

Asset Based Lending

Time to change?

In 1623 the law regarding a six year limitation period for commencing actions based on breach of contract were introduced. This law, now contained in the Limitations Act 1980, remains intact but for how much longer?

In 1990 the Law Commission reviewed this law and concluded that the current law was incoherent, complex, outdated, uncertain, sometimes unfair and needed reform. A public consultation followed in 1998 and the Law Commission published its recommendations in 2001.

On 3 December 2008 in the Queen's Speech it was announced that a Draft Civil Law Reform Bill is to be published in 2009 for pre-legislative scrutiny and, after some 386 years, one of the proposed changes to be made is to make a single limitation period, the same for both contract claims, including debt actions (but excluding secured lending and enforcement of judgements) and for negligence. Oh... and it will be shorter of course.

The law on limitations is intended to protect the interests of claimants giving them a fair opportunity to pursue legal claims while at the same time creating a balance between the interests of defendants not having to answer unduly old claims.

The intention of the proposed changes, which were the subject of a limited consultation period for the credit and debt industries until the 13 July this year, are to simplify the structure to a core regime which will be the same in contract and negligence.

Currently, the Limitation Act provides:

- simple contracts (ie debt) – six years from the date the debt becomes due
- statutory debt – six years from the date a cause of action for a sum recoverable by statute
- on demand debts/loans – six years from date of demand
- speciality contracts – 12 years from the cause of action arising (includes contracts under seal or deeds)
- land and money secured by mortgage – 12 years (but six years for interest)

What is proposed is that actions to recover debts under simple contracts are:

- a three year limitation period in which to issue a claim
- to run from the claimants date of knowledge of:
 - the facts giving rise to the cause of action
 - the identity of the defendant and
 - where injury, loss or damage has occurred or a benefit has been received, that the injury, loss, damage or benefit is significant
- Subject to a ten year longstop from the date of the cause of action (whether the three year period has expired or not)

In practice, this may not be very different to the normal position in respect of debt claims, you will be aware of when the debt is due and whether it is paid, you will know who the debtor is and it is unlikely that you will

want to wait three years to seek recovery of debts.

What is not proposed to change is significant however. The current rules regarding on demand debts are that the limitation period does not commence until notice is served on the debtor. This will not change and means the creditor has effective control over when the limitation period begins.

Also, an acknowledgement of a debt or part payment (however small) shall continue to act to restart the limitation period. It is proposed that any form of written acknowledgement will suffice for this purpose (being any recording by means of representation of words, symbols or numbers, whether recorded by the person making the acknowledgement or its recipient). Thus a voice recording may not be an acknowledgement (though consultation has been sought in this regard) but a written record of a conversation or email will be sufficient as there is no need for the acknowledgement to be signed by the debtor.

Additionally, the three year limitation period is proposed to apply to an action brought upon a judgement. That does not mean an action to enforce a judgement such as a warrant of execution but will apply to other proceedings such as a statutory demand and/or bankruptcy petition based upon the judgement.

Where this may cause issues is to proliferate the number of matters going to court and the speed at which they do so. While this is mitigated by the preservation of the rules relating to acknowledgement of debts nonetheless attempts to settle disputes over time, which of course is in accordance with the letter and tenet of the current Civil Procedure Rules which view the instigation of proceedings as a matter of last resort, and recourse to other means of alternative dispute resolution may find the process shortened or circumvented when the limitation period deadline is looming large.

Also, there is perhaps justifiably, some concern over the impact on the debt collection industry and those that are in the market to buy books of debt because that market may be curtailed itself if the time limits bite. It is unclear to date exactly what the anticipated outcome of the consultation into this will give rise to but no doubt that will be released soon with the draft Bill.

The thing to remember in this regard is that every time the debt is acknowledged or a part payment is made the limitation period would restart. This gives those working with debtors who are unable to pay in full or temporarily unable to pay a relatively straightforward way to protect the underlying debt and is not proposed to be subject to the ten year longstop. Equally, where the limitation period is triggered by the issuance of a written demand the creditor is given the means to control when the limitation period commences (subject to the ten year longstop).

In summary therefore, the impact of the proposed limitation period changes may not cause large impact on receivables financiers who usually seek to recover debts swiftly. It may impact on their ability to recover on guarantees and indemnities but it is presently unclear from the consultation papers whether the revised limitation periods are to apply to debts arising from deeds but analogy with the other classes of debts currently holding a 12 year limitation period would suggest that these will be subject to the proposed ten year longstop at least.

For those that routinely package and sell debt books and those that purchase them it will be of great importance when the cause of action arose and perhaps even more importance whether any acknowledgement or part payment has been made in respect of them as this can substantially enhance their value.

The bill in respect of these changes is expected later this year.

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