees which, if any, of the following five options (discussed in paragraphs 12.9 to 12.21) they prefer, and why:-
Option one: date of discoverability
Option two: date of discoverability or accrual of the cause of action
Option three: date of accrual of the cause of action
Option four: date of the act or omission giving rise to the cause of action
Option five: date of accrual of the cause of action for contract claims; date of discoverability for tort claims[1]
Before expressing their views we would urge consultees to consider the definition of the date of discoverability (including corporate knowledge) discussed at paragraphs 12.26 - 12.87. We would also ask consultees to bear in mind paragraphs 14.1 - 14.6 where we indicate that, subject to the normal rules on the validity of contractual terms, contracting parties should be able to provide their own "more certain" regime should they so wish. We would be particularly keen to hear consultees' views as to whether option one (which we provisionally prefer) should be rejected because of the danger that, in contrast to the present law, it would lead to satellite litigation and would increase legal costs. If consultees feel that none of the above options is appropriate, they are requested to set out their preferred alternative. (Paragraph 12.22).

[1] See para 12.7, n 9, above.

(2) Definition of the Date of Discoverability

Knowledge of which facts?

15.4 We ask consultees whether they agree with our provisional proposals that:

(1) the definition of the date of knowledge (or date of discoverability) should focus on three main factual elements:

(a) that the plaintiff has a cause of action

(b) against the defendant which is

(c) significant.

(2) A cause of action should be regarded as significant if a person with the plaintiff's abilities would have reasonably considered the cause of action sufficiently serious to justify instituting proceedings against the defendant, on the assumption that the defendant does not dispute liability and has the resources to meet the claim.

If consultees do not agree with these provisional proposals, what proposals would they prefer? (Paragraph 12.44).

What is meant by actual knowledge (of facts)?

15.5 We ask consultees whether they agree with our provisional views that:

(1) "actual knowledge" should be treated as a straightforward concept and should not be defined in our proposed statute.

(2) the approach of the Court of Appeal in *Spargo v North Essex District Health Authority*[2] should be supported. According to this, the courts should treat actual knowledge as a subjective concept; and a plaintiff, who so firmly believes that he or she has a significant cause of action against the defendant that he or she goes to a solicitor to seek advice about making a claim, should be regarded as having actual knowledge.

(3) as under the present law, once actual knowledge has been acquired, time should run irrespective of subsequent advice to the contrary.

If consultees do not agree with our provisional views we ask them to explain why not, and what alternative approach they would prefer. (Paragraph 12.49).

15.6 We ask consultees whether they agree with our provisional view that it would be prudent to clarify in the proposed legislation that normal rules of agency would apply so that a plaintiff would be taken to have his or her agent's actual knowledge of information acquired within the agent's authority to act for the plaintiff. (Paragraph 12.51).

[2] [1997] PIQR P235.

What is meant by constructive knowledge (of facts)?

15.7 We ask consultees whether they agree with our provisional views that:

(1) constructive knowledge should include a large subjective element so that it should be defined as "what the plaintiff in his circumstances and with his abilities ought to have known had he acted reasonably."

(2) no more elaborate definition of constructive knowledge is required.

If consultees do not agree with our provisional views we ask them to explain why not, and what alternative approach they would prefer. (Paragraph 12.57).

Should knowledge of the law be relevant?

15.8 We ask consultees whether knowledge for the purposes of the date of discoverability:

(1) should always include knowledge of the law, including knowledge of one's entitlement to a legal remedy for what has occurred; or

(2) should include knowledge of the law only in so far as such knowledge is necessary for the plaintiff to know all the elements of his or her cause of action.

If consultees do not agree with either of these options, we ask them what alternative proposals they would prefer. (Paragraph 12.69).

How would discoverability apply to corporate plaintiffs?

15.9 Given the uncertainty of how the courts would apply the principles of agency and the identification test to discoverability by a corporate plaintiff - and given that this is already an issue of uncertainty under the present law of limitations - it is our provisional view that we should lay down specific statutory provisions setting out how discoverability would apply to corporate plaintiffs. We ask consultees if they agree. If consultees disagree, we ask them how they believe the courts would, or should, apply the discoverability test to corporate plaintiffs. (Paragraph 12.76).

Actual knowledge

15.10 We provisionally propose that:

(1) there should be a general rule that a company has actual knowledge, for the purposes of the discoverability test, where an employee or officer has that knowledge;

(2) but that this rule should not apply where the company can show that the employee or officer did not himself have authority to act on the information, and

(a) the individual in question did not in fact communicate it to a superior or anyone else within the company with the authority to act on the information, *and*

(b) the individual would not be expected, in the course of his or her employment or under a duty to the company, to communicate that information to a superior or anyone else within the company with the authority to act on the information.

(3) "Communication" for these purposes would include not only direct personal communication with the superior or the person with the relevant authority, but indirect communication via another person in the company.

(4) To "act on the information" for these purposes would mean to initiate litigation or to take preliminary steps thereto.

Consultees are asked if they agree with our provisional view and, if not, what alternative proposals they would prefer. (Paragraph 12.80).

15.11 We provisionally recommend that, in an action by the company against a defendant who has deliberately concealed relevant facts from the company, the defendant's knowledge should not count as the knowledge of the company. We ask consultees where they agree, and, if not, to say why not. (Paragraph 12.83).

Constructive knowledge

15.12 It is our provisional view that:

(1) there should be a general rule that a company has constructive knowledge of any fact relevant to its cause of action of which one of its employees or officers has constructive knowledge;

(2) but that this rule should not apply where the company can show that the employee or officer concerned would not, had he or she had actual knowledge of that fact, be expected, in the course of his or her employment or under a duty to the company, to act on the information or to communicate that information to a superior or anyone else within the company with the authority to act on the information.

(3) No provision should be made for "structural constructive knowledge".

Do consultees agree? If consultees do not agree, would they prefer to have no test for corporate constructive knowledge, so that the initial limitation period would start for a corporate plaintiff only on the date the company had actual knowledge of the facts relevant to the cause of action under the test set out in paragraph 12.80 above? (Paragraph 12.87).

2 HOW LONG SHOULD THE LIMITATION PERIOD BE?

15.13 We provisionally recommend the adoption within the core regime of a uniform period of limitation. We ask consultees whether they agree and, if not, to say why not. (Paragraph 12.89).

15.14 We provisionally recommend that the uniform limitation period within the core regime should be three years. We ask consultees:

(1) Do you agree with that provisional recommendation?

(2) Would you prefer a limitation period of four years? or

(3) What period (other than three or four years) do you consider is more appropriate?

15.15 What one considers to be an appropriate limitation period is likely to depend on one's preferred starting date. The above provisional recommendation assumes a discoverability starting date. We ask those consultees who have favoured a different starting date than discoverability (that is, who have favoured one of the options 2 - 5 in paragraphs 12.14 - 12.20 above) to say what limitation period they consider appropriate in respect of their preferred starting date. (Paragraphs 12.95 - 12.96).

3 A LONG-STOP?

15.16 We ask consultees whether they agree with our provisional view that, to counterbalance the "discoverability" starting point, there should be a long-stop, including for personal injury claims. If consultees disagree, we ask them whether they would favour a long-stop except for personal injury claims. (Paragraph 12.104).

15.17 Our provisional view is that, if there is to be a long-stop under the core regime, it should run from the date of the act or omission of the defendant which gives rise to the claim. We ask consultees whether they agree. We also ask consultees whether, for construction liability claims, the date of the act or omission of the defendant should be deemed to be the date of completion of the works, and, if so, how "construction liability claims" should be defined. (Paragraph 12.108).

15.18 Our provisional view is that, under our core regime, there should be a uniform long-stop period of 10 years, applicable to all actions other than for personal injury. We consider that personal injury claims should be subject to a long-stop period of 30 years. We ask consultees whether they agree. If not, we ask them whether they would prefer a long-stop of 12 years, or 15 years, for non-personal injury claims. (Paragraph 12.113).

4 FACTORS EXTENDING THE LIMITATION PERIOD

(1) Disability

15.19 As under the present law, our provisional view is that disability should extend an initial limitation period so that the period starts to run only when the plaintiff's disability has ceased. We ask consultees whether they agree. (Paragraph 12.115).

Definition

15.20 Consultees are asked

(1) whether they agree with our provisional view that the definition of "lack of capacity" in paragraph 12.123 should be adopted as the definition of disability (other than minority) in the law of limitations, and

(2) whether, in addition, the definition of "disability" should make provision for the psychological incapacity suffered by victims of sexual abuse. (Paragraph 12.125).

Supervening Disability

15.21 We ask consultees whether they agree with our provisional view that supervening disability should suspend the running of time under the initial limitation period. If consultees do not agree, we ask them to say why not. (Paragraph 12.128).

The person under a disability has a representative adult

15.22 Consultees are asked whether a limitation period should run against a person under a disability who has a representative adult capable of bringing proceedings on his or her behalf (except where the claim is against the representative). (Paragraph 12.136).

Should disability override a long-stop?

15.23 We consider that, at least in relation to adult disability - where in contrast to minority there is no necessary end to the disability - disability should not override a long-stop. Do consultees agree? (Paragraph 12.142).

15.24 We ask consultees which, if any, of the following three options they favour in relation to the question of whether minority should override a long-stop. These three options are all posited on the assumption that time would not be running against a person under a disability in respect of the initial limitation period (see paragraph 12.136).

(1) Option 1: Minority should override a long-stop (so that the running of time for any act or omission committed during the plaintiff's minority would not commence until the plaintiff is 18).

(2) Option 2: Minority should not override a long-stop (so that a 10 year long-stop would potentially bar a non-personal injury claim even though the plaintiff is a minor).

(3) Option 3: There should be a special long-stop for minors which would end on the later of two dates:

(a) the date the plaintiff reached the age of 21, or

(b) the date the long-stop would have ended in the absence of disability. (Paragraph 12.144).

(2) Deliberate Concealment

15.25 Consultees are asked if they agree with our provisional views that:-

(a) the long-stop limitation period[3] should be inapplicable where the defendant has deliberately concealed from the plaintiff the facts relevant to the discoverability test under the core regime, that is

(i) the facts constituting the cause of action;

(ii) the identity of the defendant; and

(iii) that the cause of action is significant[4]

(whether by act or omission and whether the concealment took place contemporaneously with, or subsequent to, the act or omission giving rise to the cause of action). But, in the absence of deliberate concealment, the long-stop limitation period should apply where the cause of action rests on the mistake of the plaintiff or the fraud of the defendant.

(b) Concealment subsequent to the act or omission giving rise to the cause of action should suspend the running of the long-stop.

(c) As is the case under the present law, for deliberate concealment the defendant must conceal the relevant facts intending the plaintiff not to discover the truth or reckless as to whether the plaintiff discovers the truth or not.

If consultees do not agree with these provisional views, we ask them to say why not. (Paragraph 12.154).

(3) Acknowledgement and Part Payment

15.26 We provisionally recommend that acknowledgement or part payment should continue to restart a limitation period in relation to, at least, the same actions for which this is presently the law. (And by limitation period, we mean to refer to both an initial limitation period and a long-stop). We ask consultees if they agree. (Paragraph 12.156).

15.27 We are provisionally opposed to an additional requirement that a plaintiff should have to show that he or she relied on the acknowledgement or part payment. We ask consultees whether they agree. (Paragraph 12.157).

Should the law on acknowledgement and part payments be extended to all causes of action?

15.28 We provisionally recommend that acknowledgements and part payments should start time running again for all claims, whether liquidated or unliquidated. Consultees are asked whether they agree and, if not, to say why not. (Paragraph 12.167).

[3] Our provisional view, that the initial limitation period should run from discoverability, would 'swallow up' the need for deliberate concealment (or mistake or fraud) to extend the 'initial' limitation period: see para 12.146 above.

[4] And in the case of actions to recover converted goods, the location of the goods: see para 15.41 below.

Should an acknowledgement or part payment bind anyone other than the person making the acknowledgement or payment?

15.29 Though we believe that separate rules should continue to apply to actions in respect of mortgages and for the possession of land, we provisionally recommend that, otherwise, there should be no difference in the effect on third parties of part payments as opposed to acknowledgements: both acknowledgements and part payments should only bind the acknowledgor or the person making the part payment (or their successor). We ask consultees whether they agree with this provisional recommendation. (Paragraph 12.172).

Should an acknowledgement or part payment be capable of reviving a claim if it is made after the limitation period has already expired?

15.30 We provisionally recommend that there should be no reform of the law to enable an acknowledgement or part payment to revive a claim notwithstanding the expiry of a limitation period. We ask consultees whether they agree, or whether they consider that acknowledgements made after the expiry of a limitation period should revive the plaintiff's cause of action (where the expiry of a limitation period serves only to bar the remedy rather than to extinguish the plaintiff's claim). (Plaintiffs 12.177).

15.31 We ask consultees for their views as to whether a contract (for example, a contractual compromise) can be effective to revive a party's rights when those rights would otherwise have been extinguished by the operation of the law of limitations. (Paragraph 12.181).

Other issues

15.32 We take the provisional view that the requirement that an acknowledgement must be in writing if it is to restart a limitation period should remain. "Writing" for these purposes would include any recording by any means of a representation of words, symbols or numbers, whether recorded by the acknowledgor or the recipient of the acknowledgement. We ask consultees

(1) whether they agree with our provisional view that only acknowledgements in writing should be effective to restart a limitation period?

(2) whether they think that oral acknowledgements should in some, but not all, circumstances extend a limitation period, and if so, in what circumstances they would recognise an oral acknowledgement as having this effect? (Paragraph 12.184).

15.33 Our provisional view is that, other than the changes which we have provisionally recommended above, the law on acknowledgements and part payments is not in need of reform. We ask consultees if they agree. If consultees disagree, they are invited to tell us of any problems in the existing law and of the reforms which they consider desirable (Paragraph 12.186).

5 SHOULD THE COURTS HAVE A DISCRETION TO DISAPPLY OR EXCLUDE A LIMITATION PERIOD?

15.34 We ask consultees whether they agree with our provisional view that within our core regime the courts should not have a discretion to disapply an initial limitation period or a long-stop. If consultees disagree, we ask them in what circumstances they consider that the courts should have a discretion to disapply limitation periods. (Paragraph 12.196).

THE RANGE OF THE CORE REGIME

1 ACTIONS ON A SPECIALTY

15.35 Our provisional view is that specialties should be subject to our core regime. We ask consultees whether they agree, and if not, to say why not. (Paragraph 13.6)

2 ACTIONS UNDER THE LAW REFORM (MISCELLANEOUS PROVISIONS) ACT 1934

15.36 Our provisional view is that claims under the Law Reform (Miscellaneous Provisions) Act 1934 should be subject to the core regime, save that (as under the present law in relation to claims for personal injury) the initial limitation period should start from the later of the date the cause of action was discoverable by the plaintiff (that is, the personal representative) or the date of death. Do consultees agree? (Paragraph 13.10).

3 ACTIONS UNDER THE FATAL ACCIDENTS ACT 1976

15.37 We provisionally consider that claims under the Fatal Accidents Act 1976 should be subject to our core regime save that, as under the present law, the date of discoverability should refer to the knowledge of the dependants for whom the action is brought. Do consultees agree? (Paragraph 13.16).

4 ACTIONS BY VICTIMS OF CHILD SEXUAL ABUSE

15.38 We are provisionally of the view that claims by victims of child sexual abuse should continue to be subject to a limitation period. We ask consultees whether they agree and, if not, to say why not. (Paragraph 13.25).

15.39 Our provisional view is that our core regime (in essence, three years from discoverability with a long-stop of 30 years from the date of the abuse and postponement - unless, possibly, there is a representative adult other than the defendant - for minority and adult disability) should apply, rather than a separate regime, to claims by victims of child sexual abuse. We ask consultees whether they agree and, if not, to say why not. (Paragraph 13.37).

5 ACTIONS FOR DEFAMATION OR MALICIOUS FALSEHOOD

15.40 We ask consultees whether they agree with our provisional view that defamation and malicious falsehood should be subject to our core regime. If consultees do not agree, we ask them what, if any, reform to the present law they would prefer. (Paragraph 13.43).

6 ACTIONS FOR CONVERSION

Are modifications to the core regime needed for conversion generally?

15.41 We provisionally propose that for actions to recover converted property - and, possibly, for all actions for conversion - the definition of discoverability should require knowledge of the location of the property in addition to the other three elements (knowledge of the facts constituting the cause of action, the identity of the defendant and the significance of the cause of action) to start time running. We ask consultees for their views on this issue. (Paragraph 13.49).

15.42 We ask consultees whether they agree with our provisional view that, at least in respect of actions for conversions that are not thefts or theft-related, the long-stop under our core regime should run from the date of the first conversion. (Paragraph 13.50).

Are further modifications to the core regime needed for conversions constituting, or related to, theft?

15.43 We ask consultees whether they favour the retention of the theft exception, whereby conversions constituting, or related to, theft (other than a claim against a bona fide purchaser) are not subject to a limitation period; or whether, on the contrary, they agree with our provisional view that the initial limitation period under the core regime (that is, three years from the date of discoverability) should apply to conversions constituting, or related to, theft. If consultees support the retention of the theft exception we ask them to explain why. (Paragraph 13.57).

15.44 We ask consultees whether they agree with our provisional views that where goods have been stolen:-

(a) The long-stop period should apply in relation to actions for conversion against bona fide purchasers of the goods, and that the long-stop period should commence on the date of the purchase or, where there has been more than one purchase, on the date of the first bona fide purchase.

(b) The long-stop period should be disapplied in relation to actions for conversion against anyone other than bona fide purchasers of the goods.

If consultees do not agree, we ask them what alternative they would prefer.

15.45 We further ask consultees, who agree with our provisional views in the previous paragraph, whether they consider that the desired result can be achieved by a provision on deliberate concealment analogous to the present section 32(1), (3) and (4) of the 1980 Act or whether, on the contrary, they consider that special rules on long-stops are necessary to deal with claims for conversions constituting, or related to, theft. (Paragraphs 13.63 - 13.64).

The effect of the expiry of the limitation period

15.46 Our provisional view is that where goods have been converted (whether there has been a theft or not) the plaintiff's title should become extinguished when both the following conditions are satisfied: (i) the limitation period (whether the initial period or the long-stop) has expired in relation to the plaintiff's claim in conversion against a defendant; and (ii) at the time when that limitation period

expired the goods remained in the possession of that defendant. We ask consultees whether they agree and, if not, to say why not. (Paragraph 13.69).

7 ACTIONS BY A SUBSEQUENT OWNER OF DAMAGED PROPERTY

15.47 Our provisional view is that (a) contrary to the present law, a fresh cause of action should accrue to a subsequent owner of damaged property even where the previous owner had knowledge of the material facts; and (b) the core regime should apply subject to the minor modification that the initial limitation period should start on the date when the plaintiff acquires an interest in the property, where this is later than the date of discoverability. Do consultees agree? (Paragraph 13.76).

8 ACTIONS IN RESTITUTION

15.48 We provisionally propose that restitutionary actions should be subject to our core regime (with the qualification expressed at paragraph 15.49). We ask consultees whether they agree and, if not, to say why not. (Paragraph 13.83).

9 ACTIONS FOR A CONTRIBUTION OR AN INDEMNITY

(1) Contribution under Section 1 of the Civil Liability (Contribution) Act 1978

15.49 We ask consultees whether they agree with our provisional view that the core regime should apply to actions for contribution under section 1 of the Civil Liability (Contribution) Act 1978 subject to the modification that, to avoid the problem of a chain of contribution claims, there should be a single long-stop running from the date of the judgment or settlement in the original action to which the contribution claim relates. We also ask consultees whether they would favour shortening the length of the ten year long-stop in this context and, if so, what length of long-stop they would favour. (Paragraph 13.91).

(2) Contractual indemnity

15.50 We ask consultees whether they agree with our provisional view that actions for a contractual indemnity should be subject to our core regime subject to the modification that, to avoid the problem of a chain of indemnities, there should be a single long-stop running from the date of the judgment or settlement in the original action to which the indemnity claim relates. We ask consultees whether they would favour shortening the length of the ten year long-stop in this context and, if so, what length of long-stop they would favour. (Paragraph 13.97).

10 BREACH OF TRUST AND RELATED ACTIONS

15.51 Consultees are asked whether they agree with our provisional view that the core regime should apply to actions for breach of trust and to recover trust property, and that the core regime, which includes provisions dealing with deliberate concealment, obviates the need for separate provisions in respect of fraudulent breaches of trust. We also ask consultees whether they agree with our provisional view that the core regime should apply in the same way to actions for breach of fiduciary duty, for breach by a trustee of the "self-dealing" and "fair dealing" rules,

and for dishonestly assisting or procuring a breach of fiduciary duty, in so far as these do not constitute a breach of trust. (Paragraph 13.104).

15.52 We ask consultees whether they agree with our provisional view that the core regime should apply to actions in respect of the personal estate of a deceased person (including any claims to arrears of interest on legacies). (Paragraph 13.108).

11 ACTIONS TO RECOVER LAND AND RELATED ACTIONS

Actions to recover land

15.53 We provisionally recommend that, while the core regime's initial limitation period of three years from the date of discoverability should not apply to actions to recover land, a long-stop limitation period (commencing on the date of adverse possession or, if later, the date on which the plaintiff's interest becomes an interest in possession) should apply to, and be the sole limitation period for, actions to recover land. We ask consultees whether they agree. We also ask consultees whether they consider that the length of the long-stop period applicable to actions to recover land should be the same as the length of the long-stop period under the core regime, that is, ten years. Alternatively we ask consultees whether they would support a twelve-year long-stop period applicable only to actions to recover land. (Paragraph 13.121).

15.54 Our provisional view is that the additional protection for spiritual and eleemosynary corporations sole and for the Crown, in respect of actions to recover land, should be abolished. Consultees are asked whether they agree. Consultees are also asked whether, as an alternative, they consider that it would be justified to retain a special limitation period for the Crown in certain circumstances, for example, claims relating to foreshore or sea bed, or claims to property acquired as bona vacantia or by escheat. If so, they are asked to comment on the circumstances in which the special limitation period should apply, and the length of the period. (Paragraph 13.126).

15.55 We provisionally recommend that where a person has been in adverse possession of land as against the Crown and the limitation period expires: (i) in the case of unregistered land the Crown's title to the land should be extinguished so far (but only so far) as its continued existence would be inconsistent with the squatter's acquisition of an estate in fee simple and (ii) in the case of registered land the trust under section 75(1) of the Land Registration Act 1925 should take effect in relation to the Crown's estate in the land so far (but only so far) as its continued existence would be inconsistent with the squatter's acquisition of an estate in fee simple. We ask consultees whether they agree. (Paragraph 13.127).

Other land-related actions

15.56 We ask consultees whether they agree with our provisional view that the limitation period for actions to recover principal or interest relating to a loan secured by a mortgage should not be three years from the date of discoverability but should be the long-stop period of 10 years (or, under our alternative proposal for land related actions, 12 years) running from the date when the money in question should have been paid and was not. (Paragraph 13.131).

15.57 We provisionally recommend that the long stop period under the core regime should apply to a redemption action brought by a mortgagor who is not in possession of the property, so that the limitation period for such an action would be 10 years (or, under our alternative proposal for land related actions, 12 years) running from the date on which the mortgagor ceased to be in possession. We ask consultees whether they agree. (Paragraph 13.134).

15.58 We make no provisional recommendation as to whether a mortgagee should continue to be entitled to deduct from the proceeds of sale of the mortgaged property arrears of interest whose recovery is statute barred. We ask consultees whether they agree that we should make no such recommendation in this project. (Paragraph 13.135).

15.59 Consultees are asked whether they agree with our provisional view that actions to recover arrears of rent should fall within our core regime (that is, there would be an initial limitation period of three years from discoverability with a long-stop of 10 years from when the rent should have been paid). (Paragraph 13.136).

12 ACTIONS ON A JUDGMENT

15.60 Our provisional view is that actions on a judgment should be subject to the core regime. We ask consultees whether they agree and, if they do not, to say why not. (Paragraph 13.138).

13 ACTIONS ON AN ARBITRATION AWARD

15.61 We provisionally recommend that actions on an arbitration award should be subject to the core regime. Consultees are asked if they agree and, if they do not, to say why not. (Paragraph 13.139).

14 ACTIONS ON A STATUTE

15.62 We ask consultees whether they agree with our provisional recommendation that actions on a statute should be subject to our core regime. If consultees do not agree, we ask them to say why not. (Paragraph 13.141).

15 ACTIONS AGAINST PUBLIC AUTHORITIES

15.63 Our provisional view is that, as under the present law, no special protection in limitations law should be given to public authorities. Where the core regime would apply to any other defendant, it should therefore apply in the same way to actions against public authorities. Do consultees agree? (Paragraph 13.153).

16 SHOULD THE CORE REGIME APPLY TO PROCEEDINGS UNDER SECTION 459 OF THE COMPANIES ACT 1985?

15.64 Our provisional view is that the core regime should apply to proceedings under section 459 of the Companies Act 1985.[5] However, we would welcome consultees' views on this in the light of the difficulties highlighted in paragraphs

[5] We would envisage that the approach to section 459 proceedings would apply also to analogous proceedings, such as a contributory's petition to wind up a company on just and equitable grounds.

13.155 - 13.157. If consultees do not consider that the core regime should apply to section 459 proceedings:

(1) Do they consider that a longer initial limitation period should apply, and if so what period?

(2) Do they consider that the initial limitation period should run from some starting point other than the date of discoverability and, if so, what starting point?

(3) Do they consider that a different length of long-stop should apply? (Paragraph 13.158).

17 SHOULD THE CORE REGIME APPLY TO EQUITABLE, AS WELL AS, COMMON LAW REMEDIES?

15.65 We ask consultees whether they agree with our provisional view that (subject to the question dealt with in the next paragraph) where the core regime applies to common law remedies for a cause of action, it should also apply to equitable remedies for that cause of action. If consultees do not agree, we ask them how they think such equitable remedies should be dealt with for limitation purposes. (Paragraph 13.165).

15.66 We incline to the view that, so as to avoid any question of our proposals affecting the long-established rule that a contract to transfer a legal interest is as good as a transfer of that interest, a limitation period for specific performance should not be introduced where under the present law (as exemplified by *Williams v Greatrex*)[6] laches does not operate to bar specific performance of a contract. We ask consultees for their views on this issue. If consultees are against the introduction of a limitation period for specific performance in this situation, we ask them whether they would nevertheless favour, in this situation, a limitation period being introduced for damages in lieu of specific performance so as to produce assimilation, for the same breach of contract, with the limitation period applicable to an action for common law damages. (Paragraph 13.167).

15.67 We ask consultees which of the following three options, if any, they prefer. In each, by laches we do not mean to include either acquiescence, or delay in prosecuting, rather than instituting, an action.

(1) Option 1: Laches should not apply to final equitable remedies where the relevant cause of action is governed by the core regime but should continue to be relevant to applications for interlocutory relief (for example, interlocutory injunctions).

(2) Option 2: Laches should not apply to (final) equitable monetary remedies where the relevant cause of action is governed by the core regime but should continue to apply to equitable specific remedies (for example, specific performance or injunctions) whether interlocutory or final.

[6] [1957] 1 WLR 31.

(3) Option 3: Laches should continue to apply to all (interlocutory or final) equitable remedies (including specific performance, injunctions, an account of profits, equitable damages, equitable compensation, and rescission) as opposed to common law remedies.

If consultees feel that none of the options discussed above is appropriate, they are requested to set out their preferred alternative. (Paragraph 13.176).

18 THE INTERRELATIONSHIP BETWEEN OUR PROPOSED CORE REGIME AND STATUTORY LIMITATION PERIODS OUTSIDE THE 1980 ACT

We ask consultees whether they agree with our provisional view that, analogously to section 39 of the Limitation Act 1980, the core regime we are proposing should not apply where a limitation period is prescribed in another enactment. We also ask consultees whether they agree that the limitation periods in the following statutes do not merit special treatment and should be brought within the core regime: the Rent Act 1977, section 94; the Vaccine Damages Payments Act 1979, section 3; the Compulsory Purchase (Vesting Declarations) Act 1981, section 10; the Copyright, Designs and Patents Act 1988, sections 113 and 203. We would also ask consultees for their views as to whether there are other limitation periods in other statutes that ought to be brought within the core regime. (Paragraph 13.184).

19 A "SWEEPING-UP" OR "DEFAULT" PROVISION?

15.68 We ask consultees:

(1) whether they agree with our provisional view that a new Limitations Bill should include a "sweeping-up" or "default" clause stating that the core regime applies to all causes of action unless excluded by another provision in the Bill (or any other enactment);

(2) whether they consider that a limitation period (and if so what limitation regime) should apply to proceedings by the Crown for the recovery of any tax or duty or to forfeiture proceedings under the Customs & Excise Acts. (Paragraph 13.187).

ADDITIONAL ISSUES

1 AGREEMENTS TO CHANGE THE LIMITATION PERIOD

15.69 We ask consultees whether (assuming the agreement is otherwise valid) they agree with our provisional view that it should be possible, by agreement:

(1) to reduce the initial limitation period or long-stop;

(2) to extend the initial limitation period; and

(3) to change the starting date for the initial limitation period.

We also ask consultees for their views as to whether, by agreement, a long-stop period may or may not be extended or a long-stop starting date may or may not be changed. (Paragraph 14.6).

2. WHAT THE PLAINTIFF NEEDS TO DO TO PREVENT THE EXPIRY OF THE LIMITATION PERIOD: ISSUE OR SERVICE OF THE PROCEEDINGS?

15.70 We are provisionally of the view that, as under the present law, the limitation period should stop running when proceedings are issued by the plaintiff. Consultees are asked if they agree. (Paragraph 14.10).

3. NEW CLAIMS IN EXISTING ACTIONS

15.71 We are provisionally of the view that new claims should be permitted provided that they are sufficiently related to the original cause of action, even where the limitation period has expired since the proceedings were started. Whether the addition of a new claim is so related will be a question of fact for the courts. Consultees are asked if they agree and, if they do not, to say why not. (Paragraph 14.14).

4 THE EFFECT OF THE EXPIRY OF THE LIMITATION PERIOD

15.72 Our provisional view is that (with the exception explained in paragraphs 13.65 - 13.69 above) no change should be made to the present law on the effect of the expiry of a limitation period. Consultees are asked if they agree. (Paragraph 14.21).

5 THE "SEVCON PROBLEM": RESTRICTIONS ON THE PLAINTIFF'S RIGHT TO SUE.

15.73 We ask consultees whether they agree with our provisional view that, where the plaintiff's right to bring the action is subject to a restriction, the running of time, for the purposes of the initial limitation period and long-stop, should be suspended from the date the plaintiff has done all that he or she could do to lift that restriction. If consultees do not agree with this, we ask them to say why they do not agree. (Paragraph 14.27).

6 THE BURDEN OF PROOF

15.74 We provisionally propose that, in general, the burden of proof on limitation should continue to be on the plaintiff. (Paragraph 14.31).

15.75 We ask consultees whether they would favour placing the burden of proving that the plaintiff's claim is barred by the long-stop on the defendant. (Paragraph 14.32).

7 COMMENCEMENT AND RETROSPECTIVITY

15.76 Our provisional view is that the proposed new Act would apply to causes of action accruing before it commences, except where the cause of action has been barred by the expiry of a limitation period under the provisions of a previous Act or proceedings have been instituted in respect of a cause of action before the commencement of the Act. Consultees are asked if they agree. (Paragraph 14.36).

APPENDIX

LIMITATION ACT 1980[1]

(1980 Chapter 58)

An Act to consolidate the Limitation Acts 1939 to 1980

[13 November 1980]

PART I
ORDINARY TIME LIMITS FOR DIFFERENT CLASSES OF ACTION

Time limits under Part I subject to extension or exclusion under Part II

1 Time limits under Part 1 subject to extension or exclusion under Part II

(1) This Part of this Act gives the ordinary time limits for bringing actions of the various classes mentioned in the following provisions of this Part.

(2) The ordinary time limits given in this Part of this Act are subject to extension or exclusion in accordance with the provisions of Part II of this Act.

Actions founded on tort

2 Time limit for actions founded on tort

An action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued.

3 Time limit in case of successive conversions and extinction of title of owner of converted goods

(1) Where any cause of action in respect of the conversion of a chattel has accrued to any person and, before he recovers possession of the chattel, a further conversion takes place, no action shall be brought in respect of the further conversion after the expiration of six years from the accrual of the cause of action in respect of the original conversion.

(2) Where any such cause of action has accrued to any person and the period prescribed for bringing that action has expired and he has not during that period recovered possession of the chattel, the title of that person to the chattel shall be extinguished.

[1] As amended by the Supreme Court Act 1981, the Mental Health Act 1983, the Patronage (Benefices) Measure 1986, the Latent Damage Act 1986, the Consumer Protection Act 1987, the Arbitration Act 1996, the Defamation Act 1996, the Trusts of Land and Appointment of Trustees Act 1996, the Protection from Harassment Act 1997, the Land Registration Act 1997. Only schedules 1 and 2 to the Act have been included.

4 Special time limit in case of theft

(1) The right of any person from whom a chattel is stolen to bring an action in respect of the theft shall not be subject to the time limits under sections 2 and 3(1) of this Act, but if his title to the chattel is extinguished under section 3(2) of this Act he may not bring an action in respect of a theft preceding the loss of his title, unless the theft in question preceded the conversion from which time began to run for the purposes of section 3(2).

(2) Subsection (1) above shall apply to any conversion related to the theft of a chattel as it applies to the theft of a chattel; and, except as provided below, every conversion following the theft of a chattel before the person from whom it is stolen recovers possession of it shall be regarded for the purposes of this section as related to the theft.

If anyone purchases the stolen chattel in good faith neither the purchase nor any conversion following it shall be regarded as related to the theft.

(3) Any cause of action accruing in respect of the theft or any conversion related to the theft of a chattel to any person from whom the chattel is stolen shall be disregarded for the purpose of applying section 3(1) or (2) of this Act to his case.

(4) Where in any action brought in respect of the conversion of a chattel it is proved that the chattel was stolen from the plaintiff or anyone through whom he claims it shall be presumed that any conversion following the theft is related to the theft unless the contrary is shown.

(5) In this section "theft" includes--

(a) any conduct outside England and Wales which would be theft if committed in England and Wales; and

(b) obtaining any chattel (in England and Wales or elsewhere) in the circumstances described in section 15(1) of the Theft Act 1968 (obtaining by deception) or by blackmail within the meaning of section 21 of that Act;

and references in this section to a chattel being "stolen" shall be construed accordingly.

4A. Time limit for actions for defamation or malicious falsehood

The time limit under section 2 of this Act shall not apply to an action for--

(a) libel or slander, or

(b) slander of title, slander of goods or other malicious falsehood,

but no such action shall be brought after the expiration of one year from the date on which the cause of action accrued.

Actions founded on simple contract

5 Time limit for actions founded on simple contract

An action founded on simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued.

6 Special time limit for actions in respect of certain loans

(1) Subject to subsection (3) below, section 5 of this Act shall not bar the right of action on a contract of loan to which this section applies.

(2) This section applies to any contract of loan which--

(a) does not provide for repayment of the debt on or before a fixed or determinable date; and

(b) does not effectively (whether or not it purports to do so) make the obligation to repay the debt conditional on a demand for repayment made by or on behalf of the creditor or on any other matter;

except where in connection with taking the loan the debtor enters into any collateral obligation to pay the amount of the debt or any part of it (as, for example, by delivering a promissory note as security for the debt) on terms which would exclude the application of this section to the contract of loan if they applied directly to repayment of the debt.

(3) Where a demand in writing for repayment of the debt under a contract of loan to which this section applies is made by or on behalf of the creditor (or, where there are joint creditors, by or on behalf of any one of them) section 5 of this Act shall thereupon apply as if the cause of action to recover the debt had accrued on the date on which the demand was made.

(4) In this section "promissory note" has the same meaning as in the Bills of Exchange Act 1882.

7 Time limit for actions to enforce certain awards

An action to enforce an award, where the submission is not by an instrument under seal, shall not be brought after the expiration of six years from the date on which the cause of action accrued.

General rule for actions on a specialty

8 Time limit for actions on a specialty

(1) An action upon a specialty shall not be brought after the expiration of twelve years from the date on which the cause of action accrued.

(2) Subsection (1) above shall not affect any action for which a shorter period of limitation is prescribed by any other provision of this Act.

Actions for sums recoverable by statute

9 Time limit for actions for sums recoverable by statute

(1) An action to recover any sum recoverable by virtue of any enactment shall not be brought after the expiration of six years from the date on which the cause of action accrued.

(2) Subsection (1) above shall not affect any action to which section 10 of this Act applies.

10 Special time limit for claiming contribution

(1) Where under section 1 of the Civil Liability (Contribution) Act 1978 any person becomes entitled to a right to recover contribution in respect of any damage from any other person, no action to recover contribution by virtue of that right shall be brought after the expiration of two years from the date on which that right accrued.

(2) For the purposes of this section the date on which a right to recover contribution in respect of any damage accrues to any person (referred to below in this section as "the relevant date") shall be ascertained as provided in subsections (3) and (4) below.

(3) If the person in question is held liable in respect of that damage--

(a) by a judgment given in any civil proceedings; or

(b) by an award made on any arbitration;

the relevant date shall be the date on which the judgment is given, or the date of the award (as the case may be).

For the purposes of this subsection no account shall be taken of any judgment or award given or made on appeal in so far as it

varies the amount of damages awarded against the person in question.

(4) If, in any case not within subsection (3) above, the person in question makes or agrees to make any payment to one or more persons in compensation for that damage (whether he admits any liability in respect of the damage or not), the relevant date shall be the earliest date on which the amount to be paid by him is agreed between him (or his representative) and the person (or each of the persons, as the case may be) to whom the payment is to be made.

(5) An action to recover contribution shall be one to which sections 28, 32 and 35 of this Act apply, but otherwise Parts II and III of this Act (except sections 34, 37 and 38) shall not apply for the purposes of this section.

Actions in respect of wrongs causing personal injuries or death

11 Special time limit for actions in respect of personal injuries

(1) This section applies to any action for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under a statute or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to the plaintiff or any other person.

(1A) This section does not apply to any action brought for damages under section 3 of the Protection from Harassment Act 1997.

(2) None of the time limits given in the preceding provisions of this Act shall apply to an action to which this section applies.

(3) An action to which this section applies shall not be brought after the expiration of the period applicable in accordance with subsection (4) or (5) below.

(4) Except where subsection (5) below applies, the period applicable is three years from--

(a) the date on which the cause of action accrued; or

(b) the date of knowledge (if later) of the person injured.

(5) If the person injured dies before the expiration of the period mentioned in subsection (4) above, the period applicable as respects the cause of action surviving for the benefit of his estate by virtue of section 1 of the Law Reform (Miscellaneous Provisions) Act 1934 shall be three years from--

(a) the date of death; or

(b) the date of the personal representative's knowledge;

whichever is the later.

(6) For the purposes of this section "personal representative" includes any person who is or has been a personal representative of the deceased, including an executor who has not proved the will (whether or not he has renounced probate) but not anyone appointed only as a special personal representative in relation to settled land; and regard shall be had to any knowledge acquired by any such person while a personal representative or previously.

(7) If there is more than one personal representative, and their dates of knowledge are different, subsection (5)(b) above shall be read as referring to the earliest of those dates.

11A Actions in respect of defective products

(1) This section shall apply to an action for damages by virtue of any provision of Part I of the Consumer Protection Act 1987.

(2) None of the time limits given in the preceding provisions of this Act shall apply to an action to which this section applies.

(3) An action to which this section applies shall not be brought after the expiration of the period of ten years from the relevant time, within the meaning of section 4 of the said Act of 1987; and this subsection shall operate to extinguish a right of action and shall do so whether or not that right of action had accrued, or time under the following provisions of this Act had begun to run, at the end of the said period of ten years.

(4) Subject to subsection (5) below, an action to which this section applies in which the damages claimed by the plaintiff consist of or include damages in respect of personal injuries to the plaintiff or any other person or loss of or damage to any property, shall not be brought after the expiration of the period of three years from whichever is the later of--

(a) the date on which the cause of action accrued; and

(b) the date of knowledge of the injured person or, in the case of loss of or damage to property, the date of knowledge of the plaintiff or (if earlier) of any person in whom his cause of action was previously vested.

(5) If in a case where the damages claimed by the plaintiff consist of or include damages in respect of personal injuries to the plaintiff or any other person the injured person died before the expiration of the period mentioned in subsection (4) above, that subsection shall have effect as respects the cause of action surviving for the benefit

of his estate by virtue of section 1 of the Law Reform (Miscellaneous Provisions) Act 1934 as if for the reference to that period there were substituted a reference to the period of three years from whichever is the later of--

(a) the date of death; and

(b) the date of the personal representative's knowledge.

(6) For the purposes of this section "personal representative" includes any person who is or has been a personal representative of the deceased, including an executor who has not proved the will (whether or not he has renounced probate) but not anyone appointed only as a special personal representative in relation to settled land; and regard shall be had to any knowledge acquired by any such person while a personal representative or previously.

(7) If there is more than one personal representative and their dates of knowledge are different, subsection (5)(b) above shall be read as referring to the earliest of those dates.

(8) Expressions used in this section or section 14 of this Act and in Part 1 of the Consumer Protection Act 1987 have the same meanings in this section or that section as in that Part; and section 1(1) of that Act (Part I to be construed as enacted for the purpose of complying with the product liability Directive) shall apply for the purpose of construing this section and the following provisions of this Act so far as they relate to an action by virtue of any provision of that Part as it applies for the purpose of construing that Part.

12 Special time limit for actions under Fatal Accidents legislation

(1) An action under the Fatal Accidents Act 1976 shall not be brought if the death occurred when the person injured could no longer maintain an action and recover damages in respect of the injury (whether because of a time limit in this Act or in any other Act, or for any other reason).

Where any such action by the injured person would have been barred by the time limit in section 11 or 11A of this Act, no account shall be taken of the possibility of that time limit being overridden under section 33 of this Act.

(2) None of the time limits given in the preceding provisions of this Act shall apply to an action under the Fatal Accidents Act 1976, but no such action shall be brought after the expiration of three years from--

(a) the date of death; or

(b) the date of knowledge of the person for whose benefit the action is brought;

whichever is the later.

(3) An action under the Fatal Accidents Act 1976 shall be one to which sections 28, 33 and 35 of this Act apply, and the application to any such action of the time limit under subsection (2) above shall be subject to section 39; but otherwise Parts II and III of this Act shall not apply to any such action.

13 Operation of time limit under section 12 in relation to different dependants

(1) Where there is more than one person for whose benefit an action under the Fatal Accidents Act 1976 is brought, section 12(2)(b) of this Act shall be applied separately to each of them.

(2) Subject to subsection (3) below, if by virtue of subsection (1) above the action would be outside the time limit given by section 12(2) as regards one or more, but not all, of the persons for whose benefit it is brought, the court shall direct that any person as regards whom the action would be outside that limit shall be excluded from those for whom the action is brought.

(3) The court shall not give such a direction if it is shown that if the action were brought exclusively for the benefit of the person in question it would not be defeated by a defence of limitation (whether in consequence of section 28 of this Act or an agreement between the parties not to raise the defence, or otherwise).

14 Definition of date of knowledge for purposes of sections 11 and 12

(1) Subject to subsection (1A) below, in sections 11 and 12 of this Act references to a person's date of knowledge are references to the date on which he first had knowledge of the following facts--

(a) that the injury in question was significant; and

(b) that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty; and

(c) the identity of the defendant; and

(d) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant;

and knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant.

(1A) In section 11A of this Act and in section 12 of this Act so far as that section applies to an action by virtue of section 6(1)(a) of the Consumer Protection Act 1987 (death caused by defective product) references to a person's date of knowledge are references to the date on which he first had knowledge of the following facts--

(a) such facts about the damage caused by the defect as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment; and

(b) that the damage was wholly or partly attributable to the facts and circumstances alleged to constitute the defect; and

(c) the identity of the defendant;

but, in determining the date on which a person first had such knowledge there shall be disregarded both the extent (if any) of that person's knowledge on any date of whether particular facts or circumstances would or would not, as a matter of law, constitute a defect and, in a case relating to loss of or damage to property, any knowledge which that person had on a date on which he had no right of action by virtue of Part I of that Act in respect of the loss or damage.

(2) For the purposes of this section an injury is significant if the person whose date of knowledge is in question would reasonably have considered it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.

(3) For the purposes of this section a person's knowledge includes knowledge which he might reasonably have been expected to acquire--

(a) from facts observable or ascertainable by him; or

(b) from facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek;

but a person shall not be fixed under this subsection with knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and,

where appropriate, to act on) that advice.

Actions in respect of latent damage not involving personal injuries

14A Special time limit for negligence actions where facts relevant to cause of action are not known at date of accrual

(1) This section applies to any action for damages for negligence, other than one to which section 11 of this Act applies, where the starting date for reckoning the period of limitation under subsection (4)(b) below falls after the date on which the cause of action accrued.

(2) Section 2 of this Act shall not apply to an action to which this section applies.

(3) An action to which this section applies shall not be brought after the expiration of the period applicable in accordance with subsection (4) below.

(4) That period is either--

(a) six years from the date on which the cause of action accrued; or

(b) three years from the starting date as defined by subsection (5) below, if that period expires later than the period mentioned in paragraph (a) above.

(5) For the purposes of this section, the starting date for reckoning the period of limitation under subsection (4)(b) above is the earliest date on which the plaintiff or any person in whom the cause of action was vested before him first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action.

(6) In subsection (5) above "the knowledge required for bringing an action for damages in respect of the relevant damage" means knowledge both--

(a) of the material facts about the damage in respect of which damages are claimed; and

(b) of the other facts relevant to the current action mentioned in subsection (8) below.

(7) For the purposes of subsection (6)(a) above, the material facts about the damage are such facts about the damage as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was

able to satisfy a judgment.

(8) The other facts referred to in subsection (6)(b) above are--

(a) that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence; and

(b) the identity of the defendant; and

(c) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant.

(9) Knowledge that any acts or omissions did or did not, as a matter of law, involve negligence is irrelevant for the purposes of subsection (5) above.

(10) For the purposes of this section a person's knowledge includes knowledge which he might reasonably have been expected to acquire--

(a) from facts observable or ascertainable by him; or

(b) from facts ascertainable by him with the help of appropriate expert advice which it is reasonable for him to seek;

but a person shall not be taken by virtue of this subsection to have knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice.

14B Overriding time limit for negligence actions not involving personal injuries

(1) An action for damages for negligence, other than one to which section 11 of this Act applies, shall not be brought after the expiration of fifteen years from the date (or, if more than one, from the last of the dates) on which there occurred any act or omission--

(a) which is alleged to constitute negligence; and

(b) to which the damage in respect of which damages are claimed is alleged to be attributable (in whole or in part).

(2) This section bars the right of action in a case to which subsection (1) above applies notwithstanding that--

(a) the cause of action has not yet accrued; or

(b) where section 14A of this Act applies to the action, the date which is for the purposes of that section the starting date for reckoning the period mentioned in subsection (4)(b) of that section has not yet occurred;

before the end of the period of limitation prescribed by this section.

Actions to recover land and rent

15 Time limit for actions to recover land

(1) No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

(2) Subject to the following provisions of this section, where--

(a) the estate or interest claimed was an estate or interest in reversion or remainder or any other future estate or interest and the right of action to recover the land accrued on the date on which the estate or interest fell into possession by the determination of the preceding estate or interest; and

(b) the person entitled to the preceding estate or interest (not being a term of years absolute) was not in possession of the land on that date;

no action shall be brought by the person entitled to the succeeding estate or interest after the expiration of twelve years from the date on which the right of action accrued to the person entitled to the

preceding estate or interest or six years from the date on which the right of action accrued to the person entitled to the succeeding estate or interest, whichever period last expires.

(3) Subsection (2) above shall not apply to any estate or interest which falls into possession on the determination of an entailed interest and which might have been barred by the person entitled to the entailed interest.

(4) No person shall bring an action to recover any estate or interest in land under an assurance taking effect after the right of action to recover the land had accrued to the person by whom the assurance was made or some person through whom he claimed or some person entitled to a preceding estate or interest, unless the action is brought within the period during which the person by whom the assurance was made could have brought such an action.

(5) Where any person is entitled to any estate or interest in land in possession and, while so entitled, is also entitled to any future estate or interest in that land, and his right to recover the estate or interest in possession is barred under this Act, no action shall be brought by that person, or by any person claiming through him, in respect of the future estate or interest, unless in the meantime possession of the land has been recovered by a person entitled to an intermediate estate or interest.

(6) Part I of Schedule 1 to this Act contains provisions for determining the date of accrual of rights of action to recover land in the cases there mentioned.

(7) Part II of that Schedule contains provisions modifying the provisions of this section in their application to actions brought by, or by a person claiming through, the Crown or any spiritual or eleemosynary corporation sole.

16 Time limit for redemption actions

When a mortgagee of land has been in possession of any of the mortgaged land for a period of twelve years, no action to redeem the land of which the mortgagee has been so in possession shall be brought after the end of that period by the mortgagor or any person claiming through him.

17 Extinction of title to land after expiration of time limit

Subject to--

(a) section 18 of this Act; and

(b) section 75 of the Land Registration Act 1925;

at the expiration of the period prescribed by this Act for any person to bring an action to recover land (including a redemption action) the title of that person to the land shall be extinguished.

18 Settled land and land held on trust[2]

(1) Subject to section 21(1) and (2) of this Act, the provisions of this Act shall apply to equitable interests in land*, including interests in the proceeds of the sale of land held upon trust for sale,* as they apply to legal estates.

Accordingly a right of action to recover the land shall, for the purposes of this Act but not otherwise, be treated as accruing to a person entitled in possession to such an equitable interest in the like manner and circumstances, and on the same date, as it would accrue if his interest were a legal estate in the land (and any relevant provision of Part I of Schedule 1 to this Act shall apply in any such case accordingly).

(2) Where the period prescribed by this Act has expired for the bringing of an action to recover land by a tenant for life or a statutory owner of settled land--

(a) his legal estate shall not be extinguished if and so long as the right of action to recover the land of any person entitled to a beneficial interest in the land either has not accrued or has not been barred by this Act; and

(b) the legal estate shall accordingly remain vested in the tenant for life or statutory owner and shall devolve in accordance with the Settled Land Act 1925;

but if and when every such right of action has been barred by this Act, his legal estate shall be extinguished.

(3) Where any land is held upon trust *(including a trust for sale)* and the period prescribed by this Act has expired for the bringing of an action to recover the land by the trustees, the estate of the trustees shall not be extinguished if and so long as the right of action to recover the land of any person entitled to a beneficial interest in the land *or in the proceeds of sale* either has not accrued or has not been barred by this Act; but if and when every such right of action has been so barred the estate of the trustees shall be extinguished.

(4) Where--

(a) any settled land is vested in a statutory owner; or

[2] The words in this section in italics have been repealed by the Trusts of Land and Appointment of Trustees Act 1996, s 25(2) and Schedule 4, with effect from 1 January 1997, subject to the saving provisions in s 25(4) and 25(5).

(b) any land is held upon trust *(including a trust for sale)*;

an action to recover the land may be brought by the statutory owner or trustees on behalf of any person entitled to a beneficial interest in possession in the land *or in the proceeds of sale* whose right of action has not been barred by this Act, notwithstanding that the right of action of the statutory owner or trustees would apart from this provision have been barred by this Act.

19 Time limit for actions to recover rent

No action shall be brought, or distress made, to recover arrears of rent, or damages in respect of arrears of rent, after the expiration of six years from the date on which the arrears became due.

Actions to recover money secured by a mortgage or charge or to recover proceeds of the sale of land

20 Time limit for actions to recover money secured by a mortgage or charge or to recover proceeds of the sale of land

(1) No action shall be brought to recover--

(a) any principal sum of money secured by a mortgage or other charge on property (whether real or personal); or

(b) proceeds of the sale of land;

after the expiration of twelve years from the date on which the right to receive the money accrued.

(2) No foreclosure action in respect of mortgaged personal property shall be brought after the expiration of twelve years from the date on which the right to foreclose accrued.

But if the mortgagee was in possession of the mortgaged property after that date, the right to foreclose on the property which was in his possession shall not be treated as having accrued for the purposes of this subsection until the date on which his possession discontinued.

(3) The right to receive any principal sum of money secured by a mortgage or other charge and the right to foreclose on the property subject to the mortgage or charge shall not be treated as accruing so long as that property comprises any future interest or any life insurance policy which has not matured or been determined.

(4) Nothing in this section shall apply to a foreclosure action in respect of mortgaged land, but the provisions of this Act relating to actions to recover land shall apply to such an action.

(5) Subject to subsections (6) and (7) below, no action to recover arrears of interest payable in respect of any sum of money secured by a mortgage or other charge or payable in respect of proceeds of the sale of land, or to recover damages in respect of such arrears shall be brought after the expiration of six years from the date on which the interest became due.

(6) Where--

(a) a prior mortgagee or other incumbrancer has been in possession of the property charged; and

(b) an action is brought within one year of the discontinuance of that possession by the subsequent incumbrancer;

the subsequent incumbrancer may recover by that action all the arrears of interest which fell due during the period of possession by the prior incumbrancer or damages in respect of those arrears, notwithstanding that the period exceeded six years.

(7) Where--

(a) the property subject to the mortgage or charge comprises any future interest or life insurance policy; and

(b) it is a term of the mortgage or charge that arrears of interest shall be treated as part of the principal sum of money secured by the mortgage or charge;

interest shall not be treated as becoming due before the right to recover the principal sum of money has accrued or is treated as having accrued.

Actions in respect of trust property or the personal estate of deceased persons

21 Time limit for actions in respect of trust property

(1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action--

(a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or

(b) to recover from the trustee trust property or the proceeds of trust property in the possession of the trustee, or previously received by the trustee and converted to his use.

(2) Where a trustee who is also a beneficiary under the trust receives or retains trust property or its proceeds as his share on a distribution

of trust property under the trust, his liability in any action brought by virtue of subsection (1)(b) above to recover that property or its proceeds after the expiration of the period of limitation prescribed by this Act for bringing an action to recover trust property shall be limited to the excess over his proper share.

This subsection only applies if the trustee acted honestly and reasonably in making the distribution.

(3) Subject to the preceding provisions of this section, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of six years from the date on which the right of action accrued.

For the purposes of this subsection, the right of action shall not be treated as having accrued to any beneficiary entitled to a future interest in the trust property until the interest fell into possession.

(4) No beneficiary as against whom there would be a good defence under this Act shall derive any greater or other benefit from a judgment or order obtained by any other beneficiary than he could have obtained if he had brought the action and this Act had been pleaded in defence.

22 Time limit for actions claiming personal estate of a deceased person

Subject to section 21(1) and (2) of this Act--

(a) no action in respect of any claim to the personal estate of a deceased person or to any share or interest in any such estate (whether under a will or on intestacy) shall be brought after the expiration of twelve years from the date on which the right to receive the share or interest accrued; and

(b) no action to recover arrears of interest in respect of any legacy, or damages in respect of such arrears, shall be brought after the expiration of six years from the date on which the interest became due.

Actions for an account

23 Time limit in respect of actions for an account

An action for an account shall not be brought after the expiration of any time limit under this Act which is applicable to the claim which is the basis of the duty to account.

Miscellaneous and supplemental

24 Time limit for actions to enforce judgments

(1) An action shall not be brought upon any judgment after the expiration of six years from the date on which the judgment became enforceable.

(2) No arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.

25 Time limit for actions to enforce advowsons and extinction of title to advowsons

Repealed.

26 Administration to date back to death

For the purposes of the provisions of this Act relating to actions for the recovery of land and advowsons an administrator of the estate of a deceased person shall be treated as claiming as if there had been no interval of time between the death of the deceased person and the grant of the letters of administration.

27 Cure of defective disentailing assurance

(1) This section applies where--

(a) a person entitled in remainder to an entailed interest in any land makes an assurance of his interest which fails to bar the issue in tail or the estates and interests taking effect on the determination of the entailed interest, or fails to bar those estates and interests only; and

(b) any person takes possession of the land by virtue of the assurance.

(2) If the person taking possession of the land by virtue of the assurance, or any other person whatsoever (other than a person entitled to possession by virtue of the settlement) is in possession of the land for a period of twelve years from the commencement of the time when the assurance could have operated as an effective

bar, the assurance shall thereupon operate, and be treated as having always operated, to bar the issue in tail and the estates and interests taking effect on the determination of the entailed interest.

(3) The reference in subsection (2) above to the time when the assurance could have operated as an effective bar is a reference to the time at which the assurance, if it had then been executed by the person entitled to the entailed interest, would have operated, without the consent of any other person, to bar the issue in tail and the estates and interests taking effect on the determination of the entailed interest.

PART II

EXTENSION OR EXCLUSION OF ORDINARY TIME LIMITS

Disability

28 Extension of limitation period in case of disability

(1) Subject to the following provisions of this section, if on the date when any right of action accrued for which a period of limitation is prescribed by this Act, the person to whom it accrued was under a disability, the action may be brought at any time before the expiration of six years from the date when he ceased to be under a disability or died (whichever first occurred) notwithstanding that the period of limitation has expired.

(2) This section shall not affect any case where the right of action first accrued to some person (not under a disability) through whom the person under a disability claims.

(3) When a right of action which has accrued to a person under a disability accrues, on the death of that person while still under a disability, to another person under a disability, no further extension of time shall be allowed by reason of the disability of the second person.

(4) No action to recover land or money charged on land shall be brought by virtue of this section by any person after the expiration of thirty years from the date on which the right of action accrued to that person or some person through whom he claims.

(4A) If the action is one to which section 4A of this Act applies, subsection (1) above shall have effect--

(a) in the case of an action for libel or slander, as if for the words from "at any time" to "occurred)" there were substituted the words "by him at any time before the expiration of one year from the date on which he ceased to be under a disability"; and

(b) in the case of an action for slander of title, slander of goods or other malicious falsehood, as if for the words "six years" there were substituted the words "one year".

(5) If the action is one to which section 10 of this Act applies, subsection(1) above shall have effect as if for the words "six years" there were substituted the words "two years".

(6) If the action is one to which section 11 or 12(2) of this Act applies, subsection (1) above shall have effect as if for the words "six years" there were substituted the words "three years".

(7) If the action is one to which section 11A of this Act applies or one by virtue of section 6(1)(a) of the Consumer Protection Act 1987 (death caused by defective product), subsection (1) above--

(a) shall not apply to the time limit prescribed by subsection (3) of the said section 11A or to that time limit as applied by virtue of section 12(1) of this Act; and

(b) in relation to any other time limit prescribed by this Act shall have effect as if for the words "six years" there were substituted the words "three years".

28A Extension for cases where the limitation period is the period under section 14A(4)(b)

(1) Subject to subsection (2) below, if in the case of any action for which a period of limitation is prescribed by section 14A of this Act--

(a) the period applicable in accordance with subsection (4) of that section is the period mentioned in paragraph (b) of that subsection;

(b) on the date which is for the purposes of that section the starting date for reckoning that period the person by reference to whose knowledge that date fell to be determined under subsection (5) of that section was under a disability; and

(c) section 28 of this Act does not apply to the action;

the action may be brought at any time before the expiration of three years from the date when he ceased to be under a disability or died (whichever first occurred) notwithstanding that the period mentioned above has expired.

(2) An action may not be brought by virtue of subsection (1) above after the end of the period of limitation prescribed by section 14B of this Act.

Acknowledgment and part payment

29 Fresh accrual of action on acknowledgment or part payment

(1) Subsections (2) and (3) below apply where any right of action (including a foreclosure action) to recover land or an advowson or any right of a mortgagee of personal property to bring a foreclosure action in respect of the property has accrued.

(2) If the person in possession of the land, benefice or personal property in question acknowledges the title of the person to whom the right of action has accrued--

(a) the right shall be treated as having accrued on and not before the date of the acknowledgment; and

(b) in the case of a right of action to recover land which has accrued to a person entitled to an estate or interest taking effect on the determination of an entailed interest against whom time is running under section 27 of this Act, section 27 shall thereupon cease to apply to the land.

(3) In the case of a foreclosure or other action by a mortgagee, if the person in possession of the land, benefice or personal property in question or the person liable for the mortgage debt makes any payment in respect of the debt (whether of principal or interest) the right shall be treated as having accrued on and not before the date of the payment.

(4) Where a mortgagee is by virtue of the mortgage in possession of any mortgaged land and either--

(a) receives any sum in respect of the principal or interest of the mortgage debt; or

(b) acknowledges the title of the mortgagor, or his equity of redemption;

an action to redeem the land in his possession may be brought at any time before the expiration of twelve years from the date of the payment or acknowledgment.

(5) Subject to subsection (6) below, where any right of action has accrued to recover--

(a) any debt or other liquidated pecuniary claim; or

(b) any claim to the personal estate of a deceased person or to any share or interest in any such estate;

and the person liable or accountable for the claim acknowledges the claim or makes any payment in respect of it the right shall be treated as having accrued on and not before the date of the acknowledgment or payment.

(6) A payment of a part of the rent or interest due at any time shall not extend the period for claiming the remainder then due, but any payment of interest shall be treated as a payment in respect of the principal debt.

(7) Subject to subsection (6) above, a current period of limitation may be repeatedly extended under this section by further acknowledgments or payments, but a right of action, once barred by this Act, shall not be revived by any subsequent acknowledgment or payment.

30 Formal provisions as to acknowledgments and part payments

(1) To be effective for the purposes of section 29 of this Act, an acknowledgment must be in writing and signed by the person making it.

(2) For the purposes of section 29, any acknowledgment or payment--

(a) may be made by the agent of the person by whom it is required to be made under that section; and

(b) shall be made to the person, or to an agent of the person, whose title or claim is being acknowledged or, as the case may be, in respect of whose claim the payment is being made.

31 Effect of acknowledgment or part payment on persons other than the maker or recipient

(1) An acknowledgment of the title to any land, benefice, or mortgaged personalty by any person in possession of it shall bind all other persons in possession during the ensuing period of limitation.

(2) A payment in respect of a mortgage debt by the mortgagor or any other person liable for the debt, or by any person in possession of the mortgaged property, shall, so far as any right of the mortgagee to foreclose or otherwise to recover the property is concerned, bind all other persons in possession of the mortgaged property during the ensuing period of limitation.

(3) Where two or more mortgagees are by virtue of the mortgage in possession of the mortgaged land, an acknowledgment of the mortgagor's title or of his equity of redemption by one of the mortgagees shall only bind him and his successors and shall not bind any other mortgagee or his successors.

(4) Where in a case within subsection (3) above the mortgagee by whom the acknowledgment is given is entitled to a part of the mortgaged land and not to any ascertained part of the mortgage debt the mortgagor shall be entitled to redeem that part of the land on payment, with interest, of the part of the mortgage debt which bears the same proportion to the whole of the debt as the value of the part of the land bears to the whole of the mortgaged land.

(5) Where there are two or more mortgagors, and the title or equity of redemption of one of the mortgagors is acknowledged as mentioned above in this section, the acknowledgment shall be treated as having been made to all the mortgagors.

(6) An acknowledgment of any debt or other liquidated pecuniary claim shall bind the acknowledgor and his successors but not any other person.

(7) A payment made in respect of any debt or other liquidated pecuniary claim shall bind all persons liable in respect of the debt or claim.

(8) An acknowledgment by one of several personal representatives of any claim to the personal estate of a deceased person or to any share or interest in any such estate, or a payment by one of several personal representatives in respect of any such claim, shall bind the estate of the deceased person.

(9) In this section "successor", in relation to any mortgagee or person liable in respect of any debt or claim, means his personal representatives and any other person on whom the rights under the mortgage or, as the case may be, the liability in respect of the debt or claim devolve (whether on death or bankruptcy or the disposition of property or the determination of a limited estate or interest in settled property or otherwise).

Fraud, concealment and mistake

32 Postponement of limitation period in case of fraud, concealment or mistake

(1) Subject to subsections (3) and (4A) below, where in the case of any action for which a period of limitation is prescribed by this Act, either--

(a) the action is based upon the fraud of the defendant; or

(b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or

(c) the action is for relief from the consequences of a mistake;

the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.

References in this subsection to the defendant include references to the defendant's agent and to any person through whom the defendant claims and his agent.

(2) For the purposes of subsection (1) above, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty.

(3) Nothing in this section shall enable any action--

(a) to recover, or recover the value of, any property; or

(b) to enforce any charge against, or set aside any transaction affecting, any property;

to be brought against the purchaser of the property or any person claiming through him in any case where the property has been purchased for valuable consideration by an innocent third party since the fraud or concealment or (as the case may be) the transaction in which the mistake was made took place.

(4) A purchaser is an innocent third party for the purposes of this section--

(a) in the case of fraud or concealment of any fact relevant to the plaintiff's right of action, if he was not a party to the fraud or (as the case may be) to the concealment of that fact and did not at the time of the purchase know or have reason to believe that the fraud or concealment had taken place; and

(b) in the case of mistake, if he did not at the time of the purchase know or have reason to believe that the mistake had been made.

(4A) Subsection (1) above shall not apply in relation to the time limit prescribed by section 11A(3) of this Act or in relation to that time limit as applied by virtue of section 12(1) of this Act.

(5) Sections 14A and 14B of this Act shall not apply to any action to which subsection (1)(b) above applies (and accordingly the period of limitation referred to in that subsection, in any case to which either of those sections would otherwise apply, is the period applicable under section 2 of this Act).

Discretionary exclusion of time limit for actions for defamation or malicious falsehood

32A Discretionary exclusion of time limit for actions for defamation or malicious falsehood

(1) If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which--

(a) the operation of section 4A of this Act prejudices the plaintiff or any person whom he represents, and

(b) any decision of the court under this subsection would prejudice the defendant or any person whom he represents,

the court may direct that that section shall not apply to the action or shall not apply to any specified cause of action to which the action relates.

(2) In acting under this section the court shall have regard to all the circumstances of the case and in particular to--

(a) the length of, and the reasons for, the delay on the part of the plaintiff;

(b) where the reason or one of the reasons for the delay was that all or any of the facts relevant to the cause of action did not become known to the plaintiff until after the end of the period mentioned in section 4A--

(i) the date on which any such facts did become known to him, and

(ii) the extent to which he acted promptly and reasonably once he knew whether or not the facts in question might be capable of giving rise to an action; and

(c) the extent to which, having regard to the delay, relevant evidence is likely--

(i) to be unavailable, or

(ii) to be less cogent than if the action had been brought within the period mentioned in section 4A.

(3) In the case of an action for slander of title, slander of goods or other malicious falsehood brought by a personal representative--

(a) the references in subsection (2) above to the plaintiff shall be construed as including the deceased person to whom the cause of action accrued and any previous personal representative of that person; and

(b) nothing in section 28(3) of this Act shall be construed as affecting the court's discretion under this section.

(4) In this section "the court" means the court in which the action has been brought.

Discretionary exclusion of time limit for actions in respect of personal injuries or death

33 Discretionary exclusion of time limit for actions in respect of personal injuries or death

(1) If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which--

(a) the provisions of section 11 or 11A or 12 of this Act prejudice the plaintiff or any person whom he represents; and

(b) any decision of the court under this subsection would prejudice the defendant or any person whom he represents;

the court may direct that those provisions shall not apply to the action, or shall not apply to any specified cause of action to which the action relates.

(1A) The court shall not under this section disapply--

(a) subsection (3) of section 11A; or

(b) where the damages claimed by the plaintiff are confined to damages for loss of or damage to any property, any other provision in its application to an action by virtue of Part I of the Consumer Protection Act 1987.

(2) The court shall not under this section disapply section 12(1) except where the reason why the person injured could no longer maintain an action was because of the time limit in section 11 or subsection (4) of section 11A.

If, for example, the person injured could at his death no longer maintain an action under the Fatal Accidents Act 1976 because of the time limit in Article 29 in Schedule 1 to the Carriage by Air Act 1961, the court has no power to direct that section 12(1) shall not apply.

(3) In acting under this section the court shall have regard to all the circumstances of the case and in particular to--

(a) the length of, and the reasons for, the delay on the part of the plaintiff;

(b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 11, by section 11A or (as the case may be) by section 12;

(c) the conduct of the defendant after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;

(d) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;

(e) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;

(f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received.

(4) In a case where the person injured died when, because of section 11, or subsection (4) of section 11A, he could no longer maintain an action and recover damages in respect of the injury, the court shall have regard in particular to the length of, and the reasons for, the delay on the part of the deceased.

(5) In a case under subsection (4) above, or any other case where the time limit, or one of the time limits, depends on the date of knowledge of a person other than the plaintiff, subsection (3) above shall have effect with appropriate modifications, and shall have effect in particular as if references to the plaintiff included references to any person whose date of knowledge is or was relevant in determining a time limit.

(6) A direction by the court disapplying the provisions of section 12(1) shall operate to disapply the provisions to the same effect in section 1(1) of the Fatal Accidents Act 1976.

(7) In this section "the court" means the court in which the action has been brought.

(8) References in this section to section 11 or 11A include references to that section as extended by any of the preceding provisions of this Part of this Act or by any provision of Part III of this Act.

PART III

MISCELLANEOUS AND GENERAL

34 Application of Act and other limitation enactments to arbitrations

Repealed.

35 New claims in pending actions: rules of court

(1) For the purposes of this Act, any new claim made in the course of any action shall be deemed to be a separate action and to have been commenced--

(a) in the case of a new claim made in or by way of third party proceedings, on the date on which those proceedings were commenced; and

(b) in the case of any other new claim, on the same date as the original action.

(2) In this section a new claim means any claim by way of set-off or counterclaim, and any claim involving either--

(a) the addition or substitution of a new cause of action; or

(b) the addition or substitution of a new party;

and "third party proceedings" means any proceedings brought in the course of any action by any party to the action against a person not previously a party to the action, other than proceedings brought by joining any such person as defendant to any claim already made in the original action by the party bringing the proceedings.

(3) Except as provided by section 33 of this Act or by rules of court, neither the High Court nor any county court shall allow a new claim within subsection (1)(b) above, other than an original set-off or counterclaim, to be made in the course of any action after the expiry of any time limit under this Act which would affect a new action to enforce that claim.

For the purposes of this subsection, a claim is an original set-off or an original counterclaim if it is a claim made by way of set-off or

(as the case may be) by way of counterclaim by a party who has not previously made any claim in the action.

(4) Rules of court may provide for allowing a new claim to which subsection (3) above applies to be made as there mentioned, but only if the conditions specified in subsection (5) below are satisfied, and subject to any further restrictions the rules may impose.

(5) The conditions referred to in subsection (4) above are the following--

(a) in the case of a claim involving a new cause of action, if the new cause of action arises out of the same facts or substantially the same facts as are already in issue on any claim previously made in the original action; and

(b) in the case of a claim involving a new party, if the addition or substitution of the new party is necessary for the determination of the original action.

(6) The addition or substitution of a new party shall not be regarded for the purposes of subsection (5)(b) above as necessary for the determination of the original action unless either--

(a) the new party is substituted for a party whose name was given in any claim made in the original action in mistake for the new party's name; or

(b) any claim already made in the original action cannot be maintained by or against an existing party unless the new party is joined or substituted as plaintiff or defendant in that action.

(7) Subject to subsection (4) above, rules of court may provide for allowing a party to any action to claim relief in a new capacity in respect of a new cause of action notwithstanding that he had no title to make that claim at the date of the commencement of the action.

This subsection shall not be taken as prejudicing the power of rules of court to provide for allowing a party to claim relief in a new capacity without adding or substituting a new cause of action.

(8) Subsections (3) to (7) above shall apply in relation to a new claim made in the course of third party proceedings as if those proceedings were the original action, and subject to such other modifications as may be prescribed by rules of court in any case or class of case.

36 Equitable jurisdiction and remedies

(1) The following time limits under this Act, that is to say--

(a) the time limit under section 2 for actions founded on tort;

(aa) the time limit under section 4A for actions for libel or slander, or for slander of title, slander of goods or other malicious falsehood;

(b) the time limit under section 5 for actions founded on simple contract;

(c) the time limit under section 7 for actions to enforce awards where the submission is not by an instrument under seal;

(d) the time limit under section 8 for actions on a specialty;

(e) the time limit under section 9 for actions to recover a sum recoverable by virtue of any enactment; and

(f) the time limit under section 24 for actions to enforce a judgment;

shall not apply to any claim for specific performance of a contract or for an injunction or for other equitable relief, except in so far as any such time limit may be applied by the court by analogy in like manner as the corresponding time limit under any enactment repealed by the Limitation Act 1939 was applied before 1st July 1940.

(2) Nothing in this Act shall affect any equitable jurisdiction to refuse relief on the ground of acquiescence or otherwise.

37 Application to the Crown and the Duke of Cornwall

(1) Except as otherwise expressly provided in this Act, and without prejudice to section 39, this Act shall apply to proceedings by or against the Crown in like manner as it applies to proceedings between subjects.

(2) Notwithstanding subsection (1) above, this Act shall not apply to--

(a) any proceedings by the Crown for the recovery of any tax or duty or interest on any tax or duty;

(b) any forfeiture proceedings under the customs and excise Acts (within the meaning of the Customs and Excise Management Act 1979); or

(c) any proceedings in respect of the forfeiture of a ship.

In this subsection "duty" includes any debt due to Her Majesty under section 16 of the Tithe Act 1936, and "ship" includes every description of vessel used in navigation not propelled by oars.

(3) For the purposes of this section, proceedings by or against the Crown include--

(a) proceedings by or against Her Majesty in right of the Duchy of Lancaster;

(b) proceedings by or against any Government department or any officer of the Crown as such or any person acting on behalf of the Crown; and

(c) proceedings by or against the Duke of Cornwall.

(4) For the purpose of the provisions of this Act relating to actions for the recovery of land and advowsons, references to the Crown shall include references to Her Majesty in right of the Duchy of Lancaster; and those provisions shall apply to lands and advowsons forming part of the possessions of the Duchy of Cornwall as if for the references to the Crown there were substituted references to the Duke of Cornwall as defined in the Duchy of Cornwall Management Act 1863.

(5) For the purposes of this Act a proceeding by petition of right (in any case where any such proceeding lies, by virtue of any saving in section 40 of the Crown Proceedings Act 1947, notwithstanding the general abolition by that Act of proceedings by way of petition of right) shall be treated as being commenced on the date on which the petition is presented.

(6) Nothing in this Act shall affect the prerogative right of Her Majesty (whether in right of the Crown or of the Duchy of Lancaster) or of the Duke of Cornwall to any gold or silver mine.

38 Interpretation[3]

(1) In this Act, unless the context otherwise requires--

"action" includes any proceeding in a court of law, including an ecclesiastical court;

"land" includes corporeal hereditaments, tithes and rentcharges and any legal or equitable estate or interest therein, *including an interest in the proceeds of the sale of land held upon trust for sale*, but except as provided above in this definition does not include any incorporeal hereditament;

[3] The words in this section in italics have been repealed by the Trusts of Land and Appointment of Trustees Act 1996, s 25(2) and Schedule 4, with effect from 1 January 1997, subject to the saving provisions in s 25(4) and 25(5).

"personal estate" and "personal property" do not include chattels real;

"personal injuries" includes any disease and any impairment of a person's physical or mental condition, and "injury" and cognate expressions shall be construed accordingly;

"rent" includes a rentcharge and a rentservice;

"rentcharge" means any annuity or periodical sum of money charged upon or payable out of land, except a rent service or interest on a mortgage on land;

"settled land", "statutory owner" and "tenant for life" have the same meanings respectively as in the Settled Land Act 1925;

"trust" and "trustee" have the same meanings respectively as in the Trustee Act 1925; and

"trust for sale" has the same meaning as in the Law of Property Act 1925.

(2) For the purposes of this Act a person shall be treated as under a disability while he is an infant, or of unsound mind.

(3) For the purposes of subsection (2) above a person is of unsound mind if he is a person who, by reason of mental disorder within the meaning of the Mental Health Act 1983, is incapable of managing and administering his property and affairs.

(4) Without prejudice to the generality of subsection (3) above, a person shall be conclusively presumed for the purposes of subsection (2) above to be of unsound mind--

(a) while he is liable to be detained or subject to guardianship under the Mental Health Act 1983 (otherwise than by virtue of section 35 or 89); and

(b) while he is receiving treatment as an in-patient in any hospital within the meaning of the Mental Health Act 1983 or mental nursing home within the meaning of the Nursing Homes Act 1975 without being liable to be detained under the said Act of 1983 (otherwise than by virtue of section 35 or 89), being treatment which follows without any interval a period during which he was liable to be detained or subject to guardianship under the Mental Health Act 1959, or the said Act of 1983 (otherwise than by virtue of section 35 or 89) or by virtue of any enactment repealed or excluded by the Mental Health Act 1959.

(5) Subject to subsection (6) below, a person shall be treated as claiming through another person if he became entitled by, through, under, or by the act of that other person to the right claimed, and any person whose estate or interest might have been barred by a person entitled to an entailed interest in possession shall be treated as claiming through the person so entitled.

(6) A person becoming entitled to any estate or interest by virtue of a special power of appointment shall not be treated as claiming through the appointor.

(7) References in this Act to a right of action to recover land shall include references to a right to enter into possession of the land or, in the case of rentcharges and tithes, to distrain for arrears of rent or tithe, and references to the bringing of such an action shall include references to the making of such an entry or distress.

(8) References in this Act to the possession of land shall, in the case of tithes and rentcharges, be construed as references to the receipt of the tithe or rent, and references to the date of dispossession or discontinuance of possession of land shall, in the case of rent charges, be construed as references to the date of the last receipt of rent.

(9) References in Part II of this Act to a right of action shall include references to--

(a) a cause of action;

(b) a right to receive money secured by a mortgage or charge on any property;

(c) a right to recover proceeds of the sale of land; and

(d) a right to receive a share or interest in the personal estate of a deceased person.

(10) References in Part II to the date of the accrual of a right of action shall be construed--

(a) in the case of an action upon a judgment, as references to the date on which the judgment became enforceable; and

(b) in the case of an action to recover arrears of rent or interest, or damages in respect of arrears of rent or interest, as references to the date on which the rent or interest became due.

39 Saving for other limitation enactments

This Act shall not apply to any action or arbitration for which a period of limitation is prescribed by or under any other enactment (whether passed before or after the passing of this Act) or to any action or arbitration to which the Crown is a party and for which, if it were between subjects, a period of limitation would be prescribed by or under any such other enactment.

40 Transitional provisions, amendments and repeals

(1) Schedule 2 to this Act, which contains transitional provisions, shall have effect.

(2) The enactments specified in Schedule 3 to this Act shall have effect subject to the amendments specified in that Schedule, being amendments consequential on the provisions of this Act; but the amendment of any enactment by that Schedule shall not be taken as prejudicing the operation of section 17(2) of the Interpretation Act 1978 (effect of repeals).

(3) The enactments specified in Schedule 4 to this Act are hereby repealed to the extent specified in column 3 of that Schedule.

41 Short title, commencement and extent

(1) This Act may be cited as the Limitation Act 1980.

(2) This Act, except section 35, shall come into force on 1st May 1981.

(3) Section 35 of this Act shall come into force on 1st May 1981 to the extent (if any) that the section substituted for section 28 of the Limitation Act 1939 by section 8 of the Limitation Amendment Act 1980 is in force immediately before that date; but otherwise section 35 shall come into force on such day as the Lord Chancellor may by order made by statutory instrument appoint, and different days may be appointed for different purposes of that section (including its application in relation to different courts or proceedings).

(4) The repeal by this Act of section 14(1) of the Limitation Act 1963 and the corresponding saving in paragraph 2 of Schedule 2 to this Act shall extend to Northern Ireland, but otherwise this Act does not extend to Scotland or to Northern Ireland.

SCHEDULES

SCHEDULE 1

Provisions with Respect to Actions to Recover Land (s 15(6), (7))

PART I

ACCRUAL OF RIGHTS OF ACTION TO RECOVER LAND

Accrual of right of action in case of present interests in land

1. Where the person bringing an action to recover land, or some person through whom he claims, has been in possession of the land, and has while entitled to the land been dispossessed or discontinued his possession, the right of action shall be treated as having accrued on the date of the dispossession or discontinuance.

2. Where any person brings an action to recover any land of a deceased person (whether under a will or on intestacy) and the deceased person--

   (a) was on the date of his death in possession of the land or, in the case of a rentcharge created by will or taking effect upon his death, in possession of the land charged; and

   (b) was the last person entitled to the land to be in possession of it;

   the right of action shall be treated as having accrued on the date of his death.

3. Where any person brings an action to recover land, being an estate or interest in possession assured otherwise than by will to him, or to some person through whom he claims, and--

   (a) the person making the assurance was on the date when the assurance took effect in possession of the land or, in the case of a rentcharge created by the assurance, in possession of the land charged; and

   (b) no person has been in possession of the land by virtue of the assurance;

   the right of action shall be treated as having accrued on the date when the assurance took effect.

Accrual of right of action in case of future interests

4. The right of action to recover any land shall, in a case where--

   (a) the estate or interest claimed was an estate or interest in reversion or remainder or any other future estate or interest; and

   (b) no person has taken possession of the land by virtue of the estate or interest claimed;

be treated as having accrued on the date on which the estate or interest fell into possession by the determination of the preceding estate or interest.

5.

(1) Subject to sub-paragraph (2) below, a tenancy from year to year or other period, without a lease in writing, shall for the purposes of this Act be treated as being determined at the expiration of the first year or other period; and accordingly the right of action of the person entitled to the land subject to the tenancy shall be treated as having accrued at the date on which in accordance with this sub-paragraph the tenancy is determined.

(2) Where any rent has subsequently been received in respect of the tenancy, the right of action shall be treated as having accrued on the date of the last receipt of rent.

6.

(1) Where--

(a) any person is in possession of land by virtue of a lease in writing by which a rent of not less than ten pounds a year is reserved; and

(b) the rent is received by some person wrongfully claiming to be entitled to the land in reversion immediately expectant on the determination of the lease; and

(c) no rent is subsequently received by the person rightfully so entitled;

the right of action to recover the land of the person rightfully so entitled shall be treated as having accrued on the date when the rent was first received by the person wrongfully claiming to be so entitled and not on the date of the determination of the lease.

(2) Sub-paragraph (1) above shall not apply to any lease granted by the Crown.

Accrual of right of action in case of forfeiture or breach of condition

7.

(1) Subject to sub-paragraph (2) below, a right of action to recover land by virtue of a forfeiture or breach of condition shall be treated as having accrued on the date on which the forfeiture was incurred or the condition broken.

(2) If any such right has accrued to a person entitled to an estate or interest in reversion or remainder and the land was not recovered by virtue of that right, the right of action to recover the land shall not be treated as having accrued to that person until his estate or interest fell into possession, as if no such forfeiture or breach of condition had occurred.

Right of action not to accrue or continue unless there is adverse possession.

8.

(1) No right of action to recover land shall be treated as accruing unless the land is in the possession of some person in whose favour the period of limitation can run (referred to below in this paragraph as "adverse possession"); and where under the preceding provisions of this Schedule any such right of action is treated as accruing on a certain date and no person is in adverse possession on that date, the right of action shall not be treated as accruing unless and until adverse possession is taken of the land.

(2) Where a right of action to recover land has accrued and after its accrual, before the right is barred, the land ceases to be in adverse possession, the right of action shall no longer be treated as having accrued and no fresh right of action shall be treated as accruing unless and until the land is again taken into adverse possession.

(3) For the purposes of this paragraph--

(a) possession of any land subject to a rentcharge by a person (other than the person entitled to the rentcharge) who does not pay the rent shall be treated as adverse possession of the rentcharge; and

(b) receipt of rent under a lease by a person wrongfully claiming to be entitled to the land in reversion immediately expectant on the determination of the lease shall be treated as adverse possession of the land.

(4) For the purpose of determining whether a person occupying any land is in adverse possession of the land it shall not be assumed by implication of law that his occupation is by permission of the person entitled to the land merely by virtue of the fact that his occupation is not inconsistent with the latter's present or future enjoyment of the land.

This provision shall not be taken as prejudicing a finding to the effect that a person's occupation of any land is by implied permission of the person entitled to the land in any case where such a finding is justified on the actual facts of the case.

Possession of beneficiary not adverse to others interested in settled land or land held on trust for sale[4]

9. Where any settled land or any land *held on trust for sale* [subject to a trust of land] is in the possession of a person entitled to a beneficial interest in the land *or in the proceeds of sale* (not being a person solely or absolutely entitled to the land *or the proceeds*), no right of action to recover the land shall be treated for the purposes of this Act as accruing during that possession to any person in whom the land is vested as tenant for life, statutory owner or trustee, or to any other person entitled to a beneficial interest in the land *or the proceeds of sale.*

PART II

MODIFICATIONS OF SECTION 15 WHERE CROWN OR CERTAIN CORPORATIONS SOLE ARE INVOLVED

10. Subject to paragraph 11 below, section 15(1) of this Act shall apply to the bringing of an action to recover any land by the Crown or by any spiritual or eleemosynary corporation sole with the substitution for the reference to twelve years of a reference to thirty years.

11.

(1) An action to recover foreshore may be brought by the Crown at any time before the expiration of sixty years from the date mentioned in section 15(1) of this Act.

(2) Where any right of action to recover land which has ceased to be foreshore but remains in the ownership of the Crown accrued when the land was foreshore, the action may be brought at any time before the expiration of--

(a) sixty years from the date of accrual of the right of action; or

(b) thirty years from the date when the land ceased to be foreshore;

whichever period first expires.

(3) In this paragraph "foreshore" means the shore and bed of the sea and of any tidal water, below the line of the medium high tide between the spring tides and the neap tides.

12. Notwithstanding section 15(1) of this Act, where in the case of any action brought by a person other than the Crown or a spiritual or eleemosynary

[4] The words between square brackets have been substituted for the phrase “held on trust for sale” by Trusts of Land and Appointment of Trustees Act 1996, section 25(1) and schedule 3. The words in italics have been repealed by section 25(2) and schedule 4 of the above Act. All changes take effect effect from 1 January 1997, subject to the savings contained in section 25.

corporation sole the right of action first accrued to the Crown or any such corporation sole through whom the person in question claims, the action may be brought at any time before the expiration of--

(a) the period during which the action could have been brought by the Crown or the corporation sole; or

(b) twelve years from the date on which the right of action accrued to some person other than the Crown or the corporation sole;

whichever period first expires.

13. Section 15(2) of this Act shall apply in any case where the Crown or a spiritual or eleemosynary corporation sole is entitled to the succeeding estate or interest with the substitution-

(a) for the reference to twelve years of a reference to thirty years; and

(b) for the reference to six years of a reference to twelve years.

SCHEDULE 2

TRANSITIONAL PROVISIONS (s 40(1))

1. Nothing in this Act shall affect the operation of section 4 of the Limitation Act 1963, as it had effect immediately before 1 January 1979 (being the date on which the Civil Liability (Contribution) Act 1978 came in to force), in relation to any case where the damage in question occurred before that date.

2. The amendment made by section 14(1) of the Limitation Act 1963 in section 5 of the Limitation (Enemies and War Prisoners) Act 1945 (which provides that section 5 shall have effect as if for the words "in force in Northern Ireland at the date of the passing of this Act" there were substituted the words "for the time being in force in Northern Ireland") shall continue to have effect notwithstanding the repeal by this Act of section 14(1).

3. It is hereby declared that a decision taken at any time by a court to grant, or not to grant, leave under Part I of the Limitation Act 1963 (which, so far as it related to leave, was repealed by the Limitation Act 1975) does not affect the determination of any question in proceedings under any provision of this Act which corresponds to a provision of the Limitation Act 1975, but in such proceedings account may be taken of evidence admitted in proceedings under Part I of the Limitation Act 1963.

4.

(1) In section 33(6) of this Act the reference to section 1(1) of the Fatal Accidents Act 1976 shall be construed as including a reference to section 1 of the Fatal Accidents Act 1846.

(2) Any other reference in that section, or in section 12 or 13 of this Act, to the Fatal Accidents Act 1976 shall be construed as including a reference to the Fatal Accidents Act 1846.

5. Notwithstanding anything in section 29(7) of this Act or in the repeals made by this Act, the Limitation Act 1939 shall continue to have effect in relation to any acknowledgment or payment made before the coming into force of section 6 of the Limitation Amendment Act 1980 (which amended section 23 of the Limitation Act 1939 and made certain repeals in sections 23 and 25 of that Act so as to prevent the revival by acknowledgment or part payment of a right of action barred by that Act) as it had effect immediately before section 6 came into force.

6. Section 28 of the Limitation Act 1939 (provisions as to set-off or counterclaim) shall continue to apply (as originally enacted) to any claim by way of set-off or counterclaim made in an action to which section 35 of this Act does not apply, but as if the reference in section 28 to that Act were a reference to this Act; and, in relation to any such action, references in this Act to section 35 of this Act shall be construed as references to section 28 as it applies by virtue of this paragraph.

7. Section 37(2)(c) of this Act shall be treated for the purposes of the Hovercraft Act 1968 as if it were contained in an Act passed before that Act.

8. In relation to a lease granted before the coming into force of section 3(2) of the Limitation Amendment Act 1980 (which substituted "ten pounds a year" for "twenty shillings" in section 9(3) of the Limitation Act 1939), paragraph 6(1)(a) of Schedule 1 to this Act shall have effect as if for the words "ten pounds a year" there were substituted the words "twenty shillings".

9.

(1) Nothing in any provision of this Act shall--

(a) enable any action to be brought which was barred by this Act or (as the case may be) by the Limitation Act 1939 before the relevant date; or

(b) affect any action or arbitration commenced before that date or the title to any property which is the subject of any such action or arbitration.

(2) In sub-paragraph (1) above "the relevant date" means--

(a) in relation to section 35 of this Act, the date on which that section comes into force in relation to actions of the description in question or, if section 8 of the Limitation Amendment Act 1980 (which substituted the provisions reproduced in section 35 for section 28 of the Limitation Act 1939) is in force immediately before 1st May 1981 in relation to actions of that description, the date on which section 8 came into force in relation to actions of that description; and

(b) in relation to any other provision of this Act, 1st August 1980 (being the date of coming into force of the remaining provisions of the Limitation Amendment Act 1980, apart from section 8).