



Jersey Law Commission

PROPOSAL FOR A REVIEW OF THE LAW IN JERSEY RELATING TO PRESCRIPTION AND LIMITATION

20 September, 2019

This paper outlines a proposed review of the law in Jersey relating to the legal concepts of prescription and limitation. This proposal has been reviewed and approved by the Jersey Law Commission by resolution dated 20 September 2019.

Background

What?

Prescription and Limitation are distinct but linked legal concepts. The Jersey Law Commission has described the extent to which the concepts already form part of Jersey law in the 2008 Consultation. Both terms are used in Jersey law but not in a consistent way.

Both terms are concerned with time limits for the acquisition and expiry of certain legal rights but operate in different ways and with different effects.

- Limitation is a concept found principally in common law systems that has the effect of establishing a period within which claims must be initiated and providing a procedural defence to a claim
- Prescription is a concept found principally, but not exclusively, in civil law systems whereby the substantive rights involved in the claim or dispute may be affected by the time limit

The legal system in Jersey derives from Norman customary law and is neither a civil law system nor a common law system. Both civil and common law legal systems have, however, been influential in the development of jurisprudence in Jersey but the sources are not necessarily consistent amongst themselves nor have they been applied consistently. The result is that the law in Jersey relating to issues of prescription and

limitation is difficult to determine with certainty or to apply consistently. It is in need of simplification and modernization.

Why?

The duty of the Jersey Law Commission is set out in the Proposition¹ of the States of Jersey by which the Jersey Law Commission was established, as follows:

It shall be the duty of the Commission to identify aspects of Jersey law which it considers should be examined with a view to their development and reform, including in particular the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and generally the simplification and modernisation of the law

The Jersey Law Commission reviewed issues of prescription and limitation under the law of Jersey in its Consultation Paper No 1/2008/CP², *Prescription and Limitation*, in March 2008 (the **2008 Consultation**). It concluded, amongst other matters, that the law of Jersey in relation to prescription and limitation had developed in a piecemeal fashion with the result that there were anomalies and inconsistencies and that aspects of the law were unclear or obsolete and were in need of simplification and modernization.

The 2008 Consultation concluded that the law in Jersey relating to prescription and limitation should be reformed and made a number of recommendations in relation to that conclusion including that reform should be by way of a consolidating statute gathering together and reforming existing periods of prescription contained in general and customary law as well as statute.³

The problems identified by the Jersey Law Commission in 2008 remain unresolved. Whilst the court in Jersey has found ways of addressing these issues and there have been judicial attempts to clarify the position nevertheless issues identified in the 2008 Consultation continue to cause difficulty: the difficulties include problems deriving from determining prescription periods by reference to legal categories that are not directly applicable to Jersey law. This creates legal problems both locally and in courts overseas. In a case in the High Court of England and Wales where a preliminary issue arose as to whether claims were time barred as a matter of Jersey law it was common ground amongst the experts assisting the court that there was “no authoritative decision of the Jersey courts that is determinative of the preliminary issue”.⁴ In relation to some issues the court has observed that a cure would require legislation. There has been no such legislation in Jersey. With the passage of time since the 2008 Consultation, it is

¹ <https://jerseylawcommission.files.wordpress.com/2018/04/jersey-law-commission-states-proposition-1996.pdf>

² <https://jerseylawcommission.files.wordpress.com/2015/06/2008-prescription-and-limitation.pdf>

³ para 8.2, 2008 Consultation

⁴ see, for example, comments in *O’Keefe and anor (in their capacity as Joint Liquidators of Level One Residential (Jersey) Ltd and Special Opportunity Holdings Ltd v Caner & ors* [2017]EWHC1105(Ch at para 10

appropriate and consistent with its duties for the Jersey Law Commission to revisit these issues.

Developments in other jurisdictions in relation to prescription and limitation since the issue of the 2008 Consultation Paper also justify returning to these issues. The Irish Law Commission, whose 1998 Consultation Document was referred to in a number of contexts in the 2008 Consultation, carried out a further consultation in July 2009.⁵ A report was issued on the basis of that consultation in December 2011.⁶ The Scottish Law Commission has also issued a report reviewing the position since legislation concerning prescription and limitation was introduced in 1973. In the introduction to their report the Scottish Law Commission observed that the issue of prescription, in particular in relation to claims for latent damage had become topical in the light of a 2014 judgment of the UK Supreme Court.⁷ These developments shed a fresh light on the problems and possible responses to them that may assist with addressing them as they continue to be found in Jersey law.

The Project

This project will review the position in Jersey law in relation to prescription and limitation and consider approaches taken to issues of prescription and limitation in certain other jurisdictions.

The following issues will need to be considered:

- The current position under Jersey law in relation to prescription and limitation
- Whether reform is necessary or appropriate
- If reform is necessary or appropriate, what the reforms should be
- How any reform would be effected
- The human rights implications of the current position and of any proposed reform

The questions to be raised in the Consultation will need to include at least the following:

- Is reform necessary?
- If reform is necessary:
 - should it be by way of a consolidating statute, gathering together and reforming existing periods of prescription and limitation contained in general and customary law as well as statute?
 - should the reforms apply generally unless there is specific provision otherwise?
 - are there areas of law that should not be covered by a general provision for prescription or limitation or both?
 - should the effect of any reforms be prospective only or retrospective also?

⁵ https://www.lawreform.ie/_fileupload/cpLimitationOfActionsx.pdf

⁶ https://www.lawreform.ie/_fileupload/Reports/r104LimitationOfActions.pdf

⁷ David T Morrison & Co Limited v ICL Plastics Limited [2014] UKSC 48

- are there any existing areas that are appropriate to preserve (eg *empêchement d'agir*)?
- should there be provision for prescription or limitation only or should there be a basic limitation period (procedural) and an ultimate prescription period (substantive)?
- how long should a basic limitation period be?
 - When should it start?
 - Should it be interruptible and in what circumstances?
 - Should it be able to be contracted out from?
 - does it preclude or constrain the court's inherent power to strike out actions?
 - Whose obligation is it to assert its effect?
- should the courts have discretion in relation to start, interruption or duration of the basic limitation period?
 - On what grounds would the discretion be exercised?
- if there is to be an ultimate prescription period, how long should it be?
 - When should it start?
 - Should it be interruptible and in what circumstances?
 - Should it be able to be contracted out from?
 - Should it preclude or constrain the court's inherent power to strike out actions?
 - Whose obligation is it to assert its effect?
- what should the effect of any reformed provisions in relation to international law?
- What would be the costs and benefits of reform of the law relating to limitation and prescription?

How?

The Project will require research to be conducted into:

- Jersey law as it has developed in relation to prescription and limitation since the publication of the 2008 Consultation
- the requirements of Jersey as a jurisdiction in respect of issues of prescription and limitation including areas where the law in its current state gives rise to problems that may be ameliorated by reform
- a review of the position in other relevant jurisdictions including England and Wales, Scotland and Ireland with a view to illuminating the benefits and problems arising from different approaches that may be considered for Jersey.

The Project will be conducted in accordance with the standard working method of the Jersey Law Commission as set out in Appendix A (*Method*). The consultation process may include conducting seminars and making presentations with a view to preparation and presentation of a Report containing recommendations.

The resources required for the Project will include

- a research student to review the law as it stands in relation to prescription and

- limitation in Jersey and approaches to reform taken in other relevant jurisdictions
- a Topic Practitioner to advise upon matters of legal practice in Jersey as affected by the law relating to prescription and limitation as it currently stands, including how the law works in this regard in relation to court actions and otherwise
- facilities for conducting seminars and presentations for the purposes of the consultation process

As the Project proceeds it may become apparent that other resources are also required.

Project Budget

A budget of £10,000 is proposed for the Project to enable the research and consultation to be conducted as set out, subject to such variations as it becomes apparent during the conduct of the Project, are necessary or appropriate for the production of a concluding Report.

Signed: CA CHAPLIN
Chairman

Appendix A

METHOD

The working method of the Jersey Law Commission

Upon accepting a topic for review the Jersey Law Commission appoints one of its members to act as the Topic Commissioner to conduct and co-ordinate all of the Jersey Law Commission's work on that topic. On his or her recommendation the Jersey Law Commission seeks expert support from lawyers practising in the field or academics learned in the subject as Topic Practitioner to assist him or her generally and to ensure that the work of the Jersey Law Commission remains relevant to the issues arising in relation to the topic. The Topic Commissioner is not paid in respect of the work undertaken for the Jersey Law Commission unless also acting as Topic Practitioner. The Jersey Law Commission typically agree a fee with the Topic Practitioner who then recovers that fee direct from the States of Jersey. Requisite legal research may be carried out by others: either by professional researchers under contract or by experts willing to give their time as a public service.

The procedure for the review of each topic will commonly fall into the following steps:

- 1 finding out whether there is a problem, and if there is, defining exactly what it is;
- 2 researching and summarising the existing law relevant to the topic;
- 3 suggesting how the relevant law might be changed to solve the problem;
- 4 preparing and publishing a consultation document based on items 1, 2 and 3;
- 5 receiving and discussing representations made in response to the consultation document;
- 6 preparing and publishing a final report.