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Collas Crill explains... Prescription

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When we talk about prescription in Guernsey in the litigation context we're not referring to anything medical, but rather the period of time in which a plaintiff must bring a cause of action.

The reason for prescription periods is to establish certainty for parties. Not only that, but prescription also recognises that evidence and memories will diminish the longer the period between the claim arising and commencement of proceedings. This may result in unjust inequalities between the parties and increased costs.

Prescription periods

The length of the prescription period depends on the type of cause of action and is set down either by customary law or statute. For example:

- Claims in contract (eg breach of a loan agreement) must be brought within a period of six years from the date of the accrual of the action (which is the date of the breach of contract).
- Claims in tort (e.g. negligence by a surveyor) must be brought within a period of six years from the date of the accrual of action (which is the date when the actionable damage occurred).
- Claims for personal injury or death arising from negligence must be brought within three years of the accrual of the cause of action or the date of the plaintiff's knowledge.
- Claims for breach of trust must be brought within three years of when the plaintiff first has knowledge of the breach.

Consequences of a claim becoming prescribed

For those familiar with the English legal system, prescription appears very similar to the English concept of limitation. However, there is a crucial and important difference. Unlike limitation, prescription is a complete defence to a claim. If a claim is prescribed it will be extinguished, such that it no longer exists. The reason being that prescription is part of substantive law (the *lex causae*) whereas limitation is part of procedural law (the *lex fori*). This distinction can make it a powerful weapon in a defendant's armoury.

Suspending prescription

Prescription can have particularly harsh effects in cases where the plaintiff's knowledge is not a requirement for time to start to run (e.g. breach of contract) and so Guernsey customary law has developed a means by which prescription periods may be suspended/extended in certain circumstances. This is known as *empêchement d'agir*.

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There are two types of *empêchement*:

- *Empêchement de droit* - This is an impediment as of right and covers situations where the plaintiff was a minor or legally incapacitated and therefore unable to bring a cause of action. Some Guernsey Laws expressly include provision to suspend prescription periods where the plaintiff is suffering from a "disability". An example of this is the Law Reform (Tort) (Guernsey) Law, 1979 which provides that the prescription period will run from the period when the plaintiff ceased to be under a "disability" which is defined as being a minor or of "unsound mind".
- *Empêchement de fait* - This is an impediment of fact. Guernsey case law confirms that this applies in situations where it was practically impossible for the plaintiff to have brought the cause of action, for example because they lacked a key piece of information. The exact boundaries of when *empêchement de fait* applies are continuing to be developed by decisions of the courts, but the principle is usually relied upon when a plaintiff was not aware that they had a claim until some time after time began to run.

Interrupting prescription

In order to avoid a claim becoming prescribed a plaintiff must commence proceedings. The effect of commencing proceedings is to “interrupt” the prescription period. A claim will be "commenced" for the purposes of prescription when a Summons is handed to HM Sergeant (the office responsible for executing Orders of the Royal Court) to serve on the defendant.

Prescription and enforcing judgments

Prescription does not just apply when issuing a claim. It also requires that steps are taken to enforce a judgment within a certain time period, failing which the judgment is no longer enforceable.

Again, the rationale here is certainty. A plaintiff should not be allowed to sit on a judgment for several years and potentially hamstring the defendant from disposing of assets.

In respect of judgment following trial or a judgment entered into by consent, the prescription period is six years. In respect of a judgment obtained in default, the prescription period is only three years.

If it has not been possible to enforce a judgment within that time, it is possible to extend prescription by making an application to the Royal Court.

Conclusion

Prescription is a complicated but very important area of the law that arises in practice very regularly. If you require any guidance, please do not hesitate to contact a member of our Dispute Resolution team.

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