

EXTINCTIVE PRESCRIPTION – John Carr-Hartley (Managing Partner)

Many cases fail before they get to trial because they have become prescribed. This is called extinctive prescription and it is essentially a time barring law which precludes a person from succeeding on what may be a perfectly valid claim which has become unenforceable by the lapse of time.

The periods of extinctive prescription are set out in Section 4 of the Prescriptions Act. Some of the most common periods of extinctive prescription seen in legal proceedings are:

- a) A period of one year for claims in respect of claims for defamation;
- b) A period of three years (subject to what appears below) in respect of:
 - (i) a claim based on any oral contract;
 - (ii) a claim for payment for services rendered;
 - (iii) a claim for payment of the price for goods sold and delivered;
 - (iv) claims for damages;
- c) A period of six years in respect of claims based on written contracts including bills of exchange (cheques and the like) and other liquid documents but excluding mortgage bonds, unless a shorter period is applicable under any provision of sub-section (b).

At first there may appear to be a conflict between the provisions of some of the sub-sections of the Act which are set out above. For example, a claim for the payment of the price for goods sold and delivered is said to prescribe after the lapse of a period of three years. But the goods might have been sold to the debtor in terms of a written contract, and sub-section (c) provides that claims based on written contracts prescribe after the lapse of a period of six years, but sub-section (c) also says “unless a shorter period is applicable under any provision of sub-section (b)”. This gives rise to a circular argument. This issue has, however, been settled by the Court of Appeal which has found that if two periods of prescription can be applied to a single claim, then the longest period of prescription will be the applicable period of prescription.

Section 6 of the Prescriptions Act governs the date from which prescription is deemed to begin running. Section 6 provides that prescription starts to run:

- a) In an action for damages, where the debtor is known to the creditor, from the date when the wrong upon which the claim for damages is based was first brought to the knowledge of the creditor, or from the date when the creditor should reasonably have been expected to have knowledge of the wrong which gives rise to the claim, whichever is the earlier date; and
- b) In respect of an action, other than an action for damages, from the date when the right of action first accrued against the debtor.

Section 7 of the Prescriptions Act governs the interruption of prescription. Section 7 provides that extinctive prescription will be interrupted by “service on the debtor of any legal process (legal proceedings) whereby action is instituted;”

As a consequence of what is set out above, it is to be noted that claims which are not based on written contracts generally prescribe after the lapse of a period of three years. This may, at first blush, appear to be a very long time; however, it is surprising how many claims become prescribed owing to a lack of understanding of the law of prescription.

Many people assume that if they send a letter of demand to the debtor or engage in discussions with the debtor to try and secure payment, that this is sufficient to stave off prescription. This is not correct. It is only when legal proceedings are served on the debtor that prescription is interrupted. In matters where any claims or disputes must be resolved by arbitration, it is the submission of the claim or dispute to arbitration which interrupts the running of prescription. The date of “submission to arbitration” can generally be regarded as the date where the claimant takes steps to have the dispute referred to an arbitrator. Each contract may vary on how this takes place.

We certainly do not encourage clients to litigate at the drop of a hat. Litigation is expensive and time consuming; however, we do encourage you to be vigilant so that your claim does not become prescribed.