CONVEYANCING 2019

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PREFACE

This is the twenty-first annual update of new developments in the law of conveyancing. As in previous years, it is divided into five parts. There is, first, a brief description of all cases which have been reported, or appeared on the websites of the Scottish Courts (www.scotcourts.gov.uk) or of the Lands Tribunal for Scotland (www.lands-tribunal-scotland.org.uk/), or have otherwise come to our attention since *Conveyancing 2018*. A notable feature this year, as last, is the number of unreported cases which Professor Roderick Paisley has retrieved from the archives and passed on to us. We are grateful to him; the cases enrich this volume.

The next two parts summarise, respectively, statutory developments during 2019 and other material of interest to conveyancers. The fourth part is a detailed commentary on selected issues arising from the first three parts. Finally, in part V, there are two tables. A table of decisions on the variation or discharge of title conditions covers all decisions in 2019; an earlier, cumulative table of all cases from 2004 to 2018 can be found at the end of *Conveyancing 2018*. This is followed by a cumulative table of appeals, designed to facilitate moving from one annual volume to the next.

We do not seek to cover agricultural holdings, crofting, public sector tenancies (except the right-to-buy legislation), compulsory purchase or planning law. Otherwise our coverage is intended to be complete.

We gratefully acknowledge help received from Alan Barr, Ian Bowie, Malcolm Combe, Andrew Steven, Scott Wortley and Timothy Young.

Kenneth G C Reid
George L Gretton
14 March 2020

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MISSIVES OF SALE

(1) Ramoyle Developments Ltd v Scottish Borders Council [2019] CSOH 1, 2019 SLT 284

Scottish Borders Council owned property at Burgh Yard, Galashiels, Selkirkshire. It entered into missives to sell the property to Ramoyle Developments Ltd, the price being £1,053,000. The missives had the following provision:

> The Purchasers shall lodge the application for planning consent … as soon as reasonably practicable following the date of purification or waiver of the suspensive condition contained within Clause 2.2.4 and no later than the date falling 6 months after the said date of purification or waiver … In the event that the Purchasers have failed to submit the said application for planning permission with the local authority by the expiry of the said 6 month period then either party shall be entitled to rescind the Missives …

The buyer, Ramoyle Developments Ltd, submitted an online planning application within the six-month deadline, but it did not pay the application fee until after the deadline. The seller rescinded the missives, on the basis that the six-month time limit had not been met. The buyer responded with the present action, seeking declarator that the application for planning permission had been timeously submitted and that accordingly the seller was not entitled to rescind. The Lord Ordinary (Lord Ericht) held in favour of the pursuer. We quote from paras 24 and 25:

> The planning authority uses a system for submission of planning applications online through a web portal. The portal specifically uses the words 'submitting' and 'submitted'. The portal advises the applicant to check the amount of the fee 'before submitting an application'. It states that 'you won't be able to submit the application' until a payment method is selected. The system expressly provides that an application can be submitted without the fee having been paid: the portal states that 'The method of payment you select here will be applied once you have submitted the application'. The system advised the pursuer [the buyer] that the pursuer's application had been 'successfully submitted'. In my opinion the successful submission of an application under the system used by the planning authority for online submission satisfies the requirement to 'submit' an application … This is in accordance with the natural and ordinary meaning of the word 'submit'. In addition in my opinion it makes

commercial common sense in this digital age for the pursuer to use the planning authority's online submission system and comply with the provisions of that system. That system provided that an application is successfully submitted prior to payment of the fee by cheque.

(2) Hurley v Wells
7 October 1986, Aberdeen Sheriff Court

This unreported case from 1986 has only recently come to our attention. Missives were concluded for the sale of 'the dwellinghouse, outbuildings and their immediate environs known as Corseburn Croft Cottage' in Aberdeenshire. It was further provided that 'the Dutch barn and silage pit are excluded from this sale, and access to both … will be allowed to the seller, his workers, and any future purchasers'. It does not appear that the missives contained any plan. The buyer (pursuer) argued that the *solum* of the Dutch barn should be included in the disposition: his view was that the barn was moveable and that it was only that moveable structure that was reserved to the seller. The seller (defender) took the opposite view: he argued that the barn was heritable and thus a *unum quid* with the ground on which it stood, so that the missives contemplated the reservation to the seller of both the barn and the ground on which it stood.

It was held that the question of whether the barn was moveable (in which case the *solum* should be conveyed to the buyer) or heritable (in which case the *solum* would be reserved to the seller) would require proof as to the physical nature of the barn. Reference was made to *Christie v Smith's Exrs* 1949 SC 572, the well-known case, involving a summer-house, on whether a structure is to be considered as having acceded to the ground. It is, we would suggest, hard to see how a Dutch barn could not have acceded to the ground.

The missives were imperfectly drafted. (i) It seems that the missives had no plan, yet this was a case where a plan was surely needed. Had there been a plan, the status of the ground on which the barn stood would have been clear. (ii) If the barn was to be an enclave within land being bought by the pursuer, and the seller was to retain access rights, then why was the access right limited to just 'the seller, his workers, and any future purchasers'? For instance, suppose that the seller had died and had bequeathed his property to X, then why should X (being a legatee rather than a purchaser) not have had access rights? Indeed, could such an arrangement bind singular successors? Was what was intended a servitude? If so, why was that not what was said?

(3) White v Walker
27 August 1992, Kirkcudbright Sheriff Court

This unreported case from 1992 has only recently come to our attention. The pursuers, Mr and Mrs White, bought from the defenders, Mr and Mrs Walker, a farm at Drumwhill, near Castle Douglas, Kirkcudbrightshire. As will be seen, for the point is an important one, the farm bordered on a loch called Woodhall Loch. The missives were dated 18, 20, 29 December 1988 and 13 January 1989.

The transaction settled, and the disposition was recorded in the GRS on 12 May 1989. The offer said:

> It is understood that no part of the subjects of sale has been declared or contemplated to be declared a Sight [*sic*] of Special Scientific Interest. It is further understood that the subjects of sale are not affected by any designation or designations, and that the sellers are unaware of any contemplated designation or designations by the Secretary of State for Scotland in terms of any statute.

The qualified acceptance on behalf of the sellers, Mr and Mrs Walker (and which did not, it seems, delete the original clause), said:

> Our client warrants that there are no notices served on the subjects themselves but has no knowledge of any such notices that may affect any adjacent property and your client must satisfy themselves in this respect.

On 1 December 1988, ie shortly before receipt of the offer, the sellers had been contacted by the Nature Conservancy Council (its statutory successor today is Scottish Natural Heritage). The Council said that Woodhall Loch was being considered for designation as a Site of Special Scientific Interest. This fact was not made known to the buyers. In the end the proposal went ahead, the SSSI designation being made on 21 May 1990. At that point Mr and Mrs White, the new owners of Drumwhill Farm, were notified. They 'were furious, and felt that they had been cheated by the defenders, and induced to buy the land as a result of false representation' (para 9).

Why were they so unhappy? They believed that the property they had bought included rights in the loch, and that the SSSI designation would mean that they would not be able to use the loch as they had planned. This was particularly important because they intended to develop the farm 'for commercial purposes, such as the provision of recreational facilities, including shooting, boating, fishing' etc (para 2). They raised the present action for damages for misrepresentation.

The case has two points of interest. The first is that the alleged misrepresentation was what the missives said. This is a controversial area: there can be misrepresentation that induces a party to enter into a contract, of course. But can a term of the contract itself function as a misrepresentation? Or is a false contractual undertaking something that simply amounts to breach of contract? This issue is discussed in *Conveyancing 2018* p 133 ff. Here the defenders seem not to have challenged the idea that a contractual term can itself be a misrepresentation.

More significant is what the case has to say about boundaries. The sellers' title was a GRS title, plan-based, and this was the property as it was disponed to the buyers. The plan marked the boundary of the property as running along the *edge* of the loch. Accordingly, held the sheriff (Sheriff J R Smith), the title excluded the loch, citing *Dick v Earl of Abercorn* (1769) Mor 12813. That concerned Duddingston Loch, then near, now in, Edinburgh. The pursuer's title in that case was to the entire loch, so that the defender's title was its edge, and did not include any of

the loch itself. James Boswell acted for the pursuer at first instance, though not in the appeal; his witty memorial is reproduced in *The Legal Papers of James Boswell* vol I (ed Hugh M Milne; Stair Society vol 60, 2013) 18–27.

The learned sheriff sitting in Kirkcudbright was not able to access the report in *Dick v Abercorn*, only a summary, but we have checked the pursuer's title:

> Necnon totum et integrum lacum jacentem prope et continue ad dicta terras de Priestfield cum integris bondis ejusdem in longitudine et latitudine, prout idem jacet tam ex adverso et contigue ad dictas terras de Priestfield, quam ex adverso et contigue ad quascumque alias terras, una cum totis piscariis dicti lacus, et omnibus priviligiis et libertatibus, proficuis, et commoditabus hujismodi.

Verbose, of course, but clear enough. We trust that this wording has been copied into the A section of the current title sheet.

The sheriff accurately sets out the law, but we would also quote a more modern account, that of Jill Robbie's *Private Water Rights* (2015) at pp 83–84:

> If it [an inland loch] is surrounded by the lands of several persons, it is presumed they each own a section of the alveus to the medium filum … The presumption … can be displaced … by the alveus being excluded from the titles …

Since the pursuer's title excluded the loch, the designation of the loch as a SSSI did not affect the buyers. Accordingly the action failed.

(4) Barratt Developments (Falkirk) Ltd v Smith 19 November 1980, Kilmarnock Sheriff Court

This unreported case from 1980 has only recently come to our attention. The terms of the missives were significantly different from those that one would typically see nowadays, but nevertheless the case is of interest. The defender entered into missives with the pursuer to buy a small field in or near Galston, Ayrshire. When the date for settlement arrived the defender declined to settle, on the basis that since the date of conclusion of missives the property had become flooded, this flooding being caused, averred the defender, by works carried out by the pursuer on an adjacent site that it owned. An action of implement was then raised against the buyer. The defence was that the pursuer was in breach of an implied term that the land would be handed over in the state which it was in at the date of the missives. The sheriff (D B Smith) found in favour of the pursuer but at the same time held that the buyer might have a damages claim against the pursuer. See **Commentary** p 153.

(5) Neocleous v Rees [2019] EWHC 2462 (Ch), [2020] 1 P & CR DG8

Can a contract for the sale of land be entered into by email alone? In Scots law the answer is negative, though, depending on the circumstances, an agreement by email may be validated by what is sometimes called 'statutory personal bar' under s 1(3) of the Requirements of Writing (Scotland) Act 1995. Furthermore, email can and is used to deliver a PDF of an offer or acceptance which itself is

in paper form, a practice authorised by s 4 of the Legal Writings (Counterparts and Delivery) (Scotland) Act 2015.

The position in England and Wales is different. Section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 says that: 'A contract for the sale … of an interest in land can only be made in writing.' In the present case it was held that 'writing' can include email.

TENEMENTS, DEVELOPMENTS AND FACTORS

(6) Boatland Property Trs v Abdul
30 June 2014, Perth Sheriff Court

The tenement at 37–41 North Methven Street, Perth, originally comprised four flats but now, following the division of one of the flats, comprised five. Under the titles, decisions could be reached by the owners of a majority of flats, and there was no requirement to consult the other owners. The owners of three of the flats (two of which were originally the single flat) carried out repairs, without consultation, and sought to recover the cost from the owners of the two remaining flats. It was held (i) that the title provision as to decision-making, though meagre, replaced the default provisions in rule 2 of the Tenement Management Scheme, and (ii) that, in calculating majorities for the purpose of this provision, the tenement had to be taken as it was now (ie with five flats) and not as it was previously. See **Commentary** p 186.

(7) Sangha v Boland
13 May 1994, Kilmarnock Sheriff Court

This unreported case from 1994 has only recently come to our attention. The split-off disposition of a shop in a tenement in Largs, Ayrshire, granted in 1981, conveyed a right of common property in, among other things, 'the common entrance close and common passage both hatched red and marked "common entrance close" and "common passage" on the plan annexed and executed as relative hereto'. But when the shop came to be disponed again, in 1990, the disposition (i) omitted the parts and pertinents clause, (ii) described the subjects conveyed as being 'part of the subjects' conveyed by the 1981 disposition, and (iii) made reference to a plan which did not include the close and passage. A dispute having later arisen as to whether the owner of the shop had any rights in respect of the close and passage, it was held by the sheriff (Sheriff D B Smith) that he did not. On a proper construction of the 1990 disposition, the granter had retained her rights of common property in the close and passage.

Although the close did not give access to the shop, the case was argued on the basis that, under the common law of the tenement which applied in 1990, there would normally have been a right in common to the close. Nonetheless, the terms of the disposition were sufficiently clear to exclude the default rule of the common law. Whether that was really the common law position is doubtful (see K G C Reid, *The Law of Property in Scotland* (1996) para 231), although the

decision itself seems correct. We would add that under the Tenements (Scotland) Act 2004 s 3(2) the default rule does not give any rights over the close to a shop (or flat) which does not take access by the close.

[Another aspect of this case is digested as Case (24) below.]

(8) Strong v Gillespie
21 March 1984, Kilmarnock Sheriff Court

This unreported case from 1984 has only recently come to our attention. A Victorian tenement of six flats was sold off, flat by flat, in the 1950s. In the first five of the split-off dispositions the flat itself, the strip of garden ground which was to be in sole ownership, and the back green which was to be in common ownership, were coloured on a plan. The final flat was disponed as the whole tenement under exception of the other five flats.

Many years later a question arose as to the ownership of the stone wall enclosing the tenement and garden. This was because one of the flat-owners, wanting to build a garage on his strip of garden ground, needed to be able to make an opening in the wall. The colouring on the plan excluded the wall. That being the case, it was held by the sheriff (Sheriff D B Smith) (i) that no rights over the wall had been carried by the first five split-off writs, and (ii) that, accordingly, the wall was the sole property of the owner of the sixth flat.

In seeking to resist this conclusion it had been argued, on behalf of the owner who wished to alter the wall, that the wall was common property of all the owners. This was said to be because (a) the five split-off dispositions each conveyed, as a pertinent of the flat, 'all other rights common and mutual appertaining and belonging to the subjects herein before disponed', and (b) each flat was under a real burden to pay a one-sixth share of the cost of maintaining the wall. This was a weak argument and it was rejected by the sheriff.

(9) Duncan v Ross & Liddell Ltd
[2019] UT 61, 2019 GWD 37-590

By s 17(1) of the Property Factors (Scotland) Act 2011:

> A homeowner may apply to the First-tier Tribunal for determination of whether a property factor has failed –
>
> (a) to carry out the property factor's duties,
> (b) to ensure compliance with the property factor code of conduct as required by section 14(5) (the 'section 14 duty').

'Property factor's duties' are defined by s 17(5) as:

> (a) duties in relation to the management of the common parts of land owned by the homeowner, or
> (b) duties in relation to the management or maintenance of land –
> (i) adjoining or neighbouring residential property owned by the homeowner, and
> (ii) available for use by the homeowner.

The Code of Conduct can be found at www.scotland.gov.uk/Publications/2012/07/6791/0. Appeal from the First-tier Tribunal is to the Upper Tribunal.

Now that this new tribunal system is in place, there has been a stream of complaints about property factors to the First-tier Tribunal (www.housingandpropertychamber.scot/previous-tribunal-decisions), some of which have been appealed to the Upper Tribunal (www.scotcourts.gov.uk/search-judgments/upper-tribunal-decisions). Typically these cases are highly fact-specific and contain little or no law. We include only a small selection of them here.

In *Duncan v Ross & Liddell Ltd* a factor had allegedly breached the data protection legislation in respect of the applicant homeowner. On appeal, the Upper Tribunal held that, while data protection breaches were capable of coming within the ambit of s 17(5), the question of whether a particular breach qualified depended on the precise nature of the breach. As the facts were still in dispute, the case was returned to a differently constituted First-tier Tribunal in order to make a determination.

(10) Lynas v James Gibb Property Management Ltd [2019] UT 22

The appellants concluded missives on 2 July 2015 to buy flat 3, Fairyknowe Court, Bothwell, Lanarkshire. They took entry on 4 September. The day before entry they received the reassuring news from the factors for the housing estate that: 'Our records do not show any extraordinary repairs anticipated under our instruction.' Not long thereafter the appellants received a bill for £1,300 for common repairs. They applied to the First-tier Tribunal on the basis that the factors had breached para 2.1 of the Code of Conduct for Property Factors. This provides that: 'You must not provide information which is misleading or false.'

The appellants' difficulty was that, at the time the alleged false statement was made, they had not yet become owners, only holding a right under missives. The Upper Tribunal held that this was fatal to the application. As was clear from the nature of its provisions, the Code of Conduct applied only to current homeowners. A person who had only a right under missives, and had neither paid the price nor taken entry, was not an 'owner', either in the technical sense of the word (as to which see W M Gordon and S Wortley, *Scottish Land Law* (3rd edn, 2009) paras 13-01 to 13-05) or in the word's normal understanding.

The decision seems correct. But even if the appellants had been successful, they would not have recouped the £1,300. For by 3 September 2015 they were contractually committed to the purchase, and would, presumably, have gone ahead even if the factors' letter had disclosed the common repairs. At most, the First-tier Tribunal might have awarded a small sum, under s 20(1)(b) of the Property Factors (Scotland) Act 2011, for distress and inconvenience. Indeed an award of £500 under this head was made by the Tribunal to the appellants on 17 May 2018 in respect of subsequent breaches of the Code of Conduct.

(11) Shield v First-tier Tribunal for Scotland (Housing and Property Chamber) [2019] UT 31, 2019 SLT (Tr) 7

This is like the previous case but the other way around. The appellants were homeowners at the time of the alleged failures by the property factors but had ceased to be homeowners by the time of the application to the Tribunal. The First-tier Tribunal decided that when a person ceases to be an owner, the person also ceases to be eligible to apply to the Tribunal under the 2011 Act. On appeal, the Upper Tribunal (Sheriff A F Deutsch) reversed this decision. The Act, said the UT, must be interpreted purposively. The UT continued (para 4):

> The reasoning of the First-tier Tribunal in each case emphasises the opening clause of s 17(1) – 'A homeowner may apply'. If a person is not a homeowner at the time of presenting the application then, it is argued, they have no right to do so. In taking this approach the First-tier Tribunal has adopted a very literal, non-purposive interpretation. When s 17(1) is considered as a whole it becomes clear that the right to apply to the tribunal is for determination of past failures on the part of the property factor. Once that is recognised it does not greatly strain the language of the subsection to interpret it as requiring only that the person making the application was a homeowner at the time of the failure which is the subject of the complaint.

Furthermore, at least one provision of the Code of Conduct – rule 3.1 – presupposed that the applicant would be a person who had ceased to be a homeowner. So far as relevant, rule 3.1 provided:

> If … a property changes ownership, you must make available to the homeowner all financial information that relates to their account. This information should be provided within three months of termination of the arrangement unless there is a good reason not to (for example, awaiting final bills relating to contracts which were in place for works and services).

Breaches of the Code are not justiciable in the ordinary courts. Unless, therefore, an application can be made to the Tribunal, the Code would be unenforceable in cases of sale.

(12) McCormick v West Dunbartonshire Council [2019] UT 9

This dispute concerned an end-terrace house in Clydebank, Dunbartonshire. The only link between West Dunbartonshire Council and the homeowner was that the Council arranged common buildings insurance for the homeowner along with the owners of certain other houses (which were, we imagine, council houses). Was this enough to make the Council a property factor in respect of the house and, if so, did that mean that the duties under the Property Factors (Scotland) Act 2011 applied more generally vis-à-vis the homeowner? The Upper Tribunal (Sheriff A F Deutsch) held that the answer was yes. The duties under the Act, the UT found, were of a general nature. Nothing in the Act or Code of Conduct contained a requirement (para 11):

that the property which gives rise to any enquiry or complaint should actually be subject to management by the property factor; to imply that condition would not be consistent with the legislative intention of setting minimum standards of practice for all registered property factors (section 14(1)). The only requirement is that the property factor who is the subject of complaint did in fact manage or maintain common property pertinent to the homeowner's property.

A consideration of 'practical scenarios' bore this out. For example, where there was unexpected water ingress, a homeowner was entitled to contact the factor and the factor was bound to respond to the inquiry within a prompt timescale under section 2.5 of the Code (the very provision which had been breached in the present case) even if it later turned out that the source of the water came from a pipe or drain which was not communal. Thus, '[a]s the home owner's property factor, the property factor was bound to comply with section 2.5 of the code regardless of whether the property which was the subject of her enquiry or complaint was as a matter of fact managed by the property factor in that capacity' (para 15).

(13) Hanover (Scotland) Housing Association Ltd v Morrison [2019] UT 25, 2019 GWD 17-258

The First-tier Tribunal held that property factors in a private retirement complex at Muirfield House, Gullane, East Lothian, had breached their property factor duties by failing to accede to the request of one of the owners to replace the external light on the sun-lounge with a new light which would be on at all times during darkness and was not just triggered by a sensor. The cost of the light would be around £1,000 and the yearly running costs around £300. The Upper Tribunal (Sheriff Nigel Ross) reversed this decision. (i) Under the deed of conditions the external light was a common part. The property factors could only carry out works to the common parts with the prior authority of the homeowners. Yet the property council of homeowners, which had jurisdiction over common parts, had rejected the proposal to replace the light. (ii) In any case, although the boundary between repair and improvements was a difficult one, this was clearly an improvement rather than a repair and so beyond the powers of even a majority of homeowners. The homeowner was seeking 'something better and different, not simply a replacement of like with like. There is no want of repair or maintenance, only of performance' (para 20).

SERVITUDES

(14) Snowie v Farish [2019] SC PER 1, 2019 SLT (Sh Ct) 46

An express servitude of way was challenged as being insufficiently clearly drafted to be valid. The challenge was repelled by the sheriff and the action, for declarator and reduction, was dismissed. See Commentary p 142.

(15) Lothian Amusements Ltd v The Kiln's Development Ltd [2019] CSOH 51, 2019 GWD 23-354

As part of a residential development of 55 flats in Edinburgh's Portobello district the developer (and first defender) built a basement car park with 73 parking spaces. In the event, 18 of these spaces turned out to be surplus because the developer did not proceed with a proposed second development of 18 apartments. In August 2013 the developer concluded missives with the pursuer to sell to the pursuer (i) the 18 car-parking spaces and (ii) a servitude right of access by means of a doorway in the eastern wall of the car park ('the KDL Doorway'). Later the pursuer rescinded the missives on the ground of material breach by the developer. In this action the pursuer was seeking damages. The current stage was a debate on the relevancy of aspects of the pursuer's pleadings.

In relation to (i), the pursuer averred that the whole of the car park, including the 18 spaces being purchased, was subject to a servitude right to park held by the owners of each of the 55 flats. Hence the title to the car park was materially encumbered. Whatever practice was in fact adopted on the ground, this servitude right was a right to park anywhere in the car-parking area; from a legal point of view, there was not an allocated parking space for each flat. The servitude was created by clause 5.2 of the deed of conditions affecting the development. So far as relevant, this read:

> 5.2.3 The Owners shall have the right to use one Car Park Space per Apartment on the following basis:-
>
> > 5.2.3.1 no more than one vehicle per Apartment shall be permitted at any time;
> > 5.2.3.2 each Owner shall ensure that their vehicle is parked considerately without blocking access to any other car parking spaces.
>
> 5.2.4 Each of the Owners shall have a right of vehicular and pedestrian access to the Car Park Spaces across the Car Park.

Although this was not, thought the Lord Ordinary (Lord Doherty) 'a model of good drafting' he was satisfied (para 44) that 'in relation to both the servitudes of parking and the servitudes of access and egress that the servient tenement is the entire Car Park' (ie including the 18 spaces being sold). Hence, in the absence of proper averments by the developers as to the allocation of spaces within the car park, the pursuer's averments were relevant and suitable for inquiry. It might be added that no one seems to have disputed what was, until recently, a controversial matter, namely that a right to park can be created as a freestanding servitude: on that topic, see *Conveyancing 2016* pp 141–44.

In relation to (ii) (the servitude of access by the KDL Doorway), the pursuer averred that the whole of the car park's eastern wall was part of the 'Development Common Parts' as defined in the deed of conditions and hence was the common property of the owners of all 55 flats. As the developer had thus ceased to be owner of the wall, it could not now grant a servitude of access to the pursuer.

Again, the Lord Ordinary accepted this interpretation of the clause, and hence the relevancy of the pursuer's averments. A complication, however, was created by condition 16.2.1(f) of the deed of conditions which purported to reserve to

the developer a right to grant a servitude of access in respect of the eastern wall. The condition read:

> The Developer reserves the right to grant to the proprietor(s) of the Arcade or any part thereof or anyone authorised by such proprietor(s) without the requirement to obtain the consent of any of the Owners or the Commercial Owner (or their tenants or any other occupier of the Development) servitude rights over any part of the Development in relation to … (f) a right to knock through any part of the eastern boundary wall of the Car Park and form and/or construct a doorway, entrance for pedestrians and vehicles or other means of communication ('doorway') from the Car Park to the Arcade and grant heritable and irredeemable servitude rights of pedestrian access through the doorway, subject to, in each case, the party exercising such rights making good all damage caused in exercise of the same.

The Lord Ordinary explored the scope of this reservation but, in the absence of fully developed submissions from counsel, declined to offer a firm view as to its effect (paras 66–68). For as long as all 55 of the original proprietors continued to own the flats, the reservation might be seen as a sort of mandate to the developer to grant a servitude on their behalf. But once a flat was sold on, the reservation could affect the new owner only if it was real in character. As the Lord Ordinary noted, following his own researches, the issue of whether a reservation of this kind might be real was considered in *Conveyancing 2009* pp 182–83, where doubt was expressed on the point.

(16) Johnston v Davidson
29 August 2019, Forfar Sheriff Court

Circumstances in which it was held that the grant of a 'heritable and irredeemable servitude right of access' included, by implication, an ancillary right to park a car. See **Commentary** p 146.

(17) Macallan v Arbuckle
11 June 2019, Dundee Sheriff Court

Does a servitude of way carry an ancillary right to use verges and passing places? On the particular facts of the case it was held that it did not. See **Commentary** p 149.

(18) Ruddiman v Hawthorne
[2019] CSOH 65, 2019 GWD 29-463

The pursuer was the owner of Bieldside House in Aberdeen (title number ABN7030) and the defenders were owners of two contiguous areas of land (the 'yellow' and 'brown' areas) which, until 1990, had been part of Bieldside House. The first and second defenders (Mr and Mrs Hawthorne) had previously owned the entire property, but in 1990 they disponed Bieldside House while retaining the yellow and brown areas.

Access to Bieldside House from the public road was by means of a horseshoe-shaped driveway which was owned by the pursuer as part of the house. The split-off disposition of 1990 (which conveyed Bieldside House) had reserved a pedestrian and vehicular servitude of way over the driveway for the benefit of the yellow area but not the brown area. The failure to include the brown area within the dominant tenement resulted in an action for professional negligence by Mr and Mrs Hawthorne against their solicitors which, in the event, was unsuccessful: see *Hawthorne v Anderson* [2014] CSOH 65, 2014 GWD 13-247 (*Conveyancing 2014* Case (62)).

The defenders built and lived in a house ('Bieldside Lodge') on the yellow area. For a number of years they have sought to obtain planning permission for the brown area. Apart from the awkwardness of the site (a steeply sloping area of scrubland and bushes), there was the problem that the only possible means of access, at least for construction traffic, was over the horseshoe driveway. The pursuer, being opposed to any development of the brown area, was unwilling to grant the necessary servitude. It was accepted on both sides that the 1990 servitude could not be used for this purpose because, the dominant tenement being the yellow area only, it was not permissible to reach the brown area by means of (i) the horseshoe driveway followed by (ii) the yellow area; for this would be to use the yellow area as a bridge to the brown area, and hence, indirectly, to use the servitude for the benefit of a property (the brown area) which was not part of the dominant tenement. That view of the law, if indeed it had ever been in doubt, had been settled by the well-known case of *Irvine Knitters Ltd v North Ayrshire Co-operative Society* 1978 SC 109. For a full discussion of that case and its implications, see Roderick R M Paisley, 'The Use of Praedial Servitudes to Benefit Land outside the Dominant Tenement', in Frankie McCarthy, James Chalmers and Stephen Bogle (eds), *Essays in Conveyancing and Property Law in Honour of Professor Robert Rennie* (2015) 203.

There being no disagreement about the law or its application, the only issue between the parties was whether the pursuer was entitled to interdict against the defenders to prevent them from using the horseshoe driveway to reach the brown area. The pursuer's action had been initiated as long ago as 2009, but had stopped and started to allow for negotiations. But now the pursuer wanted interdict. The defenders were repeatedly applying for planning permission, undaunted by successive refusals. They had recently dug inspection trenches in the brown area. There was thus a reasonable apprehension of a wrong. That view was strenuously resisted by the defenders, who called upon the pursuer to aver and prove some use beyond that which was permitted by the existing servitude. 'An example of such an averment might be: "On 17 June 2018 the first defender walked up the driveway, straight through Site 1 to reach Site 2 where he set up a barbecue"' (para 25). Furthermore, the defenders had entered into a formal judicial undertaking which meant an acceptance that they could not lawfully develop the brown area unless (a) the pursuer's successor in title gave appropriate consent, or (b) a route other than the servitude route was made available for the construction phase of the development. Despite this, the Lord Ordinary (Lady Paton) refused to dismiss the action and allowed a proof before

answer. In her view there was, as the pursuer said, a reasonable apprehension of a wrong and that was, in terms of relevancy and specification, a sufficient basis for interdict.

(19) Leehand Properties Ltd
2019 GWD 29-468, Lands Tribunal

A servitude must have a dominant tenement (or, in the terminology of the Title Conditions (Scotland) Act 2003, a benefited property). And equally – indeed the one follows from the other – a servitude cannot be created in favour of an individual, without reference to a dominant tenement; nor, therefore, can it be created in favour of *all* individuals, ie of the public at large: see eg D J Cusine and R R M Paisley, *Servitudes and Public Rights of Way* (1998) paras 1.11 and 18.11. Yet sometimes 'servitudes' are found in titles which purport to be created in favour of one or both. An example was the 'servitude' considered in the present case, which was an application for the discharge of the servitude under s 90(1)(a) of the Title Conditions (Scotland) Act 2003. The 'servitude', which was contained in a feu disposition of 1994, read as follows:

> With reference to the roadways and footpaths to be constructed by the Feuars within the Feu there shall be reserved to the Superiors, and to members of the public generally, a servitude right of passage, for pedestrian use in all time coming, over and across all of the said roadways and footpaths including specifically, the footpaths tinted blue on the said plan.

Plainly, a servitude cannot be reserved 'to members of the public generally' although it might be possible to treat such a reservation as creating a public right of way (in which case it could not be discharged by the Lands Tribunal). A reservation in favour of 'the Superiors' can only be created as a servitude if (i) the word 'Superiors' is interpreted as meaning merely 'granters' and so capable of including other land held by the granters as *dominium utile*, and (ii) such land can reasonably be identified.

The second doubt, at least, would not have troubled the Lands Tribunal because, under s 90(1)(a), applications for discharges can be heard in respect of 'purported' title conditions. As the application was unopposed, the Tribunal was not addressed on the point. This presumably explains why (at para 40) the Tribunal seemed to contemplate the possibility of a servitude reserved in favour of superiors, and why the Tribunal thought that it was 'conceivable that proprietors of Ramsay Wood, *qua* members of the public, could claim a right of servitude following the 1994 feu disposition'.

[Other aspects of this case are digested as Cases (33) and (42) below.]

(20) Ury Estate Ltd v BP Exploration Operating Co Ltd
[2019] CSOH 36, 2019 GWD 18-288

The pursuer owned Ury House and policies (title number KNC11588) in what is, for administrative purposes, currently Aberdeenshire (for the long history

of this house, see https://en.wikipedia.org/wiki/Ury_House). The defender operated a pipeline which carried crude oil or petroleum from the BP terminal at Cruden Bay, Aberdeenshire, to a refinery terminal at Grangemouth. A section of the pipe ran through the pursuer's property by virtue of a deed of servitude. Condition 25 of the deed provided that:

> if at any time the [pursuer] wishes to develop land affected by the pipeline … the [pursuer] shall if the said proposed development of the land is prevented in whole or in part by reason only of the existence of the pipeline, give written notice to [the defender] of the said proposed development including details of the application for and refusal of or conditional grant of planning permission in principle by the Planning Authority. Within six calendar months of the receipt of such written notice [the defender] shall give their decision in writing to the [pursuer] that they intend to divert the pipeline or that they intend to pay compensation for all losses arising from their decision not to divert the pipeline, including, without prejudice to the foregoing generality, losses of Development Value.

On 11 April 2017, Aberdeenshire Council refused the pursuer planning permission to develop Ury House as a 35-bedroom luxury hotel due to the proximity of Ury House to the pipeline. On 20 April 2017 the pursuer served a notice on the defender under condition 25. Six months having then passed without the defender diverting the pipeline, the pursuer made this claim for compensation.

After a proof it was held (i) that Ury House could have been converted into a luxury hotel by virtue of earlier planning consent, and (ii) that in any case the pursuer had suffered no loss following Aberdeenshire Council's refusal of consent in 2017. In relation to (ii), the Lord Ordinary (Lord Bannatyne) accepted the evidence of the defender's expert witness to the effect that there had been no loss in development value. The Lord Ordinary rejected the pursuer's preferred method of quantifying loss – as the difference in value between the proposed development, had it been successful, and the development for which planning permission had previously been granted (less building costs) as too speculative. Apart from anything else, the hotel might have been unsuccessful.

(21) Alexander Monro & Co v Glennie
6 April 1984, Aberdeen Sheriff Court

This unreported case from 1984 has only recently come to our attention. When Drumforskie was broken off from the Estate of Craighall in Aberdeenshire in 1956, there was reserved to the Estate 'the right to use for the water supply, drainage and sewerage of the other portions of the estate all existing springs … pipes … connections … and others which are at present so used, with a right of access for maintenance'. Subsequently, an adjoining property, Craighill Farm, was also broken off from the Estate. The water supply to Craighill Farm came from Drumforskie and hence had the benefit of the 1956 servitude. This, as the sheriff (R J D Scott) pointed out, was a combined servitude of *aquaehaustus* and aqueduct.

For a while all was well, but in 1982 the defenders, having acquired Drumforskie (by now known as Redcraigs), connected into the water supply themselves. The present action was raised by the owners of Craighill Farm. Their principal craves were for (i) interdict against the use of the water supply by the defenders, and (ii) interdict against interference with the supply pipes. It was accepted that a proof would be needed in respect of (ii) but the defenders attacked the relevancy of (i) on the following ground. They (the defenders) owned Drumforskie. That ownership included the well and other parts of the water supply system. The only restraint on their ownership was the servitude. So long, therefore, as their use of the water supply did not interfere with the servitude, the pursuers had no cause for complaint.

The sheriff agreed (p 5 of the transcript):

> [W]hat the pursuers are saying is that the defenders should be judicially restrained from making any use of the water supply running through their own land, and that they should be ordained to go to the trouble and expense of (a) removing the connection which they have made and (b) restoring the line of the water supply to its original position, which, as it happens, is underneath the house which they have built and in which they are now living. For these extravagant remedies to be available there would be required, in my opinion, abundant proof from which it could be inferred that the operations of the owner of the servient tenement threatened to interfere with the supply of water required now or in the future for the use of the dominant tenement as described in the grant.

The pursuers' averments, which showed only a single, isolated interruption of supply, fell far short of what was needed in that respect. No proof, said the sheriff, could be allowed of the averments as they stood.

(22) Morrison v Marshall
15 January and 4 April 1985, Aberdeen Sheriff Court

This unreported case from 1985 has only recently come to our attention. The facts and result of this case may be contrasted with the previous case. The water supply to Upper Culphin Farm in Banffshire, owned by the pursuers, derived from a well in Rothin Farm, owned by the defenders. It was secured by an express servitude in a disposition of 1959. When the defenders proposed to carry out drainage operations on some of their fields, the pursuers sought interdict against such drainage operations as would interfere with their water supply. The pursuers averred in some detail how they had a reasonable apprehension of such interference in the event that the drainage works were to go ahead. The defenders averred that their works would not have any effect on the water supply.

The applicable law was clear enough and not in dispute. The pursuers were entitled to their water supply, with a certain margin of safety. Equally, the defenders were entitled to drain their fields as long as this did not disturb the water supply. *Crichton v Turnbull* 1946 SC 52 was the leading case. The dispute between the parties was essentially a procedural one. The defenders wanted a proof so that the court could assess whether the water supply would be

interrupted. The pursuers wanted an interdict on the basis of their averments and without the expense of a proof. It was held by the sheriff (Sheriff R J D Scott) and, on appeal, by the sheriff principal (S E Bell) that the defenders' averments were too scant to form the basis of a proof. Hence the pursuers were entitled to their interdict.

(23) Pirie v Harrold
5 June 1984, Aberdeen Sheriff Court

This unreported case from 1984 has only recently come to our attention. Access from the main Aberdeen to Skene road to one of the pursuer's fields was by means of a rough track, with the grand and perhaps misleading name of 'Duke Street'. For part of its length Duke Street separated two areas of land which belonged to the defender. The parties were in dispute for a number of years as to the pursuer's entitlement to take access over the track. The present litigation seems to have been prompted by the defender's action in erecting a wall across the track. The pursuer sought declarator that he had a servitude right of access either by express grant or by positive prescription. Following a proof it was held that a servitude had been established on both grounds.

The decision is of interest for two reasons. First, the sheriff (Sheriff D Risk) decided that prescription had run despite the fact that the defender had erected a wire fence across the track which remained in place for a short period until it was taken down by the pursuer. This was because of the defender's evidence that it had been erected, not to challenge the pursuer's right, but to prevent the escape of cattle. This followed the decision in *Stevenson v Donaldson* 1935 SC 551. The clear implication is that, without this evidence as to the purpose of the fence, the sheriff would have regarded it as having interrupted the running of prescription.

Secondly, a question arose as to whether the track, at the relevant point, was the property of the defender. On a construction of the relevant disposition it was held that it was not carried by the disposition and hence was not the defender's property. One issue that required to be considered was a declaration in the relevant disposition that 'the said access road shall be the mutual property of the proprietors on either side of the said road and shall be maintained by them mutually'. The problem here, as the sheriff pointed out (p 8 of the transcript), arose from uncertainty as to what was meant by 'mutual property', given that the expression 'is not a term of art having a recognised meaning in Scots law'. That being so, the meaning of the words depended on the context in which they were found. In the present context, said the sheriff, they probably conferred a right of common interest. See **Commentary** p 134.

(24) Sangha v Boland
13 May 1994, Kilmarnock Sheriff Court

This unreported case from 1994 has only recently come to our attention. The general rule of the law of servitudes, that a servitude cannot be granted by an

individual *pro indiviso* owner but only by all owners acting together, applies equally to the case of implied servitudes. Although this is not, we think, a controversial proposition, it is one for which hitherto there has been no direct authority. The decision in *Sangha v Boland* now provides that authority. A disposition of a shop in a tenement conferred no express right of access over the common passage and stair, even though the owner of the shop was subject to a maintenance obligation in respect of the roof. The shop-owner argued that a servitude of access to the roof by the passage and stair was implied into the disposition. The disponer, however, had herself only a *pro indiviso* share in the passage and stair. In these circumstances it was held by the sheriff (Sheriff D B Smith) that no servitude could be implied.

[Another aspect of this case is digested as Case (7) above.]

(25) Greig v Stroud
29 September 1993, Stonehaven Sheriff Court

This unreported case from 1993 has only recently come to our attention. When land in Bridge of Cairn, Ballater, Aberdeenshire, was disponed in 1939, there was reserved a servitude over a private road 'for all the usual purposes'. In this action the pursuer, who now owned the road, sought to interdict the daughter of a neighbour (and dominant proprietor in the servitude) from riding her horse along the road. Although the motivation for the action was, apparently, the pursuer's allergy to horses, it was accepted that this could not be a relevant consideration.

It was argued for the pursuer that the meaning of 'all usual purposes' might or might not include horse-riding, and that the issue could only be determined after proof. The sheriff (Sheriff David Kelbie) disagreed:

> In my view … such a provision in a disposition is not intended to be construed with reference to the particular use presently being made of the road. 'All usual purposes' simply means all the usual purposes for which a road of that kind may be used and is, in my view, a grant of a right of access 'in general terms'.

See further, on this topic, D J Cusine and R R M Paisley, *Servitudes and Rights of Way* (1998) para 14.51.

As for horse-riding, the sheriff thought, surely correctly, that the position was beyond doubt:

> It is difficult to think of a more usual purpose for a country road in a rural setting than riding a horse along it. Certainly, in 1939, horses were still commonly used for agricultural purposes in the north east of Scotland and it is hard to imagine that anybody would have thought there was anything unusual about taking a horse along the road to a farm.

There was also a second servitude on which the defender could rely, and again the sheriff held that this entitled her to ride her horse. This servitude, from 1980, was for 'vehicular and pedestrian access'. The pursuer sought to argue that express grants have to be limited to their terms, and that in the present

case the terms conferred 'a grant of right by vehicle or by foot to the exclusion of access on horseback'. So, rejoined the sheriff, a horse was permitted when pulling a cart but not when on its own? The argument was plainly a hopeless one, particularly in the light of the well-established rule that, in servitudes, the greater right includes the lesser. A grant of vehicular access must therefore include a right to ride a horse.

(26) Watkinson v Blain
5 June 1989, Stranraer Sheriff Court

This unreported case from 1989 has only recently come to our attention. 81 and 83 Fairhurst Road, Stranraer, were, respectively, a mid- and an end-terrace house in a block of four terraced houses. These were built as council houses by Stranraer Town Council in the mid-1950s. The pursuer, who was the original tenant of number 81, exercised his right to buy the house in 1981. The defender did likewise in 1984. For as long as the houses were still owned by the council (or so the pursuer averred), he had an express right of access in the lease to his back garden by way of the side of the defender's house 'for all reasonable purposes (eg) conveyance of fuel, manure, dustbins, bicycles (etc)'. In this present action he sought declarator that he had a servitude right to continue to take the same access.

The split-off feu disposition of 1981 gave no express right to take the access. Nor could positive prescription have run, because less than 20 years had elapsed since 1981 (and there could be no question of prescription for as long as both houses were in the ownership of the council). That left only constitution by implication. For this there were (and are) two requirements: (i) the servitude must be necessary for the comfortable or convenient enjoyment of the dominant tenement, and (ii) the access (or other right) must normally have been exercised prior to severance, ie prior to the split-off of the first property (number 81) from the second (number 83) in 1981.

The sheriff (Sheriff J R Smith) was sceptical as to whether the case for an implied servitude could be made out. A particular difficulty, he noted, was that the feu disposition from the council conferred an express right of access to the house from the public road at the front. This came 'close to a situation where the maxim "expressio unius est exclusio alterius" applies, if it does not actually apply': in other words the fact that one access servitude was granted expressly suggested that a second could not have been granted by implication (see D J Cusine and R R M Paisley, *Servitudes and Rights of Way* (1998) para 8.26(2)). Another difficulty was the *dictum* of Lord Neaves in *Gow's Trs v Mealls* (1875) 2 R 929 at 736 to the effect that the requirement of being necessary for convenient enjoyment can be tested by asking whether the purchaser, as a reasonable man, would have bought the dominant property without it. (In fact this is not a very useful test since, in most cases, the person seeking to establish the servitude will indeed have bought the property without the assurance of a servitude being in place.)

Whether sufficient facts and circumstances existed from which a servitude could be implied could only have been ascertained by a proof. But the pursuer's

averments were so thin (implied servitude having apparently been an afterthought) that a proof was refused. From the tenor of the sheriff's remarks, however, it seems unlikely that the pursuer would have met with success.

(27) Ferguson v Barklie
2 October 1991 and 22 January 1993, Arbroath Sheriff Court

This unreported case from 1991 and 1993 has only recently come to our attention. This was a dispute between neighbours in a housing estate in Monikie in Angus. In 1979 the pursuer built a garage at the rear of his house. Access was by means of a private roadway. Ten years later it was discovered that the roadway was the sole property of the defenders, a neighbour – something which was not obvious from the boundary features on the ground. Relying on their ownership, the defenders blocked the pursuer's access, first by parking cars and later by the erection of a fence. In this action the pursuer challenged the defenders' right to do so.

The pursuer's case was that he had a servitude right of access over the roadway which had been constituted either (i) by the original deed of conditions over the estate (which dated from 1967) or (ii) by the acquiescence of the defenders' immediate predecessors in title.

On (i), the pursuer founded on the following provision from the deed of conditions:

> And declaring that where parts of the separate lots of ground to be feued off form part of an access roadway and/or foot pavement the said parts of ground shall be burdened with the heritable and irredeemable servitude rights of access wayleave and tolerance in favour of (a) the over superior and us and our successors (b) all the proprietors having access to the said lot of ground by said access roadway and/or footpath and (c) the said George Johnson Fortis Fyvie or his successors as proprietors of the neighbouring ground.

Following a proof it was held that, as there was no evidence that the area of land in question was an access roadway at the time when the pursuer took entry to his house in 1975 (let alone earlier), the provision in the deed of conditions could not be shown to apply.

As for (ii), while the defenders' predecessors had certainly consented to planning permission for the garage, they did not know that they owned the roadway and, even if they had known, they could not have prevented the pursuer from building on his own property. None of this was sufficient to amount to acquiescence.

WAYLEAVES

(28) Arqiva Ltd v Kingsbeck Ltd
[2019] SAC (Civ) 28, 2019 SC (SAC) 95

This case concerns the Telecommunications Code set out in sch 2 of the Telecommunications Act 1984. (This has since been replaced, with effect from

28 December 2017, by a new Electronic Communications Code which is inserted as sch 3A into the Communications Act 2003 by s 4 and sch 1 of the Digital Economy Act 2017. For details, see *Conveyancing 2017* pp 71–73.)

Arqiva Ltd, being the statutory successor of the Independent Broadcasting Authority, is (with its sister company, Arqiva Services Ltd) the sole provider, owner and operator of terrestrial television broadcasting services in the UK. It also has a market share of around 90% for radio broadcasting. The case concerns one of Arqiva's electronic communication masts which was located on Unthank Farm, Coulter, Biggar, Lanarkshire, a property owned by Kingsbeck Ltd. As is permitted under the Telecommunications Code, the mast was also used by certain mobile network operators (EE, Vodafone, O2, BT and ITS) (as to which see *SSE Telecommunications Ltd v Millar* [2018] SCA (Civ) 14, 2018 SC (SAC) 73 (*Conveyancing 2018* Case (26)). In addition, these operators had other equipment on site, including cabins.

The dispute concerned the basis on which Arqiva could continue to use the site, and its right to regulate who else used it. Kingsbeck had served a notice to quit on Arqiva whereupon Arqiva had served a notice under para 5 of the Code requiring Kingsbeck to agree to grant a lease. When the statutory period of 28 days passed without Kingsbeck having responded, Arqiva exercised its right under para 5 to ask the court to confer the lease. It was accepted by Kingsbeck that a grant of Code rights could be made by lease (but could also, as the Sheriff Appeal Court pointed out, be given by other means). This concession as to the lease, said the court (in an Opinion delivered by Appeal Sheriff Peter J Braid), was significant (paras 31 and 32):

> [A]s soon as it is accepted that a lease of land is required, the normal incidents of a lease (including the right to exclusive occupation) must follow. We therefore agree with counsel for the respondent [Arqiva] that the question then becomes what should be the terms of the lease. As soon as that proposition is understood, it then becomes simply a question of negotiation (failing which, determination by the court) as to what the terms and conditions of the lease should be.
>
> That negotiation (or court determination) must take place against the background of the code, in other words it must recognise that the respondent not only has certain rights, but certain obligations, as a code operator. In particular, it has the right (and obligation) to share its equipment including the mast. As counsel for the respondent submitted, as occupier under the lease, its consent would be required for any other operator to enter upon the site and to attach equipment to its mast or to place equipment on the ground for that matter. That also makes commercial sense … Accordingly, it seems to us that many of the proposed terms of the lease are unexceptional, and are necessary to enable the respondent to exercise its code rights. That said, it does not follow that the respondent should have the exclusive right to permit work to be done on the site, such as the erection of a new building.

In the light of these remarks, the case was put out by order to discuss what orders the parties wished the court to make.

(29) Lothian Regional Council v Spence
8 August 1986, Edinburgh Sheriff Court

This unreported case from 1986 has only recently come to our attention. Decisions on the provision by public authorities (nowadays Scottish Water) of sewage and drainage are few and far between, and so this decision and the next, both from the 1980s, are particularly welcome. We are grateful to Professor Roderick Paisley for supplying the judgments.

Section 3(2) of the Sewerage (Scotland) Act 1968 empowers courts to grant consent to the relevant public authority for the construction of a sewer in private property. No criteria are provided for the exercise of the court's powers, and the decision of the court is final.

This was an application by Lothian Regional Council under s 3(2). It related to a proposed new development of 10 houses in Bonnyrigg, Midlothian. The Council's plan, for which it sought approval, was to construct a trench for a fireclay pipe through the garden of the defenders' house at 120 High Street. The application was opposed by the defenders. Following a proof, the sheriff granted the application, subject to a number of conditions which had been suggested by the Council (eg as to surveys, temporary fencing and reinstatement).

The Council's proposal was not an entirely straightforward one. Care would have to be taken of existing trees and their roots. As the defenders were minded to build a further house in the garden, it was important that the pipe was not positioned under the proposed house. On the other hand, the disruption caused by the works would be manageable, and a single growing season would remove any traces of the works. There were several alternative routes for the pipe, involving other properties, but none was as convenient as the route over the defenders' garden.

(30) Strathclyde Regional Council v Dales of Dalry (Furnishing Centre) Ltd
13 October 1981, Kilmarnock Sheriff Court

In this, the second case on s 3(2) of the Sewerage (Scotland) Act 1968, the sheriff (Sheriff D B Smith) came to the opposite conclusion and declined to allow the building works to go ahead.

The dispute concerned the construction of the Garnock Valley Sewer by Strathclyde Regional Council. The Council planned to run a section of the sewer alongside a railway line, a plan which involved tunnelling under the railway at two different places. When contractors began work, they found a 'lens of silt' which would make the whole operation considerably more costly. Reverting to an earlier idea, the Council decided to run the sewer through land tenanted by the defender, relatively close to the defender's warehouse. In the light of the defender's objections, the Council made this application to the court under s 3(2).

A proof was held in which there was conflicting evidence as to whether and, if so, how much damage would be done to the defender's warehouse by the proposed work. In reaching a decision on the matter, the sheriff noted that:

> Parliament has given no guidance to sheriffs as to what considerations they should have regard to in making a decision under section 3(2). It appears to me that Parliament has conferred upon sheriffs an unfettered discretion. As I have already said the decision depends on weighing up imponderables. On the one hand there is the interest of the local authority on behalf of the community in having their sewer laid as economically as possible. On the other is the interest of individuals to suffer as little personal loss injury and damage as possible, without unreasonably impeding works which will be of benefit to the community.

On balance, the sheriff thought that the latter consideration outweighed the former. While it was true that the Act provided, in s 20, for compensation, the sheriff accepted the defender's argument that 'it might be difficult to persuade the pursuers that any loss he could demonstrate was due to their sewerage operations, and did not arise from the current economic recession'. In addition, the sheriff thought that it was 'inverting matters' for the Council to complain that the railway route was the more expensive. As contracts had already been made for the railway route, and work had started, the correct way at looking at things was to say that the warehouse route was the cheaper – a way of saving money.

ROADS

(31) Ingram v Grampian Regional Council 11 September 1986, Aberdeen Sheriff Court

This unreported case from 1986 has only recently come to our attention. Section 59 of the Roads (Scotland) 1984 deals with obstructions on roads. Subsection (1) provides that 'nothing shall be placed or deposited in a road so as to cause an obstruction except with the roads authority's consent in writing and in accordance with any reasonable conditions which they think fit to attach to the consent'. Contravention is an offence. If the person causing the obstruction fails to remove the obstruction when being requested to do so by notice, the Council, under subsection (4), can carry out the work of removal itself.

In the present case Grampian Regional Council, as the then roads authority for Aberdeen, removed fencing and granite blocks placed by the pursuers at the boundary between their house and the public road at Leslie Terrace, Aberdeen. This followed the service of a notice on the pursuers. The reason for having fencing and granite blocks, said the pursuers, was to prevent motor vehicles from being abandoned on their land.

In this action the pursuers sought (i) declarator as to their ownership of the strip of land in question, and (ii) an order requiring the Council to restore the fencing and blocks. A debate was held on relevancy.

According to the Council, the strip of land formed part of the verge which, under s 151 of the Act (definition of 'road'), formed part of the road itself. Hence the Council was fully entitled to remove the obstructions. The action was irrelevant in respect that the pursuers had failed to aver the opposite, namely that the strip was *not* part of the verge.

This argument was rejected by the sheriff (Sheriff Douglas Risk) and a proof before answer allowed. The sheriff was critical of the approach taken by the Council:

> I trust that libertarian sentiment is not deflecting legal reasoning when I say that the defenders' submissions seemed to display a remarkably insensitive attitude on the part of a public authority towards the rights of private citizens. There is practically nothing in Scots law more clearly established than a proprietor's exclusive right to the use and occupation of his land … I reject the proposition that the pursuers have to aver anything beyond ownership in order to be entitled to defend their property against trespass or encroachment. It seems to me that if there were nothing in the case beyond proprietorship on the part of the pursuers and invasion on the part of the defenders, the pursuers would be bound to succeed.

REAL BURDENS

(32) O'Gorman v Love
2019 SLT (Lands Tr) 1

The applicant owned one of a row of Victorian villas in Helensburgh, Dunbartonshire. Each villa was subject to the terms of its own feu disposition, granted in the 1860s. The applicant sought a determination that the real burdens in her feu disposition were unenforceable. The application was opposed by the owner of the villa next door. The application was granted. It was held that, while the feu dispositions laid down a common scheme of burdens applying to the row of villas, neither s 52 nor s 53 of the Title Conditions (Scotland) Act 2003 applied to the effect of conferring on the owner of the villa next door a title to enforce the burdens. See **Commentary** p 160.

[Another aspect of this case is digested as Case (39) below.]

(33) Leehand Properties Ltd
2019 GWD 29-468, Lands Tribunal

Land at Bracken Wood, Gatehouse of Fleet, Kirkcudbrightshire, was feued in 1994 for development. Over the years, 17 houses had been built and disponed, and more houses were in prospect. The developer applied to the Lands Tribunal for a determination that the real burdens in the 1994 feu disposition were unenforceable. The application was granted, the Tribunal deciding that, while the feu disposition laid down a common scheme of burdens applying to the 17 houses and to the remainder of the site still owned by the developer, neither s 52 nor s 53 of the Title Conditions (Scotland) Act 2003 applied to the effect of conferring on the 17 houses a title to enforce the burdens. See **Commentary** p 160.

[Other aspects of this case are digested as Case (19) above and Case (42) below.]

(34) Scottish Woodlands Ltd v Majekodunmi [2019] SAC (Civ) 38, 2019 GWD 40-645

In what was originally a simple procedure claim, the claimant and appellant, Scottish Woodlands Ltd, which owned and maintained an amenity area in a housing estate in Dalkeith, Midlothian, sought to recover from the defenders and respondents, the owners of one of the houses on the estate, a sum said to be due as their share of the cost of maintenance. The legal basis of the action was a maintenance burden in the deed of conditions which applied to the housing estate.

There were two defences. (i) The maintenance burden was void due to a failure to identify with sufficient clarity the benefited property. (ii) Even if the burden was valid, the amount sued for was incorrect.

On (i), see **Commentary** p 128. As the defenders succeeded on this point, the second defence fell. Nonetheless the Sheriff Appeal Court offered a view as to its merits. Under the deed of conditions, each homeowner was liable to pay a pro rata share of the maintenance costs, 'which pro rata share shall in the case of each Plot be calculated by reference to the total number of Plots created or permitted to be created within the Entire Site'. The dispute hinged on the meaning of 'created or permitted to be created'. This was a development that was proceeding in phases so that, at the time of the action, not all phases had been completed. The summary sheriff's view was that the phrase had to be read conjunctively, meaning that the total number of plots was 850, being the plots built *or* to be built (though this figure was itself disputed: the sheriff had arrived at it without hearing evidence). On that basis he granted decree against the defenders for £308.26 rather than for the £405.60 sued for.

The Sheriff Appeal Court acknowledged the difficulty posed by the language of the burden (para 30):

> We have to say that we do not find the phrase in question particularly easy to construe. That said, difficulty in construing a provision in a contract does not of itself lead to the contract being void for uncertainty. It is the court's function to decide what the contract means.

This accommodating approach is not without its problems. Real burdens are not 'a provision in a contract'; nor are they interpreted as charitably as contractual provisions, as the voluminous case law shows (as to which see K G C Reid, *The Law of Property in Scotland* (1996) paras 415–422). Be that as it may, the Sheriff Appeal Court thought (a) that the phrase 'created or permitted to be created' was ambiguous; (b) that there was therefore a role for commercial common sense; and (c) that the interpretation favoured by the sheriff offended commercial common sense in respect that, if all 850 houses were not in the event built, the total cost of maintenance might not be recoverable by Scottish Woodlands. The proper approach would have been to hear 'evidence as to the number of plots completed and yet to be completed, and on the whole circumstances generally' (para 31).

(35) Greenbelt Group Ltd v Walsh [2019] SAC (Civ) 9, 2019 Hous LR 45

As with the previous case, the pursuer and appellant, Greenbelt Group Ltd, which owned and maintained an amenity area in a housing estate in Dundee, sought to recover from the defenders and respondents, the owners of two of the houses on the estate, a sum said to be due as their share of the cost of maintenance. The legal basis of the action was a maintenance burden in the deed of conditions which applied to the housing estate.

There were two defences, the second of which was familiar from the previous case. (i) The real burden was invalid under s 3(7) of the Title Conditions (Scotland) Act 2003 as having the effect of creating a monopoly. (ii) The maintenance burden was void due to a failure to identify with sufficient clarity the property to be maintained (which was also the benefited property). At first instance, the sheriff accepted the first defence and assoilzied the defenders. On appeal, the Sheriff Appeal Court rejected the first defence and pronounced decree in favour of the pursuer (and appellant).

For the second defence, see **Commentary** p 131. As for the first defence, the Sheriff Appeal Court relied on, without really adding to, the majority decision of the Lands Tribunal in *Marriott v Greenbelt Group Ltd*, 2 December 2015, unreported (discussed on this point in *Conveyancing 2015* pp 141–44), which had likewise rejected the view that such maintenance burdens created a monopoly. In one sense, of course, the arrangement was monopolistic. The amenity area would always be managed by Greenbelt or by Greenbelt's successor as owner of the amenity area. Unlike with standard management arrangements in housing estates, the homeowners had no means of changing the manager. Only the current manager (Greenbelt) had that power. Yet the homeowners still had to pay for the cost of maintenance. But, said the Sheriff Appeal Court, that monopoly was not caused by the real burden but by Greenbelt's ownership of the amenity area. After all, 'the ownership of land is inherently monopolistic' (para 22). The provision relied upon, s 3(7) of the Title Conditions (Scotland) Act 2003, merely provided that 'a real burden must not have the effect of creating a monopoly', and in the present case the monopoly was not created by the real burden.

That conclusion has been criticised by Ken Swinton ('Enforcing maintenance obligations of third party owned amenity ground' (2019) 87 *Scottish Law Gazette* 8) and by Kieran Buxton ('Management of "amenity areas" and the validity of real burdens: *Greenbelt Group Ltd v Walsh*' 2019 *Juridical Review* 260). Swinton urges a bolder approach to the interpretation of s 3(7), and castigates the approach of the Sheriff Appeal Court as 'a remarkably superficial way to consider the issue of monopoly' (p 11). Buxton supports the conclusion of the sheriff at first instance that it was the burden, by charging the homeowners for maintenance costs, that tied the homeowners to the owner of the amenity area (Greenbelt) and hence which created the monopoly. These are well-worked arguments. Yet, unwelcome as it may be as a matter of legal policy, the decision of the Sheriff Appeal Court is defensible as an interpretation of s 3(7) and, on balance, is probably correct. At the end of the day there is surprisingly little difference between the arrangements put

in place by Greenbelt on the one hand, and, on the other hand, the familiar and hardly controversial example of a tenement roof which is owned and maintained by the top-floor proprietor but with the cost of maintenance being apportioned among all the proprietors within the tenement.

PRE-EMPTIONS AND REVERSIONS

(36) West Lothian Council v Clark's Exrs [2019] SC LIV 58, 2019 GWD 24-378

The defenders' property, at West Calder, West Lothian, was subject to a pre-emption. Originally constituted as a feudal real burden, the pre-emption now bound the defenders only as a matter of contract. The pre-emption holder was West Lothian Council, the statutory successors of the original superiors (Lothian Regional Council).

A dispute arose as to whether, in the particular circumstances that arose, the pre-emption was still alive. The defenders had notified the Council of their intention to sell part of the subjects, a notification to which the Council had failed to reply with an offer to purchase within the 21 days prescribed in the clause of pre-emption. At this stage of the litigation the Council was seeking interim interdict to prevent the defenders from selling the property. The Council argued that the defenders' notification was flawed in respect that it did not properly identify the part of the subjects that was to be sold. Hence the pre-emption remained alive, and the defenders were bound to offer the property back to the Council. This argument was accepted by the court to the extent of granting interim interdict. See **Commentary** p 174. (This case was noted as Case (18) in *Conveyancing 2018*, but the note is repeated and amplified here because the case has now been reported.)

(37) Rittson-Thomas v Oxfordshire CC [2019] EWCA Civ 200, [2019] Ch 435

The School Sites Act 1841 allowed owners to convey land, including entailed land which could not otherwise be conveyed, for the building of schools and schoolhouses. The Act was widely used, both in Scotland and in England and Wales where it also applied. Its relevance for modern conveyancers lies in the third proviso to s 2 by which, 'upon the land so granted as aforesaid, or any part thereof, ceasing to be used for the purposes in this Act mentioned, the same shall thereupon immediately revert to and become a portion of the said estate [from which it derived]'. The 1841 Act was repealed, for Scotland only, by the Education (Scotland) Act 1945 s 88 and sch 5, but the reversion in s 2 remains in force. Importantly, however, the reversion was modified by s 86 of the Title Conditions (Scotland) Act 2003 so that, on the occurrence of the trigger event for reversion, the education authority need not yield up the site but has the alternative of paying its value (less the value of any improvements). For details, see G L Gretton and K G C Reid, *Conveyancing* (5th edn, 2018) para 14–32.

Rittson-Thomas v Oxfordshire CC, a decision of the Court of Appeal in England, focuses on what, precisely, triggers the statutory reversion. A school was moved from the original site conveyed under the 1841 Act to a new and adjoining site. The original site then lay unused for 18 months before the education authority sold it. By virtue of s 14 of the Act, the sale proceeds were then to be used to help defray the cost of the replacement school.

Where used carefully, s 14 prevents the statutory reversion from operating, because the replacement school is viewed as a continuation of the original school. (In Scotland, s 14 was repealed along with the rest of the 1841 Act in 1945: for details of how s 14 worked in Scotland, see Scottish Law Commission, *Report No 181 on Real Burdens* (2000) para 10.50.) But in the present case there had been a gap of 18 months between closure of the school and sale of the site. It was held that, as soon as the school closed down on the original site, the statutory reversion came into operation. The only way in which this could have been avoided would have been to keep the school open until the sale had been completed.

VARIATION ETC OF TITLE CONDITIONS

(38) Scottish Ministers v Brechin Healthcare Group 2019 GWD 18-289, Lands Tr

The opening words should be given to a report which appeared in *The Courier* on 3 November 2018:

> Battle lines have been drawn after NHS Tayside applied to remove title conditions from a former hospital site in Brechin. Brechin Infirmary, which was deemed surplus to requirements in February, is comprised of land from two donations, including one from a former cabinet minister in 1866 who tried to stop Florence Nightingale's medical reforms just 10 years earlier. The health board wants the option to sell off the land and has applied to the Lands Tribunal for Scotland for the 'complete discharge' of the title conditions. The conditions ensure the land must be used for medical purposes, which would reduce the number of potential buyers and prevent the site from being put to alternative uses. Brechin Healthcare Group (BHCG), which includes former and current healthcare professionals, has opposed the removal of title conditions and lodged a petition to save the site, which it wants to keep in community control.

The former cabinet minister in question was Fox Maule, second Baron Panmure and, later, eleventh Earl of Dalhousie (1801–1874), who was Secretary of State for War during the Crimean War. His battles with Florence Nightingale are recounted memorably, if not entirely fairly, in Lytton Strachey's celebrated *Eminent Victorians* (1918). The following gives the flavour of Strachey's narrative (pp 136–37 of the Penguin edition of 1948):

> [N]ow that peace was, somehow or another, made, now that the troubles of office might surely be expected to be at an end at last – here was Miss Nightingale breaking

> in upon the scene, with her talk about the state of the hospitals and the necessity for sanitary reform. It was most irksome; and Lord Panmure almost began to wish that he was engaged upon some more congenial occupation – discussing, perhaps, the constitution of the Free Church of Scotland – a question in which he was profoundly interested. But no; duty was paramount; and he set himself, with a sigh of resignation, to the task of doing as little of it as he possibly could.
>
> 'The Bison', his friends called him; and the name fitted both his physical demeanour and his habit of mind. That large low head seemed to have been created for butting rather than for anything else. There he stood, four-square and menacing, in the doorway of reform; and it remained to be seen whether the bulky mass, upon whose solid hide even the barbed arrows of Lord Raglan's scorn had made no mark, would prove amenable to the pressure of Miss Nightingale.

It was a full ten years after the end of the Crimean War that Lord Panmure, now the eleventh Earl of Dalhousie, feued the land to the Magistrates of Brechin which was the subject of the present dispute. Perhaps something of his dealings with Miss Nightingale had rubbed off because, in terms of the grant, the land was to be used for the purpose of erecting Brechin Infirmary. Dalhousie's grant was made in 1866, and in 1897 the site was enlarged by a second feu charter from another hand. Eventually the site comprised (i) the infirmary, (ii) a field, and (iii) a health centre.

As the *Courier* reported, Tayside Health Board wished to discharge all the real burdens with a view to selling the infirmary building and the field. It was possible that in the future the Health Board would also wish to sell the site of the health centre. Originally, the burdens would have been enforceable by feudal superiors. Following feudal abolition it seemed that no one now had title to enforce. In particular, the burdens had not, apparently, been imposed under a common scheme, with the result that neither s 52 nor s 53 of the Title Conditions (Scotland) Act 2003 applied.

More than one way forward would have been open to the Health Board to proceed. The Health Board could have asked the Lands Tribunal to pronounce on the enforceability of the burdens under s 90(1)(a)(ii) of the Title Conditions Act. Or, as the burdens were more than 100 years old, it could have used the 'sunset' rule under ss 20–24 of the same Act. What the Health Board in fact did was to make an ordinary application to the Lands Tribunal under s 90(1)(a)(i) for discharge of the burdens. Such an application is granted without further inquiry, under s 97 of the Act, unless it is opposed, ie unless representations are made by the owner of a benefited property. But in the present case there were or appeared to be no benefited properties in the frame.

In the event, as the *Courier* noted, the Brechin Healthcare Group sought to make representations against the application. So too did another community group, the Don Centenary Trust, and also the City of Brechin and District Community Council. But as none of these groups owned a benefited property, so none was entitled to make representations. Hence, held the Lands Tribunal, the application was properly classified as unopposed, meaning that it would be granted without further inquiry.

(39) O'Gorman v Love
2019 SLT (Lands Tr) 1

The applicant was the owner of a Victorian villa in Helensburgh, Dunbartonshire, one of a row of such villas. She sought discharge of the real burdens contained in the original grant in feu of the property, dating from 1862. The purpose was to allow the applicant to build a one-storey house in part of the garden. The application was opposed by the owners of the villa next door. In the event, the Tribunal decided that the burdens were no longer enforceable (see Case (32) above) but, in case it was wrong in reaching that view, the Tribunal also considered the application for discharge.

Weighing up, as usual, factors (b) (the extent of benefit conferred) and (c) (the extent to which enjoyment of the burdened property is impeded) in s 100 of the Title Conditions (Scotland) Act 2003, the Tribunal concluded that neither was very pronounced. The proposed new house would have a modest impact on the view from the respondents' back garden and from a bedroom window upstairs, and also increase the level of activity next-door. As for the applicant, the Tribunal (rather surprisingly), was 'sceptical whether the development will in fact add much value overall' to her house, not least because the garden could not be described as 'excessive in size' (para 45). Other factors gave a degree of support to the application, in particular changes in the neighbourhood (factor (a)) and the existence of planning permission for the proposed house (factor (g)). While the Tribunal would not have been willing to discharge the burdens completely it would, 'by a narrow margin', have been willing to vary them so as to allow the erection of the new house (para 48).

[Another aspect of this case is digested as Case (32) above.]

(40) Nicol v Crowley
2019 GWD 40-646, Lands Tribunal

At bottom, this was a dispute about wheelie bins. The applicant and the respondent were the owners of, respectively, the lower and upper flats in a converted Victorian semi-detached house, 19 and 19A Abercorn Terrace (MID139371 and MID22121) in the eastern Edinburgh suburb of Portobello. Access to the upper flat was by an external staircase at the side of the house. At the foot of the staircase was a small strip of ground covered in concrete and also belonging to the respondent. The rest of the front garden was the property of the applicant. From the concrete strip there was a small dog-leg to a path which then led, through the applicant's garden, to the street. The respondent had a servitude right of access over the path.

As part of a redesign of her garden and parking area the applicant wished to move the path so as to be flush against the boundary wall. This would align it, more or less, with the respondent's concrete strip, thus eliminating the dog-leg. Work began but was then halted at the instance of the respondent. In this application to the Lands Tribunal, the applicant sought a variation of the route

of the servitude to the line of the proposed new path. The respondent opposed the application.

The respondent had the usual three wheelie bins (grey, brown and green) provided by Edinburgh Council. The only place they could be stored was on the concrete strip at the foot of the stairs to her flat. Even without the proposed change of route, these left little room for the respondent to take access to her stairs. The proposed rerouting of the path would made things much worse. As the Tribunal explained (para 49):

> The existing dog-leg created by the interface of the path and the ground strip allows the choke created by the wheelie bins to be bypassed to some extent. The pedestrian proceeding up or down the stairs can bypass the choke between the bins and the corner of the building by moving in a diagonal fashion. Indeed the staircase has an arc feature at the foot to allow this. Should the access be varied so as to join the ground strip at 180 degrees the pedestrian would require to walk along a corridor with the wheelie bins to one side and a planted area to the other side. At present the 'net width' of the entrance area to the staircase, ie the combined width of the dog-leg less the width of the wheelie bins, is about 9–10 feet. Under the new arrangement the net width would reduce to little more than 2–3 feet. Allowing for the fact that probably not all the present width is required (apart from the need to view the gas meter if not otherwise provided for in the titles), we still think that the proposal would result in a significant loss of amenity to No 19A.

In those circumstances the Tribunal decided that the loss of benefit to the respondent following the requested variation of route (factor (b) in s 100 of the Title Conditions (Scotland) Act 2003) was significantly in excess of the impediment to the use of the applicant's property by the existing route (factor (c)). Admittedly the new route would be less intrusive for the downstairs bedroom of number 19, and, overall, the remake of the garden was aesthetically attractive. But this was not enough. The application was refused.

(41) Mahoney v Cumming
2019 GWD 32-506, Lands Tribunal

This, too, was a dispute about wheelie bins. A former school (later a meeting house for the Christian Brethren) in the former fishing village of Sandend in what is now Aberdeenshire was divided, about 100 years ago, into three separate houses. The applicants owned one of the end houses, known as 'Sea Breezes' (BNF8796). The defenders owned the mid-terraced house, 'The Old Hall'. Both were used as holiday houses. The applicants sought discharge of 'any' right of way over their land. This rather odd formulation was to cover both (i) an express servitude in the split-off disposition of Sea Breezes from 1907 which gave the owners of The Old Hall access to a well and also (ii) a servitude said to have been constituted by positive prescription (though this had not been judicially established), by which the owners of The Old Hall could take access to their rear garden by a path which ran down the side of Sea Breezes and then along the back of the house.

There was little real dispute in relation to the express servitude. The well had long since ceased to be in use, and there was an obvious ground for the discharge of the servitude in this change of circumstances (factor (a) in s 100 of the Title Conditions (Scotland) Act 2003). The Tribunal so held.

The prescriptive servitude was a different matter. Although there was now a back door to The Old Hall which allowed items to be taken from the front of the house to the back garden, this was not a convenient route for large items, due to the twists and turns in the corridors (this not being a purpose-built terraced house where, the Tribunal noted (para 54), access would have been more straightforward). The main issue was the wheelie bin. The respondents said that the path was the only reasonable means of taking the bin to the street from the back garden. The applicants challenged the practicability of using the path for a bin, due to a step and its narrowness at one point. In any case, they said, there were public bins which the respondents could use, or they could simply take their rubbish home as some other holiday-makers did.

The Tribunal found for the respondents and refused the application in relation to the prescriptive servitude. Matters must be viewed objectively, which meant that no account could be taken of the current use of the properties as holiday homes, and hence the possible infrequency of the need to use the access for the bin. The Tribunal accepted that the use of a path which passed so close to their house was an inconvenience to the applicants (factor (b)). The Tribunal also accepted that both the building of the rear extension to Sea Breezes, which had the effect of narrowing the path, and especially the provision of a back door for The Old Hall, were material changes in circumstances (factor (a)). But the respondents' need for wheelie-bin access (factor (c)) overrode both these points.

(42) Leehand Properties Ltd
2019 GWD 29-468, Lands Tribunal

A feu disposition of a development site at Gatehouse of Fleet, Kirkcudbrightshire, granted in 1994 purported to reserve the following servitude:

> With reference to the roadways and footpaths to be constructed by the Feuars within the Feu there shall be reserved to the Superiors, and to members of the public generally, a servitude right of passage, for pedestrian use in all time coming, over and across all of the said roadways and footpaths including specifically, the footpaths tinted blue on the said plan, under declaration that the said servitude right shall be exercisable, in relation to the roadways, following upon the initial formation of the said roadways, and not before.

The applicants sought discharge of the blue-line servitude as they wanted to build on its route. The footpath in question had not been constructed and indeed was already landlocked at one end by the time of the feu disposition. The application was unopposed and was granted by the Tribunal without much difficulty.

[Other aspects of this case are digested as Cases (19) and (33) above.]

(43) Cadman v Cook
2019 SLT (Lands Tr) 69

A feu writ of land in Cults, Aberdeen in 1876 restricted the number of houses to be built on the site to three. In due course three substantial houses – Glendarroch, Silverdale and Dunmail – were built and sold separately. In 2013 the applicants met with partial success before the Lands Tribunal, the 1876 burden being varied so as to allow the erection of four houses on the site of Dunmail: see *Cook v Cadman* 2014 SLT (Lands Tr) 13 (*Conveyancing 2013* Case (18)). Unfortunately, it did not prove possible to obtain planning permission to build the four houses. Planning permission was, however, obtained instead for a sheltered housing development of 21 units in a three-storey building. So the applicants returned to the Tribunal to ask for a further variation of the burden to allow this, quite different, development to go ahead. The application was refused: *Cadman v Cook* 2018 Hous LR 64 (*Conveyancing 2018* Case (33)). So while the first projected development had the necessary variation of a real burden but no planning permission, with the second projected development it was the other way around.

In this, the third application before the Lands Tribunal, the applicants sought (i) to have the enforceability of the burden determined and, if found valid, (ii) to have the burden discharged. As with previous applications, this was opposed by the immediate neighbours. The Tribunal dismissed the application on the ground that it raised substantially the same issues as the first application and hence was *res judicata*. As the Tribunal explained (para 25):

> We bear in mind that an unsuccessful party has a right to raise a further action against the same defenders relating to the same subject matter provided that the second action is based on different grounds. There is, however, a difference between different grounds of action and different arguments in support of grounds and it seems to us that what the applicants are doing in this application is attempting to make good omissions, as they see them, in the way the case was presented by their legal advisers in the 2013 application.

COMPETITION OF TITLE

(44) Anderson v Wilson
[2019] CSIH 4, 2019 SC 271, 2019 SLT 185

Thomas Paterson owned a farm at Cobairdy, Aberdeenshire. He was married and had five children. In 2011 he sold some of his land, amounting to about 255 acres (about 103 hectares) to George Wilson, the husband of one of his daughters. The price was, it seems, £420,000. Mr Paterson died in April 2016, leaving his whole estate to his wife. She died in November of the same year, leaving her whole estate to her five children, equally among them. In 2017 two of the five children raised the present action against their brother-in-law, Mr Wilson. Their case was that the sale in 2011 had been at undervalue (in their view the value of the land was £1,050,000). The pursuers each claimed damages amounting to one-fifth of

the difference between £1,050,000 and £420,000, ie £126,000. They argued that the sale was wrongful on three grounds (para 5):

> (1) Intentional delict. The defender deliberately, and without legal justification, arranged for the deceased to execute the said disposition at a price approximately one-half of the subject's actual or likely market value … the defender's conduct constituted fraud.
> (2) Facility and circumvention. At the time of the execution of the disposition, the deceased was in a facile ie weak condition … his will was overcome by the defender when signing the disposition.
> (3) Undue influence … At the material time the defender exercised over the deceased a dominant or influential ascendancy exercised by the defender contrary to law.

The pursuers made various factual averments, including the following (para 39):

> By 2011 the deceased was exhausted, vulnerable, weak and facile. He suffered from obvious anxiety and fatigue. He would frequently become tearful and emotional at family gatherings. He had contracted very serious shingles which left him with continuing material intermittent pain from which he never recovered. He had poor eyesight, deficient hearing, and suffered from curvature of the spine. He was also illiterate.

The defences were (para 6):

> (1) That the pursuers had no title to sue;
> (2) That the action [*sic*] had prescribed in terms of s 6 of the Prescription and Limitation (Scotland) Act 1973 … ;
> (3) That the pursuers' pleadings were so lacking in specification as to be irrelevant; and
> (4) That damages were not a competent remedy where facility and circumvention or undue influence were the bases of the action.

At first instance ([2018] CSOH 5, 2018 GWD 4-62 (*Conveyancing 2018* Case (39)) it was held that the delictual claim was so lacking in specification that it fell to be dismissed, that the only remedy for undue influence or facility and circumvention is reduction, not damages, and, finally, and above all, that the pursuers had no title to sue. If the sale had been a wrong by Mr Wilson against Mr Paterson then any claim by the latter against the former (whether for reduction or for damages) would have vested in Mr Paterson's executor.

The pursuers reclaimed, but have been unsuccessful. The Inner House agreed that the pursuers had no title to sue. It also held, reversing the decision of the Lord Ordinary on this point, that any claim that there might have been would in any event have prescribed negatively.

The decision that the pursuers lacked title to sue was surely correct. If Mr Paterson did have any claim against Mr Wilson, that claim vested in Mr Paterson's executor, for the benefit of the beneficiaries: it could not have vested in the beneficiaries directly. That is, quite simply, how executries, and trusts, work. Moreover the pursuers were not even beneficiaries of their father's estate. They

were beneficiaries of their mother's estate. The case was an attempt to turn the law of executries and trusts upside-down.

One final comment: there is a suggestion (paras 26, 30), that in certain types of case a beneficiary can sue in the name of the executor (though that, if true, could not have assisted the pursuers, who were not beneficiaries of their father's estate). That view is indeed sometimes asserted (see eg J M Thomson, 'Unravelling trust law: remedies for breach of trust' 2003 *Juridical Review* 129 n 29) but Scottish authority is hard to identify.

(45) Wilson v Watkins [2019] CSOH 44, 2019 GWD 21-319

Cases often crop up in which financial and property arrangements are made within a family, or between friends, but relations later sour, and the arrangements come to be challenged. For another such case this year, see *Lyle v Webster* (Case (87) below).

In the present case Mrs Wilson had been the sole owner, since her husband's death in 2003, of the house where she lived at 1 Woodend Drive, Kirriemuir, Angus. In 2011 she granted a power of attorney to one of her daughters, Mrs Watkins. (The reasons for this do not appear in the judgment.) In 2012 Mrs Watkins and her husband sold their property and moved into the Kirriemuir house. Once there they expended (they averred) about £45,000 upgrading and extending the house. In 2013 Mrs Wilson disponed the house to Mr and Mrs Watkins, reserving a liferent (seemingly a proper liferent, though this is not stated expressly). At the same time a minute of agreement was drawn up and signed by Mrs Wilson and by Mr and Mrs Watkins. It was prepared by Messrs Blackadders, acting for all three. This narrated that Mrs Wilson was no longer able to live independently. One strange feature of the minute is that it said that Mrs Wilson was to bequeath the house to Mr and Mrs Watkins – we say 'strange' because the disposition meant that they owned it anyway.

Relations, however, did not remain good. According to Mrs Wilson, the pursuer in the present action (para 7): 'In May 2015, there was an incident … in the course of which the second defender [Mrs Watkins] damaged the pursuer's wrist. The pursuer called the Police. She no longer felt safe residing in the property with the defenders. … For her own safety, she went to reside with her other daughter.' (For a case with some parallels see *Cox v Cox* [2018] CSOH 49, 2018 GWD 17-219 (*Conveyancing* 2018 Case (41).) We pause at this point to note a curious state of affairs: when property is liferented, it is occupied by the liferenter, not the fiar, but now 1 Woodend Drive, Kirriemuir, was occupied by the fiars but not by the liferenter.

Mrs Wilson then raised the present action, seeking reduction of the disposition, reduction of the minute of agreement, and the removal from the house of her daughter and son-in-law. The latter resisted the reduction and also counterclaimed for the money that, they averred, they had expended on upgrading and extending the house, this counterclaim being, however, applicable only if the reductive conclusions were successful. The basis of the pursuer's

action was that she had signed the disposition and the minute of agreement as a consequence of undue influence, making those deeds voidable at her instance.

It was held that the pursuer had failed to make averments which, if proved in their entirety, entitled her to the remedy that she sought. The action was therefore dismissed insofar as it related to the reduction of the disposition

The case at this stage was solely concerned with the reductive conclusions, and almost nothing was said of the pursuer's third conclusion, for the removal of the defenders. One wonders what defence to that conclusion there could have been. The defenders had either the fee of the property, ie ownership subject to a liferent, or (if the pursuer's reductive conclusions proved successful) no real right at all. In either case they would have no right to occupy. Perhaps the minute of agreement gave them a right to occupy: the minute is referred to occasionally in the case but its detailed terms are not given.

LAND REGISTRATION

(46) Dabski v Tyrrell
2019 GWD 37-603, Lands Tribunal

This is the first of a group of cases concerning essentially the same issue. On first registration the Keeper, in error, includes an area ('the disputed area') which does not form part of the property in question and is not vouched for by the Sasine title. Nonetheless, as the registration is conducted before the 'designated day' (8 December 2014) and hence under the Land Registration (Scotland) Act 1979, the effect is to confer ownership of the disputed area on the registered proprietor and thus to take ownership away from the next-door neighbour who previously owned it. This is the result of the 'Midas touch' provided for in s 3(1)(a) of the 1979 Act.

Subsequently the neighbouring owner wakes up to the problem and (the registered proprietor having refused to co-operate) asks the Keeper to put matters right by rectifying the title. This the Keeper can only do if the initial inaccuracy has not already been cured by the transitional provisions in schedule 4 of the Land Registration etc (Scotland) Act 2012, and that in turn requires proof that the registered proprietor was not in possession of the disputed area immediately before the designated day (ie on 7 December 2014). As the Keeper is not able to determine disputed matters of possession, the Keeper is bound to refuse applications of this kind. Failing agreement between the parties, the matter can only be determined by the Lands Tribunal exercising its powers under s 82 of the 2012 Act or by the ordinary courts. This and the following cases are all decisions by the Lands Tribunal under s 82.

This first case concerned a dispute as to the boundary between two houses, numbers 7 and 9 Linsey MacDonald Court, Dunfermline, Fife. Under the Sasine titles, the boundary was the mid-point of the six-feet gap between the houses. Following first registration, however, the title sheets of both houses showed the boundary as lying adjacent to the gable wall of number 7, thus giving the entire

six-feet gap to number 9. No one noticed the error for 20 years. The question was then whether the admitted inaccuracy on the title sheet of number 9 had been cured by the transitional provisions in the 2012 Act. It was held that, as the owners of number 9 had not possessed the additional three feet on 7 December 2014, the inaccuracy had not been cured. Hence the title sheets could be rectified to show the correct boundary. See **Commentary** p 191.

(47) Grant v Keeper of the Registers of Scotland 2019 SLT (Lands Tr) 25

Victoria Cottage, Tillyfourie, Aberdeenshire, was broken off from the Monymusk Estate in 1955. As was clear from the plan attached to the 1955 disposition, the subjects disponed did not include an access road which bisected the garden of the cottage. In 2004 Victoria Cottage was bought by Lewis Napier and Claire McAnespie. Despite careful inquiries (eg to the Estate, the Forestry Commission, and Scotways) they were unable to determine the ownership of the road.

Their purchase induced first registration. When the land certificate (ABN120098) came to be issued, the road was included as part of the subjects owned. Naturally enough, the purchasers did not query this inclusion with the Keeper but were content to leave matters as they were. In a letter dated 6 July 2015 their solicitor explained the position in this way (para 11):

> I have now received your Land Certificate from the Registers of Scotland, and enclose a copy for your information. You will see that the subjects now registered in your name include the 'Right of Way strip' for which we made numerous enquiries at the outset of your purchase. This is a better outcome than we could have expected.
>
> I am quite clear that the seller did not own this area and I suspect its inclusion is an error on the part of the Registers (not an unusual event).

So matters rested for a while, after which the purchasers' title was queried by Sir Archibald Grant, the owner of the Monymusk Estate. The Keeper, while acknowledging the error, refused to rectify the Register as she was unable to rule on the state of possession. That decision was challenged by Sir Archibald in the present application.

Although the land certificate was not issued until 13 June 2015, registration in favour of the purchasers was backdated, in the usual way, to 25 September 2014, being the date of the original application for registration. That date was significant because, being before the designated day (8 December 2014), the application was governed by the Land Registration (Scotland) Act 1979 and not by the later Act of 2012. Furthermore, a subsequent application for rectification was subject to the transitional provisions in sch 4 paras 17–24 of the 2012 Act.

The purchasers' defence to the application for rectification was that they were proprietors in possession at the relevant date. But there was disagreement as to what the relevant date was. The purchasers, who had started to develop the property, argued for as late a date as possible and certainly for a date after the designated day. The Tribunal, however, upheld Sir Archibald's position that the relevant date was the day immediately before the designated day,

ie 7 December 2014. Given the terms of the transitional provisions, that is plainly the correct position.

[Another aspect of this case is digested as Case (80) below.]

(48) Grant v Keeper of the Registers of Scotland (No 2) 2019 SLT (Lands Tr) 36

This was a later stage of the proceedings which were the subject of the previous case. On the view that personal bar on the part of Sir Archibald Grant might turn out to be an important issue, the Tribunal asked the parties for written submissions on the subject. Having received the submissions, however, the Tribunal concluded that a consideration of personal bar was beyond the powers conferred on it by s 82 of the Land Registration etc (Scotland) Act 2012 (para 6):

> The simple fact is that s 82 confers on any party with an interest the right to refer questions relating to the accuracy of the register and, if it finds an inaccuracy, what is needed to rectify that inaccuracy, to the tribunal and, that having been done, the tribunal's task is to determine these questions. If an inaccuracy is found a second question may arise as to whether there is a proprietor in possession who will be prejudiced by rectification. Once that question has been answered, subject to any need to consider any of the issues listed in Pts (i), (iii) or (iv) of s 9(3)(a) of the Land Registration (Scotland) Act 1979, the tribunal's role is at an end. If a rectifiable inaccuracy has been found the Keeper will rectify the register and subsequent questions and issues will be matters for the ordinary courts. It is at that point … that arguments of personal bar become permissible.

(49) White v Jackson 2019 GWD 36-579, Lands Tribunal

The applicant averred that some of his land at Charlesfield, St Boswells, Roxburghshire, had found its way into a neighbour's title sheet (ROX9548) by mistake on first registration of the neighbour's title. This took place before the designated day (8 December 2014) and hence under the 1979 Act. The Keeper accepted that an error had been made but refused to rectify it on the basis that, as the neighbour was presumed under the transitional provisions in schedule 4 of the 2012 Act to have been in possession on 7 December 2014, the inaccuracy was presumptively cured on the designated day. Hence this application to the Lands Tribunal under s 82 of the 2012 Act. As the application was unopposed, the Tribunal accepted the applicant's averment that it was the applicant and not the neighbour who had been in possession of the disputed area, and the application was granted accordingly. See **Commentary** p 194.

(50) MacGregor v Keeper of the Registers of Scotland 2019 GWD 32-505, Lands Tribunal

Beginning in the 1980s, East Wyndygoul farmhouse and steading in Tranent, East Lothian, were split by its owner, Lothian and Borders Cooperative Society

Ltd, into what were eventually five separate units: the farmhouse itself and East Windygoul were adjoining properties; the three East Windygoul cottages lay on the other side of a private access road leading to the steading from the public road. The original split-off writs were Sasine deeds but in the course of time all of the properties found their way on to the Land Register with the exception of East Windygoul. The split-offs themselves were not entirely consistent; nor were the title sheets entirely consistent with the split-offs. The main discrepancies concerned the access roads which, under the split-offs, were (by and large) the common property of all five units, but parts of which had found their way, incorrectly, into individual title sheets as sole property. The application to the Lands Tribunal was by the owners of East Windygoul, the only property still to be held on a Sasine title.

After a painstaking reconstruction of the conveyancing and of the different boundaries the Lands Tribunal concluded (i) that there were certain inaccuracies in the title sheets at the time of first registration, and (ii) that, due to the state of possession immediately prior to the designated day (7 December 2014), some of the inaccuracies had survived the designated day (and could now be rectified) and some had not. See **Commentary** p 192.

SEARCHES

(51) Commodity Solution Services Ltd v First Scottish Searching Services Ltd
[2019] SAC (Civ) 4, 2019 SC (SAC) 41, 2019 SLT (Sh Ct) 63

Mr and Mrs Gardner owned a property at 6 Arbirlot Place, Arbroath, Angus. In December 2011 Commodity Solution Services Ltd obtained decree against Mr Gardner in the sum of £50,000. In February 2012 it registered an inhibition against him. Soon thereafter Mr and Mrs Gardner sold the property to Paul Gardner and Louise Jones. Paul Gardner was the son of the sellers. A legal report was obtained from First Scottish Searching Services Ltd. The report did not disclose the inhibition. In August 2012 the disposition to the buyers was registered in the Land Register. Like the legal report, the updated title sheet did not mention the inhibition.

Commodity Solution Services Ltd, taking the view that the inhibition was now unenforceable on account of s 159 of the Bankruptcy and Diligence etc (Scotland) Act 2007 (which protects *bona fide* purchasers against inhibitions of which they are unaware), sued the search firm for damages. The main question was whether the search firm owed a duty of care to the inhibitor. At first instance the sheriff held that such a duty of care did exist: *Commodity Solution Services Ltd v First Scottish Searching Services Ltd* [2018] SC DUNF 14, 2018 SLT (Sh Ct) 117 (*Conveyancing 2018* Case (53)). In a long and detailed judgment the Sheriff Appeal Court has upheld the decision on that point. See **Commentary** p 182.

RESIDENTIAL RIGHT TO BUY

(52) Taylor v North Lanarkshire Council 2019 GWD 18-290, Lands Tribunal

Applications under the 'right to buy' had to be made by 1 August 2016 (see s 1 of the Housing (Scotland) Act 2014), so eventually the flow of case law will dry up. But as yet there continues to be a trickle. The present case involved somewhat complex facts, with the social landlord having made no fewer than three offers to sell, each of the first two having been objected to. In respect of the third offer to sell, matters dragged on because of 'difficult personal circumstances', and, whilst there was eventually what purported to be a *de plano* acceptance by the applicant, the social landlord took the view that the acceptance was ineffective since the offer had, by that time, lapsed, its deadline for acceptance having passed.

The tenant applied to the Lands Tribunal to enforce her right to buy, both under s 65 of the Housing (Scotland) Act 1987, the basis being that the deadline for acceptance had been an unreasonable condition, and under s 71 (which applies to offers issued late). It was held that the application as based on s 65 was out of time, but that the application as based on s 71 was not out of time. 'We are satisfied' said the Tribunal at para 38, 'that the Tribunal would have power to grant a remedy should the application be well founded on its merits. We shall therefore allow the remaining application to proceed as accords.'

(53) Davidson v Bridgewater Housing Association Ltd 2019 GWD 34-550, Lands Tribunal

A few days before the 1 August 2016 deadline (see s 1 of the Housing (Scotland) Act 2014), Mr and Mrs Davidson applied to buy their public-sector property at 122 Park Winding, Erskine, Renfrewshire. The social-housing landlord (the defender in this action) responded with an offer to sell. But there was a dispute (the details of which are unclear) about whether the council tax payments were up-to-date, and in addition Mr Davidson considered that the valuation of the property at £112,000 was too high. The result of all this was, he said, to cause him to 'blow up' (see para 21) and he contacted his law firm to say that the application should be cancelled. The law firm then wrote to the social-housing landlord, saying that the application was cancelled and that accordingly missives would not be concluded.

Did Mr Davidson tell his wife what he was doing? He did not. A few days later she found out, at which point 'all hell broke loose' (para 23). Mrs Davidson wrote to the landlord asking that the position be restored but the answer was no: the valid application had been cancelled and it was now too late for a new application, since the deadline of 1 August 2016 had come and gone. The Davidsons then raised the present action to enforce their right to buy, their principal argument being that the application had been made on behalf of both of them, and that their law firm had had no authority to withdraw the application on the say-so of

just one of them. Hence the withdrawal had been invalid, with the result, they pled, that the application still stood.

This argument failed, and the action was dismissed. Even if the law firm 'did not have actual authority … the two key elements of ostensible authority in the law of agency, namely representation and reliance, were present' said the Lands Tribunal (para 25), and, it continued, the law firm 'had ostensible authority to act as they did. As to whether they ought to have taken instructions from Mrs Davidson as well as from her husband, that is a matter between them and their clients. The respondents were entitled to believe that they had authority from both'.

Where there is more than one client (eg husband and wife) the question of whether a law firm needs to ensure it has instructions from both/all clients is not free from difficulty. 'Terms of business' letters often say that instructions from one will be taken as instructions from both. Whether that was the position here is not stated.

LEASES

(54) Cine-UK Ltd v Union Square Developments Ltd [2019] CSOH 3, 2019 SCLR 635, 2019 Hous LR 8

This case concerned a rent review in relation to a cinema in Aberdeen. The lease provided for the usual five-year review. The tenant proposed a rent of £563,750, while the landlord proposed a rent of £834,000. No agreement could be reached. The lease provided that in that event the rent was to be fixed by an independent surveyor. The surveyor found that the appropriate rent would be £755,375. The tenant thereupon raised the present action on the basis that the surveyor had misinterpreted the rent review clause. The action took the form of judicial review. This may surprise some, on the basis that judicial review is for public law matters, not private law matters. But for better or worse Scots law allows judicial review in certain types of private law matters.

The lease provided that the determination by the surveyor 'shall be final and binding … both on fact and law'. The landlord accordingly argued that the action was incompetent. The Lord Ordinary (Lady Wolffe) agreed (para 21):

> In my view, the parties' intention for finality in questions of fact and law is reinforced by two features of the lease not yet noted. First, the fact that there is no requirement of the independent surveyor to provide reasons for his or her determination – a point noted by the surveyor (as she noted at para 6 of her determination), is in my view significant. One important function of the provision of reasons is to enable parties to consider whether there has been an error of law in order better to inform their exercise of any right of appeal. This rationale for giving reasons largely falls away if parties agree that there is to be no appeal to the courts against a determination. The absence of a requirement to give reasons is not, of course, determinative but it is wholly consistent with finality being conferred on questions of law as well as on questions of fact. Secondly, it is also significant that the finality provision is not defined by reference to the subject matter of the kind of disputes which

may be referred to the independent surveyor. In other words, had parties wished to retain the ability to challenge a determination on the basis of an error of law in certain sorts of disputes or where legal questions could arise (eg in the construction of clauses of the lease), they could have distinguished those forms of disputes from others in which finality in fact and law was desired. They did not do so. Instead, the finality provision is inherent in the very definition of an 'independent surveyor'. In other words, the parties' intention was that all disputes remitted to an independent surveyor were to have the benefit of finality on both matters of fact and law.

(55) Ashtead Plant Hire Co Ltd v Granton Central Developments Ltd [2019] CSOH 7, 2019 Hous LR 2 rev [2020] CSIH 2, 2020 GWD 6-93

This case concerned a lease of commercial property at 50 West Harbour Road, Granton, Edinburgh. The lease was originally for the period 1988 to 2012, but in 1997 the term of the lease was extended to 2096. The rent review clause defined 'open market rent' thus:

> 'Open Market Rent' shall mean the best yearly rent for which the leased subjects if vacant might be expected to be let, without fine or premium, as one entity by a willing landlord to a willing tenant on the open market at and from the review date in question for a period, running from the review date in question, equal in length to the original duration of this Lease on terms similar in all respects to those contained or referred to in this Lease (save as to the amount of rent but including provision for a rent review cycle or pattern being a continuation of that herein contained) and on the assumption (if not a fact) that the Tenants have complied in all respects with all the obligations imposed on them under this Lease and, in the event of the leased subjects or any part thereof having been destroyed or damaged and not having been fully restored at the review date in question, on the further assumption that the destruction or damage had not occurred, *there being disregarded* however (1) any goodwill attached to the leased subjects by reason of the carrying on thereat of the business of the Tenants, (2) any work carried out in or to the leased subjects which has diminished the rental value of the same and (3) the effect on rent of all improvements carried out, with the prior approval of the [landlords], by the Tenants at their own cost after the date of entry hereunder provided such improvements are not in pursuance of an obligation to the [landlords] on the part of the Tenants (4) *the effect on any rent of the value of any buildings or other constructions erected on and any improvements carried out to the subjects of lease.*

The provisions marked in italics were at the heart of the dispute. The current landlord and tenant were not the original parties and had no information about the background to the way this provision was drafted. No new buildings had been erected since the beginning of the lease. The buildings covered only about a fifth of the site. The rest was used chiefly for construction materials and equipment.

The tenant raised the present action seeking declarator that the quoted provision meant that the rental value of the property should be calculated as if there were no buildings there. That was evidently the natural meaning of the

words, and the landlord accordingly had the uphill task of persuading the court that the natural meaning should not be adopted.

The landlord argued that the phrase 'any buildings or other constructions erected on and any improvements carried out' should be read as referring to works done by the tenant, the purpose of the clause being, argued the landlord, simply to ensure that any works done by the tenant would not be paid for twice over (ie once in terms of the direct costs, and a second time by enhancement of rent). The landlord argued that the words 'by the tenants with the landlords' approval' should be implied at the end of disregard (4).

The Lord Ordinary (Lady Wolffe) preferred the position of the pursuer. 'The ordinary and natural meaning of the words of disregard (4) are to direct the surveyor to disregard the buildings or other constructions erected on and improvements carried out to the subjects of lease,' she noted at para 36, and there was simply no reason to depart from that ordinary and natural meaning. The Lord Ordinary did not accept that the rent review clause as a whole pointed in favour of the landlord's approach. Whilst it was true that the rent review was to establish a rent for 'the leased subjects', a term which in itself included the buildings as well as the site, 'there is no legal rule which would preclude a disregard situated at the end of a rent review clause from excluding some part of the subjects of the lease themselves (as opposed to, say, the state or condition of the subjects) from the proposed valuation exercise' (para 37).

The landlord reclaimed, successfully. The Inner House decision, given by Lord Drummond Young, contains an extensive and most interesting essay on the principles of contractual interpretation, in which he stresses the importance of contextual interpretation, of purposive interpretation, and of commercial common sense. He thus rejects what he calls (para 16) 'brutal literalism'. At para 34 he says:

> The only sensible conclusion is … that the fourth disregard was intended … to relate only to improvements undertaken or buildings constructed by the tenant at its cost, or by the landlord after the date of entry under the lease. Unless it is construed in that way, the rent review provision in the lease flouts commercial common sense. First, it would contravene the fundamental commercial principle that the obligations on one side should normally be broadly equivalent to the obligations on the other side. If the tenants obtain the benefit of the buildings constructed on the site by the landlords before the original date of entry without paying rent for them, that is quite contrary to the principle of equivalence. Secondly, if buildings provided by the landlords are disregarded, that would be on a commercial basis a disproportionate burden on the landlord, which would remain in existence until 2096, when the lease is now due to end. Thirdly, if the buildings are excluded from the calculation of rent, that is a result that confers a windfall on the tenant of an essentially arbitrary nature.

One wonders how the disregard affected (i) the consideration paid by the current landlord when it acquired the landlord's interest, and (ii) the consideration paid by the current tenant when it acquired the tenant's interest.

Another thought is that, given that the reason for the drafting of the disregard is unknown, the possibility cannot absolutely be excluded that it was meant literally and was one element in a business package, in the context of which package it made sense. Such imponderables may be relevant where, as here, the dispute is not between the original contracting parties.

[For an earlier stage of the case, in which the focus was on questions of jurisdiction, see *Ashtead Plant Hire Co Ltd v Granton Central Developments Ltd* [2018] CSOH 107, 2018 GWD 39-477 (*Conveyancing 2018* Case (62)).]

(56) K/S Meadow Way v DGM London Road Ltd [2019] CSOH 20, 2019 SLT 555

Some of the facts of this case are unclear. In 1998 a lease was granted of premises (length of lease not known). In 2006 or 2007 the owner/landlord granted a second, 175-year lease to K/S Meadow Way. (The identity of this entity is not known, but 'K/S' is the standard abbreviation of *Kommanditselskab*, which is the approximate Danish equivalent of a partnership under the Limited Partnerships Act 1907.) The relationship of this 175-year lease and the lease entered into in 1998 is unclear, but the former lease was, we infer, an interposed lease. The interposed lease (if that is what it was) was registered in the Books of Council and Session. A grassum of £286,109 was payable for the interposed lease plus an annual rent, for the following 175 years, of £1. (Given that the property seems to have been worth about £11,590,000 – see para 6 – these figures are puzzling.) The interposed lease provided that the lease was to the lessee 'excluding assignees and subtenants' (para 18).

The mid-landlord, ie the holder of the interposed lease, raised an action seeking (i) declarator that the interposed lease was assignable without the landlord's consent, which failing (ii) rectification of the lease so as to allow such assignation. The present stage of the case concerned only the first of these.

Given the express and unambiguous provision stating that the lease was unassignable, it is not surprising that the Lord Ordinary (Lord Ericht) held that the lease was not assignable. It is not easy to understand why it was thought worthwhile seeking declarator.

The pursuer's case included some rather odd arguments. One was (para 23) that 'a lease of 175 years is … akin to ownership'. In an economic, rather than a legal, sense that is partially true but it is not easy to see what relevance it has to the question of assignation. At para 38 the pursuer asserted that there had been 'a common intention to procure acquisition of a heritable interest or something equivalent'. But any lease, whether assignable or not, is a heritable right or 'interest', so this assertion seems irrelevant. (And as for what 'something equivalent' means we can offer no suggestions.)

The pursuer founded on *Scottish Ministers v Trustees of the Drummond Trust* 2001 SLT 665 (discussed in *Conveyancing 2001* pp 68–69) where a 99-year lease was held to be assignable. But this argument is mistaken. In that case the lease was silent as to assignability, and so the question for the court

was whether assignability could be implied from the whole circumstances of the case. Where a lease expressly says that it is, or is not, assignable there is no question to decide.

One final oddity, though this time from the defender. The defender pled, among other things, that the action should be dismissed because the Keeper had not been called. That plea may have been aimed at the pursuer's conclusion for declarator, or at the pursuer's conclusion for rectification, but in either case it was misconceived. When two parties litigate about heritable property, there is normally no requirement to call the Keeper, and to do so will almost invariably be pointless. Cf *GCN (Scotland) Ltd v Gillespie* (Case (77) below).

(57) Eop II Prop Co III SARL v Carpetright plc [2019] CSOH 40, 2019 GWD 19-305

The question of whether a notice has been validly served is a perennial one, not least in connection with leases. This was yet another such case.

A retail unit in Auldhouse Retail Park, Cogan Street, Glasgow, was owned by the snappily-named BLCT (51560) Ltd (a Jersey-registered company), which in 2001 granted a 25-year lease to Carpetright plc. Ownership later passed from BLCT (51560) Ltd to the equally snappily-named Eop II Prop Co III SARL (a Luxembourg-registered company). In 2018 the tenant, Carpetright, entered into a company voluntary arrangement (CVA). The CVA provided that certain types of lease held by Carpetright could be terminated by the landlords, subject to certain conditions. The lease at Auldhouse Retail Park fell into that category and the landlord, Eop II Prop Co III SARL, decided to exercise its right to terminate. So far, so good.

It served the termination notice on the supervisors of the CVA, but not on Carpetright itself. Then, later, it served another notice, this time on Carpetright. But this latter notice was clearly invalid, since there was a six-month window for exercising the termination option, and the second notice was too late. So everything turned on whether the first notice, the one served on the supervisors of the CVA, was sufficient. (For the 'supervisor' of a CVA see s 7 of the Insolvency Act 1986.)

It was held by the Lord Ordinary (Lord Bannatyne) that service on the supervisors of the CVA was sufficient in terms of the CVA. (The terms of the CVA are not fully given in the judgment so we cannot quote them here.) The argument, presented on behalf of the defender, that the terms of the CVA were unclear, was rejected.

(58) Cummings v Singh [2019] SAC (Civ) 11, 2019 Hous LR 41

The pursuer owned commercial premises in Motherwell, Lanarkshire, and the defender was the tenant. He operated a 'hot food takeaway restaurant'. There was a problem with noise coming from the premises and the local authority served

an abatement notice under s 80 of the Environmental Protection Act 1990, which applies to 'statutory nuisances'. Where the excessive noise is due to 'a defect of a structural character', such a notice is served on the owner. In other cases it is served on 'the person responsible for the nuisance', which, in the case of leased property, would normally be the tenant. (One may suspect that this bifurcated approach may sometimes give rise to difficulties.)

In the present case the notice was served on the owner, ie the landlord. The present action was about whether the owner could require the tenant to carry out the necessary works. The lease had the following in clause 5:

> The Tenants bind and oblige themselves: (One) at all times and from time to time to execute at their own expense all such works as are directed or required to be done or executed upon or to the premises or any part thereof under or by virtue of any Act or Acts of Parliament in force for the time being or by any Local or other authority notwithstanding without prejudice to the foregoing generality that the direction or order for the execution of such works may be addressed to the Landlord; (Two) … at their own expense to comply in all respects with the provisions of any Act of Parliament already or hereafter to be enacted and all notices which may be served by Public, Local or Statutory Authority in relation to the premises and not to do or omit or permit or suffer to be done or omitted any act or thing which will cause the Landlord to be in breach of any of the provisions of any such Act or notice and to keep the Landlord fully and effectively indemnified against all actions, proceedings, damages, costs, expenses, claims and demands whatsoever in respect of any such act or omission …

The action by the owner was for declarator and specific implement. The tenant had two defences. One was that the provisions just quoted had been departed from by a subsequent exchange of letters. The other was that decree of specific implement is competent only if what needs to be done is perfectly precise and clear, but the abatement notice was in general terms, simply requiring the noise level to be reduced to a reasonable level.

The sheriff found for the pursuer, whereupon the defender appealed to the Sheriff Appeal Court, which has upheld the sheriff's decision. As to the first defence, it was obvious from reading the letters in question that they did not vary the terms of the lease. As to the second, the court considered the authorities, and concluded that this defence must also fail (para 9):

> What we have here is a notice [the local authority abatement notice] setting out that something needs to be done, to achieve an end. The end is clear, namely abatement of the noise made by the defender. How it is to be achieved, is left to the defender. He is, after all, best placed to know how the noise is caused, where it comes from, what equipment is in use when there is noise, and when would be best for him to have the work done … The pursuer seeks orders from the court in terms of cl 5, which clause effectively places the defender, as tenant, in the shoes of the pursuer, as landlord. We see no basis upon which the defender should be in a better position than the pursuer, as he would be if there was a requirement that the work to be done had to be specified to him. The Notice requires that the nuisance, from the premises occupied by the defender, is abated. How he does that is a matter for him.

(59) Reid v Redfern
[2019] SC DUM 34, 2019 GWD 15-239
[2019] SC DUM 35, [2019] SC DUM 40, [2019] SC DUM 41

The background facts of this case (which has four separate judgments, as above) may be quoted from paras 7 to 10 of the first judgment of Sheriff George Jamieson:

> 7. The first pursuer and his family have been farming Bengalhill Farm [Dumfriesshire] since at least 1965. In 2000, both pursuers entered into a minute of agreement with the landlord whereby the first pursuer and his son, the second pursuer, became joint tenants of the farm.
>
> 8. However, another of the first pursuer's sons occupied the farm from 2000 until November 2018. In December 2014, the second son entered into a relationship with the defender. In 2016 she became pregnant to him. She gave up her own accommodation on his persuasion and went to live with him on the farm, along with her then 10 year old daughter from a previous relationship. On 24 April 2017, the defender gave birth to twins.
>
> 9. The relationship between those parties thereafter deteriorated. The defender reports that her cohabitant assaulted her in around April 2018. They reconciled thereafter. In September 2018, they stopped cohabiting. In November 2018, the defender's cohabitant (the second son) left the farmhouse. She has remained there ever since, with her now twelve year old daughter and two year old twins. On 25 March 2019, her former cohabitant is to stand trial for his alleged assault on her in April 2018.
>
> 10. She avers that the first pursuer and various members of his family have tried to eject her from the farmhouse *brevi manu* , or have so harassed her to leave that an offence has been committed by them under section 22 of the Rent (Scotland) Act 1984 (unlawful eviction and harassment of occupier). While she has reported this complaint to the police, they have so far declined to take action, believing this solely to be a civil matter.

The pursuers then raised the present action to remove her. The case was primarily about procedural matters, including whether the action belonged to the tribunal or to the sheriff court (about which the sheriff had some strong criticism to make of the legislation). The main interest of the case from a property law standpoint is the discussion of when ejection *brevi manu* is competent. See **Commentary** p 137.

(60) M7 Real Estate Investments Partners VI Industrial Propco Ltd v Amazon UK Services Ltd
[2019] CSOH 73, 2019 SLT 1263, 2019 Hous LR 90

There was a lease of commercial property in Gourock, Renfrewshire, the period being from 2 August 2004 to 1 August 2019. The landlord served a notice to quit about five months before the ish and, when the tenant did not remove, raised the present action for removal. The defence was that the necessary notice period was one year on account of s 34 of the Sheriff Courts (Scotland) Act 1907, and that accordingly the lease had been renewed by tacit relocation. The Lord Ordinary

(Lord Ericht) held that there had been no tacit relocation and accordingly granted decree in favour of the pursuer. See **Commentary** p 139.

(61) Gatsby Retail Ltd v The Edinburgh Woollen Mill Ltd [2019] CSOH 49, 2020 SLT 122

The pursuer was the owner of 95/96A Princes Street Edinburgh. The defender, Edinburgh Woollen Mill Ltd, was the tenant. When the lease ended, the property was in disrepair. A schedule of dilapidations was drawn up and brought out a figure of £170,000. At this point the owner found a new tenant, Nero Holdings Ltd, and a figure of £110,000 was negotiated to be paid by the owner to Nero to put the property into a suitable condition. The owner then claimed that sum from Edinburgh Woollen Mill Ltd. One might think that the latter would have been pleased to have to pay that sum rather than the larger sum, but it declined to pay, and the present action ensued. The case turned on whether the £110,000 could be regarded as a loss consequent upon breach by the defender: the defender argued that the pursuer's averments did not set out a relevant link. The Lord Ordinary (Lady Wolffe) held that the pursuer's averments were indeed relevant.

(62) Drum Income Plus Ltd v LS Buchanan Ltd [2019] CSOH 94, 2019 GWD 38-620

Suppose that a lease says that at the ish the tenant is to ensure that the property is put in its original condition, or, which failing, must pay the landlord the costs of so doing. That may seem straightforward at least in theory. But the position, even in theory, may not always be clear. Suppose that the tenant does not do the required work, and further suppose that the landlord does not do so either, and indeed has no intention of doing so. Can the landlord still claim the costs of the remedial work that is not actually being done and may never be done? Or is the landlord's entitlement a claim for compensation for the tenant's breach, in which case the landlord cannot claim for more than the loss actually suffered? This is a question that has been before the courts a number of times in recent years.

In the Inner House decision of *Grove Investments Ltd v Cape Building Products Ltd* [2014] CSIH 43 (*Conveyancing 2014* Case (41)), a case of some importance even though only reported at 2014 Hous LR 35, the tenant's position was upheld. But in subsequent cases *Grove* has been distinguished. In *@Sipp (Pension Trustees) Ltd v Insight Travel Services Ltd* [2015] CSIH 91, 2016 SC 243 (*Conveyancing 2015* Case (52)) the Inner House, reversing the decision of the Lord Ordinary, found in favour of the landlord. A similar result was arrived at in *Trustees of the Tonsley 2 Trust v Scottish Enterprise* [2016] CSOH 138, 2016 GWD 31-554 (*Conveyancing 2016* Case (46)).

In the present case the fifth and sixth floors of Monteith House, 11 George Square, Glasgow, were leased by Drum Income Plus Ltd to LS Buchanan Ltd. For reasons which are not known, there was a separate lease for each floor, though this point was not material to the litigation, for their terms were essentially the same, and in the litigation both leases were taken together.

Both leases were entered into near the beginning of 2015, and the ish for both was 18 January 2019. LS Buchanan Ltd sublet both floors to Abellio Scotrail Ltd. (The arrangement is referred to in the case as a 'licence' rather than as a sublease. The lease/licence distinction was in fact not relevant to the decision, so nothing more will be said here, other than to mention that the distinction is by no means free from difficulty and that arrangements described as 'licences' can often be, in law, leases.) The premises were physically adapted to the specific requirements of Abellio Scotrail Ltd. We quote the Lord Ordinary (Lord Ericht) at paras 7 and 8:

> The structure of landlord-tenant-licensee created by the Leases and licenses came to an end when the Leases and licenses came to an end on 18 January 2019. When the Leases came to an end on 18 January 2019 the subjects were to be returned in their original condition: for example the internal partitionings installed for the benefit of Abellio would require to be removed. However the complicating factor, which has given rise to the issues in this case, is that at the end of the Leases the landlord did not resume possession of the premises. Instead by a licence for each floor dated 18 January 2019 the pursuer entered into a fresh licence direct with Abellio. Accordingly, the structure of landlord-tenant-licensee was replaced with a structure of landlord-licensee. In effect, the pursuer has cut out the defender and entered into a direct relationship with Abellio. Abellio continue to use the premises. The premises having been adapted internally to suit the requirements of Abellio, Abellio continue to use the premises in the adapted form.

In the present case the owner sued the former tenant for the cost of restoring the premises. The defence was that the owner had suffered no loss. The key provision of the leases was clause 5.35:

> At the expiration or sooner determination of the Period of this Lease … to remove from and leave the Premises empty and cleaned and in such repair and condition as shall be in accordance with the obligations of the Tenant under this Lease … Provided that if at such expiration … the Premises shall not be empty and cleaned and in such repair then at its sole option the Landlord shall be entitled to require that either (a) the Tenant carries out at its cost the works necessary to put the Premises into such condition or (b) the Tenant pays to the Landlord such sum being equal to the fair cost of carrying out such work and if the Tenant shall pay to the Landlord the sum within fourteen days of demand the Landlord shall accept the same in full satisfaction of the Tenant's liability under this sub-clause.

The Lord Ordinary compared this wording with the wording in the previous cases (above) and concluded (paras 21 and 25):

> The wording in the current case is very similar to that in *@SSIP Pension Trustees* and *Tonsley* … Accordingly on the wording of the particular leases in this case, the pursuer is entitled to payment of a sum equal to the fair cost of the work although the pursuer has not carried out nor intended to carry out the work.

The result may be right but seems odd. The tenant left the property in the state that the landlord wanted it to be left in, and, because of that, had to pay

compensation to the landlord. Some might see that as a windfall gain for the landlord.

(63) Affleck v Bronsdon [2019] UT 49, 2019 GWD 30-473

Flats, and sometimes houses, are quite often let to several people, such as students: this is known as 'multiple occupancy'. (In such a case the landlord must have a HMO licence: see Part 5 of the Housing (Scotland) Act 2006.) What is the legal relationship between each tenant and the landlord, and between the tenants themselves? Because of the frequency of such arrangements, the question is important, and yet it is a difficult area on which authority seems to be sparse. The present case is about this subject.

There was a flat in Edinburgh with four tenants, each paying the landlords £350 per month. One tenant left and, on 1 January 2018, was replaced by Ms Affleck. There was no written lease. She asked for one, but agreement could not be reached, the chief sticking point being that the landlords wished all the tenants to be liable jointly and severally, which Ms Affleck would not agree to. At this stage (para 6 of the judgment in the Upper Tribunal):

> The respondents [the landlords] tried to create what was, on the evidence, a legal fiction. They claimed that the appellant was bound by a joint and several lease which had been assigned to her by her predecessor. This position was entirely unstateable – not only could they not produce any such lease, but the predecessor (tracked down by the appellant) denied any assignation had taken place. The respondents produced only an unsigned draft of a lease form from 2012, which they claimed was the lease referred to. Bizarrely, that lease form expressly forbade any assignation without consent. They could produce no such consent. They claimed there was a 'rolling lease', but could not produce one. Their correspondence with the appellant did not mention joint and several liability. In legal terms their position was incoherent.

Ms Affleck commenced proceedings before the First-tier Tribunal seeking to enforce her rights as the holder of a private residential tenancy under the Private Housing (Tenancies) (Scotland) Act 2016. (Precisely what rights she was seeking to enforce is not known, but that fact is of limited relevance.) According to the Upper Tribunal (para 9), the First-tier Tribunal 'found that the parties had not agreed the rent, or who was the tenant, or the subjects'. As to the second of these, 'the First-tier Tribunal found that there was no agreement as to who was the tenant, because the tenant could be solely the appellant, or all four tenants' (para 10). As to the third, the lower tribunal 'found that there was no agreement as to subjects. The appellant regarded herself as the tenant of a part only of the flat. The respondents regarded her … as a joint tenant of the whole flat'. (We pause at this point to note (i) that this would suggest that the lower tribunal *had* accepted that there *was* agreement as to the subjects, and (ii) that if the lower tribunal had found that there was no agreement as to rent, parties or subjects then it is hard to see how it could have concluded that she was a

'tenant'.) The lower tribunal decided that the application by Ms Affleck must fail because she did not hold a 2016 Act tenancy.

Sitting in the Upper Tribunal, Sheriff Nigel Ross agreed with the result, though not with the reasoning. As to the rent, he concluded that there had indeed been an agreement for a rent of £350 per month, without joint and several liability. As for the parties he held: 'the correspondence … is clear that the appellant was a stand-alone tenant'. This links to the next point, the subjects. The sheriff said at para 12:

> The tribunal found that there was no agreement as to subjects. The appellant regarded herself as the tenant of a part only of the flat. The respondents regarded her (but without ever making that clear) as a joint tenant of the whole flat. Neither side is correct. Notably, the appellant is unable to point to which part of the flat was leased to her, and in fact she moved bedrooms during the tenancy. The respondents are unable to point to correspondence where the appellant agreed a joint tenancy. However, the documents and emails (which should have been expressly referred to by the tribunal in findings in fact) make clear that, whatever parties intended, there was an arrangement, capable of amounting to a lease, of a one-quarter pro indiviso share of the flat. Accordingly, the subjects are capable of being regarded as settled, by construing the plain meaning of the parties' correspondence. The tribunal was in error in considering the subjects were not agreed.

We understand this passage in the following way. Sheriff Ross considered three possibilities. (i) That Ms Affleck was tenant of part of the flat. (ii) That she was a 'joint' tenant of the whole of the flat. We think that by this is meant a single contract between the landlords and all four tenants, one of them being Ms Affleck. Presumably if a flat were let to Mr and Mrs Smith that would be an example of what the sheriff calls a joint tenancy, ie a single lease held by two persons. (iii) That there were four separate leases, each of the whole flat, with shared possession, except bedrooms, and no joint and several (solidary) liability. This third possibility is the one the sheriff considered to be correct.

Having established that, he then considered whether Ms Affleck held a 2016 Act tenancy. This was crucial because she was seeking to enforce rights which she had, she claimed, by virtue of holding such a tenancy. And on this point he held against her (paras 17 and 18):

> The lease was not a PRT [private residential tenancy]. That is because the 2016 Act requires certain features to be present. The application falls at the first hurdle. Section 1 of the 2016 Act defines a PRT. A tenancy can only qualify as a PRT if 'the tenancy is one under which a property is let to an individual (the "tenant") as a separate dwelling' (s 1(1)(a)) … she does not occupy the property 'as a separate dwelling'. She is one of four residents, and is entitled to exclusive occupation only of her own bedroom. She has to share all other facilities. Other tenants can come and go. She does not occupy a separate dwelling. She occupies part of a communal dwelling. For that reason, the arrangement does not qualify as a PRT under the 2016 Act. The remedies sought by the appellant only apply to a PRT. She is not entitled to those. Accordingly, the tribunal came to the right result for the wrong reasons, and I will refuse the appeal.

Sheriff Ross does not discuss s 2(2) of the 2016 Act ('a tenancy is to be regarded as one under which a property is let to an individual notwithstanding that it is let jointly to an individual, or individuals, and another person'). Presumably he would have regarded this as referring to a 'joint' tenancy such as a tenancy to Mr and Mrs Smith. Nor does he discuss s 2(4) ('a tenancy is to be regarded as one under which a property is let as a separate dwelling if, despite the let property lacking certain features or facilities – (a) the terms of the tenancy entitle the tenant to use property in common with another person ("shared accommodation"), and (b) the let property would be regarded as a separate dwelling were it to include some or all of the shared accommodation'). The meaning of this is open to debate, but arguably it covers the case where a let gives the tenant exclusive use of a bedroom plus shared use of kitchen, bathroom etc – which seems to be what Ms Affleck had.

The sheriff adds (para 19):

> The appellant submits that failure to find a PRT established means that landlords can skirt the law. That is not the case. It means only that 2016 Act does not apply. For all other leases, the pre-2016 law applies according to circumstances.

The sheriff does not, however, expand upon the last quoted sentence.

Finally, consider the following. A landlord lets a flat to X for £350 per month, the tenancy agreement saying that three others will be joining her as co-tenants. Freeze the video at that moment. Does she have what the sheriff said that Ms Affleck had? Seemingly so. But what of the other 75% of the property? That seems to be reserved to the landlord, for the few days or weeks until other tenants are found. Is this coherent? What of the principle that a contract is not a lease unless it gives exclusive possession to the tenant/s? Indeed, the same difficulty applies even once all four tenants have been found: none has exclusive possession. In the 'joint' case of a tenancy to Mr and Mrs Smith there is a single contract and Mr and Mrs Smith *together* have exclusive possession. But that seems not to be the case where four strangers are co-tenants under four separate contracts. We are able to offer only questions, not answers.

On 10 December 2019 there was an appeal to the Inner House which was unopposed.

(64) Rollett v Mackie
[2019] UT 45, 2019 Hous LR 75

Private-sector residential tenancy deposit schemes were introduced by the Tenancy Deposit Schemes (Scotland) Regulations 2011, SSI 2011/176, made under ss 120–122 of the Housing (Scotland) Act 2006. Where the landlord fails to comply with the obligation to pay the deposit into an approved tenancy deposit scheme, the tenant can sue for a discretionary sum, up to three times the deposit. Jurisdiction was at first vested in the sheriff court, but is now vested in the Housing and Property Chamber of the First-tier Tribunal, with an appeal on a point of law to the Upper Tribunal. Judging by the number of reported cases

(and no doubt more unreported ones), failure by landlords to comply with the deposit requirements are common.

In this case the landlord failed to pay the deposit into an approved scheme and the tenant made a claim. The First-tier Tribunal awarded the tenant £2,150, which was twice the deposit. He appealed, seeking an award of thrice the deposit. In the Upper Tribunal, Sheriff Nigel Ross rejected the appeal and, in doing so, gave valuable guidance about the way in which such awards should be determined, and also about the nature of appeals in such cases. As to the latter, he noted (para 12):

> In order for the present appeal to succeed, the appellant would have to establish (and the onus is always on an appellant) that the FtT decision was one which no reasonable tribunal could have reached. He would require, therefore, to show that no reasonable tribunal would have failed to regard this case as at the most serious end of the scale of such failures.

As to the former (how the award is to be quantified), he said (paras 13–14):

> In assessing the level of a penalty charge, the question is one of culpability, and the level of penalty requires to reflect the level of culpability … Cases at the most serious end of the scale might involve: repeated breaches against a number of tenants; fraudulent intention; deliberate or reckless failure to observe responsibilities; denial of fault; very high financial sums involved; actual losses caused to the tenant, or other hypotheticals. None of these aggravating factors is present.

(65) Searle v Bleazard [2019] UT 43, 2019 GWD 27-439

The landlord failed to pay the deposit into an approved scheme and the tenants made a claim. Under reg 9 of the Tenancy Deposit Schemes (Scotland) Regulations 2011, the tenant's claim 'must be made no later than three months after the tenancy has ended'. The landlord said that the original tenancy agreement (of 2013) had been replaced by a later one of 2017, and that the tenant's claim had been made more than three months after the first agreement had ended. The Housing and Property Chamber of the First-tier Tribunal rejected this argument, saying that the landlord had failed to prove the alleged 2017 agreement.

The landlord appealed to the Upper Tribunal. She argued that, by requiring her to establish the existence of the alleged new agreement of 2017, the burden of proof had been inverted. This argument unsurprisingly failed. Sheriff Nigel Ross was succinct (para 7):

> This ground proceeds on a misconception. The respondents' case [ie the tenants' case] did not rely on the 2017 agreement. It relied on a 2013 agreement. It was not their case that the 2017 agreement was in any way relevant, and therefore they had nothing to prove and no interest in that agreement, which they claimed was never knowingly concluded. The appellant, on the other hand, relied on an alleged contract in 2017. She was relying on it, and therefore the evidential burden was on her to prove its validity.

The landlord also argued that it was *ultra vires* of the First-tier Tribunal to deal with matters of contract law. This remarkable argument would mean that the Tribunal could never interpret a tenancy agreement. Unsurprisingly the sheriff rejected it. The Tribunal's award of £1,875 against the landlord was thus upheld.

(66) Ali v Serco Ltd
[2019] CSOH 34, 2019 SLT 463 affd [2019] CSIH 54, 2019 SLT 1335

This case, about housing for asylum-seekers, made national headlines. First, some basic concepts. An asylum-seeker is someone who has applied for asylum and whose case is pending. Once a final decision has been made, the person is no longer an asylum-seeker. If the application has been successful, that person now has permission to be in the UK. Asylum is no longer being sought, because it has now been granted. If the application has been unsuccessful, the person is now a 'failed' asylum-seeker. Such a person has ceased to fall under the classification of 'asylum-seeker' and has no permission to be in the UK. The status of asylum-seeker is thus inherently temporary. A person whose application fails may decide to leave the UK ('voluntary return'). But often that does not happen. In that case what is supposed to happen is deportation ('enforced return'). But there are practical difficulties and there is always a huge backlog of 'failed' asylum-seekers who decline to leave voluntarily and whose deportation has not been carried out.

Section 95 of the Immigration and Asylum Act 1999 says that 'the Secretary of State may provide, or arrange for the provision of, support for asylum-seekers … who appear to the Secretary of State to be destitute or to be likely to become destitute'. This is, as such, merely a provision empowering the Secretary of State so to act, but it was expanded into a positive duty by the Asylum Seekers (Reception Conditions) Regulations 2005, SI 2005/7, reg 5. The provision applies only to asylum-seekers, ie to those who have pending applications. Once an asylum application has been determined, whether in favour of asylum or against it, s 95 ceases to be applicable.

The Home Secretary, who is responsible for such matters (this area is not devolved), has a contract with Serco Ltd for the provision of s 95 accommodation. When an occupier ceases to be an asylum-seeker, Serco Ltd requires that person to leave. Once an application has failed, the 'failed' asylum-seeker no longer qualifies under s 95, and accordingly Serco Ltd, we understand, no longer receives payment. Presumably the property then becomes available to other asylum-seekers.

What if the occupier does not flit? It seems that until July 2018 Serco Ltd would then raise an action to obtain possession, but that in that month a new policy was adopted. This was what was called in the media and by political activists 'lock-change eviction' – what in traditional legal terminology is called an eviction *brevi manu*. This means eviction without a court order.

Shakar Omar Ali and Lana Rashidi, whose applications for asylum had failed, were told by Serco Ltd that they must leave, failing which they would be evicted. The Govan Law Centre took up their cases (seemingly separate cases which were conjoined for convenience). Each sought (see para 5):

(i) declarator that she is entitled to be provided with accommodation under s 95 'while her action for asylum is being determined';
(ii) declarator that evicting her without a court order would be unlawful *et separatim* unlawful in terms of s 6 of the Human Rights Act 1998, having regard to her article 3 and 8 rights … and
(iii) interdict and interdict *ad interim* to prevent such eviction.

On the question of whether, as a matter of general Scots law, eviction *brevi manu* is lawful, under the circumstances of the case, both the Outer House and the Inner House gave an affirmative answer: see **Commentary** p 138.

On the human rights point, both the Outer House and the Inner House agreed that there had been no breach of Article 3 or Article 8 rights. Article 3, headed 'Prohibition of Torture', says that 'no one shall be subjected to torture or to inhuman or degrading treatment or punishment'. At para 48 the Inner House said:

> It is well appreciated that for conduct to constitute a breach of article 3, it must meet a minimum level of severity. This usually means actual bodily injury or intense physical or mental suffering. Yet the reclaimer's pleadings make no effort to grapple with this issue, nor did the arguments advanced.

The Article 3 claim was clearly weak. The Article 8 claim was potentially more stateable. 'Everyone', says Article 8, 'has the right to respect for his private and family life, his home and his correspondence.' There have been numerous cases in which Article 8 has been invoked in an attempt to prevent eviction. Where the landlord, or other person seeking to recover possession, is not a public authority, Article 8 is generally inapplicable: *McDonald v McDonald* [2016] UKSC 28, [2017] AC 273 (*Conveyancing 2016* Case (42)); *FJM v United Kingdom* [2019] HLR 8 (*Conveyancing 2018* Case (63)). But when the landlord, or other person seeking to recover possession, is a public authority, Article 8 is relevant; whether it bites in any particular case depends on a variety of factors, including safeguards and proportionality. Of particular relevance in the present case was *R (on the application of N) v Lewisham London Borough Council* [2014] UKSC 62, [2015] AC 1259. In that case it was held that eviction without a court order did not contravene Article 8 where the occupier was being temporarily housed while her status as an alleged homeless person was being assessed. In *Ali v Serco* the Inner House adopted the approach taken by the Supreme Court in the *Lewisham* case and held that Article 8 was not engaged.

Given that the court found that neither Article 3 nor Article 8 applied, the question of whether Serco Ltd, as a private company, was subject to the provisions of the Human Rights Act 1998 did not have to be answered. Nevertheless the point was considered. In the Outer House it was held that Serco Ltd was bound by the Act, since, though itself a non-public entity, it was carrying out a public function. The Inner House disagreed. It referred to the House of Lords decision in *YL v Birmingham City Council* [2007] UKHL 27, [2008] 1 AC 95, in which a private company operated a care home on behalf of a local authority. The Inner House concluded (para 54):

> The fundamental distinction … is … between the entity that is charged with the public law responsibility, in that case a local authority, and the private operator who contracts with that entity to provide the service. The latter person operates according to private law obligations and responsibilities. The public law duty to provide care remains that of the entity with public law responsibility, in that case the local authority. In the present case it is the Home Secretary who is charged with the public law responsibility for providing accommodation for asylum seekers. Serco, by contrast, is merely subject to a private law contract with the Home Office to provide the necessary services. The fact that those services are ultimately intended to fulfil a public law responsibility is immaterial; they are still provided on a private law basis. Such services are analogous to a wide range of functions that are regularly contracted out by government to private providers, such as construction and maintenance work for government departments and local authorities. Further examples include the manufacture of vehicles, aircraft and munitions for government departments such as the Ministry of Defence; the latter analogy is drawn specifically by Lord Neuberger in *YL* at paragraph 141.

(67) Somerville v 1051 GWR Ltd [2019] CSOH 61, 2019 Hous LR 66

This case lies on the boundary of property law and company law. GCOS Ltd had two equal shareholders, who were also its directors, Mr Somerville and Mr Maguire. It became the tenant of a property at 1051 Great Western Road, Glasgow, and in June 2015 sublet it to 1051 GWR Ltd at a monthly rent of £4,333. The length of the sublease was open-ended, but it could be terminated by either party at any time upon giving three months' notice. Shortly thereafter Mr Somerville and Mr Maguire fell out and have been in dispute with each other ever since. As noted by the Lord Ordinary (Lady Wolffe) at para 2, 'this is one of several actions between the pursuer and David Maguire, or between entities with which one or other of those individuals is said to be associated'.

Mr Somerville wished the sublease to be terminated, because he considered that the monthly rent of £4,333 was below market level. In his view a full market rent would have been in the region of £6,667 per month. But Mr Maguire would not agree to such a termination, and so, with the board of directors deadlocked, the sublease continued. Mr Somerville then applied to the court for authority to raise a representative action on behalf of the company (see s 266 of the Companies Act 2006) against the subtenant, seeking reduction of the sublease. His application was granted, and the present action was the result.

The pursuer argued that Mr Maguire was a shadow director of the subtenant and had a substantial financial interest in it, so that he was benefitting from the continuation of the sublease at (allegedly) below-market rent, and therefore was in breach of his fiduciary obligations towards GCOS Ltd. (There is some suggestion in the case – see eg para 6 – that Mr Maguire himself, or perhaps some company controlled by him, may possibly have been willing to take on the premises at full market rent, but that Mr Somerville had vetoed this.)

At this stage of the case the defender (seemingly 1051 GWR Ltd was the sole defender: as far as we can see Mr Maguire was not called as a defender) attacked

the relevancy of the pursuer's averments, averments which were, said the Lord Ordinary at para 4, 'prolix and unstructured'. The debate was largely about fiduciary duties in company law, and we will say nothing about that topic here. These defences were repelled, and accordingly the case can now proceed to proof.

It is perhaps to be regretted that the emphasis was so much on company law with rather little being said about property law. The defender seems to have accepted that if the pursuer's averments were correct, and if the pursuer's approach to the fiduciary obligations of directors was correct, then it would indeed follow that the sublease would fall to be reduced. That may well be right, but one would have liked to see the point discussed. There seems to be an unexpressed proposition on roughly the following lines: 'where a company enters into a property transaction with Y, and Y knows actually or constructively that the transaction was brought about by breach of fiduciary duty by a director of the company, the transaction is voidable at the company's instance'. That sounds like a reasonable proposition, akin to the 'offside goals' rule, but it would be interesting to know the authority for it.

STANDARD SECURITIES

(68) Legal and Equitable Nominees Ltd v Scotia Investments Limited Partnership [2019] SAC (Civ) 23, 2019 SLT (Sh Ct) 193

The defender ('SILP') was an English limited partnership, under the Limited Partnerships Act 1907 (not to be confused with the very different limited liability partnership, under the Limited Liability Partnerships Act 2000). Section 4 of the 1907 Act says that 'a limited partnership must consist of one or more persons called general partners, who shall be liable for all debts and obligations of the firm, and one or more persons to be called limited partners'. SILP had one general partner, Scotia General Partner Ltd ('SGPL'). Who the limited partner was is not known and not relevant. SILP had property in St Andrews, Fife. In the Land Register the proprietor was stated to be SGPL 'as the General Partner of, and as such, Trustee for' SILP.

SILP borrowed money from the pursuer, secured by standard security over the property in St Andrews. The security was granted by SILP 'acting by our sole general partner' [ie SGPL]. It was registered in the Land Register.

Upon default, the pursuer sent notices of default both to SILP and to SGPL. The sum specified was: 'ONE MILLION ONE HUNDRED AND SIXTY EIGHT THOUSAND THREE HUNDRED AND SEVENTEEN POUNDS AND EIGHTY FOUR PENCE (£1,168,417.84).' It will be seen that the words and figures do not agree. The notices named each recipient (ie SILP and SGPL) but did not specify their capacity: thus the notice to SGPL did not identify it as general partner of and trustee for SGPL. In this connection the terms of the statutory style (Conveyancing and Feudal Reform (Scotland) Act 1970 sch 6, form A) should be noted. The style begins 'To AB' and then goes on to identify the standard

security. The notice to SGPL began 'To Scotia General Partner Ltd' without saying anything about capacity, but when, later in the notice, the standard security was identified, the capacity of SGPL was set out.

When payment was not forthcoming, the pursuer raised the present action to enforce its security, calling both SILP and SGPL as defenders. At first instance the sheriff found in favour of the pursuer, subject to questions of proof, and the defenders then appealed to the Sheriff Appeal Court. The court held that the discrepancy in the sum demanded was not fatal (para 25):

> I do not consider this to be significant, standing the total sum claimed to be due. This is not an unacceptable error. It is an obvious and minor typing error, which I do not consider renders the notices defective.

But while all three appeal sheriffs agreed on that point, there was a disagreement on the fact that the notice sent to SGPL did not specify its capacity. Sheriff W Holligan thought that the omission was fatal (para 22):

> In my opinion there is a difficulty. It is significant that, in the deeds referred to and in the various entries in the Land Register, the partnership structure is consistently referred to throughout. It is only in the notices themselves that the reference is absent. SGPL is the heritable proprietor of the property but 'as General Partner of, and as such, Trustee for [SILP]'. The notice does not so specify. SGPL may hold the title but it does so in a particular capacity and, contrary to s 19(2) [of the 1970 Act], that capacity is not made clear. In my opinion, the failure to specify the correct designation is an error which cannot be overlooked. The notice purports to follow form A of sch 6 of the 1970 Act. It seems to me that the 'To' part of the notice calls for a high degree of precision and in that the notice fails.

The other two sheriffs disagreed. We quote Sheriff A G McCulloch at para 26:

> Turning to the third challenge, the designation of the addressee in the notices. I do not consider that this presents a difficulty. In the context of the business between the pursuer, as lender, and the defender, as borrower there is no room for doubt as to the meaning of the notice served on SGPL. It is addressed to them, as required by the 1970 Act. Whilst it might have been preferable to include the capacity in which they were acting, namely as general partner of SILP, the absence in the address box does not render the notice invalid. The narrative of the notice so served makes it absolutely clear what is the basis for seeking payment. It refers, in full, to the standard security granted in the pursuer's favour by SILP, acting by its sole general partner SGPL. In my opinion there is no room for doubt on whom the notice is served, and why, and from whom payment is required. The requirement on the creditor in terms of s 19 of the 1970 Act is to serve a calling up notice 'on the person having the recorded title of the security subjects and appearing on the Land Register of Scotland as the proprietor'. … For that reason, service on SGPL was correct. The challenge was that the address box on the calling up notice did not go on to specify the capacity in which SGPL might be liable. But that was sufficiently clarified in the narrative. There can be no doubt in the mind of SGPL what is being served upon them, leaving aside any argument that a reasonable recipient test should be applied. Even applying a test of statutory interpretation, the notice is valid.

We incline to agree with the majority. The central point as we see it is that s 19(2) calls for service on the person who holds title. That had been done. Neither that subsection nor the statutory style in schedule 6 requires any special capacity to be stated, and it is not easy to see any policy reason for that to be required. Finally, we would recall the unreported case of *@Sipp (Pension Trustees) Ltd v Campbell* (21 December 2016, Kilmarnock Sheriff Court, *Conveyancing 2016* (Case (57)) in which there was an action to enforce a standard security and the defender argued that, whilst the pursuer was indeed the holder of the standard security, its capacity had changed since the security was granted and accordingly it could not sue without an assignation by itself to itself. This defence failed. It is of course not the same point as the one in dispute in the present case, but there is a link: they both involve the question of the significance – from a conveyancing standpoint – of the capacity in which a person holds a heritable right.

The defender/appellant (SILP) pled (para 9):

> The action is incompetent. The defender is referred to as a limited partnership registered in England under the 1907 Act. It is not the registered proprietor of heritable subjects and is not a legal entity. The registered proprietor is the company SGPL. An English limited partnership is not a legal person distinct from its partners. (Contrast that with s 4(2) of the Partnership Act 1890 … which provides that a Scottish partnership is a separate legal person.) An action may only be raised against a person, natural or artificial … As SILP is not a person the action is therefore incompetent.

This argument was rejected (see para 17) on the authority of *Paton v Neill Edgar & Co* (1873) 10 SLR 461, holding that an English partnership can be sued in Scotland. That seems correct. But the passage just quoted also raises another issue: even if the defender/appellant could be sued, it was 'not the registered proprietor'. On this we quote Sheriff Holligan at para 18:

> The appellant is effectively seeking to impugn its own title and the security which it granted in favour of the respondent. It has represented to the respondent that it is the owner of the property and that it can grant the security. The respondent was entitled to rely upon that representation. In short the appellant is barred from asserting that its position is directly contrary to what it said it was.

It is worth adding, though this does not emerge clearly from the judgments that the action was, wisely, raised by Legal and Equitable Nominees Ltd against *both* SILP *and* SGPL. So one way or another the proper defender was being sued.

(69) Royal Bank of Scotland plc v Jamieson [2019] SAC (Civ) 29, 2019 SLT (Sh Ct) 203, 2019 Hous LR 84

A debtor in a standard security defaulted. The bank served a calling-up notice, and then followed up with a standard action in the sheriff court to enforce the security. The debtor put forward a number of defences, which all failed, and decree in the bank's favour was granted. The debtor appealed. All his defences were once more unsuccessful – except one, and on that one successful defence

the bank's action failed. The successful defence was that the calling-up notice had not been validly served. The Sheriff Appeal Court took the view that 'a strict interpretation of the statute [the Conveyancing and Feudal Reform (Scotland) Act 1970] is required'. See **Commentary** p 179.

(70) General Asset Management Ltd t/a Accredo v Ruane or Prisic [2019] SC DUM 20, 2019 SLT (Sh Ct) 245

Decree enforcing a residential standard security was granted. Thereafter the defender sought recall of the decree, founding on s 24D(2)(b) of the Conveyancing and Feudal Reform (Scotland) Act 1970. The person who had represented the defender at the original hearing had not been authorised under the Lay Representation in Proceedings relating to Residential Property (Scotland) Order 2010, SSI 2010/264, and accordingly she, the defender, had not been validly represented. On that basis the decree was recalled.

(71) Promontoria (Chestnut) Ltd v The Firm of Ballantyne Property Services [2019] CSOH 91, 2019 GWD 37-595

The pursuer, as assignee of Clydesdale Bank plc, raised the present action for payment of £1,180,742 against a partnership and its partners. At the same time the pursuer was, in a separate action, seeking to enforce six standard securities against the defenders. One of the defences in the present action was *lis alibi pendens*, in that the same issues were being litigated elsewhere. This defence was repelled.

Whilst the decision is no doubt correct, the case does illustrate a certain awkwardness in the law, in that proceedings to enforce a standard security (or, as here, several standard securities) can be launched while leaving the substantive issue, of whether the defender actually owes the money to the pursuer, as yet undetermined. Or, in other words, it may be that the law should require the (alleged) creditor to constitute the claim by decree as a condition for seeking to enforce the standard security.

SEXUAL PROPERTY

(72) Greenshields v Carey [2019] SC LIV 59, 2019 GWD 24-381

The pursuer and defender entered into a relationship in 2001. The relationship was close, though no marriage took place. The defender's young son from a previous relationship took the pursuer's surname, and the pursuer made him the sole beneficiary of his will.

The defender owned a house in Dechmont, West Lothian. It was subject to a secured loan. The defender was in receipt of social security benefits, and she was paying the loan from those benefits. In 2009 the pursuer paid off the whole

outstanding amount, £37,000. He did this without telling the defender. Then: 'on 23 August 2013, having found the pursuer in a compromising position with another woman, the defender brought the relationship to an end' (Finding in fact 75). The following month the pursuer asked for repayment of the £37,000. His position was that it had been a loan, repayable on demand. The defender's position was that it had been a gift. The present action ensued. Since the parties had never married, the framework of divorce law was not available. To obtain the blessings of divorce, you first have to marry.

We take it that the present action was raised before September 2018, for otherwise the claim presumably would have prescribed – because on the pursuer's position the loan became repayable in September 2013, and five years from then would take us to September 2018.

Prima facie the pursuer's case was strong. When money passes from X to Y there is a presumption that it is not intended to be a gift – this is the 'presumption against donation'. As Lord Stair put it (I.8.2), in a passage quoted in the judgment: 'It is a rule in law, *donatio non præsumitur*, and therefore, whatever is done, if it can receive any other construction than donation, it is constructed accordingly.' In most cases, of course, the presumption is readily displaced because there is actual evidence, documentary or otherwise, showing why the payment was made, presumptions coming into their own only where evidence is lacking. If Jack puts a £5 note into a Macmillan Cancer collection box, that is obviously a gift, and the presumption is displaced. If he pays £5 for some apples at a market stall, he will not get far saying that *donatio non præsumitur* and that the money should be repaid; plainly, the payment was in discharge of his obligations, as a buyer, under a contract of sale. Thus why money has been paid is usually obvious, from documentation or from circumstances.

In this case there was no documentary evidence as to the basis of the payment. The pursuer was under no obligation to pay, and there was no *quid pro quo* for the payment. It was a 'he-says-she-says' case, in which he said 'it was a loan' and she said 'it was a gift'. The presumption against donation was engaged, and it operated in the pursuer's favour, so that it was not for him to prove that it was a loan but for the defender to prove that it was a gift.

The sheriff (Sheriff Susan Craig) preferred the evidence led by and for the defender. 'In contrast the pursuer did not present as a credible or reliable witness in matters of conflict. His attempts to explain away the evidence … were unimpressive and unpersuasive' (para 15 of the sheriff's note). Accordingly, 'based on the facts established I was satisfied that the defender had discharged the burden on her and established that the pursuer intended to give the money to her as a gift' (para 70). So the pursuer lost, and the defender gained, £37,000.

The sheriff cited M L Ross and J Chalmers, *Walker and Walker: The Law of Evidence in Scotland* (4th edn, 2015) para 3.11, where it is said:

> When payments are made by a parent or by a person *in loco parentis* (in the role of parent) there may be a presumption, contrary to the general presumption, that the payments are gifts made *ex pietate* (family devotion) in which case the onus is

> upon the person seeking repayment to prove the contrary. Whether or not such a presumption arises must depend upon the exact relationship of the parties and the whole surrounding circumstances.

The sheriff's own gloss was: 'where the recipient of the services is a near relative the onus of proving donation is more easily discharged' (para 9). This is not quite the same as the quoted passage, in two respects. One is that the sheriff speaks only of the presumption being more easily discharged, where the passage quoted goes further, speaking of a reverse presumption. The other is that it refers to parents and to those acting as parents, not to 'near relatives'. In any event, the sheriff's category of 'near relatives' could not be applicable to the present case, for, as far as we know, the pursuer and the defender were not relatives.

The material in *Walker & Walker* is fairly brief, and derives chiefly from chapter 5 of part 2, book 1 of *A Treatise on the Law of Evidence in Scotland* by W G Dickson (1887, ed by P J Hamilton-Grierson). Dickson's treatment is fuller than that of *Walker & Walker*. It seems that the sheriff was not referred to it, nor to what we think is the only relatively modern detailed treatment, that of W M Gordon in the title on 'Donation' in volume 8 (1992) of the *Stair Memorial Encyclopaedia*.

The 'donation-or-loan' question might seem simple: it must be either the one or the other. But matters are not always so simple. For instance in *Forbes v Forbes* (1869) 8 M 85 one brother gave money to another brother who was in financial difficulties. It was held that the money was something between a loan and a donation, namely that the money would be repayable if but only if the financial circumstances of the poorer brother should improve. It was a conditional loan, or a conditional donation. One suspects that such arrangements are common in real life between family members: 'here, my dear sister, is a cheque for £x: pay it back if and when you can'. But this approach would probably not have assisted the pursuer in *Greenshields*, for he seems to have made the payment without having communicated with the defender.

Again, payments between cohabitants may be reversible on the basis of unjustified enrichment. Thus in *Shilliday v Smith* 1998 SC 725 money paid to and on behalf of the other cohabitant was held to be recoverable when the contemplated marriage did not take place, on the basis of the *condictio causa data causa non secuta*. Might an argument on that basis have been advanced by the pursuer in *Greenshields*?

Another possibility, and perhaps the most obvious – more obvious than loan – is the principle that where X pays off Y's debt, X is entitled to recover the money from Y. For discussion see H L MacQueen, 'Payment of another's debt', in D Johnston and R Zimmermann (eds), *Unjustified Enrichment: Key Issues in Comparative Perspective* (2002), and L Macgregor and N Whitty, 'Payment of another's debt' (2011) 15 *Edinburgh Law Review* 57.

We conclude by noting one of the text messages quoted by the sheriff. In it the pursuer was described as a 'fukin unbelievable lyin useless greasy bass total delusional wanker' (para 34). We have some modest knowledge of certain languages, such as French, German and Latin, but alas lack the linguistic resources to offer a translation of these strange, haunting words. Might they

be – though we apprehend that this may be too bold a conjecture – a survival of the language of the ancient Picts? Perhaps our readers could assist us.

SOLICITORS

(73) McNulty v Conveyancing Direct 26 July 2018, Glasgow Sheriff Court

The pursuer bought some land at Ballochyle, near Dunoon, Argyll, at a price of £65,000. The transaction settled, and the pursuer's title was registered in the Land Register. He believed that the land had planning permission for the erection of a house. In fact it did not: there was such permission but it had been granted for land just outwith the boundary of the property bought by the pursuer. The value of the property without planning permission was far below the price that had been paid. The buyer sued the agents who had acted for him for damages for having failed to notice the problem. Expert evidence was given by Donald Reid and Robert Rennie, for the pursuer and the defenders respectively.

An unusual feature of the case is that the property was to be sold at auction but in the event the pursuer bought it from the auctioneer, as the seller's agent, without any actual auction. Much in the story is less than clear, and one of the obscurities was whether the buyer had entered into a legally binding contract on his own account, something that the pursuer sought to deny.

The sheriff (Sheriff Alayne Swanson) held (para 46) that 'there was an antecedent contract in place before the pursuer instructed the defenders' on the basis of what is commonly called 'statutory personal bar', ie s 1(3) of the Requirements of Writing (Scotland) 1995. Even if that was wrong, she also held (para 42) that:

> Both the solicitors for the sellers and the solicitors for the buyer made an assumption that there was a contract and that the terms of that contract were to be found in the articles of roup. In my view that was a reasonable assumption.

Since the deal was already in place before the pursuer instructed the defenders, the latter argued as follows (para 20):

> The scope of the defenders' duty was limited to an execution-only instruction, whereunder the defenders were to give legal effect to this contract that the pursuer had already committed to … In fulfilment of that instruction the defender duly attended to the steps necessary to procure the conveyance of that which the pursuer had already agreed to purchase … He got exactly what he agreed to get, namely the subjects that had been exposed for sale. Accordingly the defenders fulfilled their mandate.

The defenders' 'terms of business' letter said, in capital letters (see para 48): 'AS YOU PURCHASED AT AUCTION WITHOUT REQUESTING US TO CHECK THE TITLES YOU ARE DEEMED TO HAVE ACCEPTED THE POSITION.' The report on title that was sent to the pursuer (the pursuer denied having received it but his evidence on this point was rejected – see para 61) enclosed the title

plan. The pursuer did not reply. Professor Rennie's view was that 'there was no need to chase the pursuer for a response' (para 62), a view with which the sheriff concurred (para 64). The pursuer claimed that he had sent to the defenders a plan of what he thought he was buying, but the sheriff was not satisfied that that had happened (para 50).

The sheriff held the defenders not to have been negligent. Even if the defenders had picked up on the problem, it seems that nothing could have been done given that a contract had (it was held) already been entered into.

There seems to have been imperfect communication between the buyer and the seller (represented by the auctioneer) and imperfect communication between the buyer and his solicitors. The defenders were held not to have been negligent, and we do not question that decision. But conveyancers reading this case may feel that in an ideal world matters would have been different.

(74) Soofi v Dykes [2019] CSOH 59, 2019 GWD 27-442

In 2008 a company called Bonafied Enterprises International Ltd ('BEI') bought a petrol station (with car wash and shop) in Alexander Street, Airdrie, Lanarkshire, the seller being a Ms Young. The price was £450,000 for the heritable property, £385,000 for the goodwill, and £15,000 for fixtures and fittings. The business did not do as well as the buyer had hoped. BEI went into administration in 2010 and was later dissolved. In the present action the pursuer, as assignee of BEI, claimed damages for professional negligence against the solicitor who had acted in the purchase.

The case has had two stages. The first was on whether the pursuer's action had been relevantly pled. It was held, both in the Outer House and thereafter in the Inner House, that it had been: [2017] CSOH 2, 2017 GWD 2-14 affd [2017] CSIH 40, 2017 GWD 21-332 (*Conveyancing 2017* Case (61)). The present case comes from the second stage, namely a proof.

The nub of the pursuer's position was set out in para 2 of the judgment of Lord Mulholland when the case was at first instance in its first stage:

> In advance of the purchase BEI had obtained from the seller financial information relating to the trading history of the business, which financial information was used inter alia for the purpose of valuing the business including the goodwill. The pursuer avers that the defender failed to have included in the missives a provision to warrant the accuracy and completeness of the financial information provided by the seller and relied on by BEI in the purchase. The pursuer further avers that the defender failed to take any steps to advise BEI as to whether it should seek such a warranty, or obtain the informed instructions of BEI as to whether it should seek such a warranty. It is averred in the pleadings that such warranties are commonly sought and granted in transactions of this nature and had the defender displayed the skill and care to be expected of an ordinarily competent solicitor, advice would have been tendered to the purchaser that such a warranty should be sought from the seller. The defender denies negligence. The pursuer's case is twofold. The principal case is a no-transaction case, namely that had such a warranty been sought the seller would not have agreed

> to it and as a result the purchase would not have taken place. The alternative case is that had such a warranty been provided, the purchaser would have an action against the seller for breach of warranty.

Following proof, the Lord Ordinary (Lord Docherty) held that the defender's non-inclusion of the clause had not been negligent, and accordingly the action failed. The defender's evidence, as summarised by the Lord Ordinary at para 16, is worth quoting:

> The defender's evidence was that it was never suggested to him by the client that such a warranty was needed; and that the circumstances did not suggest that the inclusion of a warranty was necessary or appropriate. The price had been agreed at the outset before the defender's involvement. He had not seen the Ryden report [valuation report] or any other financial information. It had not been suggested to him that BEI was relying upon the accuracy of any financial or other information which had been provided by the seller. … BEI had had nearly 18 months to obtain whatever financial records of the seller they considered they required to see. The client had been content [with the wording of the missives].

Donald Reid gave expert evidence, and it is evident that this had considerable weight with the court (paras 25–27). His views, as summarised by the Lord Ordinary, are worth quoting at some length:

> Mr Reid said it was common for information warranties … to be included in offers to purchase business subjects. However, it was very common for the seller's solicitor to amend or delete the warranty during negotiation of the missives. A seller's solicitor would wish to reduce the seller's exposure. Whether the purchaser would propose such a clause, and whether the seller would accept it, depended very much upon the facts and circumstances of the particular case. He indicated that his own general approach when instructed to offer to purchase a business was that he included an information warranty in the offer. … He was not prepared to describe it as being standard practice for a solicitor to include an information warranty in an offer to purchase a business; but he thought it was more common to do that than not to do that. … Looking at transactions his firm had been involved in there were a significant number where a warranty had not been sought. The particular circumstances might have justified that course, in which case he doubted whether it would be right to describe the course taken as a departure from normal practice. … In his opinion it could not be said that the course followed by the defender was a course which no solicitor of ordinary skill would have taken if he had been acting with ordinary care. It was important to look to the whole circumstances up to the conclusion of missives. Here the circumstances as Mr Reid understood them were that a lengthy period elapsed between BEI's initial offer and the conclusion of missives – ample time for BEI to have investigated, or sought further information relating to, accounts or goodwill if that was thought to be necessary. The clients were not commercially naïve – they had previous business experience. They had arranged the funding for the transaction themselves. They … were well aware of the significance of audited accounts. They knew on 22 August 2008 that the second sentence of clause 9 had been deleted by the seller and that the entire agreement clause had been introduced. At the meeting that day the defender appeared to have been meticulous in explaining all of the changes

> introduced by the seller's proposed missive letter. In the whole circumstances Mr Reid did not think that it could be said that no solicitor of ordinary skill exercising ordinary care would have failed to propose the inclusion of an information warranty. In his view some such solicitors might have sought to introduce one, but others would not have done so.
>
> Mr Reid clarified that, while it was sometimes done, in his opinion it was not the normal practice … to advise the client of the possibility of proposing an information warranty in an offer. Normally, the solicitor simply made a judgement call as to whether it was appropriate in the circumstances to include such a clause in a missive letter.
>
> Looking at the history of the transaction, Mr Reid thought that if the defender had proposed an information warranty the seller's solicitor would have sought to delete it or to qualify it to make it toothless.

In addition, the Lord Ordinary rejected the pursuer's claim that meetings with the defender had been brief and that little advice had been tendered: paras 32–36.

The Lord Ordinary having held that there was no negligence in relation to the terms of the missives, other issues fell away, but the Lord Ordinary nevertheless took the view that, even if the missives had contained a warranty, it would have made no difference anyway. (i) The evidence suggested that BEI would have gone ahead with the purchase in any event (para 56). (ii) The seller's trading accounts had probably been accurate (paras 54 and 58). (iii) The failure of the business in the hands of BEI had been, on balance of probability, due to managerial misjudgements (para 51) and prevailing trading conditions (para 52).

ESTATE AGENTS

(75) Wells v Devani
[2019] UKSC 4, [2020] AC 129, [2019] 2 WLR 617, [2019] 3 All ER 379

Mr Wells developed a block of flats in Hackney, London, consisting of 13 units. He had found buyers for seven, but the remaining six were proving hard to sell. He came into contact with a Mr Devani, and on 29 January 2008 a telephone conversation between them took place. What was said became a matter of dispute. We quote Lord Kitchin at para 5:

> The parties at trial gave strikingly different accounts about what was said in the course of this telephone conversation. It was Mr Devani's evidence that he told Mr Wells that he was an estate agent and that his commission terms would be 2% plus VAT. Mr Wells maintained that Mr Devani made no mention of any commission and gave the impression he was an investor looking to buy on his own account.

On 5 February 2008 Mr Devani found a buyer, a social landlord called the Newton Housing Trust, which agreed to pay £2.1 million for the six flats. Later the same day Mr Devani sent an email to Mr Wells setting out his terms and conditions. The sale proceeded to completion. Mr Wells declined to pay the commission, and Mr Devani sued him.

The first issue was what, if anything, had been agreed in the telephone conversation on 29 January 2008. After hearing evidence, the trial court preferred the evidence of Mr Devani, and this finding in fact was accepted by the courts above – the Court of Appeal and finally the Supreme Court. But there remained a legal issue, an issue that was fought up to the Supreme Court. The trial court had held that the parties had agreed an estate agency relationship, and that they had agreed a rate of commission of 2% plus VAT. But the trial court also found that in the telephone conversation nothing had been said about *when* the commission would become payable. The trial court took the view that a term could be implied into the oral contract that the commission would be payable at completion.

Mr Wells appealed. The Court of Appeal held ([2016] EWCA Civ 1106, [2017] QB 959) that a contractual term can be implied only when there is already a contract. But the absence of agreement as to what would be the trigger event for payment had been fatal to the conclusion of such a contract. This was because there had been no consensus on the key terms of the contract. It had therefore not been open to the trial court to hold that completion was the implied trigger event. Had this been a nominate contract (to use civilian terminology), then implication of such a term might have been acceptable. But this was not a nominate contract, and accordingly actual agreement about the trigger event was necessary in order for there to be a contract at all. Accordingly the Court of Appeal allowed Mr Wells's appeal.

Mr Devani appealed in turn. The Supreme Court has upheld his appeal. On what basis? The Supreme Court seems to have said something like: 'payment on completion was what the parties implicitly agreed but that was not an "implied term"'. We suspect that contract law scholars may be debating this for many years to come.

As well as the 'consensus' and 'implied term' issues there was another issue, turning on s 18 of the Estate Agents Act 1979. Section 18(1) says: 'Before any person (in this section referred to as "the client") enters into a contract with another (in this section referred to as "the agent") under which the agent will engage in estate agency work on behalf of the client, the agent shall give the client' a range of information, including the commission rate and the trigger event for when the commission is payable. But Mr Devani had not done that. He did email his terms and conditions, but did not do so until 5 February 2008, which was too late.

These emailed terms and conditions, having been sent after the contract had already been entered into, could not bind Mr Wells. But that fact would be a matter of ordinary contract law. What are the consequences under s 18 of the 1979 Act? Roughly speaking, s 18 says that if an estate agent breaches the provision, then the contract is enforceable only according to the discretion of the court. In this case the court held that the contract would be enforceable but subject to a one-third reduction of the fee, as a penalty of breaching s 18. Thus the commission was £26,000.

One suspects that this dispute over the sum of £26,000, having lasted about 11 years, and having gone all the way to the Supreme Court, may have proved ruinous to both parties.

BOUNDARIES AND POSITIVE PRESCRIPTION

(76) Ardnamurchan Estates Ltd v Macgregor 14 June 2019, Fort William Sheriff Court

In this action the pursuer sought declarator that it was the owner of an area of ground extending to 5,000 square yards (about 4,181 square metres) in Ardnamurchan in Argyll, and also the reduction of a disposition of that area in favour of the defenders, Mr and Mrs Macgregor, recorded GRS Argyll on 27 June 1994. The litigation has more than one aspect, but in the present phase the question was whether the 1994 deed could be regarded as a competent foundation writ on which prescriptive possession was capable of running in favour of the Macgregors. (We are grateful to Timothy Young, advocate, for some of the details of this case.)

The deed ran thus:

> We, Michael Roy Macgregor and Mrs Karen Judith Macgregor, spouses, residing at Port an Aiseg, Glenborrodale, Argyll, for no consideration, do hereby dispone to and in favour of ourselves the said Michael Roy Macgregor and Mrs Karen Judith Macgregor equally between us and to the survivor of us and to our respective assignees and disponees and to the executors of the survivor whomsoever heritably and irredeemably All and Whole that area or piece of ground extending in total to five thousand square yards or thereby lying in the Parish of Ardnamurchan and County of Argyll shown highlighted in blue on the plan annexed and executed as relative hereto together with all buildings and others erected on the said area or piece of ground, the fittings and fixtures therein and thereon, the whole growing timber thereon, and the whole parts privileges and pertinents thereof; together with all necessary rights of access for pedestrian and vehicular purposes to the subjects hereby disponed from the road lying generally to the north east of the subjects hereby disponed; With entry at the date hereof; And we grant warrandice; And we certify that the transaction hereby effected …

It will be seen at once that this was no ordinary disposition. The disponers and the disponees were the same. This was therefore what is sometimes called an 'A-to-A' disposition. Can such a deed constitute a foundation writ for the purposes of prescriptive possession? In *Board of Management of Aberdeen College v Youngson* 2005 SLT 371 that question was answered in the negative.

The first issue was whether the decision in *Youngson* was binding on the sheriff. It was an Outer House decision, and it has always been accepted that Outer House decisions are not binding on sheriffs. Despite the urgings of counsel for the pursuer, the sheriff (Sheriff Eilidh MacDonald) adhered to the accepted view, and thus held that whilst *Youngson* was persuasive it was not binding. But in any event the sheriff took the view that *Youngson* could be distinguished (para 14):

> At paragraph 14 of the decision [*Youngson*], the Lord Ordinary refers to the Disposition in issue and categorises it thus: '… a disposition purportedly granted by four disponers in favour of the same four disponees, involving no third party or separate legal persona nor any difference in feudal interest, extent of subjects or status or character of parties …'. The essential elements for consideration by the Lord

> Ordinary were that the disposition did not have any third party involvement, that there was no difference between the legal persona of the disponers and the disponees, nor any difference in feudal interest, extent of subjects or status of character of the parties. Putting to one side the matter of how the disposition could be characterised thus without making external inquiry beyond the face of the deed itself, the factual circumstances in the present case are slightly different. In the present case, the 1994 disposition also involves no third party interest, no difference in the legal persona of the disponees nor any difference in feudal interest, or status or character of the parties. However, the extent of the subjects is significantly different given the difference in area of the subjects disponed and because the deed creates a servitude granting a right of access. The present case is therefore different on its facts and can be distinguished. For the avoidance of doubt, the special destination of the disponees is not relevant because the Defenders as disponers held their title subject to the same special capacity.

The sheriff here seems to refer to some other title held by the Macgregors, but we have no details of that. At all events it not easy to see that there is any good basis, in this passage, for distinguishing *Youngson*.

The sheriff went on to say (para 15):

> I agree … that there is a general rule that one cannot contract with oneself. I also agree that there are exceptions in law to that general rule. … Consequently it would be necessary to look beyond the deed itself to establish whether the deed falls within one of the exceptions to the general rule, in order to assess its validity. Therefore, logically, the 1994 disposition is not *ex facie* invalid, as the question of its validity cannot be established simply by reference to the deed itself. The disposition is therefore capable of being a foundation writ for the purpose of positive prescription in terms of section 1 of the Prescription and Limitation (Scotland) Act 1973.

This would seem to go beyond distinguishing *Youngson*: it would seem to go all the way to saying that *Youngson* was wrong.

There was an appeal to the Sheriff Appeal Court, and while this volume was in production the appellate decision appeared, reversing the first instance decision: [2020] SAC (Civ) 2, 2020 GWD 10-145. We will discuss the appellate decision in next year's volume. We will, however, offer two incidental reflections at this stage. (i) Before *Youngson*, it was quite common for *a non domino* deeds to be drafted as A-to-A deeds, and one must feel sympathy for those affected adversely by that decision. (ii) Because the A-to-A method was often adopted, and by good conveyancers, we would suggest that there could be no question of any professional liability arising from the adoption of that method in deeds prior to the appearance of the *Youngson* decision (applying the well-known standard of *Hunter v Hanley* 1955 SC 200).

(77) GCN (Scotland) Ltd v Gillespie [2019] CSOH 82, 2020 SLT 185

Cases in which both parties claim to own a particular area of land are common enough. This, by contrast, was a case in which both parties freely admitted to *not* owning the property in question. So what was happening?

The case was, at this stage, a debate on whether the pursuer had made a relevant case, and accordingly the facts have yet to be determined. According to the pursuer the facts were as follows. It concerned an area of ground at Garrion Business Park in Wishaw, Lanarkshire. We quote para 4 of the judgment:

> The property mainly comprises a number of large storage sheds; the pursuers use these for the purposes of their transportation and pallet delivery business. The pursuers explain in their pleadings that they have a fleet of over 40 articulated lorries and vans; they say that these vehicles use the property 24 hours a day, 7 days a week.

The pursuer had, it asserted, occupied this ground since 1998 or thereabouts. It had, however, no title. It wished to acquire ownership. The last known title had been held by Whitechurch Developments Ltd which had been dissolved in 2010, all its remaining assets having then fallen to the Crown, who is represented in such matters by the Queen's and Lord Treasurer's Remembrancer (see s 1012 of the Companies Act 2006). But the QLTR had disclaimed the property.

The pursuer decided to apply to the Keeper for the registration of an *a non domino* disposition, which would open the door to the hope that, after a further ten years, a valid title would be established. Section 43 of the Land Registration etc (Scotland) Act 2012 says that one of the conditions to be met before the Keeper will accept such an application is that the applicant should be in possession of the property, and have been so for at least 12 months. But the Keeper was not satisfied on this point. Why not?

Here the defender enters the stage. He too had ascertained that no valid title appeared to exist in respect of the area of ground, and he too wished to acquire title to it: his plan was to develop it for housing. Presumably he too was thinking of an *a non domino* disposition, but the case does not mention that. Presumably he too claimed to be in possession, though, likewise, the case does not mention that: we infer this because of the Keeper's decision to reject the pursuer's application. Cases in which the two opposing parties claim to be in possession of one and the same piece of ground are common.

Unable to buy the property from anyone able to offer a valid title, and unable to persuade the Keeper to accept an *a non domino* deed because of the question of possession, the pursuer decided to raise the present action against the defender, primarily in order to clear the way to a new *a non domino* application. It sought declarator that it had possessed the ground in question openly, peaceably and without judicial interruption for a continuous period in excess of one year. It also sought interdict against the defender to prevent him interfering with the pursuer's possession. (As already mentioned, this account is based on the pursuer's pleadings. No proof has yet taken place and it may be that the defender's position as to the facts is different.)

All the defender's challenges to the relevancy of the action failed. As to the interdict sought, if it was true that the pursuer was in possession, then there was an entitlement to interdict against the defender given that the defender had no better title: the law gives to a possessor a certain measure of protection simply

by virtue of possession, with reference to such authorities as *Irvine v Robertson* (1873) 11 M 298 and *Watson v Shields* 1996 SCLR 81.

Of particular interest was the defender's argument that the appropriate procedure for the pursuer would have been to challenge, by means of judicial review, the Keeper's rejection of the *a non domino* application. This argument was rejected by the Lord Ordinary, Lord Pentland (para 35):

> I consider the argument to be misconceived. As I understood it, the argument was predicated on the view that the Keeper is responsible for resolving a dispute between the parties as to whether the pursuers have possessed the property openly, peaceably and without judicial interruption for a continuous period of 1 year. In my opinion, the Keeper is not in a position to resolve a dispute of the type that has arisen in the present action; this is a matter for the courts.

This is, with respect, the right approach, and it is most welcome to see it so clearly stated in the Court of Session. Too many legal advisers seem to think that in property disputes the Keeper is the appropriate defender or at least needs to be brought in as a co-defender. In nine cases out of ten that view is wrong. Special cases apart, property disputes between X and Y must be resolved – failing amicable agreement – by litigation between X and Y. The Keeper will then take note of the result and act accordingly. Her role is much nearer to that of scorekeeper than to that of player.

(78) Thorpe v Frank
[2019] EWCA Civ 150, [2019] 1 WLR 6217

Often the question of possession is disputed. Usually such disputes can eventually be resolved once all the facts have been ascertained. But sometime even after all the facts are to hand there can be uncertainty as to whether those facts add up to possession. This was the situation not only in the present case but also the next, *Fletcher v Kirkhope*. Though the present case is English, it is from the Court of Appeal, and would, we think, be of some persuasive authority here. Whilst the English law of what we call positive prescription is very different, the basic ideas of possession are fairly similar.

Between two houses there was some unfenced ground. Its surface was paved. It was within the title of one of the houses, owned by Mr and Mrs Frank. But the owner of the other house, Mrs Thorpe, was under the impression that it was part of her title. She repaved the ground. Thirty years later she claimed that the ground had become hers by the running of time. The question was whether she could be regarded as having been in possession for that period.

The First-tier Tribunal held in her favour. That decision was reversed on appeal by the Upper Tribunal. A further appeal followed, to the Court of Appeal, which has reversed again, thus finding in favour of Mrs Thorpe. The paving was sufficient to constitute possession. We quote Lord Justice McCombe at para 40:

> Having regard to the nature of this open forecourt area, the ripping up of the old surface, digging out the land, inserting hard-core, levelling the surface with the area

surrounding it and then replacing the flags with new flags and bricks of one's own choosing were just the sort of actions that one would expect an occupying owner to do in dealing with this land. This was a clear interference with the rights of the paper title owner, asserting not merely a momentary control over the nature of the land's surface but a control of it for the future. This was not merely a temporary trespass for two weeks during the works period, as Mr Denehan [counsel for the Franks] put it; it was the creation of something of permanent and enduring character. Mr Thorpe's work for his mother had created something that gave the entire apron the appearance of being an adjunct to No 9, whatever might have been said of the pre-existing paved surface. In completing these works, the paper title owners were also excluded from the soil below the apron's surface by a permanent covering of Mrs Thorpe's construction.

(79) Fletcher v Kirkhope
23 July 2019, Lands Tribunal

This was a dispute, between neighbouring proprietors, over the ownership of an area of ground in a rural area near Carluke, Lanarkshire. The area was small, extending to 133 square metres, but it seems to have been important to the applicants, Mr and Mrs Fletcher, because access to the public road (Yieldshields Road, the B7056) lay through this area (see para 14). As far as we can ascertain from the judgment, it does not seem to have had much practical value to the respondents, Mr and Mrs Kirkhope, other than as a possible ransom strip. The two sides had been in a 'hostile' (para 12) relationship for many years.

In 2005 a disposition of the disputed area in favour of Mr and Mrs Fletcher had been registered in the Land Register. Indemnity was excluded because it was an *a non domino* deed. (Whether the Keeper would accept such a deed today is another matter.) In 2008 a disposition to Mr and Mrs Kirkhope, by a Mr Lockhart, was granted of an area of land which included the disputed area and presented for registration.

It might be supposed that the Keeper would either (i) have rejected the Kirkhopes' application, as far as the disputed area was concerned, because it was already registered to the Fletchers, or (ii) have accepted the application, registering the Kirkhopes as proprietors and at the same time deleting the registration of the Fletchers, on the basis that the latter was an inaccuracy. That is, indeed, how the Keeper would approach the matter in the wake of the Land Registration etc (Scotland) Act 2012. See in particular s 3(6) of the 2012 Act: 'Subject to subsections (2) and (7), there is to be only one title sheet for each plot of land.' But formerly the practice was different. Odd though it may appear, before the 2012 Act the Keeper would be prepared to register two different people as owners of one and the same piece of ground. Whether this was, in fact, lawful under the Land Registration (Scotland) Act 1979 may be doubted, but that question will not be discussed here.

The Keeper was not satisfied that Mr Lockhart had a title to the disputed area and accordingly treated the 2008 disposition – to the extent that it bore to dispone the disputed area – as an *a non domino* deed. The application was accepted, but with exclusion of indemnity in respect of that area. Thus there were now two title sheets of the disputed area, one showing the Fletchers as owners, and the

other showing the Kirkhopes as owners. (Later the Kirkhopes disponed the property to their children, reserving to themselves a proper liferent, but this point of detail did not affect the substance of the case.)

In this action the Fletchers asked the Lands Tribunal to order the Keeper to rectify the Land Register by deleting the disputed area from the Kirkhopes' title sheet. The basis was that their (the Fletchers') title had been fortified by positive prescription in that they had, they said, been in possession of the disputed area for more than ten years since the 2005 deed in their favour.

Can prescription run on a Land Register title? This is a tricky subject. (For discussion see ch 17 of K G C Reid and G L Gretton, *Land Registration* (2017).) In a nutshell, under the Land Registration (Scotland) Act 1979 prescription could run where indemnity was excluded, but not otherwise, while under the Land Registration etc (Scotland) Act 2012 it can run in all cases. Here indemnity had been excluded, so that even under the 1979 Act prescription could run.

So the question for the Tribunal was whether the applicants had had possession for ten years. We quote para 54 of the judgment:

> In approaching the sufficiency of acts of possession, we have in mind the nature of the subjects and the uses to which they can be put: point (4) in *Hamilton v McIntosh Donald Ltd* [1994 SC 304]. By their nature the subjects are verge. Both parties accepted the risk of cars failing to take the corner and ending up on the disputed area, as had occasionally happened in the past. So it is not surprising that the applicants have not attempted, for example, to construct hard structures there. However the area does affect the setting of the Lodge. It seems that the type of acts relied upon, namely the planting of shrubs, bushes etc and the maintenance of the area by cutting the grass and trimming the bushes and clearing litter are the sort of acts of possession which might reasonably improve the wider setting. So we think the various activities can be described as acts of possession.

Accordingly the applicants were successful. They had established a good prescriptive title. 'It follows that the Keeper should rectify the land register by deleting the disputed area from the respondents' title, as well as the title of Alister Kirkhope and Isla Kirkhope. There is no reason why the Keeper should continue to withhold indemnity from the applicants' title' (para 61).

One final matter. Whilst the terms of the *a non domino* disposition in favour of the Fletchers were not quoted, it appears that it was an 'A-to-A' deed, ie the Fletchers were the disponers as well as the disponees (see paras 2 and 18). Is such a deed capable of being a foundation writ for the purposes of positive prescription? In *Board of Management of Aberdeen College v Youngson* 2005 SLT 371 it was held that the answer is negative. See, however, *Ardnamurchan Estates Ltd v Macgregor,* Case (76) above. Was this issue raised in the present case? That is unclear. The judgment does not discuss it but, on the other hand, *Youngson* was cited to the Tribunal. We would hazard the following explanation. Section 1(1) of the Prescription and Limitation (Scotland) Act 1973, prior to the 2012 Act, said that prescription could run (where indemnity was excluded) following 'registration of a real right in that land, in favour of that person, in the Land Register of Scotland'. Thus what mattered was not the foundation writ itself, but

the consequent entry in the Land Register. By contrast in the GRS (and *Youngson* was a GRS case) prescription ran on the recorded *deed*. We suspect, therefore, that the Tribunal took the view that where an *a non domino* deed was registered under the 1979 Act, the doctrine in *Youngson* did not apply.

If that was the view that the Tribunal took, and if that view is indeed correct, it might at first seem that the doctrine in *Youngson* has no long-term future. But that would be too impetuous a conclusion. For under the 2012 Act, positive prescription runs not on registered titles (as was true under the 1979 Act) but on registered deeds: see s 1(1) of the 1973 Act in its current (ie since the 2012 Act) amended form.

(80) Grant v Keeper of the Registers of Scotland 2019 SLT (Lands Tr) 25

In 1955 the then owner of the Monymusk Estate in Aberdeenshire sold and disponed one of the Estate cottages, Victoria Cottage. An access road which ran through the garden of the cottage was not included in the disposition. Many years later a dispute arose between the Estate proprietor and the proprietor of Victoria Cottage as to the ownership of the access road. It was accepted that the road had not been carried by the 1955 disposition. What was in dispute was whether the road formed part of the Estate and hence belonged to the Estate's owner.

The Estate commissioned a report from Claire Kulagowski of Millar & Bryce. This found that (para 8):

> It would appear that the Access Road forms part of the Lands and Estate of Monymusk but due to the conveyancing description in the title I cannot conclude that definitively based solely on an examination of the Sasine Register. I am however satisfied that I have thoroughly searched the Sasine Register and have seen no evidence of any unique title to the Access Road.

On a balance of probability the Lands Tribunal held, surely correctly, that the road formed part of Monymusk Estate. The Tribunal's reasoning was as follows (paras 67–69):

> Although Ms Kulagowski was unable to say conclusively that the access road was still part of Monymusk Estate and therefore the property of the applicant [Sir Archibald Grant, the owner of Monymusk Estate], we are persuaded, on a balance of probability, that it is. That is because we are satisfied that, like Victoria Cottage itself, it was once part of the estate. Victoria Cottage was within the estate boundary in 1774 and 1846. There is no dispute that Victoria Cottage remained part of the estate until 1955. The plan attached to the 1955 disposition clearly excepts the access road, so the inference must be that it remained part of the estate. That could be displaced by producing another split off writ which conveyed it out of the estate but nobody has been able to produce such a writ.
>
> It is within the judicial knowledge of this tribunal that Sasine titles of large estates are frequently vague and non-specific. We recognised Mr Blain's evidence [Mr Blain was a solicitor acting for Sir Archibald Grant] as being in accord with our own understanding. Nevertheless Mr Blain did not leave things at that: he instructed

a professional searcher, who has on her cv 29 years of employment at Registers of Scotland followed by a (much shorter) period as a private searcher with Millar & Bryce. The method and rigour with which she conducted her research is beyond reproach. Properly cautious, as she is in her conclusions, she concludes nevertheless (at para 11 of her affidavit) that 'It would appear that the Access Road forms part of the Lands and Estate of Monymusk', before making the qualification that she couldn't arrive at a definite conclusion based solely on the Sasine Register. In adding that reference to the Sasine Register, Ms Kulagowski understates the extent of her own researches because an earlier paragraph in her affidavit tells us that she also examined Land Register titles for all of the properties in the immediate vicinity.

Accordingly we hold that the applicant has proved that he owns the solum of the access road.

[Another aspect of this case is digested as Case (47) above.]

(81) Sharp v Stuart
15 November 1979, Aberdeen Sheriff Court

This unreported case from 1979 has only recently come to our attention. Among the property conveyed by the defender to the pursuer in 1969 was:

> ALL and WHOLE a strip of ground approximately fifteen feet in width forming the south bank of the River Deveron and shown delineated red and extending from point 'A' to point 'B' on the [annexed] Ordnance Survey Sheet … reserving always to me … so far as ex adverso the subjects … hereby disponed the fences already erected on the boundary of the said strip of River bank …

The nature of the pursuer's right in the river itself is not disclosed in the judgment but was presumably either ownership or a right to fish for salmon.

In renewing some of the fencing, the defender advanced the fence line towards the river by an amount varying from one foot to seven feet six inches. Despite this, the line remained more than 20 feet from the river and in places was as far away as 40 feet. The pursuer challenged the defender's actions, claiming that the defender was encroaching on the pursuer's property. A practical difficulty created by the new fence line was that, in places, instead of being able to walk along the top of the bank, the pursuer had to fight his way through dense trees and bushes.

Following a proof, the sheriff held that there had been encroachment on the part of the defender. On appeal, the sheriff principal (G S Gimson QC) reversed, for the following reasons. (i) The plan attached to the disposition was on too small a scale to allow precise measurements. (ii) Nonetheless it did at least show a strip of uniform width and one which did not reach to the fencing. (iii) Admittedly, the impression given by the reservation of fences in the disposition was that the fences marked the boundary, so that to advance the fence line towards the river would be to encroach on what had been disponed to the pursuer in 1969. But not too much weight should be given to a reservation, which must give way to the boundary as stated in the description – a boundary which was defined by reference to the plan. (iv) It followed that, far from marking the boundary,

the fences lay comfortably outside it. (v) Accordingly, the defender had not encroached on the pursuer's property in relocating the fences.

Sometimes in a case like this the problem is caused by an alteration in the extent or course of the river. But it was not suggested that this had occurred in the present case.

One argument for the pursuer had been that the word 'approximately' in the phrase 'approximately fifteen feet in width' was so uncertain as to undermine the reference to 15 feet. 'Approximately' was contrasted, unfavourably, with the much more familiar 'or thereby'. The sheriff principal, however, thought that, in context, the word was 'well-chosen'. He continued (p 5 of the transcript):

> 'Fifteen feet or thereby' suggests to me a measurement within the limited tolerances acceptable in the measurement of precise boundaries: 'approximately fifteen feet' I regard as apt to a boundary which must for practical reasons be rather an 'average' line, smoothing out minute irregularities (rather in the manner illustrated in *Darling's Trs v Caledonian Railway Co* (1903) 5 F 1001 esp per Lord McLaren at p 1007).

Darling's Trs, the report of which includes an attractive plan (on p 1009), concerned the proper method of determining the foreshore boundary as between the owners of neighbouring properties on the convex side of a bend in a tidal river.

NEIGHBOUR LAW

(82) Sabet v Fife Council
[2019] CSOH 26, 2019 SLT 514, 2019 Hous LR 58, 2019 Rep LR 70

On 12 October 2012 the pursuer's house in Fife was severely damaged by flooding from the Ceres Burn. The pursuer raised an action of damages against (i) Fife Council for breach of its duties under the Flood Risk Management (Scotland) Act 2009, and (ii) a neighbour whose land abutted the burn, in nuisance.

In a debate on the relevancy, the case against the Council was dismissed. From the pursuer's point of view, the most helpful provision of the 2009 Act was s 59, which imposed a duty on local authorities to carry out any works specified in a schedule prepared by them under s 18 of the Act. Section 18 in turn required local authorities to assess risks of flooding from time to time and, where a risk was identified which could be reduced substantially by clearance and repair works, to prepare a schedule of such works. No such schedule had been prepared in respect of the Ceres Burn. Hence, held the Lord Ordinary (Lord Ericht), there had been no breach of s 59.

By contrast, the case in nuisance against the neighbour was held relevant and proof before answer allowed. The pursuer averred that the damage had been caused by the neighbour's failure to remove debris from a weir, that the debris had accumulated for three months, that it was a duty of the neighbour to take reasonable care to ensure that the water was able to flow freely over the weir, and that flooding to the pursuer's home was a reasonably foreseeable consequence of the neighbour's failure to comply with this duty.

The same disposal was made in respect of an identical claim, heard at the same time, by another person whose home had been flooded by water from the burn: see *Edwards v Fife Council* [2019] CSOH 27, 2019 GWD 11-150.

(83) Morris v Curran [2019] SC KIR 77, 2019 GWD 31-496

This dispute concerned an old cottage property, now flatted, at St Clairs Entry, Kinghorn, Fife. The pursuers, a retired couple, owned and lived in the downstairs flat. The defenders owned the upstairs flat but lived abroad; the flat was used by family and friends, and also by short-term lets on Airbnb. The pursuers had general noise concerns about the upstairs flat. The sound-proofing was poor, and the pursuers complained at various times about, for example, the noise from the washing machine and from footsteps on the floorboards. In response, the defenders removed the washing machine and carpeted the flat.

The present litigation was, however, about a different source of noise. The pursuers sought declarator that the defenders' operation of a sewage treatment machine was a nuisance to them. The machine in question was one of the attractively named 'Saniflo macerators', which operated both with the shower and also the toilet. With the former, only the pump was in operation. The pursuers' main objection concerned the toilet. On this, the sheriff's finding-in-fact 11 was as follows:

> The Saniflo macerator located within 6 St Clairs Entry, Kinghorn has been properly installed and maintained. It functions as it should. It is a two stage process when used with the toilet. First, solid waste and paper is macerated into liquid, then secondly, the whole waste is pumped out.

When the toilet was flushed, the noise of the macerator lasted for six to eight seconds. The pursuers' evidence was that the macerator sometimes made a noise akin to a motorbike or chainsaw, at other times a loud growl. At night it disturbed their sleep. The evidence from expert witnesses was that the noise made was normal for this type of machine.

The action was dismissed. The sheriff (Sheriff A G McCulloch) explained his reasoning as follows (para 9):

> In the present case, the pursuers have proved that on infrequent occasions, the use of the macerator and pump may have woken them from sleep at night. It can be heard at other times of the day, in the same way as a TV can be heard in a neighbouring property, or footsteps heard walking across an uncarpeted room, or a lorry passing outside. It is part and parcel of living in a flat in a town. It cannot be said that the use of the Saniflo causes a nuisance *per se*; it at best can be said to be an occasional annoyance, particularly at night. I do not consider that this occasional annoyance reaches the standard required to be considered as a nuisance in law, having regard to its nature, and all the surrounding circumstances. It is not substantial or material … [T]here is a level of noise that the reasonable person has to tolerate. Silence is not a right to be enjoyed by downstairs neighbours.

Any assessment of nuisance, the sheriff added, had to be carried out objectively and without regard to particular characteristics of the pursuers. In the sheriff's view, the pursuers had become 'oversensitive to noise', indeed 'totally fixated on the noise from above, as evidenced by the recording of every arrival and departure, every flush of the toilet and just about every footstep (pre carpets)' (para 8).

INSOLVENCY

(84) Accountant in Bankruptcy v Urquhart [2019] SC EDIN 23, 2019 GWD 12-163

Mr and Mrs Urquhart owned 31 Craigentinny Avenue, Edinburgh. They parted in 2007, and in terms of a separation agreement the property was sold and the whole net proceeds paid to Mrs Urquhart. Later Mr Urquhart was sequestrated, and in the present action his trustee claimed from Mrs Urquhart the value of the half share that had belonged to her husband, on the basis that the payment to her of his share of the proceeds, as well as her own, amounted to a gratuitous alienation.

One defence was that the separation agreement involved a renunciation by Mrs Urquhart of any claim against her husband for aliment, and that this meant that the payment was not gratuitous. This defence was repelled. But Mrs Urquhart also proponed a stronger defence, namely that when they had bought the property together they had done so partly by means of a loan from her father, for which they had been jointly responsible, and that she had thereafter assumed sole responsibility for it, so that the payment to her had not in fact been gratuitous. The pursuer's challenge to the relevancy of this defence was unsuccessful, and proof was allowed in respect of the defender's averments.

(85) MacDonald v Carnbroe Estates Ltd [2019] UKSC 57, 2019 SLT 1469

Grampian Maclennan's Distribution Services Ltd fell into acute financial difficulties. It decided to sell its chief asset, a property at 9 Stroud Road, East Kilbride, Lanarkshire. That type of property would typically need a long period of marketing – probably at least a year. Instead, the company decided on an immediate off-market sale for £550,000, a figure far below full market value, though enough to pay off the secured creditor, NatWest. The company soon thereafter went into insolvent liquidation, and its liquidators raised the present action to reduce the sale as a gratuitous alienation. (Alienations can be 'gratuitous' for the purposes of insolvency law even if there is a price, if the price is below value.)

The action was unsuccessful at first instance, but was successful after a reclaiming motion to the Inner House: see [2018] CSIH 7, 2018 SC 314, *Conveyancing 2018* Case (84). (At that stage the case was called *Joint Liquidators of Grampian Maclennan's Distribution Services Ltd v Carnbroe Estates Ltd*.) The buyer appealed

to the Supreme Court. Its position (one that had been successful at first instance) was that, given the financial emergency that the seller was faced with, a 'fire sale' was reasonable even though such a sale could not achieve full market value.

The Supreme Court has affirmed the decision of the Inner House, with one important qualification concerning the sum of £550,000. If the disposition were to be reduced *simpliciter,* the selling company's creditors would make a windfall gain, for whilst the buyer could, admittedly, seek to reclaim the money from the liquidators, in reality, given the company's insolvency, the buyer would receive little or nothing. Such a result seemed unacceptable to the Supreme Court, and it remitted the case back to the Court of Session requiring the latter to pronounce decree in favour of the liquidators in such a way that would not result in a windfall gain. The decision will be welcomed by conveyancers, since it reduces the risk involved in buying from a possibly insolvent seller. See **Commentary** p 168.

The Supreme Court also offered guidance, more important to insolvency practitioners than to conveyancers, as to how the question of 'adequate consideration' is to be approached in such situations. The test (paras 37–40) is whether the price achieved is at least as good as what would have been achieved by (i) a sale by a liquidator or (ii) a sale by a standard security holder.

BARONY TITLES

(86) Hamilton of Rockhall v Lord Lyon King of Arms [2019] CSOH 85, 2019 SLT 1380

When the feudal system was abolished as at Martinmas 2004, what happened to barony titles? They continued to exist as a ghostly form of heritable property, no longer tethered to the physical world: see Abolition of Feudal Tenure etc (Scotland) Act 2000 s 63 and, for analysis, K G C Reid, *The Abolition of Feudal Tenure in Scotland* (2003) paras 14.2–14.5. They can be sold, the sale being effected by assignation, and can achieve substantial prices. Although the assignation cannot be registered in the Land Register, it is possible to register it in the private Scottish Barony Register which was set up in 2007: see *Conveyancing 2007* pp 64–65 and also, for information on buying barony titles, https://baronytitles.com/frequently-asked-questions/.

Holders typically like to matriculate arms with the Lord Lyon, and the terms on which Lyon makes the grant are often a matter of some importance to the applicant. See further the important case of *Sturzenegger, Petitioner (No 2)* 2015 SLT (Lyon Ct) 2 (*Conveyancing 2015* p 35).

In 2017 the current Lyon, Joseph Morrow QC, decided that henceforth applicants to matriculate arms would no longer be recognised as (say) 'Baron of Tannochbrae' but, instead, as 'holder of the Barony of Tannochbrae'. Was this change merely *de minimis*? The pursuer was not of that opinion. She was the holder of the Barony of Lag, and she averred (quoting the Lord Ordinary's summary at para 47) that:

> The capital value of the pursuer's … barony title will be reduced in value by approximately £75,000 if it can no longer be sold with the purchaser being recognised … as the Baron or Baroness of Lag. With such recognition, the pursuer's barony title has a capital value of approximately £85,000. Without such recognition, its value is approximately £10,000.

Whether this estimate of loss of value was accurate we have no idea – and we should, in the interests of full disclosure, make it plain that neither of us holds any barony – but it explains the litigation, for the pursuer raised the present action to challenge Lyon's new policy.

The basis of the pursuer's argument was an extra-judicial settlement of 2008, which was noted in *Conveyancing 2008* pp 74–75. We quote the Lord Ordinary (Lady Wolffe) at para 1: 'The present action concerns the parties' dispute as to the validity, proper meaning and effect of heads of agreements … entered into in 2008 to settle extrajudicially prior litigation (in the form of a judicial review) between the parties.' The Lord Ordinary held that the agreement did no more than settle that action, that it did not bind Lyon for the future, that the new wording that the pursuer objected to was within Lyon's discretionary authority, and that accordingly the pursuer's action failed.

The Lord Ordinary noted at para 3, that 'the pursuer is, together with her husband and her daughter, a partner of a partnership … which markets and sells barony titles'. Giving further details, she said (para 100):

> The pursuer did not dispute the defender's characterisation of the firm's trade as facilitating a secondary market in the sale of titles. … This appears to enable persons who have no connection with Scotland and who are not domiciled here, nonetheless to obtain a grant of arms so long as they can show that they have acquired a barony title. It is far from clear that this is the purpose for which the royal prerogative is properly to be exercised by the Lord Lyon.

And in the following paragraph the Lord Ordinary added:

> While no submissions were made as to how the requirement that the applicant be a 'virtuous and well deserving person' was met, the *de facto* promotion of a secondary market in barony titles would appear to be out of step with the passage from Lyon Sellar in *Scots Heraldry* at p 85 … that, in short, barony titles are conferred on 'persons deserving of being raised to the nobility …' Nor is it clear that confirmation that this requirement has been met is delegable to the Lyon Clerk.

These observations in paras 100 and 101 were no more than *obiter dicta* but possibly they will have repercussions.

MISCELLANEOUS

(87) Lyle v Webster
[2019] SC DUN 2, 2019 GWD 2-24

Not much is known, alas, about the background facts of this unhappy story. What is known is that Mrs Lyle, a widow and in poor health, knew a couple, the

Websters. There was some sort of an agreement that she would sell her house and move in with them, providing them with money to renovate and enlarge their house, and that as well as accommodating her they would support her in other ways, including providing her with transport to hospital appointments. Nothing was put in writing. Mrs Lyle moved in with the Websters in November 2011, but moved out again in September 2012, after which she raised the present action.

Her claim was made up of four elements: (i) the sum of £133,000 which she said that she paid for the building of an extension to the defenders' property; (ii) the sum of £37,000 which she said she had given to the defenders 'to help them pay certain personal unsecured debts' (para 3); (iii) the sum of £31,000 which she said she had given them to buy two cars, to enable them to 'provide transport for her as and when required, to, for example, hospital appointments' (para 4); and (iv) the sum of £1,660 which she said had been a loan to enable the defenders to buy jewellery.

The pursuer's claims were in part based on the law of contract and in part on the law of unjustified enrichment. To a large extent the facts were in dispute between the parties. The sheriff (Sheriff S G Collins QC) complained (para 1) that 'over the three years that the case has been in court the pleadings have been repeatedly amended, and have got somewhat out of control. The Record now runs to forty-six pages'. He ordered (para 88) that the record should be improved, following which the dispute will proceed to a proof before answer.

The legally interesting aspect of the case is whether restitution (as opposed to damages) is competent in a case of breach of contract. This aspect is discussed in a valuable article by Hector MacQueen, 'Restitution upon rescission for breach of contract, mutuality, and unjustified enrichment: *Lyle v Webster*' (2019) 23 *Edinburgh Law Review* 278.

(88) Shanley v Clydesdale Bank plc [2019] CSOH 75, 2019 GWD 33-513

This case does not have much doctrinal significance but its facts may be of interest to conveyancers. Mr and Mrs Shanley owned a house in Frogston Road West, Edinburgh. On 16 May 2008 they concluded missives to sell it for £3.25 million, with a deposit payable of £330,000, and settlement due on 12 December. In the autumn of 2008 the Shanleys identified a property they wished to buy in Ettrick Road, Edinburgh, advertised for sale at £4 million. They succeeded in negotiating a price of £2.65 million, missives were concluded on 10 December 2008, and settlement took place on 24 December 2008. So far, so good, perhaps, or perhaps not.

There was a problem with the buyers of the Frogston property. It seems that there was an inhibition over their existing property (see para 12). Whether for that or for some other reason they failed to pay the deposit and, come December, they failed to settle. In order to settle the purchase of their new property, the Shanleys took out a six-month bridging loan with Clydesdale Bank plc. Eventually they resold the Frogston property, this not happening until 2013. At that point they were finally able to pay off the bridging loan. (Whether they claimed damages

against the original buyers is not known.) Although they had survived the disaster, the bridging had cost them dear. They took the view that the bank was to blame. It should either have advised them against the bridging transaction or converted the bridging loan into an ordinary mortgage deal, which would have been cheaper for the Shanleys.

Mr Shanley complained to the Financial Ombudsman Service. The complaint was rejected. He appealed. The appeal was rejected. Undeterred, he then raised the present action against the bank for damages. He argued that the bank had been in an 'advisory relationship' with him and had been in breach of the duties arising therefrom. Had he received proper advice he would never have concluded missives to buy the Ettrick Road property, and would never have agreed to the bridging loan.

But the account given by the pursuer was inconsistent with the documentation that he signed and, no less importantly, inconsistent with the email exchanges. He had in fact been keen on going ahead and had pressed the bank to agree. At the same time he did not disclose to the bank the fact that there was doubt about the ability of the buyers of the property at Frogston Road West to come up with the purchase price. He had understood the risks and had accepted them. The force of his testimony was also weakened by certain facts, unearthed by the diligent defence: we quote the Lord Ordinary (Lady Wolffe) at para 23: 'The pursuer was crossed extensively under reference to findings in English proceedings that he had forged a document critical to those proceedings … and was, ultimately, sentenced to a term of imprisonment for that conduct.'

As an example of his attitude at the time, here is an email (for the full text see Appendix B of the judgment) from the pursuer to the bank dated 20 November 2008 (spelling and punctuation as in the original):

> I have just pulled of a cracking deal/purchase Frank knight have been trying to sell his house for £4,000.000.00, but dropped the price to £3,500.000.00. After very heavy negotiations I have managed to broker a deal. … So working with my agents we have managed to buy it for £2,650,000.00 nearly a £1,000,000,00 of the price. … I need to pay for it A.S.A.P to get this deal as these dosent come around every day I Pay for Ettrick Road in Say a weeks or so time … I put in £1,000,000 cash and I borrow £1,650,000.00 from the bank, and in turn I make monthly payments until the funds of Frogston Road West hits the account. What can you do to assist me in delivering this quickly and to save as much money as possible? PS … What's the quickest and cheapest solution?

In a detailed judgment running to 21,000 words, the Lord Ordinary held that there had been no 'advisory relationship' and that accordingly the pursuer's contractual claim failed. Moreover, whilst the defender had been in breach of MCOB (Mortgages and Home Finance Code of Conduct Sourcebook), that breach had had no causal effect on the pursuer's loss. The pursuer would have acted in the way he did regardless.

Mrs Shanley was not involved in the FOS complaint or in the present action. Whether that meant that Mr Shanley was claiming only for half of the alleged loss, or whether for all of it on the basis that Mrs Shanley's claim had somehow vested in him, was not a matter discussed in the case.

PART II

STATUTORY DEVELOPMENTS

STATUTORY DEVELOPMENTS

Private parking schemes

Private parking schemes have begun to trouble the courts, with those who operate such schemes seeking to enforce their charges against those who parked, lawfully or unlawfully, in an area regulated by a scheme. Among the legal issues which have been debated are the role and wording of notices giving information as to the scheme and the cost of parking, the nature of the legal relationship between scheme operator and the person who parks (generally considered to be contract), and whether the charge demanded might be unlawful as an unfair term under the Consumer Rights Act 2015, or (as to the common law) as a penalty clause. (See further *Conveyancing 2017* pp 131–35.) Citizens Advice Scotland reports on its website (www.cas.org.uk) that: 'In the past 12 months CAS's "Advice for Scotland" website has had over 200,000 (207,731) views to pages related to parking tickets on private land and how to challenge them.' Now, suddenly, there is legislation, both at Holyrood and also at Westminster. Neither is yet in force.

First Holyrood. Part 8 (ss 90–108) of the **Transport (Scotland) Act 2019 (asp 17)** makes detailed provision for the recovery of charges for the parking of vehicles on private property. It applies both where the parties are in a contractual relationship (the contract typically being formed by the act of parking in an area where a notice is displayed setting out the terms on which parking is allowed), and also where the parking is an unlawful trespass (s 91). In the latter case, the driver must have been given 'adequate notice' of the amount due (s 92), and this is likely to have occurred with the former case also. Under the Act, the scheme operator or other creditor is entitled to make recovery of unpaid charges from the keeper of the vehicle (s 95) – the identity of the keeper being available from the DVLA, on application, under reg 27 of the Road Vehicles (Registration and Licensing) Regulations 2012, SI 2012/2742. So it is the keeper rather than the driver who has liability under the Act, even though any contract will have been made with the driver. But recovery is available from the keeper only where the name and address of the driver are unknown, as indeed must often be the case (s 96). Certain conditions are imposed before recovery can be made under the Act (s 95(2)(a)). So for example the scheme operator must normally put a ticket on the vehicle, and the ticket must contain prescribed information (s 98). The keeper of the vehicle must also be notified (ss 99 and 100). Regulations may, and presumably will, be made by Scottish Ministers prescribing requirements as to the display of notices on the parking area, including the contents of such

notices (s 103); a failure to comply with the requirements will prevent recovery under the Act.

Then Westminster. The **Parking (Code of Practice) Act 2019 (c 8)**, which applies both in England and Wales and in Scotland, requires the Secretary of State to prepare a code of practice containing guidance about the operation and management of private parking facilities. The main effect of failure to comply with the code will be a refusal of information by the DVLA (ie as to a vehicle's keeper etc), thus making enforcement of parking charges problematic (s 5). The UK Government has yet to embark on the public consultations which are required (by s 2) to precede the preparation of the code of practice.

Amendments to the Money Laundering Regulations

The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, SI 2017/692 (for which see *Conveyancing 2017* pp 73–74) were amended by the **Money Laundering and Terrorist Financing (Amendment) Regulations 2019, SI 2019/1511** with effect from 10 January 2020. As with the 2017 Regulations themselves, very little notice was given of the changes, with the amending Regulations not being laid before Parliament until 20 December 2019. The amendments implement the EU's Fifth Money Laundering Directive (Directive 2018/843 of the European Parliament and of the Council of 30 May 2018).

A note of the key changes is available on the Law Society of Scotland's website. Only some are mentioned here. In relation to customer due diligence, amendments to reg 28 require firms to update their records relating to the 'beneficial ownership' of corporate clients. Firms also need to understand the ownership and control structure of their corporate clients (a new reg 28(3A)), and record any difficulties encountered in identifying 'beneficial ownership'. Regulation 30A imposes a new requirement to report to Companies House discrepancies between the information the firm holds on its corporate clients compared with the information held in the Companies House Register.

Private landlords

Tenancy deposit schemes

Tenancy deposit schemes are provided for and regulated by the Tenancy Deposit Schemes (Scotland) Regulations 2011, SSI 2011/176. For details, see *Conveyancing 2011* pp 55–56. Minor changes are made to these regulations by the **Tenancy Deposit Schemes (Scotland) Amendment Regulations 2019, SSI 2019/331**.

Private landlord registration

When registration of private landlords was introduced in 2006, the information that applicants for registration had to provide was set out in (i) s 83(1) of the Antisocial Behaviour etc (Scotland) Act 2004, and (ii) the Private Landlord

Registration (Information and Fees) (Scotland) Regulations 2005, SSI 2005/558. The second of these has now been revoked and replaced by the **Private Landlord Registration (Information) (Scotland) Regulations 2019, SSI 2019/195**. Connoisseurs of interpretation provisions will enjoy the definition of 'joint owner' (in reg 1(2)) as 'an owner of a house which is owned by two or more persons, either equally between them or in pro indiviso shares'.

New provision for fees is made by the **Private Landlord Registration (Fees) (Scotland) Regulations 2019, SSI 2019/160**. In future years, with effect from each 1 April, fees are to be increased in accordance with the Consumer Prices Index (reg 3).

Private residential tenancies: accommodation provided to veterans and care leavers

The **Private Housing (Tenancies) (Scotland) Act 2016 (Modification of Schedule 1) Regulations 2019, SSI 2019/216** adds a new para 22 to sch 1 of the Private Housing (Tenancies) (Scotland) Act 2016 (which lists tenancies which cannot be private residential tenancies). Paragraph 22 applies to tenancies in which the landlord is either (i) a charity providing accommodation to those who have served in the armed forces or merchant navy, and (ii) a charity providing temporary accommodation to people under 26 leaving local authority care.

Landlord's duty to repair and maintain

Section 14(1) of the Housing (Scotland) Act 2006 places private-sector landlords under a duty to ensure that the house meets the repairing standard both at the start of and throughout the tenancy. 'Repairing standard' is defined in s 13(1), a definition which has now been amended by the **Housing (Scotland) Act 2006 (Modification of the Repairing Standard) Regulations 2019, SSI 2019/61,** reg 3. Included as part of the 'repairing standard' is the 'tolerable standard' (s 13(1)(h)); the definition of 'tolerable standard', found in s 86(1) of the Housing (Scotland) Act 1987, has itself been amended (to include fire detection and carbon monoxide alarms) by the **Housing (Scotland) Act 1987 (Tolerable Standard) (Extension of Criteria) Order 2019, SSI 2019/8**.

From 28 March 2027 the duty to adhere to the repairing standard is to be extended to agricultural tenancies, crofting tenancies, and tenancies under the Small Landholders (Scotland) Acts 1886 to 1931: see SSI 2019/61 regs 1(5) and 2(2).

Some exceptions to the landlord's duty are noted in s 16 of the 2006 Act. One is where the repair relates to work for which the tenant is liable under the lease (s 16(1)(a)). Another is 'where the purported failure occurred only because the landlord lacked necessary rights (of access or otherwise) despite having taken reasonable steps for the purposes of acquiring those rights'. That provision, which is found in subsection (4) of s 16, is now amplified by a new subsection (5) which is inserted by the **Housing (Scotland) Act 2006 (Supplemental Provision) Order 2019, SSI 2019/62**. This provides that:

> For the purpose of subsection (4), in relation to any work intended to be carried out to parts owned in common with other owners but where a majority of the owners has not consented to the intended work, a landlord is to be treated as lacking necessary rights.

The reason for this addition is not entirely clear. In common property a *pro indiviso* owner is always entitled to carry out necessary repairs. Perhaps – but here we speculate – the provision is really aimed at common parts in tenements where, with some important exceptions, the right to recover the cost of repairs to common property requires that owners should first have made a (majority) scheme decision to carry out the work: see Tenements (Scotland) Act 2004 s 16 and sch 1 (Tenement Management Scheme) rr 2 and 4. (For more on tenement repairs see p 186.)

New 'relevant authority' for the purposes of asset transfer requests

Part 5 of the Community Empowerment (Scotland) Act 2015 Act enables community bodies to request a whole range of public bodies ('relevant authorities') to sell or lease heritable property to them (s 79). See p 107 below. Relevant authorities, most of which are listed in sch 3 of the 2015 Act, include local authorities, the Scottish Government, the Scottish Courts and Tribunal Service, the Scottish Police Authority, Scottish Natural Heritage, and Scottish Water. VisitScotland is added to this list by the **Asset Transfer Request (Designation of Relevant Authority) (Scotland) Order 2019, SSI 2019/111.**

New rural housing bodies

Rural housing bodies are bodies which are able to create and hold rural housing burdens under s 43 of the Title Conditions (Scotland) Act 2003. A rural housing burden is a personal right of pre-emption in respect of rural land, ie land other than 'excluded land'. 'Excluded land' has the same meaning as in part 2 of the Land Reform (Scotland) Act 2003. Until 15 April 2016, 'excluded land' meant settlements of over 10,000 people but now it has almost no content following an amendment made by s 36 of the Community Empowerment (Scotland) Act 2015. A perhaps unintended consequence of that amendment is that 'rural' housing burdens can be used over virtually all land in Scotland.

The first list of rural housing bodies was prescribed by the Title Conditions (Scotland) Act 2003 (Rural Housing Bodies) Order 2004, SSI 2004/477. More names were added by the Title Conditions (Scotland) Act 2003 (Rural Housing Bodies) Amendment Order 2006, SSI 2006/108, the Title Conditions (Scotland) Act 2003 (Rural Housing Bodies) Amendment Order 2007, SSI 2007/58, the Title Conditions (Scotland) Act 2003 (Rural Housing Bodies) Amendment (No 2) Order 2007, SSI 2007/535, the Title Conditions (Scotland) Act 2003 (Rural Housing Bodies) Amendment Order 2008, SSI 2008/391, the Title Conditions (Scotland) Act 2003 (Rural Housing Bodies) Amendment Order 2013, SSI 2013/100, the Title Conditions (Scotland) Act 2003 (Rural Housing Bodies) Amendment Order 2014, SSI 2014/130, the Title Conditions (Scotland) Act 2003 (Rural Housing Bodies) Amendment (No 2) Order 2014, SSI 2014/220, the Title Conditions (Scotland) Act

2003 (Rural Housing Bodies) Amendment Order 2017, SSI 2017/7, and the Title Conditions (Scotland) Act 2003 (Rural Housing Bodies) Amendment (No 2) Order 2017, SSI 2017/301. The **Title Conditions (Scotland) Act 2003 (Rural Housing Bodies) Amendment Order 2019, SSI 2019/172,** now adds Arran Development Trust to the list.

Following these amendments, the official list of rural housing bodies is:

Albyn Housing Society Limited
Argyll Community Housing Association
Arran Development Trust
Barra and Vatersay Housing Association Limited
Berneray Housing Association Limited
Buidheann Taigheadais na Meadhanan Limited
Buidheann Tigheadas Loch Aillse Agus An Eilein Sgitheanaich Limited
Cairn Housing Association Limited
Colonsay Community Development Company
Comhairle nan Eilean Siar
Community Self-Build Scotland Limited
Craignish Community Company Limited
Dormont Passive Homes (Scotland) Ltd
Down to Earth Solutions Community Interest Company
Dumfries and Galloway Small Communities Housing Trust
Dunbritton Housing Association Limited
Ekopia Resource Exchange Limited
Fyne Homes Limited
Fyne Initiatives Limited
HIFAR Limited
Isle of Jura Development Trust
Kilfinan Community Forest Company
Lochaber Housing Association Limited
Muirneag Housing Association Limited
Mull and Iona Community Trust
North West Mull Community Woodland Company Limited
Orkney Islands Council
Pentland Housing Association Limited
Rural Stirling Housing Association Limited
Taighean Ceann a Tuath na'Hearadh Limited
The Highland Housing Alliance
The Highlands Small Communities' Housing Trust
The Isle of Eigg Heritage Trust
The Isle of Gigha Heritage Trust
The North Harris Trust
Tighean Innse Gall Limited
West Harris Trust
West Highland Housing Association Limited

West Highland Rural Solutions Limited
Yuill Community Trust CIC

This official list is likely to be a little out of date. For example, five of the housing associations mentioned above – Barra and Vatersay Housing Association Limited, Berneray Housing Association Limited, Buidheann Taigheadais na Meadhanan Limited, Muirneag Housing Association Limited, and Taighean Ceann a Tuath na'Hearadh Limited – have now merged with a sixth (Hebridean Housing Partnership) which is not on the list. Some other bodies may have ceased to be active.

PART III

OTHER MATERIAL

OTHER MATERIAL

Land registration

Completion of the Land Register

The notional target for completion of the Land Register is 2024, with an interim target of 2019 for the registration of all public land (ie land owned by the Crown and by public-sector bodies). It is clear that the second target has been missed, not least because of the (natural) reluctance of local authorities to use scarce resources to carry out a mass programme of voluntary registration. Overall, however, completion of the Register continues to advance. According to RoS's *Annual Report and Accounts 2018–19* p 14, 67% of titles (over 1.8 million in all) are now on the Land Register; this amounts to 34% of the country's land mass.

Keeper-induced registration (KIR)

The focus of KIR has now switched to public land, and especially to property owned by local authorities, with around 63,000 local authority properties having been registered. This has meant pausing the programme for housing estates and other private land at the point when around 65,000 titles had been registered. An earlier target had been between 500,000 and 600,000 registrations in respect of private land by 2020: see *Conveyancing 2017* pp 146–47. In addition, RoS is now making good their earlier failure to notify owners affected by KIR, a task made easier by being able to refer owners to ScotLIS to see their new title.

Digital registration

By the end of 2019, more than 100,000 discharges had been registered digitally since the launch of the digital discharge service in May 2017. Currently, around 40% of all discharges are registered digitally, a large majority of those being in respect of standard securities over residential property. Although RoS have the power to close down paper registration and make digital registration of discharges compulsory, there is no sign that this is likely to happen in the near future.

As recently as 2017, 2020 was seen as the year during which most deeds (including dispositions and standard securities) would come to be submitted and processed digitally. That timetable, which always looked optimistic, has now been abandoned. One reason is that RoS resources are concentrated elsewhere, for example in clearing the registration backlog and in working towards the

completion of the Land Register by 2024. Another reason is an evident reluctance on the part of the legal profession to embrace digital registration. Behind this is a concern about solicitors having to carry out the execution of digital deeds on behalf of clients. Not only is this inconvenient in practice, because paralegals who do much of the conveyancing work are not able to sign, but it also exposes solicitors to the risk of clients turning round later and saying that they did not authorise the deed to be signed in the first place. A possible solution would be to allow clients to use their own digital signatures. RoS's *Annual Report and Accounts 2018–19* p 22 reports that further progress on digital registration has been suspended 'until such time as an appropriate signing solution becomes available'.

Relaxation of the one-shot rule

It is said that the one-shot rule is being applied with greater flexibility than in the first years of the 2012 Act. Furthermore, if a deficiency is missed in the initial scrutiny of the application, and more than three months then passes before the error is picked up, RoS will normally allow the application to be amended rather than reject it outright.

Fee increases for legal and plans reports

The cost of legal reports and plans reports from RoS was increased with effect from 30 September 2019. The new fees are given below (previous fees in brackets). VAT is payable in addition.

PRR01 (legal report unregistered subjects): £85 (£55)
PRR02 (legal report registered subjects): £75 (£50)
PRR03 (legal continuation report): first is free, subsequent reports £40 (£25)
PRR06 (plans report, level 1): £55 (£35)
PRR04 (plans report, level 2): £70 (£45)
PRR05 (plans report, level 3): £85 (£55)
PRR07 (plans continuation report): free
PRR010 (combined plans and legal report, level 1): £130 (£85)
PRR08 (combined plans and legal report, level 2: £145 (£95)
PRR09 (combined plans and legal report, level 3): £150 (£100)

Country of origin of registered proprietors

Recently, RoS has begun to publish data on an annual basis on the country of origin of registered proprietors. The most recent report was published on 26 March 2019. It shows that, of the 1.75 million titles held on the Land Register as at 31 December 2018, both residential and non-residential, 6% (104,257 titles) related to titles for which one or more of the registered owners (or tenants) had an address identifiable as being outside Scotland. Most of these (4.3%) had addresses in England, with 1.4% outside the UK. Most such owners (82.2%) were private individuals. Trustees accounted for 3.4% of the owners, and non-UK companies for 13.1% (of which 61.9% were accounted for by four Crown dependencies and

overseas territories: Isle of Man, Jersey, British Virgin Islands and Guernsey). A large majority of the properties involved were in Edinburgh or Glasgow.

Ending of personal presentment for Register of Inhibitions

Personal presentment of applications for registration in the Register of Inhibitions ceased to be possible with effect from 3 June 2019. Applications can still be hand-delivered but will then be treated as post received the following day unless delivered before 9 am in which case they will be treated as if they had arrived by post that morning.

'Transparency' in property ownership

Since 6 April 2016 UK-registered companies have had to maintain a public register (the 'PSC register') of those who have 'significant control' over the company: see Small Business, Enterprise and Employment Act 2015 Part 7 and sch 3, inserting ss 790A to 790ZG and sch 1A into the Companies Act 2006. (Connoisseurs of statutes will savour a section numbered as '790ZG'.) It is intended to apply a similar regime to 'overseas entities', and accordingly a draft Bill (Westminster) was published in 2018: the Registration of Overseas Entities Bill. (For discussion see *Conveyancing 2018* pp 174 ff.) The expectation had been that this Bill would be passed before the end of 2019, with commencement planned for 2021. No doubt due to the Brexit chaos, the Bill was not passed (and indeed not even introduced to Parliament) in 2019. But it is likely that it will soon be introduced.

One significant development in 2019 was that a joint committee of the House of Commons and House of Lords was set up in February 2019 to examine the draft Bill. The committee's report was published on 20 May 2019 (HL Paper 358 – HC 2009, available at https://publications.parliament.uk/pa/jt201719/jtselect/jtovsent/358/35802.htm). It is a substantial document that will repay study by those interested in this area. It supports the UK Government's proposals but offers suggestions for improvement in matters of detail. As discussed in last year's volume, the draft Bill would make extensive amendments to the Land Registration etc (Scotland) Act 2012.

At the same time there is a parallel legislative initiative in Scotland, so that it is likely that by the end of 2021 Scotland will have three separate 'transparency' regimes, namely: (i) the existing PSC regime, which is UK-wide; (ii) what can be expected to be the Registration of Overseas Entities Act 2020 or 2021, also UK-wide; and (iii) the proposed Register of Persons Holding a Controlled Interest in Land (Scotland) Regulations. These last are to be made under s 39(1) of the Land Reform (Scotland) Act 2016. The first of the regimes does not have direct relevance to conveyancers, but the second and third do, because entities governed by them will have to be registered if they wish to own land in Scotland. If there is further delay as to (ii), then the new Register of Persons Holding a Controlled Interest in Land (abbreviated as 'RCI', pronounced 'rocky') may have to go ahead on its own, without what would otherwise have been a carve-out for overseas entities. Registration in the RCI will largely be automated, and the RCI will be publicly available via ScotLIS.

The draft Scottish regulations, published in 2018, were discussed in *Conveyancing 2018* pp 174 ff. The consultation on the draft regulations closed on 8 November 2018, and in April 2019 the Scottish Government published a report arising from the consultation responses: *Analysis of Responses: Delivering Improved Transparency of Land Ownership in Scotland: Consultation on Draft Regulations: Final Report* (www.gov.scot/publications/delivering-improved-transparency-land-ownership-scotland-consultation-analysis-report/). The conclusions at the end of the report may be quoted:

> 6.1 A range of informed stakeholders took part in the consultation. They were typically highly-engaged and knowledgeable about relevant issues, such as land ownership, interpretation of regulations and citizens' rights to accessing information. They shared expertise, examples and reflections on ways the proposals may affect those who own or lease land in Scotland and the implications for greater transparency. These responses provide a useful evidence base for the Scottish Government to draw upon in the development of the final regulations.
>
> 6.2 At a broad level, responses to the proposals were mixed. Participants' comments typically reflected different interests and perspectives and in some cases these views were at odds with each other; for example, in relation to penalties and enforcement, or the level of information captured in the Register. This presents a challenge for those drafting the regulations; it is likely that the final regulations will not be able to satisfy all stakeholders.
>
> 6.3 Reflecting across responses, it was evident that participants would like more clarity about aspects of the regulations, particularly in relation to exemptions. In some cases, participants asked for an extension to the timescales proposed in the consultation document. There were frequent calls for the Scottish Government to specify the resources that will be made available to the Registers of Scotland when the Register is created.

Behind the Civil Service language one may detect the sentiment that there might be trouble ahead.

On 23 January 2020 a second draft of the regulations was laid before the Scottish Parliament. We will report on further developments in next year's volume.

PSG style for index-linked rent reviews

The indispensable Property Standardisation Group has recently adapted for Scotland the Model Commercial Leases style of clauses for index-linked rent review: see the leases pages of the PSG website (www.psglegal.co.uk). An explanation of the approach taken by the clauses is given on p 34 of the *Journal of the Law Society of Scotland* for April 2019.

Divine Grace Solicitors LLP

On 4 April 2019 the Law Society reported on its website that a fake law firm was doing the rounds. The firm has the improbable name of Divine Grace Solicitors

LLP and is claimed to be based at 16 Charlotte Square, Edinburgh (where it apparently shares premises with Dickson Minto). Imaginatively, the firm is peopled by 'Alvin Brock' and 'Ursula Isaac'.

Scottish Housing Market Review 2019

The Scottish Housing Market Review for 2019, divided into four quarterly returns, is a treasure trove of useful information: see www.gov.scot/publications/scottish-housing-market-review-2019/. It draws together data from a number of sources including Registers of Scotland, UK Finance and the Bank of England. Some of the more important findings are summarised below.

Housing market

Across 2018–19 as a whole, volumes were down slightly with 101,668 transactions registered in the year. This is a slight dip of 0.5%, or 534 fewer sales. The housing market was healthy through the first quarter of 2019, with 19,491 transactions registered across Scotland in the first quarter ('Q1') of 2019, up by an annual 3.9%. More recent data from Revenue Scotland for the three months to May 2019 shows a 7.1% annual increase.

In the third quarter of 2019, sales growth was strongest in Aberdeen/shire and Moray, where sales increased by an annual 2.3% (+61 sales). This followed negative sales growth in those areas from Q4 2014 to Q1 2017, a period which coincided with a significant fall in the price of oil. Sales in Aberdeen/shire and Moray in Q3 2019 were still 24.7% below the level of sales five years before.

Prices

House price inflation has continued to moderate since Q1 2018. The average house price across Scotland was £149K in Q1 2019, up by an annual 2% (compared to a rise of 6.4% in Q1 2018). In Q2 2019 it was £152K, and in Q3 2019 (the latest quarter for which figures are available) it was £155K. In real terms, house price growth has been relatively subdued since 2016, while real house prices remain below their peak level seen just before the 2008 financial crisis. House price growth was positive in all but one area of Scotland, with negative annual house price growth in Ayrshire and in Dumfries and Galloway for the third consecutive quarter.

Loans

There were 6,870 loans for home purchase to first-time buyers across Scotland in Q1 2019, up by an annual 6.2% (+400), and 6,710 loans to existing homeowners buying a new house, up by an annual 8.1% (+500). The respective figures for Q3 2019 were 8,810 (up by an annual 1.6%) and 9,060 (down by an annual 1.8%). Overall, while new mortgages to first-time buyers have almost recovered to pre-financial crisis levels, those to home-movers still lag behind the pre-financial crisis peak by around 51%.

The average loan to value (LTV) ratio for first-time buyers in Q1 2019 was 81.6%, the highest level seen since 2005. In Q3 it was even higher at 82.8%. For

other buyers it was 71.4%. The increase in LTV ratios has contributed to the reduction in the average deposit for first-time buyers since the 2008 financial crisis. In Q1 2019, the average was £26.7K, equivalent to two-thirds of the average first-time buyer's annual income. This is a real-terms reduction of just over one-third over the past ten years.

In May 2019, the average interest rate on two-year fixed rate mortgages was 1.7% for 75% LTV and 2.2% for 90% LTV. The average interest rate on five-year (75% LTV) mortgages stood at 2.0% The revert-to-rate (formally Standard Variable Rate) was 4.3%. Buyers have been taking out longer fixed-rate terms as they look to take advantage of low interest rates. In April 2019, five-year fixed rate lending accounted for 48% of all new residential lending across the UK, up 22 percentage points on April 2017. Meanwhile, the share of two-year fixed-rate lending has fallen by 16 percentage points over the same period.

There has been a significant increase in the volume and value of re-mortgaging. Following the 2008 financial crisis, the number of home-owner loans for re-mortgaging steadily declined, reaching a low of 23,200 in 2014. There has since been a substantial increase. In 2018, there were 35,400 loans for re-mortgaging, up 53% on 2014, with a value of £4.45bn (up 72% from 2014). Part of the reason for this increase is that low interest rates are encouraging home-owners to re-mortgage to lower, fixed-rate loans.

Newbuilds

There have been sizeable increases in newbuild housing output. In 2018, newbuild completions (20,255) and starts (22,258) both exceeded 20,000 units for the first time since the 2008 financial crisis. There were 21,403 newbuild completions in the year ending Q2 2019, an annual increase of 17.6%. The annual rate of growth in newbuild completions has been positive for the last eight consecutive quarters. Private-sector completions accounted for nearly three-quarters of completions.

Rents

In the year ending in September 2019, the mean monthly rent of a two-bedroom property in Scotland stood at £668 per month, an increase of 2.4% on the previous year. The largest annual increase was in Greater Glasgow, where the mean monthly rent increased by 5.3%, to £780. Meanwhile, the largest annual fall in rents was in East Dunbartonshire, where they fell 1.0%, to £677. Since 2010, the mean monthly rent has increased by 24.6% across Scotland, or 2.5% per annum on an annualised basis. This is higher than the increase in the mean house price over the same period, of 13.3% (or 1.4% on an annualised basis).

High Hedges (Scotland) Act 2013

The 2013 Act allows an owner or occupier of a domestic property to complain to the local authority about a neighbour's hedge where it is felt to be too high. If the local authority agrees with the complainant, it can issue a 'high hedge

notice' requiring the neighbour to reduce the height of the hedge. In the event that the notice is not complied with, the local authority can arrange for the work to be carried out and can then recover the cost. For further details, see *Conveyancing 2013* pp 163–67. Guidance to local authorities as to the operation of the Act has been issued by the Scottish Government, and a new (third) edition of this guidance was issued on 31 January 2019: see www.gov.scot/publications/high-hedges-scotland-act-2013-revised-guidance-local-authorities-2019/.

Law reform: Scottish Law Commission

In its final *Report on s 53 of the Title Conditions (Scotland) Act 2003* (Scot Law Com No 254), published in April 2019, the Scottish Law Commission makes a number of sensible and highly welcome recommendations for the reform of what has proved to be a very troublesome provision. For details, see p 167 below.

Meanwhile, the Scottish Law Commission has embarked on a major review of the law of heritable securities, the first since the Halliday Report back in 1966. Unlike the Halliday Report, it is most unlikely that the review will lead to the introduction of a new type of heritable security, or indeed to radical change. But there is much that is wrong, or at least not quite right, with the law of standard securities, and a changed financial and business environment has added to the need for reform. In its initial stages, the reform project has been divided in two. A *Discussion Paper on Heritable Securities: Pre-default* (Scot Law Com DP No 168) was issued for the purposes of consultation in June 2019. A second discussion paper, on enforcement and ranking, is expected to follow in 2020. Among a whole range of topics considered in this first discussion paper are: enforcement of securities in respect of non-monetary obligations; the continuing provision (or not) of mandatory statutory forms; the future role, if any, of the standard conditions, bearing in mind the potential complexity of having (i) provisions in the Act itself, plus (ii) the standard conditions, plus (iii) the lender's own deed of variation of the standard conditions; and the assignation of standard securities in the light of the growing practice for banks to sell substantial portfolios of securities. In all, there are 61 separate questions for consultees to consider. The closing date for responses was 30 September 2019.

Reform of the law of the tenement

A working group was formed in March 2018 to consider new initiatives and mechanisms for facilitating communal repairs by owners within tenements. Initially convened by Ben Macpherson MSP, the working group is now convened by Graham Simpson MSP. Details of the group's membership as well as minutes of its meetings and all papers that have been issued can be found at www.befs.org.uk/policy-topics/buildings-maintenance-2/. These include a background paper by Douglas Robertson on *Common Repair Provisions for Multi-Owned Property: A Cause for Concern* (10 January 2019).

The group's final report, brief but ambitious, was issued in April 2019. There are three recommendations. First, the 'scheme property' of all tenements (ie the

roof and other parts of a tenement which, under the Tenement Management Scheme ('TMS'), require to be maintained in common) should be inspected every five years by an appropriate professional and the report held on an online platform such as ScotLIS. Second, management should be in the hands of a (compulsory) owners' association. As in the current, but little used, Development Management Scheme, this would be a body corporate, with provisions for an annual meeting, annual budgeting, and so on. If, for any reason, an owners' association could not be established or an existing association failed, the tenement would be subject to compulsory factoring. Third, there would be a requirement to establish a 'building reserve fund' to build up funds to pay for future repairs. Each owner would contribute the percentage specified in the titles for repairs or, if these were silent, contribute in accordance with a statutory formula along the lines of the TMS.

As with all proposals to reform the rules for the management and maintenance of tenements, the difficulty will lie in persuading owners to take action, and in particular to spend their own money for the benefit of the building as a whole. Already the Tenements (Scotland) Act 2004, and in particular the TMS, provide quite extensive powers for those owners who choose to use them. Decisions can be made by a majority. Funds for repairs can be collected in advance. All must pay whether they agreed with the decision or not. Yet owners remain reluctant to use these powers, and are likely to be equally reluctant to use any enhanced powers that future legislation might give to them. Arrangements for monitoring and enforcement will be crucial here, as the working group recognises. In that connection the group has two good ideas. One is to link the proposed quinquennial building inspection to the home report, so that anyone wishing to sell a flat would be unable to do so without an up-to-date report on the state of the tenement. The other is to require the building reserve fund to be held, not in an ordinary private bank account, but centrally in a specially established national or regional fund (though details of how this would work are vague).

On 20 December 2019 the Scottish Government responded positively to the working group's report and undertook to refer the matter back to the Scottish Law Commission: see www.gov.scot/publications/tenement-maintenance-report-scottish-government-response/. In the meantime, the Government indicated that it would 'support voluntary and incremental change', including (i) supporting development of good practice to encourage owners to set up their own owners' associations; (ii) the development of a form for a tenement condition report and a framework for recognised professionals to complete it, with the idea that such reports might in the end become mandatory and be included in the home report; (iii) convening a forum of finance professionals to advise on a building reserve fund, initially to be available on a voluntary basis; and (iv) consideration of what an affordable, viable compulsory factoring service might look like, and engage with property factors on this.

All of these are welcome and encouraging developments. As the working group acknowledged, however, any legislation on the subject is likely to be a decade away.

Airbnb and other short-term lets

Research on the impact on communities

Research into the impact on communities of short-term lets ('STLs') has been carried out on behalf of the Scottish Government by the Indigo House Group: its report can be found at www.gov.scot/publications/research-impact-short-term-lets-communities-scotland/. The report found that, across Scotland as a whole, there are 31,884 active Airbnb listings, a threefold increase since 2016.

The research focused on (i) Edinburgh's City Centre ward (Old Town, New Town and Tollcross); (ii) Glasgow's City Centre including the central business district and residential areas close to the Scottish Exhibition Centre (Merchant City, Anderston and Yorkhill); (iii) the East Neuk of Fife (excluding St Andrews); (iv) Fort William; and (v) the Isle of Skye. The research involved a mixed-method approach of secondary data analysis, short surveys of residents and hosts, and in-depth interviews involving residents, hosts, community actors and local businesses.

While in Scotland overall Airbnb listings were found to account for only 1.2% of dwellings, this was 18.6% (the highest penetration rate by ward in Scotland) in Skye, 16.7% in Edinburgh's City Centre, 9.7% in Fort William, 5.6% in the East Neuk of Fife and 3.2% in Glasgow City Centre.

Across Scotland as a whole, 69.2% of active Airbnb listings were for entire houses or apartments, but this was 89% in the East Neuk of Fife and 79% in Edinburgh. The survey results from host respondents indicated that a notable proportion of the listings had previously been occupied by an owner-occupier (21%) or had been on a long-term lease in the private rented sector (15%).

On average, each Airbnb listing generated 52 visitors per year in Scotland. For Edinburgh's City Centre ward (population 32,000) this would equate to about 140,000 visitors per year (about 4.5 times the local resident population) and in Skye (population 10,500) this would equate to around 56,000 annual visitors, or around 5.4 times the local resident population. This created, said the report, economic benefit for the communities in question. On the other hand, there were indications from the survey, and recurring themes from the qualitative research from all types of participants except for some hosts, that properties were changing from long-term private lets and owner-occupation into STLs. In Edinburgh and the East Neuk of Fife the rise in STLs was associated with the fall in resident population and school rolls, and with fears about the long-term sustainability of the community.

In its executive summary the report noted that:

> [D]isturbance of residents, quality of life and well-being was evident in the two cities in particular, but also some other areas depending on the property type. This related particularly to tenemental, but also other types of high-density properties with shared space and common stairs/closes. Concentrations of entire property STLs let full-time as holiday lets in common stairs often resulted in daily disruption and stress caused by constant 'visitor use', rather than residential use – noise, disturbance, buzzers, door knocking, littering, anti-social behaviour, the loss of a sense of community and security where the majority in both the close, and within

> the wider local community, were constantly changing strangers. The change of use also brought issues around common repairs and property maintenance although this was refuted by some hosts who considered there was more investment in STLs properties compared to other types of letting or ownership. Concerns around health and safety, and building insurance was particularly acute in these more densely built environments, but were relevant across all types of communities to protect guests, neighbouring residents and hosts.

Mention might also be made of a series of briefing papers and other material on short-term lets written or collected by the Scottish Green Party: see https://greens.scot/homesfirst.

A new regulatory framework

On 28 April 2019 the Scottish Government embarked on a public consultation on the desirability or otherwise of a regulatory framework for short-term lets ('STLs') (www.gov.scot/publications/short-term-lets-consultation-regulatory-framework-scotland/). This acknowledged (para 4.3) that STLs can provide a range of benefits to landlords, guests and the visitor economy in general. As well as providing flexibility in the amount and variety of accommodation for tourists at peak points in the season, they also provide opportunities for relocating corporate tenants, people who are researching an area before committing to buying, owners who want to make income from their property while on holiday themselves, contract workers looking for short-term accommodation, and existing homeowners who are looking for alternative accommodation while carrying out work on their own property. But there are significant downsides. The consultation document (para 4.8) suggested that these might include: loss of residential housing; reduced community cohesion; a loss of amenity through eg the antisocial behaviour of guests; personal safety risks to hosts, guests and other residents from unverified or unknown others; damage to property, eg from key boxes affixed to external walls, as well as fire-safety risks; regulatory mismatches between the STLs, hotel and B&B sectors, eg in terms of health and safety and taxation.

An analysis of the 1,086 responses (975 from individuals) to the Scottish Government's consultation was published on 28 October 2019: www.gov.scot/publications/short-term-lets-consultation-regulatory-framework-scotland-analysis-consultation-responses/. Overall, a majority of respondents supported regulation in some form, although views were mixed as to how this should be done. The importance of enforcement was emphasised. While there was some support for a national framework, there were calls for flexibility within this so that local authorities could apply what is most relevant to their area, its economy and the impacts of short-term lets.

The Scottish Government has now come to a view. On 8 January 2020 a statement was made to the Scottish Parliament by the Minister for Local Government, Housing and Planning, Keith Stewart: see *Official Report*, 8 January 2020, cols 36–39. The new policy has three prongs. First, a licensing scheme for short-term lets will be established under powers contained in the Civic

Government (Scotland) Act 1982. Among other benefits this will ensure that local authorities know which properties in their area are being used for Airbnb, and so allow monitoring for fire safety and the like. Secondly, local authorities will be able to introduce 'short-term let control areas' under powers contained in the Planning (Scotland) Act 2019. The use of property for short-term lets in such areas will require planning permission. The intention is that this should apply only to lets of whole properties and not to home-sharing; presumably this is because it is only the former which reduces the number of houses available for 'ordinary' residential letting. Thirdly, the Government will 'carefully and urgently consider the tax treatment of short-term lets' with the aim of ensuring 'that short-term lets make an appropriate contribution to local communities and support local services' (col 38). This is in addition to the proposed visitor tax ('transient visitor levy') for which legislation is proposed in the current parliamentary session.

Shared equity schemes

Guidance has been published (www.gov.scot/publications/sale-shared-equity-procedures-guidance-2019/) on after-sale procedures in relation to the Scottish Government's various shared equity schemes. These are:

- Homestake;
- Help to Buy (Scotland);
- Help to Buy (Scotland) Affordable New Build;
- Help to Buy (Scotland) Smaller Developers Scheme;
- Open Market Shared Equity;
- New Supply Shared Equity;
- New Supply Shared Equity with Developers; and
- First Home Fund.

The topics covered are exercise of a golden share; change of owner; change of lender; additional secured loan; increase of stake; sales; subsequent securities; grants of tenancy; application of the 20-year security rule; corresponding with owners; valuations and letters of reliance; enforcement of primary lender security; alterations to the property; and death of the owner.

Separate guidance on First Home Fund has been issued for buyers (www.gov.scot/publications/first-home-fund-guidance-leaflet-for-buyers/) and for lenders (www.gov.scot/publications/first-home-fund-guidance-leaflet-for-lenders/). A number of other documents on First Home Fund were also published by the Scottish Government in December 2019.

Guide to compulsory purchase

The Scottish Government has prepared a guide to compulsory purchase (www.gov.scot/publications/compulsory-purchase-scotland-guide-property-owners-occupiers/) for those owners and occupiers who are potentially affected by it.

The guide explains the procedure, and gives information as to entitlement to compensation.

Community ownership and community right to buy

Community ownership

The latest annual survey of community ownership (www.gov.scot/publications/community-ownership-scotland-2018/) shows that there were 593 'assets' in community ownership as at December 2018. This is an increase of 37 (7%) from 556 in 2017. Of the 593 assets, 503 have been acquired since 2000. All but two of the assets in community ownership are land and/or buildings. The Highland and the Argyll and Bute local authorities together contain 226 assets, 38% of all assets in community ownership. The 593 assets were owned by 429 community groups and covered an area of 209,810 hectares (518,452 acres). The survey reports that, on the recommendation of the Scottish Land Commission, the target to have a million acres in community ownership by 2020 has been abandoned. The current figures fall a long way short of that target. More than half of the land in community ownership consists of just four assets, each greater than 20,000 hectares. Nearly half of community-owned assets are exclusively land (296), with a third (199) exclusively buildings.

'Route maps' for community right to buy

Meanwhile, rather attractive 'route maps' have been published by the Scottish Government in relation to (i) the ordinary community right to buy (www.gov.scot/publications/community-right-to-buy-route-map/); (ii) the community right to buy abandoned, neglected or detrimental land (www.gov.scot/publications/community-right-to-buy-abandoned-neglected-or-detrimental-land-route-map/); and (iii) the crofting community right to buy (www.gov.scot/publications/crofting-community-right-to-buy-route-map/).

Funding models

Money is typically the most serious obstacle facing communities wishing to exercise the right to buy. The Scottish Government's Scottish Land Fund is committed to disbursing £10 million per year until 2021 (at least). Nonetheless this cannot of itself fund all the acquisitions which communities would like to make. A recent paper commissioned by the Scottish Land Commission (https://landcommission.gov.scot), *The Range, Nature and Applicability of Funding Models to Support Community Land Ownership*, reviews what other sources of funding might be available. Thirteen possible sources are identified and described, and the paper also considers the 'fit' between community bodies and sources of funding. As the paper notes (pp 8–9):

> Organisational capacity and willingness to take financial risk are important factors in determining whether an individual organisation will explore and use alternative financing models. High capacity organisations tend to be more entrepreneurial and

> use a wide range of financial tools, whereas low capacity ones will be much more conservative. The writers know from experience that the level of ability to understand and interpret financial information in many organisations is low. This is a significant barrier to good governance and the ability to make sound investment decisions.

The paper's overall recommendations contain few surprises. More information and support should be made available to community bodies. Fiscal incentives for lending and borrowing should be considered. Some funding models which are found in other countries but not in the UK should be looked at more closely.

Community ownership organisations: case studies

A number of community ownership organisations have recorded their experiences (www.gov.scot/publications/community-ownership-case-studies/), often rather briefly and in language which is a mixture of the aspirational and the candid. Overall, however, there is much of use to be learned even from such brief accounts. The organisations covered are: Action Porty (Bellfield Church and grounds in Portobello, Edinburgh); Aigas Community Forest (Aigas Forest, 703 acres, in Lower Strathglass, Beauly, Inverness-shire); Carloway Estate (11,491 acres, Carloway Estate, Isle of Lewis); Colintraive and Glendaruel Development Trust (Stronafian Forest); The Findhorn Village Conservation Company (Novar estates land, 4,149 acres, near Findhorn, Moray); Garbh Allt Community Initiative (3,000 acres, Helmsdale, Sutherland, including the crofting townships of Portgower, Gartymore, West Helmsdale and Marrel); Kilfinan Community Forest (Acharachan Forest, 1,067 acres); North Harris Trust (North Harris Estate, 25,900 acres, plus Scalpay Island, 1,750 acres); The Pairc Trust (Pairc Estate, South Lochs, Uist, 26,755 acres); South West Mull and Iona Development (Tiroran Forest, 1,956 acres); and Urras Bharabhais (Barvas Estate, 34,580 acres).

Consultation on the right to buy land to further sustainable development

When it is brought into force, Part 5 of the Land Reform (Scotland) Act 2016 will allow community bodies to apply to buy land for the purpose of furthering sustainable development. Unlike most of the community rights to buy (but not the right to buy abandoned, neglected or detrimental land), the right applies even where the owner of the land is not willing to sell it. For more details, see *Conveyancing 2016* pp 81–83. On 26 June 2019 a consultation was launched on the content and scope of the regulations that can and will require to be made under Part 5: see www.gov.scot/publications/consultation-secondary-legislation-proposals-relating-part-5-land-reform-scotland-act-2016-right-buy-land-further-sustainable-development/. The consultation closed on 18 September 2019.

Asset transfer requests: appeals to Scottish Ministers

Under Part 5 of the Community Empowerment (Scotland) Act 2015, which came into force on 23 January 2017, community bodies are able to request a whole range of public bodies to sell or lease heritable property to them (s 79). These bodies, listed in sch 3 of the Act, include local authorities, the Scottish Government,

the Scottish Police Authority, Scottish Natural Heritage, Scottish Water, and (see p 90 above) VisitScotland. In considering such an 'asset transfer request', the public body is required to assess the community body's proposals against the current use or any other proposal, and must agree to the request unless there are reasonable grounds for refusal (s 82). Among the factors that it must take into account are whether agreeing to the request would promote economic development, regeneration, public health, social wellbeing or environmental wellbeing, and whether it would be likely to reduce inequalities of outcome which result from socio-economic disadvantage. For further details, see *Conveyancing 2015* p 76, *Conveyancing 2016* pp 88–89 and *Conveyancing 2017* pp 86–88.

If a request is refused, or if conditions which are imposed seem unacceptable, there is a right of appeal to Scottish Ministers (s 85). Four such appeals have been made so far: by Ettrick & Yarrow Community Development Company (Gamescleuch Forest), by Barra & Vatersay Community Ltd (land opposite to Castlebay Community School), by North Berwick Community Development Company (Lime Grove Council Depot), and by The Garioch Partnership (Inverurie Market Place Primary School). Details can be found at: www.gov.scot/publications/asset-transfer-requests-index-of-notifications/.

Review of large-scale and concentrated land ownership in rural Scotland

In the spring of 2018 the Scottish Land Commission issued a call for evidence from those with experience of living or working in parts of Scotland where most of the land is owned by a small number of people. More than 400 responded. The question they were asked was whether there are any benefits/disadvantages of land being owned by a very small number of people and whether they had experience of these benefits/disadvantages. In addition, a literature review was carried out for the Scottish Land Commission by Jayne Glass, Rob McMorran and Steven Thomson of Scotland's Rural College and published in March 2019. Its purpose (para 1.3) was to describe and interpret recent and older research related to concentrated and large-scale land ownership in Scotland and other countries. The bibliography does not, however, include any literature written in a language other than English.

On the basis of both the empirical research and the literature review, the Scottish Land Commission published, on 20 March 2019, a 70-page *Investigation into the Issues Associated with Large scale and Concentrated Landownership in Scotland*. Of the five authors, three were from the Land Commission itself (Shona Glenn, James MacKessack-Leitch and Katherine Pollard) and the other two from Scotland's Rural College (Jayne Glass and Rob McMorran). This *Investigation* in turn formed the basis of a report and set of formal recommendations by the Scottish Land Commission to Scottish Ministers: *Review of Scale and Concentration of Land Ownership: Report to Scottish Ministers* (20 March 2019). All of these documents are available at https://landcommission.gov.scot.

Billed as 'the most substantial nationwide investigation conducted into the impacts of scale and concentration of land ownership in Scotland', the *Investigation* contains much of interest derived from the call for evidence. The

most frequently identified issue (40%) concerned the link between how land is owned and the ability of rural communities to realise their economic potential. The claimed advantages of concentration of ownership were substantial private investment and economies of scale. The claimed disadvantages included: (i) the landowner's ability to restrict the availability of land for business development; (ii) poor engagement between landowners and communities; (iii) a fear of repercussions from 'going against the landowner'; and (iv) a shortage of local housing, although here there were also other factors at work, notably the planning system.

The formal *Review*, with its recommendations to Scottish Ministers, is more terse. Summarising the evidence produced by the *Investigation*, the *Review* explains (para 2.2) that 'the power associated with land ownership can act both for or against the public interest. Where it is acting against (whether intentionally or not), there is in many cases little or no method of redress or intervention for those affected'. Scale of landownership, it is emphasised, is not the same thing as the concentration of ownership (and therefore of power), and it is the latter which is the more important. The *Review* continues (para 2.3):

> For this reason we do not advocate a simple area limit on the amount of land an individual can own, as we do not believe this would address the underlying issues. Instead we conclude that interventions to address the adverse effects of concentrated market power are required, as well as systemic change to diversify the pattern of ownership.
>
> The evidence demonstrates a pattern of market and social power associated with land ownership that is consistent with characteristics of monopoly power in other economic sectors. As in other sectors, it would be in the public interest to put in place controls to manage the risks associated with excessively concentrated power and prevent monopoly positions emerging.
>
> The research has identified strong evidence that harmful land monopolies exist and appear to be causing significant and long-term detriment to the communities affected. Our recommendations focus on the core issue of concentration of power, rather than scale per se. However, given that large scale holdings amplify the risks of concentrated ownership, scale is an appropriate criteria in targeting interventions in a proportionate way, though other risk factors will also be appropriate criteria.

In making formal recommendations to Scottish Ministers, the Scottish Land Commission was mindful of the Land Rights and Responsibilities Statement mandated by ss 1–3 of the Land Reform (Scotland) Act 2016 and published in its final version on 28 September 2017. (It is reproduced on p 95 of *Conveyancing 2017*.) The Land Commission was particularly influenced by the first of the six principles, namely that:

> The overall framework of land rights, responsibilities and public policies should promote, fulfil and respect relevant human rights in relation to land, contribute to public interest and wellbeing, and balance public and private interests. The framework should support sustainable economic development, protect and enhance the environment, help achieve social justice and build a fairer society.

The main recommendations of the Scottish Land Commission to Scottish Ministers are the following:

(1) A public-interest test and approval mechanism should apply at the point of significant land transfer. The test should consider matters such as scale, value, location, proposed land use, and the possible fragility of the community. Administration of the test would be by local authorities. The recommendation draws on parallels with established practice in regulating corporate acquisitions and mergers.

(2) All landholdings above a certain size (which might be fixed at somewhere between 1,000 and 3,000 hectares) should be required to prepare and engage on a management plan that demonstrates delivery against the Land Rights and Responsibilities Statement and connects with local priorities, opportunities and public policy. This should include a community engagement plan in line with the Scottish Government's Guidance on Engaging Communities in Decisions Relating to Land made under s 44 of the Land Reform (Scotland) Act 2016 (www.gov.scot/publications/guidance-engaging-communities-decisions-relating-land/). The Land Commission has itself recently published a practice guide on preparing a community engagement plan (see below).

(3) Statutory codes of practice should be prepared on the basis of the Land Rights and Responsibilities Statement and their implementation monitored. Where necessary, individual landholdings could be investigated to ensure compliance.

(4) The effects of concentrated ownership should be one of the factors taken into account in making individual decisions on the exercise of the right to buy land to further sustainable development (ie under Part 5 of the Land Reform (Scotland) Act 2016).

(5) The Scottish Land Commission should itself review and investigate policy options to encourage a more diverse pattern of private ownership and investment. This would recognise that community ownership is not the only way forward, and that smaller holdings of privately owned land are also beneficial (p 11):

> This review will draw together the next stages of several workstreams already identified by the Commission. We will consider tax, including land value taxation, and fiscal policy (for example land management support mechanisms) as key levers influencing the pattern of ownership, as well as potential interventions associated with point of sale or purchase, including for example options for conditions or restrictions, and rights of pre-emption. We will also consider the role of publicly owned land, and particularly transactions of publicly owned land, as another key opportunity to promote a more diverse pattern of ownership.

(6) The Scottish Government should develop more robust mechanisms for engaging land managers and communities in land-use change, choices and priorities at a local or regional scale.

All of the foregoing presupposes a great deal more work in this area by the Scottish Land Commission. In the *Review* (p 12) the Land Commission envisages working with the Scottish Government and sector organisations such as Scottish Land and Estates, Community Land Scotland, and environmental NGOs to 'seek to improve practical implementation of the principles of the Land Rights and Responsibilities Statement building on work started to date on promotion, guidance, protocols and action' (as to which see below).

Scottish Land Commission papers

Apart from the above, the Scottish Land Commission (*Coimisean Fearainn na h-Alba*) has continued to publish papers and documents on other topics within its remit, and all are available on the Land Commission's website (https://landcommission.gov.scot). Separate consideration is given later to the Land Commission's work on land value uplift capture, on common good, and on vacant and derelict land. Below we mention two other areas of Land Commission work: the 'good practice' programme, and the papers in a new series called 'Land Focus'. An interview with Hamish Trench, the chief executive of the Scottish Land Commission, was published on pp 24–26 of the June 2019 issue of the *Journal of the Law Society of Scotland*.

'Good practice' programme

On 3 December 2019 the Scottish Land Commission launched a programme to promote good practice in relation to land rights and responsibilities. This is intended to encourage and enable those with an interest in land to recognise and fulfil their rights and responsibilities in practical ways, and 'to help drive the cultural change needed to make more of Scotland's land'. The idea is founded 'on promoting fair and reasonable behaviour rather than policing compliance'. More precisely, the aim is to provide guidance on the practical implementation of the Scottish Government's Land Rights and Responsibilities Statement (as to which see *Conveyancing 2017* pp 95–96). The intention is to produce documents which will be 'short, clear, practical and fair to all parties'. In this project the Land Commission is working with an advisory group which includes representatives from Community Land Scotland, Development Trusts Association Scotland, National Farmers Union Scotland, Scottish Land and Estates, and the Scottish Property Federation.

For its first topic, the Scottish Land Commission has focused on the last of the six principles in the Land Rights and Responsibilities Statement: 'There should be greater collaboration and community engagement in decisions about land.' Building on the *Guidance on Engaging Communities in Decisions Relating to Land*, which was published by the Scottish Government in April 2018 (www.gov.scot/publications/guidance-engaging-communities-decisions-relating-land/), the Land Commission has produced (i) a 'protocol' on *Community Engagement in Decisions Relating to Land*, (ii) a 'route map', and (iii) a 'practice guide' on *Developing an Engagement Plan for Decisions relating to land*. The first of these sets out four 'general principles' and seven 'specific expectations'. The general principles are:

i. Communities can reasonably expect to be engaged in decisions about the use and management of land where the outcome is likely to have an impact on the community.
ii. Engagement should be a genuine exercise in collaboration, and community views should be considered to aim to achieve mutually beneficial outcomes.
iii. Engagement and communication should be open-ended to encourage positive working relationships and communication between communities, land owners and managers.
iv. Engagement should be proportionate to the resources available to all parties and the impact that the decision may have on the community.

The specific expectations are:

a. Up to date contact information for people with local decision-making authority over the land and for the office bearers of community organisations should always be publicly available.
b. Where a community aspiration or concern about current or proposed land management emerges, this should be communicated promptly to the owner or manager of the land. Reasonable opportunity should be given for them to respond to issues raised and enter into constructive dialogue about it.
c. Where a relevant party makes a request for information, or for a meeting to discuss matters relevant to that organisation, and where the information requested is appropriate and proportionate, this should be accommodated. It is recommended that this is within six weeks of a request.
d. Those who take decisions about land which can significantly impact on a local community should create an engagement plan that sets out what, how and when they will engage with the community on the decisions that affect them, particularly where a community organisation or elected representative proposes it, or where it becomes clear that such a plan would be useful. It is recommended that this is developed jointly within twelve months.
e. Where plans to significantly alter an aspect of land management or use can be reasonably anticipated in advance, information about the proposed change should be publicly available at a stage when there is opportunity for the decision to be influenced. It is recommended that this be at least three months in advance of the planned change.
f. Arrangements for recording actions and decisions taken at consultation/engagement meetings should be agreed in advance of the meeting with the record made available to relevant parties. It is recommended that this is within six weeks of the end of the consultation period or of feedback having been received unless otherwise agreed.
g. Where decisions about land use or management may have a significant impact, the people making them should explain how views from the community have been considered in their decision-making process. It is recommended that this is within six weeks of the end of the consultation period, or of feedback from a community consultation exercise being received.

More 'protocols' are to be added in the future, with the next topics being transparency in relation to land ownership and management, and land ownership by private trusts.

'Land Focus' papers

The Scottish Land Commission has embarked on a new series of succinct briefing papers under the heading of 'Land Focus'. The four published so far are on *Common Good Land*, *Land Ownership by Trusts*, *Land Value Capture* and *Land Value Tax*.

Land value uplift capture

Building on research papers published in 2018 (for which see *Conveyancing 2018* pp 115–17), the Scottish Land Commission (https://landcommission.gov.scot) has now published formal advice to Scottish Ministers on *Options for Land Value Uplift Capture*. The issue has become a familiar one. The value of land can increase for reasons which have nothing to do with the efforts of its owner. The main examples of such publicly-created uplifts in value are public investment in infrastructure, the granting of planning permission, and societal factors such as economic growth which have the effect of making particular locations more desirable to live in. If it is accepted that the state should be able to 'capture' some at least of this gain, this still leaves open the critical questions as to 'how?' and 'how much?' In relation to 'how?', the Land Commission (p 4) highlights three means of land value capture: planning-led mechanisms (such as s 75 agreements); fiscal mechanisms (such as land value tax); and commercial arrangements (such as joint ventures). The focus of the Land Commission's paper is on the first of these, although separate work is also proceeding on the second. As well as recommending a more systematic use of s 75 agreements, the Commission is particularly enthusiastic about the new infrastructure levy which is provided for by Part 5 of the Planning (Scotland) Act 2019.

The Land Commission stresses, however, that there are no easy solutions in this area. As past experience shows, rigid or clumsy attempts to capture land value uplift will simply result in land being withdrawn from the market. Furthermore, in many parts of Scotland there may not be much value to capture, and development may have to be led, or at least facilitated, by public agencies. This indeed is a broader theme of the Land Commission's paper. 'In many ways', concludes the Commission (p 10), 'the current debate around land value capture is merely a reflection of more fundamental concerns about the effects of Scotland's speculative approach to development, in which decisions about whether, when and where land is developed are largely left to the market.'

Common good property

The foundation statute for common good property continues to be the Common Good Act of 1491, APS ii 227 c 19, RPS 1491/4/23. To the extent that it has not been repealed, this provides that:

> Item, it is statut and ordinit that the commoune gud of all oure soverane lordis burrowis within the realme be observit and kepit to the commoune gude of the toune and to be spendit in commoune and necessare thingis of the burghe be the avise of the consale of the toune for the tyme and dekkynnis of craftis quhare thai ar.

There has of course been later legislation, which is traced in chapter 2 of Andrew C Ferguson's indispensable book on *Common Good Law*, now (since 2019) in its second edition. The very latest is the Community Empowerment (Scotland) Act 2015, s 102 of which requires every local authority to compile a 'common good register', ie a register of all property which is held as part of the common good. This must be made available for public inspection free of charge, including on a website. In addition, before taking any decision to dispose of or change the use of common good property, a local authority must publish details of its proposal, notify community councils and any community body with an interest in the property, and consider representations (s 104). Statutory guidance on the implementation of the 2015 Act was published by the Scottish Government in 2018: see *Conveyancing 2018* pp 113–14.

The cause of common good property has now been taken up the Scottish Land Commission (https://landcommission.gov.scot). Research commissioned from the Centre for Local Economic Strategies (*Delivering Greater Benefit from Common Good Land and Buildings*) was published in September 2019. After tracing the history of common good and setting out the current position, the paper offers three options for the future. One is abolition, on the basis that, in the modern era of community engagement, there can be no reason for singling out one type of property just because it happens to be associated with the historic burghs of Scotland. Indeed such singling out can be a disadvantage because, partly due to legal uncertainty, local authority officers are often more cautious about utilising common good assets than other assets. A second option is the *status quo*, building best practice for local authorities on the basis of the 2015 Act. The paper is opposed to the first of these options, partly because 'it would cause the loss of an important legal and cultural tradition that is at the cornerstone of the relationship between the people of Scotland and its land' (para 4.2), and it is indifferent as to the second. Instead, the paper supports a third option which, recognising that common good is 'inherently a legal anachronism' and that, left to itself, it will continue to decline, proposes the enactment of revivifying legislation (para 4.4):

> [I]n order to truly restore the vibrancy of the common good to people and place across Scotland, it is necessary to go beyond empowering local authorities to exercise more control over these assets, but instead seek ways to ensure that the management, ownership, and governance of the common good is redistributed down to the lowest level. This would require a process 'recommoning' the common good, in which Scotland returns to the original purpose of the 1491 legislation, and fits it into a modern context. In order to 'recommon' the common good, a new Common Good (Scotland) Act should be written; a new statutory framework to modernise common good law and replace the original Act of 1491. The purpose of this Act would be to go beyond the local authority focus offered by the Community Empowerment legislation, and instead provide formal mechanisms for the residents of former burghs to exercise direct democratic control over common good assets.

For the moment, at least, the details as to how this might be done are left entirely vague.

Some idea of the likely future direction of travel is given in a blog posting of 18 September 2017 by one of the Scottish Land Commission's policy officers, James MacKessack-Leitch. He begins with some history:

> In many respects urban land reform – particularly community ownership – has proven more challenging to foster than its rural partner. There are, however, across Scotland, often significant portfolios of urban land and assets that represent arguably the oldest (if not original) form of community ownership – the common good of the burghs. This land and property – granted to, or acquired by the burghs from the medieval period until their abolition in 1975 – was intended to help support the running of the burgh, as well as provide amenity space for the citizens of the burgh, and resources such as grazing land and woods. However, by the 19th century many of these assets had been sold, appropriated, or simply lost from records, and by the time the Land Reform Review Group (LRRG) published their report in 2014, of the original 197 burghs, 54 were recorded as having no Common Good assets at all. The abolition of burghs, and subsequent local government reforms in the second half of the 20th century, further weakened links between common good assets and local governance and management. This has led to a confusing picture where in many cases it's not clear when an asset is part of the common good.

One cure for this muddle would be, not to abolish common good, but to extend it:

> As the last Royal Burgh Charter was granted in 1700 there are a number of substantial Scottish towns with no common good assets – settlements that developed during the industrial revolution, and the five post-war new towns, have no common good despite being some of the largest population centres in the country. However, they do all have property that could, or would, be considered common good had they been burghs – town halls, council chambers or other civic buildings, parks and greenspace. It's difficult to see why such cherished and communal assets should not receive the same sort of status afforded to common good elsewhere, and allow the residents a measure of influence over what is, and certainly will become, their local heritage. Creating new common good – also enabling former burghs to rebuild and expand their common good portfolios – would require new legislation. But if done carefully and with a view to sustainability and long term prosperity, it could facilitate the preservation of built heritage and greenspace, and cultivate a flourishing of community led development throughout urban Scotland.

Work on this issue continues at the Scottish Land Commission. But in the meantime Mr MacKessack-Leitch finishes his blog with a shining vision for the future:

> Fundamentally, common good represents an extensive property portfolio from which it should be possible to derive significant community, local economic, and environmental benefit, with the right governance and legal framework. It could also be a game changer for urban land reform and community development, and a catalyst to deliver the benefits of community empowerment and ownership in urban areas that have so far been unrealised.

Vacant and derelict land (1): Scottish Survey 2018

The Scottish Government conducts an annual survey of vacant and derelict land based on returns from local authorities. 'Vacant' land is land which is unused for the purposes for which it is held and is viewed as an appropriate site for development; the land must either have had prior development on it or preparatory work must have taken place in anticipation of future development. 'Derelict' land (and buildings) is land which has been so damaged by development that it is incapable of development for beneficial use without rehabilitation. The annual surveys are being watched with greater attention following the introduction of a community right to buy abandoned, neglected or detrimental land by s 74 of the Community Empowerment (Scotland) Act 2015, which came into force on 27 June 2018, and also in the light of the work of the Scottish Land Commission (for which see below).

Key findings from the 2018 survey (published on 24 April 2019: www.gov.scot/publications/scottish-vacant-derelict-land-survey-2018/) include:

- The total amount of derelict and urban vacant land in Scotland has decreased by 716 hectares (6%) in the latest year, from 11,753 hectares in 2017 to 11,037 hectares in 2018. The net decrease of 716 hectares (6%) between 2017 and 2018 is the result of 350 hectares being brought back into use, 632 hectares recorded as naturalised (including 561 hectares of former open cast coal sites in East Ayrshire where restoration schemes are now complete), the addition of 187 hectares in new sites and a net increase of 79 hectares as a result of changes to existing sites and removal of sites that do not meet the required definitions.
- Of the 11,037 hectares of derelict and urban vacant land recorded in the 2018 survey 1,992 hectares (18%) were classified as urban vacant and 9,044 hectares (82%) were classified as derelict.
- Five authorities have more than 1,000 hectares of derelict and urban vacant land. East Ayrshire has the largest area – 1,810 hectares, 16% of the Scotland total. Glasgow City has the largest area of the City Authorities – 1,005 hectares, 9% of the Scotland total.
- For those sites where the previous use is known, 29% of derelict and urban vacant land had been previously used for mineral activity (3,080 hectares), 20% for manufacturing (2,137 hectares) and a further 12% for defence (1,270 hectares).
- Of the 187 hectares of new derelict and urban vacant land reported in 2018, the largest area had previous land uses related to mineral activity, 55 hectares, 29% of new land reported.
- Overall in Scotland 29.1% of the population were estimated to live within 500 metres of a derelict site, though there were differences across the country. Shetland and Orkney had the lowest percentage, both less than 1%. 58% of people living in the most deprived decile in Scotland are estimated to live within 500 metres of derelict land, compared to 11% of people in the least deprived decile.
- 350 hectares of land was reclaimed or brought back into use in 2018. An additional 632 hectares were recorded as naturalised.
- Almost half of the 350 hectares of derelict and urban vacant land brought back into use in 2018 (173 hectares) were listed as private sector funded. 109 hectares,

31% of the 350 hectares of derelict and urban vacant land brought back into use in 2018 involved some form of public funding, either a full or partial contribution.

- Since its inception in 2005/06, the Scottish Government's Vacant and Derelict Land Fund has contributed (either fully or partially) to the reuse of 402 hectares (in total) of previously derelict and urban vacant land across Dundee City, Fife, Glasgow City, Highland, North Ayrshire, North Lanarkshire and South Lanarkshire.

Vacant and derelict land (2): the Scottish Land Commission taskforce

Together with the Scottish Environment Protection Agency (SEPA), the Scottish Land Commission has set up a taskforce for vacant and derelict land. The idea is to challenge all government and economic sectors in Scotland to help bring back such land into productive use. Three phases of research are envisaged:

- Phase 1: developing the approach to understand better the nature of the challenge and identify potential changes to policy and practice;
- Phase 2: demonstration through partnership working;
- Phase 3: develop and launch a vacant and derelict land tool kit.

2019 saw the completion of phase 1 with the publication of various papers, all available on the Land Commission's website (https://landcommission.gov.scot/). Possible funding sources were reviewed on the Commission's behalf by Ryden (*A Review of Funding Sources for the Re-use of Vacant and Derelict Land*, October 2019). The main sources identified were the Scottish Government; local authorities; the national lottery; Historic Environment Scotland; development trusts and charities; investment specialists and private company subsidiaries; private philanthropy; civic crowdfunding and local sources. Each source is examined in turn. The report's conclusion (para 10.2) is that:

> Funding for vacant and derelict land in Scotland is generally geared to the full range of productive outputs, eg infrastructure, housing, 'greening', etc and can vary in breadth from the strategic City Deals to much smaller scale community projects. This means there is funding available for all sizes and types of project. In addition, funding is available to a wide range of applicant organisations including local authorities, charities, community organisations or business/property owners.

On the other hand, the report warns, funders are looking to spread their risks and it will usually be necessary to obtain funding from a number of different sources.

A second report by Ryden (*Vacant and Derelict Land Task Force: Phase One Report*, June 2019) reviews existing policy and research, analyses the current portfolio of vacant and derelict sites as listed in the annual survey (above), examines 60 sites more closely in a search for archetypes, and considers some cases where sites have been brought back into use. While admiring of and grateful for the Scottish Government's annual survey, the report also criticises it for masking the distinction between sites which can be and are quickly reused and a hard core of persistent, 'stuck sites' – usually older, larger and derelict sites – some of which have been on the register for decades. It is these persistently problematic

sites that the taskforce is especially keen to tackle. Together they account for around 30% of sites and 20% of land area of properties in the survey.

As another report shows, the impact of vacant and derelict land on local communities can be severe. In *Vacant and Derelict Land in Scotland: Assessing the Impact of Vacant and Derelict Land on Communities* (September 2019), Peter Brett Associates LLP reviews the (meagre) literature on the topic, and makes a first attempt to develop a framework which could be used in the future, especially by local authorities, for assessing the impact of vacant and derelict land and to inform future decisions as to the use of that land. The review contains few surprises. Due to Scotland's industrial past, almost a third of the population lives within 500 metres of a derelict site; in deprived communities, that figure increases to 58%. This proximity affects the health and life expectancy of local communities, creates environmental hazards from eg asbestos or the pollution of watercourses, and can also have a significant impact on community perceptions of the local area. Apparently some communities in Glasgow have resorted to 'guerilla urbanism' by planting seeds on derelict land (para 3.2.21).

Finally, the Scottish Land Commission has produced its own *Statement of Intent* on the topic, urging the following:

- Coordinate priorities for action and align finance and support.
- Use the rich data Scotland has about vacant and derelict sites to promote opportunities for re-use of land.
- Learn through demonstration what changes are needed in regulatory, policy and finance systems.
- Embed a socially responsible corporate culture to prevent future sites being abandoned.

The scale of the problem, says the Land Commission, means that 'a site by site approach to reuse will be inadequate. There are simply too many sites to be tackled individually. A thematic approach is needed in which solutions for different types of sites are developed and then applied to other sites with similar characteristics.' The Commission proposes a division of sites into 'large', 'local' and 'small' with 'a coordinated, multi-agency approach' needed in respect of the first of these.

A point made more than once in the papers is the inadequacy of conventional cost-benefit analysis as a basis for decision-making in respect of vacant and derelict land. In a website post on 10 December 2019, Shona Glenn, the Head of Policy and Research at the Scottish Land Commission, returns to this topic:

> Currently decisions about what to do with a site, including if and when to dispose of it, are usually made on the basis of fairly narrow cost benefit analysis. Anticipated financial returns to the landowner are usually the most important, and often the only, consideration and when these numbers don't stack up, nothing happens. And when the site in question has been vacant and/or derelict for some time, particularly if it's located in a challenging market area or might require costly remediation, the numbers rarely do stack up. The result? A legacy of derelict sites some of which have been blighting communities for decades.

> Making decisions based purely on financial returns makes sense for private landlords – you wouldn't really expect a rational profit maximising firm to behave any other way – but it's not just the private sector that behaves this way. Although the public sector does sometimes take wider benefits into account this usually only happens when sites are part of a wider regeneration initiative. Where sites are part of a programme of disposals to fund core activity, financial considerations often trump all else.
>
> If we're going to succeed in addressing Scotland's legacy of vacant and derelict land – and realising the benefits that come along with that – then we need to change this. And we're going to need new tools to help us do it. To help with this, the Land Commission has appointed a team led by BiGGAR Economics to help us develop a new approach for assessing – and where possible quantifying – the full benefits of bringing sites back into use and the full costs of allowing dereliction to persist.

The potential gains, says Shona Glenn, from taking steps to solve a problem which has hitherto been regarded as 'too difficult' are immense:

> Fixing urban dereliction could play a major role in addressing health inequalities and improving wellbeing – but the benefits don't stop there: in fact, tackling urban dereliction could help us solve some of society's biggest challenges. Think about it: bringing derelict urban sites back into use could help us provide new homes for people that need them (while limiting the need for out of town residential development.) They could provide space for growing food in towns and cities – helping us to cut food miles and tackle obesity. They could be used to create new urban green spaces, providing places for people to relax and enjoy the outdoors and an opportunity to improve biodiversity in urban areas. Some sites may even have the potential to generate renewable energy.

Scotland's Forestry Strategy 2019–2029

A new *Forestry Strategy* (www.gov.scot/publications/scotlands-forestry-strategy-20192029/) comprises one 'vision', three 'objectives', and six 'priorities'. In outline, these are:

Vision

In 2070, Scotland will have more forests and woodlands, sustainably managed and better integrated with other land uses. These will provide a more resilient, adaptable resource, with greater natural capital value, that supports a strong economy, a thriving environment, and healthy and flourishing communities.

Objectives

- Increase the contribution of forests and woodlands to Scotland's sustainable and inclusive economic growth.
- Improve the resilience of Scotland's forests and woodlands and increase their contribution to a healthy and high quality environment.
- Increase the use of Scotland's forest and woodland resources to enable more people to improve their health, well-being and life chances.

Priorities

- Ensuring forests and woodlands are sustainably managed.
- Expanding the area of forests and woodlands, recognising wider land-use objectives.
- Improving efficiency and productivity, and developing markets.
- Increasing the adaptability and resilience of forests and woodlands.
- Enhancing the environmental benefits provided by forests and woodlands.
- Engaging more people, communities and businesses in the creation, management and use of forests and woodlands.

In the last 100 years, the paper explains, Scotland's forest cover has increased from around 5% of the country's land to 18.5%. A long-term strategy is needed because the productive lifespan of trees in Scotland generally ranges from 30 to 150 years.

An accompanying document (www.gov.scot/publications/scotlands-forestry-strategy-20192029-report-consultation-process-undertaken/) discusses the consultation undertaken as part of the preparation of the new strategy.

An appendix: the Forestry Commission is no more. It disappeared on 1 April 2019, being replaced by two Scottish Government agencies, Forestry and Land Scotland (*Coilltearachd agus Fearann Alba*), and Scottish Forestry (*Coilltearachd na h-Alba*), in pursuance of the Forestry and Land Management (Scotland) Act 2018.

The *Conveyancing Protocol* in England and Wales

Among the services provided for its members, the Law Society in England and Wales compiles and maintains a detailed *Conveyancing Protocol*, which sets out, step-by-step, the things that need to be done by the respective solicitors for seller and buyer in a typical residential conveyancing transaction. The issuing of a new edition in 2019 (www.lawsociety.org.uk/support-services/advice/articles/conveyancing-protocol/) prompts the thought as to whether an equivalent document might be of value in Scotland.

Checkpoint Penicuik

In *Conveyancing 2018* we wrote about *Manson v Midlothian Council* [2018] SC EDIN 50, 2019 SCLR 723, a case in which an eight-foot barrier had been erected across a path which led to the grounds of Penicuik House, obstructing public access rights under s 1 of the Land Reform (Scotland) Act 2003, and at p 190 we promised a further site visit. We visited in early January 2020. The barrier had been removed and free access fully restored.

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Chathuni Jayathilaka, *Sale and the Implied Warranty of Soundness* (Studies in Scots Law vol 6, Edinburgh Legal Education Trust 2019; ISBN 9781999611804)

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Iain Doran, 'LBTT – problems with assumption of debt as consideration' (2019) 160 *Greens Property Law Bulletin* 1

Iain Doran, 'Problems with sub-sale development relief' (2019) 162 *Greens Property Law Bulletin* 1

Iain Doran, 'Reflections on 40 years of commercial leasing' (2019) 158 *Greens Property Law Bulletin* 2

George Gretton and John King, 'Land registration: KIR title sheets' (2019) 64 *Journal of the Law Society of Scotland* Feb/34

Laura Hay, 'Expert determination: can a "final and binding" decision be overturned?' (2019) 160 *Greens Property Law Bulletin* 6

Amir Ismail, 'Let me go! The end of the lease revisited' (2019) 64 *Journal of the Law Society of Scotland* Dec/Online (considering the Scottish Law Commission's *Discussion Paper No 165 on Aspects of Leases: Termination*)

Michael Johnston, 'Buildmark, and little extra help for NHBC' (2019) 64 *Journal of the Law Society of Scotland*, online edition: bit.ly/2VFG32D (considering the effect of the Insurance Distribution Directive on property sales with Buildmark)

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Hector MacQueen, 'Restitution upon rescission for breach of contract, mutuality, and unjustified enrichment: *Lyle v Webster*' (2019) 23 *Edinburgh Law Review* 278

Laura McCarthy, 'Scottish and English conveyancing: are the two compatible?' (2019) 64 *Journal of the Law Society of Scotland* July/37

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PART IV

COMMENTARY

COMMENTARY

MAINTENANCE BURDENS FOR AMENITY GROUND

Introduction

In arranging the ownership and maintenance of amenity ground in housing estates, two legal models predominate. By far the more common is for the amenity ground to be conveyed to the homeowners as common property, accompanied, usually, by a maintenance real burden.[1] This is sometimes referred to as the 'common-ownership model'. The main alternative, affecting around 20,000 homeowners, is for the amenity ground to be held by a third party, typically a land management company nominated by the developer.[2] The land management company manages and maintains the area, but the homeowners are subject to a real burden to pay the cost. Of the various operators of this 'land-owning model' the most prominent is the Greenbelt Group which owns and manages land in around 200 housing estates.[3]

From a legal point of view, neither model has proved straightforward. Each requires the developer both (i) validly to convey ownership of the amenity ground (whether to the homeowners or to a land management company such as Greenbelt), and (ii) validly to impose a maintenance real burden on the homeowners.

With the common-ownership model it is the first of these that has hitherto caused difficulty, for often the developer must begin selling houses – and hence conveying a share in the amenity ground – before the development is complete and so, it may be, before the boundaries of the amenity ground are finally determined. In the absence of proper identification, any purported conveyance of a share in the amenity ground will fail – a principle which was applied in a series of cases beginning with *PMP Plus Ltd v Keeper of the Registers of Scotland*.[4]

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1 Strictly, though, the real burden is not necessary, as *pro indiviso* owners are in any event bound as a matter of common law to pay for necessary maintenance.

2 Much useful information on this model is contained in Consumer Focus Scotland, *Consumer Experiences of Land–Owning Land Management Companies* (2011).

3 For the terminology used here, see *Greenbelt Group Ltd v Walsh* [2019] SAC (Civ) 9, 2019 Hous LR 45 at para 1.

4 2009 SLT (Lands Tr) 2, discussed in *Conveyancing 2008* pp 133–49. Significant later cases are: *Lundin Homes Ltd v Keeper of the Registers of Scotland* 2013 SLT (Lands Tr) 73, discussed in *Conveyancing 2013* pp 105–16; *Miller Homes Ltd v Keeper of the Registers of Scotland* 2014 SLT (Lands Tr) 79, discussed in *Conveyancing 2014* pp 134–39.

In contrast, the land-owning model has no difficulty with conveying the amenity area, because this is not done until the development is complete and the amenity ground properly identified.

Recently, attention has turned to the difficulties concerning the imposition of the maintenance real burden. Again, these problems have at their root the potentially uncertain boundaries of the amenity ground. Necessarily, a maintenance real burden must specify the ground in respect of which the cost of maintenance is to be met. It must also, where the land-owning model is used, nominate the same ground as the benefited property in the burden, because the idea is that the burden should be enforceable by (and only by) the land management company in its capacity as owner of the amenity ground. (Matters are simpler, in this respect, under the common-ownership model because the maintenance burden can be treated in the same way as the other real burdens in the deed of conditions, ie it will be a community burden which is mutually enforceable by and against all the homeowners within the development.)

But at this point the uncertainties inherent in new developments come into collision with the rules applicable to real burdens. In terms of s 4(2) of the Title Conditions (Scotland) Act 2003, a real burden must both (i) set out the terms of the real burden, and also (ii) nominate and identify the benefited property. Furthermore, by virtue of the 'four-corners-of-the-deed' rule, both must be done within the deed itself.[1] It is not enough to put some vague formulation into the deed and hope that matters will be clarified by later events. The deed must be clear from the start. That is fine if, at the time when the deed of conditions is being prepared, the precise boundaries of the amenity ground are already clear and can be described in the deed (preferably by use of a plan). But it is not at all fine if the development is proceeding in stages, if the planning position is fluid, if the precise number of houses to be built, and their precise location, is as yet uncertain, and if, therefore, the boundaries of the amenity ground are unclear. Two new cases illustrate the pitfalls which may then result. In both the land-owning model had been used, and in both the land management company was seeking to recover a contribution to the cost of maintenance from a recalcitrant homeowner whose defence was that the maintenance burden was invalid and unenforceable.

An inevitable failure

The first case, *Scottish Woodlands Ltd v Majekodunmi*,[2] concerned a housing estate at West Cowden, Dalkeith. In terms of the deed of conditions a number of real burdens were 'imposed on the Burdened Property [ie the individual houses] in favour of the Open Ground'. These included the following maintenance obligation:

1 See eg G L Gretton and K G C Reid, *Conveyancing* (5th edn, 2018) para 14-10.

2 [2019] SAC (Civ) 38, 2019 GWD 40-645. The Opinion of the Court was delivered by Appeal Sheriff P J Braid, the other members of the court being Sheriff Principal I R Abercrombie QC and Sheriff Principal M W Lewis.

> The Proprietors are hereby taken bound and obliged to pay the Annual Management Charge applicable from time to time to each Plot and which sum shall be payable in all time coming annually in advance by the Proprietor of each Plot to the Open Ground Proprietors.

This provision can only be understood by recourse to the battery of definitions found in the deed. Some patience will be required of the reader. In the first place, 'Annual Maintenance Charge' was defined as meaning:

> the pro rata share applicable to each Plot of the total annual costs incurred by the Open Ground Proprietors in effecting the Management Operations, together with reasonable estate management remuneration, insurance premiums and charges (plus all Value Added Tax exigible thereon) for the relevant year, which pro rata share shall in the case of each Plot be calculated by reference to the total number of Plots created or permitted to be created within the Entire Site.

The 'Management Operations' were to be carried out on the 'Open Ground' by the 'Open Ground Proprietors', who were Scottish Woodlands Ltd, the appellants in the present action. As the 'Open Ground' was also the benefited property in the burden, the crucial definition, or rather series of definitions, was of 'Open Ground'.

As a starting-point, 'Open Ground' was defined as 'the Development Common Property, or part or parts thereof disponed or transferred to the Landscape Company'.[1] 'The Development Common Property' was defined in turn as including the 'Public Open Space' and the 'Landscaped Areas'. 'Public Open Space' meant 'any area (together with any apparatus or equipment installed thereon) designated in any Planning Consent for sports, play, recreational or other leisure purposes'. 'Landscaped Areas' meant 'any areas within the Entire Site designated in any Planning Consent to be permanently planted with trees, shrubs, grass or other planting, or otherwise as the Planning Consent may prescribe but always excepting any Plot'. 'Planning Consent' meant 'any outline or detailed planning consent or reserved matters consent governing development of any part of the Entire Site'.

It is hard to make progress through this thicket of definitions.[2] But what it amounted to was that the crucial term 'Open Ground' – which was both the benefited property and also the property for which, under the burden, maintenance costs had to be paid – was ultimately defined by reference to whatever areas happened to be designated for certain purposes by means of planning consent. Whether this was present or future planning consent was not disclosed, and the terms of consent or consents themselves were entirely absent from the deed.

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1 The distinction between 'disponed' and 'transferred' is puzzling. So too is the term 'Development Common Property' given that the whole point of the land-owning model is that the amenity ground should *not* be common property.

2 The deed of conditions was said by the Sheriff Appeal Court to illustrate the 'danger inherent in preparing documents of wholly unnecessary complexity' while one of the passages under scrutiny was criticised as 'complex and opaque to the extent of being virtually meaningless': see paras 4 and 33.

The objections to this definitional scheme are obvious. In order to discover the boundaries of the Open Ground – assuming indeed that such boundaries were discoverable at all – it was necessary to go beyond the four corners of the deed; and the very need for such an inquiry was fatal to the validity of the maintenance real burden.[1] The point was put succinctly by the Sheriff Appeal Court:[2]

> [F]ollowing the bouncing ball through the complexities of the definition, one arrives at a position where one can only tell what the benefited land is by referring to planning consents; not only that, but the reference to 'any' planning consent, which includes 'any outline or detailed planning consent or reserved matters consent', means that any number of documents might have to be consulted, some or all of which may not have been in existence when the burden was created. In our view, that plainly contravenes the four corners rule.

The burden therefore failed, and with it the action by Scottish Woodlands Ltd, the owner of the Open Ground and the company charged with its maintenance, to recover unpaid maintenance dues from the owners of one of the houses in the estate.

In seeking to avoid that result, Scottish Woodlands had placed reliance on a passage from the well-known decision of the House of Lords in *Anderson v Dickie* which explained how extrinsic evidence might be used to eke out a written description of property:[3]

> For however accurate and detailed a description may be, it cannot prove the reality of the things described, and oral evidence may be needed to apply a specific written description to external facts. But that does not displace the rule of law that there must be found in the title, to begin with, the clear expression in words of a specific burden imposed on a definite piece of land.

The trouble was, however, that, as the passage quoted made clear, the inescapable starting-point for extrinsic evidence was the presence in the deed of 'the clear expression in words of a specific burden imposed on a definite piece of land'. That was the very thing that was lacking in the present deed of conditions.[4]

The type of documentation in *Scottish Woodlands Ltd v Majekodunmi* is, unfortunately, not an isolated example, and perhaps not even an untypical one. Exactly the same result for exactly the same reason had been reached by the

1 Other deficiencies in the definitional scheme would also, probably, have been fatal to the validity of the real burden. In particular, 'Open Ground' was defined as 'the Development Common Property, or part or parts thereof disponed or transferred to the Landscape Company'; but as the transfer to the Landscape Company (presumably) took place after the registration of the deed of conditions it would not have been possible to know, at the time of such registration, whether all or only part of the Development Common Property would ultimately be transferred to the Landscape Company and so would constitute 'Open Ground'.

2 Paragraph 22.

3 1915 SC (HL) 79 at 86 per Lord Kinnear.

4 Paragraph 23.

Lands Tribunal in *Marriott v Greenbelt Group Ltd*, decided in 2015.[1] The case next to be discussed also raises similar issues. One might speculate that there are many other deeds of conditions up and down the country which are vulnerable to challenge on the same grounds.

An unexpected success

The drafting was much simpler in the second of the cases, *Greenbelt Group Ltd v Walsh*,[2] but the issues were much the same. This time the 'Open Ground' in respect of which the cost of maintenance was imposed, by real burden, on the homeowners was defined in the deed of conditions as:[3]

> all and whole [A] those open and landscaped areas within the subjects shown coloured green on the said plan annexed and executed as relative hereto [B] together with any other open spaces or areas which have been or may in the future be designated as open space within the subjects.

The first part of this definition is blameless: the subjects which are to be maintained as 'Open Ground' are indicated in a plan annexed to the deed of conditions. But the second part is fatally indeterminate. No one buying a house in the estate could discover from the deed of conditions the extent of the property which was to be maintained as 'Open Ground'. Worse than that, not even the most detailed inquiries could guarantee that further property might not '*in the future* be designated as open space within the subjects'. That a maintenance real burden tied to such a definition must be invalid seems a conclusion hardly capable of being avoided. It was the conclusion which had been reached by the Lands Tribunal in *Marriott v Greenbelt Group Ltd* (above) in respect of a definition of 'Open Ground' by reference to the area covered by planning permission, 'planning permission' itself being defined as:

> [A] the planning permission issued by the Scottish Ministers under Reference No 00/00129OUT on 7 Mar. 2002 [B] together with any variation thereof or supplementary permission issued in respect thereof.

As in *Scottish Woodlands Ltd v Majekodunmi* (above), the reference to planning permission, the terms of which were not given in the deed of conditions, was in itself fatal to the validity of the maintenance real burden. But even if that had not been so – even if, in other words, the planning consent had been reproduced in full in the deed of conditions – the definition of 'Open Ground' would still have been insufficient because of the uncertainty caused by the second half of the definition of 'planning permission' (ie 'together with any variation thereof

1 2 December 2015, Lands Tribunal. For discussion, see *Conveyancing 2015* pp 137–51. The Sheriff Appeal Court in *Scottish Woodlands Ltd v Majekodunmi* thus followed the decision of the Lands Tribunal in the earlier case although, as it was at pains to point out (para 21), it was not bound to do so.

2 [2019] SAC (Civ) 9, 2019 Hous LR 45. The Opinion of the Court was delivered by Sheriff Principal C D Turnbull, the other members of the court being Sheriff Principal I R Abercrombie QC and Sheriff Principal M W Lewis.

3 Our lettering.

or supplementary permission issued in respect thereof'). As the Lands Tribunal explained:[1]

> When the applicants [homeowners] registered their title the ultimate extent of the open ground was unknown. It was defined by reference to the planning permission for the development as that permission may be varied or supplemented. Even if resort to the planning permission was permissible, therefore, there was no means of knowing the extent of land for the maintenance of which they might end up having to pay a share … [A] burden of this kind is insufficiently specific. We agree, therefore, that the burden is bad for this reason also.

In *Greenbelt Group Ltd v Walsh*, however, the sheriff and, on appeal, the Sheriff Appeal Court took a different view. The first part of the definition was, said the court, perfectly clear. Hence the burden was enforceable to that extent. The second part, which was unclear, could simply be disregarded. In other words, the court treated the two parts of the definition as severable, so that the obvious invalidity of the second part had no effect on the validity of the first part. That is a generous interpretation, and one for which no reasons were given by the court. The case is of course different from *Scottish Woodlands Ltd v Majekodunmi* where *no part* of the definition of 'Open Ground' was certain. But, despite what the Sheriff Appeal Court seems to imply,[2] it is not different from one aspect at least of the definition in *Marriott v Greenbelt Group Ltd*. In our view, the line taken by the Lands Tribunal in *Marriott* (ie that uncertainty in one part of the definition is fatal to the definition as a whole) is to be preferred to the decision reached by the Sheriff Appeal Court in *Greenbelt Group Ltd v Walsh*.[3]

Possible solutions: undershooting and overshooting

It is not obvious how the problems disclosed by these cases can be solved. Unless the boundaries of the amenity ground are settled by the time the deed of conditions is being prepared, it is difficult to see how an effective maintenance burden can be imposed. That conclusion does not reflect well on our legal system. The need for amending legislation seems both self-evident and urgent.

In the meantime, can anything be done to alleviate the difficulties? Two suggestions emerge from the case law.[4] One is for the definition of amenity ground deliberately to undershoot; the other is for it to overshoot.

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1 *Marriott v Greenbelt Group Ltd*, 2 December 2015, Lands Tribunal, at para 173. This is similar to, but distinct from, the argument that prevailed in *PMP Plus Ltd v Keeper of the Registers of Scotland* 2009 SLT (Lands Tr) 2: see *Marriott* para 171.

2 Paragraph 26.

3 That is also the view taken, for similar reasons, by Kieran Buxton, 'Management of "amenity areas" and the validity of real burdens*: Greenbelt Group Ltd v Walsh*' 2019 *Juridical Review* 260, 265–67. Buxton places particular emphasis on the failure to identify the benefited property in the manner required by s 4(2)(c)(ii) of the Title Conditions (Scotland) Act 2003.

4 It seems worth adding that the difficulties are not avoided by using the statutory Development Management Scheme because, under that scheme, the 'scheme property' (ie the areas to be set aside as amenity ground) must, likewise, be defined at the outset, in the deed of application (the equivalent, for the DMS, of a deed of conditions): see Title Conditions (Scotland) Act 2003 s 71(2)(a).

The undershooting idea is suggested by the facts of *Greenbelt Group Ltd v Walsh*. If a developer is able to identify at the outset most – but not necessarily all – of the amenity ground, then the real burden could be limited to the part of the ground that can be identified now, the ground being identified on a plan attached to the deed of conditions. Admittedly, this would mean that, if more ground were ultimately to be set aside for amenity purposes, that additional ground would not be covered by the maintenance burden. That would be a loss. But at least the burden would be safe and secure in respect of the ground identified in the deed of conditions.

The overshooting idea was put forward as a possible solution by the Lands Tribunal in *Marriott v Greenbelt Group Ltd*:[1]

> The requirement for such identification has the potential to cause difficulty more widely, given developers' need for flexibility. But it is possible to exaggerate that difficulty. In many small developments the developer will, we imagine, be sufficiently confident that things will go according to plan that the amenity areas can be identified precisely from the outset. In larger developments, involving more uncertainty, there will be, at the very least, an indicative layout plan from the outset which could be incorporated into the constitutive deed, the text of which could be worded to the effect that the area to be maintained will not exceed that shown on the plan. That *may* be sufficient to solve the problem but we express no concluded view.

In considering this idea it is necessary to distinguish between (i) the nomination of the benefited property, and (ii) the wording of the maintenance burden itself. Both are important for the land-owning model, but only the second for the common-ownership model.[2]

On (i), the Title Conditions (Scotland) Act 2003 gives no room for manoeuvre. In terms of s 4(2)(c) the constitutive deed must not only 'nominate' the benefited property but also 'identify' it. A benefited property cannot be said to have been 'identified' if it is described as an uncertain part of a certain larger area. It comes as no surprise, therefore, to find the idea firmly rejected, in this context, by the Sheriff Appeal Court in *Scottish Woodlands Ltd v Majekodunmi*:[3]

> Senior counsel for the appellant advanced a somewhat, if we may say so, ingenious argument that because the Open Ground is known to lie within the Entire Site, which is a clearly defined area, it was sufficiently defined to enable one then to have regard to extrinsic material to ascertain its precise extent. However, to know the maximum extent of a piece of ground is not to know the true extent of a specific piece of ground within it. Having regard to the wording of section 4(2)(c) of the 2003 Act, the land could possibly be said to be nominated but it cannot be said to have been identified.

A possible way of avoiding this difficulty is to nominate as the benefited property the *whole* of the (certain) larger area. Although this will confer enforcement rights

1 *Marriott v Greenbelt Group Ltd*, 2 December 2015, Lands Tribunal, at para 177.

2 The first is not important for the common-ownership model because, as mentioned at the start of this section, the maintenance burden is simply a community burden, mutually enforceable among the homeowners.

3 [2019] SAC (CIV) 38 at para 23.

on those homeowners whose houses happen to be built on the excess land, that may not much matter. What does matter is that it will also confer enforcement rights, on the land-owning model, on the land management company.

The position as to (ii) may perhaps be more flexible. All that the Title Conditions Act requires is that the deed 'sets out … the terms of the prospective real burden'.[1] This is no more than a repetition of the rule that existed at common law.[2] According to the Scottish Law Commission, in its *Report on Real Burdens*, the relevant test is that: 'A real burden must be framed so that a successor can understand the nature and extent of the burden imposed.'[3] It is arguable, to put it no stronger, that a real burden to contribute to the maintenance of such part of a defined larger area as is used, from time to time, as amenity ground, is sufficient compliance with the statutory requirement.

THE MYSTERY OF 'MUTUAL PROPERTY'

All conveyancers are familiar with 'common property' and 'joint property', both terms of art in Scots law.[4] But what of 'mutual property'? The term is far from unknown in conveyancing deeds, a particularly frequent appearance being in relation to boundary walls which, at least in older deeds, are quite often said to be 'mutual'. Yet there is almost no authority as to its meaning. For that reason the decision in *Pirie v Harrold*[5] is to be welcomed. The case involved a dispute between neighbours as to the right to use a private access road. In a disposition forming part of the title of one of the combatants, it was stated that 'the said access road shall be the mutual property of the proprietors on either side of the said road and shall be maintained by them mutually'. But what did this mean?

The term 'mutual property', said the sheriff, 'is not a term of art having a recognised meaning in Scots law'.[6] With that view it is hard to disagree. Such meagre case law as exists does not suggest a settled meaning. So, for example, in *Cochran's Trs v Caledonian Railway Company*, a decision of the First Division from 1898, Lord Adam treated 'mutual property' as meaning common property,[7] whereas in a case from 2019, *O'Gorman v Love*, the Lands Tribunal said of a boundary wall owned on each side to the mid-point that: 'Strictly speaking therefore, the wall is a mutual wall, as opposed to common property.'[8]

In the absence of a settled meaning, the meaning of 'mutual property' must, as the sheriff said in *Pirie v Harrold*, be sought from the context in which the

1 Title Conditions (Scotland) Act 2003 s 4(2)(a).
2 For the rule at common law, see K G C Reid, *The Law of Property in Scotland* (1996) para 388.
3 Scottish Law Commission, *Report No 181 on Real Burdens* (2000) para 3.21.
4 For these terms, and the distinction between them, see eg K G C Reid, *The Law of Property in Scotland* (1996) paras 17–36.
5 5 June 1984, Aberdeen Sheriff Court. Although hardly a new decision, it has only recently been uncovered and drawn to our attention by Professor Roderick Paisley of Aberdeen University.
6 At p 8 of the transcript. The sheriff was Sheriff Douglas Risk.
7 *Cochran's Trs v Caledonian Railway Co* (1898) 25 R 572 at 577.
8 *O'Gorman v Love* 2019 SLT (Lands Tr) 1 at para 37. In *Thom v Hetherington* 1988 SLT 724, too, it seems to have been assumed that 'mutual property' meant ownership to the mid-point.

words were used. The difficulty, though, is that context may not turn out to be particularly helpful. If something is 'mutual property' the implication is that there is an element of sharing between two (or more) people. That being so, the effective choice is often likely to be between common property (ie where each person has an undivided share in the whole) or ownership to the mid-point[1] (ie where the person on each side of the thing owns the thing to its mid-point). Either solution would have been satisfactory on the facts of *Pirie v Harrold*.[2] The problem lay, and lies, in choosing between them.

From a drafting point of view, the lesson is obvious. As the term 'mutual property' is uncertain as to meaning, it should not be used. Instead the deed should make clear whether the intended outcome is common property or ownership to the mid-point.

OUSTING OCCUPIERS AND TERMINATING TENANCIES

Recovering property from the possession of a tenant or other occupier involves practical problems, but it also involves legal difficulties, for the law is complex. Much of it is old, and involves a series of patches added on over the centuries. Some of the complexity is probably inevitable, because there are different types of lease, the main divisions being residential, agricultural and commercial, with subdivisions in the first two divisions, and different policy considerations may apply. Nevertheless, the law is far more complex than it needs to be. Over the years there have been some reforms, but not enough. The Scottish Law Commission's 1989 report on the subject has not been implemented,[3] and previous attempts at reform have been equally unsuccessful. The Law Commission has recently taken the subject up again, publishing a discussion paper for consultation in 2018,[4] and the Commission's final recommendations are expected to be published in the course of 2020.

Here we can only touch on a few issues, our discussion arising out of three 2019 cases, *Ali v Serco Ltd*,[5] *Reid v Redfern*[6] and *M7 Real Estate Investments Partners VI Industrial Propco Ltd v Amazon UK Services Ltd*.[7]

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1 In Latin, *ad medium filum*.

2 In the event, the sheriff thought that the right of the adjoining landowners was one of common interest. Whether this was the correct interpretation of the disposition is open to question, not least because it was uncertain and controversial at the time whether a right of common interest could be created expressly, as opposed to created by operation of law. On this point, compare K G C Reid, *The Law of Property in Scotland* (1996) para 358 with D J Cusine, 'Common interest re-visited' (1998) 2 *Edinburgh Law Review* 315. The rule is now that common interest cannot be expressly created: see Title Conditions (Scotland Act 2003 s 118.

3 Scottish Law Commission, *Report No 118 on Recovery of Possession of Heritable Property* (1989).

4 Scottish Law Commission, *Discussion Paper No 165 on Aspects of Leases: Termination* (2018). But it should be noted that the project is limited – understandably in view of the need to keep the project manageable – to commercial leases.

5 [2019] CSOH 34, 2019 SLT 463 affd [2019] CSIH 54, 2019 SLT 1335. This was a decision of the Second Division (the Lord Justice Clerk (Lady Dorrian), Lord Drummond Young, and Lord Malcolm). Lady Dorrian gave the Opinion of the Court.

6 [2019] SC DUM 34, 2019 GWD 15-239, [2019] SC DUM 35, [2019] SC DUM 40, [2019] SC DUM 41. This was a decision of Sheriff George Jamieson.

7 [2019] CSOH 73, 2019 SLT 1263, 2019 Hous LR 90. This was a decision of Lord Ericht.

Can possession be resumed without a court order?

Introduction

Can possession be recovered without a court order? In one sense the answer is 'yes', for it is, alas, common enough, at any rate in certain parts of Scotland, for unscrupulous landlords to disregard the law and to throw out tenants, using threats, and sometimes direct physical action, using heavies. So to reformulate the question: can possession *lawfully* be recovered without a court order? Of course, legal advisers here will usually err on the side of caution. Why risk the consequences of what might turn out to be an unlawful ejection if one can go to court and avoid all problems? Nevertheless clients may wish to know the law, and moreover the legal adviser may be acting for the occupier. We begin with the criminal dimension.

The criminal dimension

If ejection is carried out unlawfully, there will be civil consequences, but in some cases there can also be criminal consequences. That is the case if the property is residential, due to s 22 of the Rent (Scotland) Act 1984. Despite the name of the statute in which the rule appears, this criminalisation of wrongful residential eviction is not limited to residential *tenancies*. That will, it is true, be the typical case, but there can also be cases of someone occupying residential property without having, or having had, a lease or tenancy, and in such cases also s 22 is potentially applicable.[1]

This section does not say 'ejection from residential property without a court order is an offence'. It says (in our words) '*unlawful* ejection from residential property without a court order is an offence'. In other words, the preliminary question is whether the ejection is civilly lawful or not. If it is civilly lawful, then s 22 does not apply. Moreover, s 22 is purely a criminal provision. This is fairly obvious from the text itself, but the point was confirmed in the first of our 2019 cases, *Ali v Sirco Ltd*. The section 'did not create any new civil right in favour of a residential occupier'.[2]

So five points may be made about the scope of s 22. (i) It creates no new rights in the civil law. It is solely a criminal provision. (ii) It applies only to residential property. Eviction without a court order from other types of property is not covered by s 22, nor, we think, by any other statutory provision of the criminal law. Of course, if violence or threats of violence are involved, other aspects of the criminal law might be engaged, such as the law of assault. (iii) Section 22 is not limited to residential *tenancy* cases. It is also potentially applicable to other cases of residential occupation. (iv) It is applicable only where the eviction is unlawful as a matter of civil law. In that sense it is a dependent rather than a freestanding provision. (v) Section 22 covers not only actual unlawful eviction but also attempts in that direction.[3]

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1 *Reid v Redfern* was in fact such a case. So too, with very different facts, was *Ali v Serco Ltd*.
2 *Ali v Sirco Ltd* [2019] CSIH 54, 2019 SLT 1335 at para 8(i).
3 The title of the section is 'Unlawful eviction and harassment of occupier'.

It is said, we know not with what accuracy, that s 22 prosecutions are rarer than might be expected given what seems to be the widespread use of unlawful eviction and harassment. That view receives some confirmation from the second of our cases, *Reid v Redfern*: 'While she [the occupier of the property] has reported this complaint to the police, they have so far declined to take action, *believing this solely to be a civil matter*.'[1]

The three categories of the civil law

Having looked at the criminal dimension, we return to the civil law. If a lease or tenancy comes to an end (which will generally require notice, otherwise tacit relocation will set in), the tenant cannot be forced out except by means of a court order.[2] That is and has long been the law. Sheriff George Jamieson in *Reid v Redfern* carried out some research on this point – judges with such keen interest in the law are to be honoured – going as far back as 1457.[3] Probably the principle is older even than that. It is sometimes supposed that if the lease has been terminated, using a correct notice, served at the right time, then the ex-tenant becomes an 'unlawful' occupier, and can be ejected without court order. That is not the law. The ex-tenant is certainly an unlawful occupier in the sense that the continuing occupation is a civil wrong, can be ended by court order, and may result in damages becoming payable. But all that does not authorise ejection *brevi manu* – lock-change eviction. The authorities do indeed say that an 'unlawful' occupier can be ejected *brevi manu*, but they are using the word in a special sense, of a person who has *obtained* possession unlawfully, such as a squatter. A tenant whose tenancy has come to an end is not an 'unlawful' occupier in that special sense. We quote Sheriff Jamieson: 'As Erskine makes plain in his *Institute* at II, I, 23, the law distinguishes between the ejection of unlawful occupiers (those possessing *vi clam aut precario*) and the removing of those occupiers who had, but have ceased to have, lawful occupation.'[4]

So: tenants whose leases have expired cannot be removed *brevi manu*.[5] Those who have obtained possession unlawfully, such as squatters, can be. But there is a third category: those who are neither (i) tenants whose tenancy has come to an end nor (ii) those who have obtained possession unlawfully. What is their position? Must the owner go to court? Or is ejection *brevi manu* competent? This third category has long been fuzzy, with ejection *brevi manu* being accepted in

1 *Reid v Redfern* [2019] SC DUM 34 at para 10 per Sheriff George Jamieson.

2 The Glasgow *Evening Times* ran a story on 14 January 2020 about a lock-change eviction: 'The tenant was a man in his 60s who had resided in his flat in Govan for a few years without any difficulty until he lost his job and got into financial difficulty. One day before Christmas he entered his close to discover all his worldly possessions sitting in seven cardboard boxes. His landlord's son and friend were in the process of changing his locks.' He moved to a night shelter. Eventually he was awarded £18,000 damages against his landlord. The newspaper story gave no names, date, or address, and we have not been able to trace details of the case.

3 [2019] SC DUM 34 at paras 46 ff.

4 Paragraph 51.

5 Subject to the baffling s 34 of the Sheriff Courts (Scotland) Act 1907. This applies only to leases of property of more than two acres. We return to this section below.

some types of case but not in others.[1] The decision of the Second Division in *Ali v Serco Ltd* now clarifies the law.

Ali v Serco Ltd[2]

Shakar Omar Ali and Lana Rashidi were asylum-seekers. They were provided with accommodation in Glasgow by Serco Ltd. They did not pay for the accommodation: Serco Ltd was paid by the Home Office. Asylum-seekers are entitled to such publicly-funded accommodation under the Immigration and Asylum Act 1999 s 95 read with the Asylum Seekers (Reception Conditions) Regulations 2005, SI 2005/7, reg 5. But these provisions apply only to persons whose status is that of *current* asylum-seekers, ie those whose applications are pending. Once an application has been finally determined, whether in favour of or against the applicant, these provisions cease to apply. Because the persons in question are then no longer asylum-*seekers*, they no longer qualify for free accommodation under these particular provisions, and Serco Ltd will no longer be paid by the Home Office. If, after the final determination of their applications, such persons do not leave the accommodation, Serco Ltd seeks to recover the property, which is then available for the accommodation of other asylum-seekers.

At one time Serco Ltd's practice, if properties were not vacated, was to go to the sheriff court for a possession order. But in July 2018 it changed its policy. After July 2018 its policy was to serve a notice, and if, after the deadline specified, the keys had not been returned, Serco Ltd would carry out an eviction *brevi manu*, ie with no court order. It was with the lawfulness of that policy that *Ali v Serco Ltd* was concerned.

It was held that there had been no breach of the ECHR,[3] but the question we are concerned with here is the question under general law of whether lock-change eviction – eviction *brevi manu* – is competent under such circumstances. The Inner House, affirming the decision of the Lord Ordinary,[4] held that it was competent, and in doing so clarified, and arguably altered, the law in this area.

Until 2019, the position as to the lawfulness of *brevi manu* eviction in the third category of occupiers was uncertain.[5] The decision of the Inner House is that *brevi manu* eviction is competent in this third category. '*Macdonald v Watson*[6] … is … clear authority for the proposition that an occupier without a lease may be evicted without proceedings in court.'[7] Again: 'The owner of property is

1 See eg K G C Reid, *The Law of Property in Scotland* (1996) para 156.
2 [2019] CSOH 34, 2019 SLT 463 affd [2019] CSIH 54, 2019 SLT 1335.
3 See p 56 above.
4 The Outer House decision is at [2019] CSOH 34, 2019 SLT 463.
5 The first category, that of expired tenants, is clear: eviction *brevi manu* is unlawful, subject to s 34 of the Sheriff Courts (Scotland) Act 1907. The second category, that of squatters etc, is also clear: eviction *brevi manu* is lawful. The third category concerns occupiers who fall into neither of the first two categories.
6 (1883) 10 R 1079.
7 [2019] CSIH 54 at para 44.

entitled to recover possession by means of summary ejection in any case where a contractual right to occupy that does not amount to a lease has come to an end.'[1] With reference to the case at hand: 'Occupancy was precarious, in the absence of any obligation to pay rent,[2] and the first respondents [Serco Ltd] were entitled to proceed to summary ejection from the property. That does not require court procedure.'[3]

The effect of *Ali v Serco Ltd* seems to be that the third category has disappeared, absorbed by the second. Only two categories now seem to exist: (i) tenants whose leases have expired, who cannot lawfully be ejected *brevi manu*, and (ii) everyone else, who can be.[4] Category (ii) appears to include licensees, though it should be borne in mind that the lease/licence distinction is somewhat fuzzy, and, moreover, that what the parties call their agreement is indicative but not determinative: agreements that use the term 'licence' may be held to be leases, and, indeed, *vice versa*.[5]

Notices to quit and tacit relocation

Those who have studied ss 34 to 38 of the Sheriff Courts (Scotland) Act 1907 are few. Fewer still are those who have studied these provisions and emerged both alive and sane. The provisions have been strongly criticised almost from the very beginning, both by judges and by commentators, and yet they remain in force, more than 100 years later.[6]

In *M7 Real Estate Investments Partners VI Industrial Propco Ltd v Amazon UK Services Ltd*,[7] the last of our three cases, the defender held a 15-year lease of a commercial property in Gourock, Renfrewshire. The property was large. We do not know how large, but it was more than two acres, a significant point because under the 1907 Act two acres is a threshold figure for certain important rules. The contractual ish was 1 August 2019, and the landlord (the pursuer), served notice to quit about five months before that date.[8] The tenant (the defender) declined to flit, on the basis that the notice had not been timeously served, and that, as a result, tacit relocation had set in, making 1 August 2020 the new ish.

The landlord raised the present action for removal, founding on a provision lurking like an adder within s 34 of the 1907 Act. We quote the section in full, but with the warning that readers should attempt this 445-word sentence only *at their own risk*:

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1 Paragraph 46.
2 The Inner House, agreeing with the Lord Ordinary, curtly rejected the claim that there was a tenancy. The occupiers paid no rent and so were not tenants: see para 12.
3 Paragraph 46.
4 A difficult case would be where the tenant leaves at the end of the lease, but others in the household remain. The logic of *Ali v Serco Ltd* is that such persons could be removed *brevi manu*.
5 For discussion, see *Conveyancing 2017* pp 155–61.
6 For recent analysis of these provisions, see ch 3 of Scottish Law Commission, *Discussion Paper No 165 on Aspects of Leases: Termination* (2018).
7 [2019] CSOH 73, 2019 SLT 1263, 2019 Hous LR 90.
8 Because of the terms of s 34 of the Sheriff Courts (Scotland) Act 1907, about to be discussed, it is usual to give 12 months' notice. Why that precaution was not taken here we do not know.

34 Removings

Where lands exceeding two acres in extent are held under a probative lease specifying a term of endurance, and whether such lease contains an obligation upon the tenant to remove without warning or not, such lease, or an extract thereof from the books of any court of record, shall have the same force and effect as an extract decree of removing obtained in an ordinary action at the instance of the lessor, or any one in his right, against the lessee or any party in possession, and such lease or extract shall, along with authority in writing signed by the lessor or any one in his right or by his factor or law agent, be sufficient warrant to any sheriff officer or messenger-at-arms of the sheriffdom within which such lands or heritages are situated to eject such party in possession, his family, sub-tenants, cottars, and dependants, with their goods, gear and effects, at the expiry of the term or terms of endurance of the lease: Provided that previous notice in writing to remove shall have been given –

(A) When the lease is for three years and upwards not less than one year and not more than two years before the termination of the lease; and

(B) In the case of leases from year to year (including lands occupied by tacit relocation) or for any other period less than three years, not less than six months before the termination of the lease (or where there is a separate ish as regards land and houses or otherwise before that ish which is first in date):

Provided that if such written notice as aforesaid shall not be given the lease shall be held to be renewed by tacit relocation for another year, and thereafter from year to year: Provided further that nothing contained in this section shall affect the right of the landlord to remove a tenant who has been sequestrated under the Bankruptcy (Scotland) Act 1985 or 2016, or against whom a decree of *cessio* has been pronounced under the Debtors (Scotland) Act 1880, or who by failure to pay rent has incurred any irritancy of his lease or other liability to removal: Provided further that removal or ejectment in virtue of this section shall not be competent after six weeks from the date of the ish last in date: Provided further that nothing herein contained shall be construed to prevent proceedings under any lease in common form; and that the foregoing provisions as to notice shall not apply to any stipulations in a lease entitling the landlord to resume land for building, planting, feuing, or other purposes or to subjects let for any period less than a year.

The property in Gourock was more than two acres in extent, and the lease was probative, and so s 34 was potentially engaged. It was for a term of more than three years, and so the section requires, or appears to require, notice to quit to be served not less than one year, and not more than two years, before the ish.[1] If notice is not timeously served, says the section, 'the lease shall be held to be renewed by tacit relocation'. Well, said the tenant, the notice to quit was served less than a year before the ish, so tacit relocation had set in. Not so, countered the landlord. Section 34 was a special procedure by which a tenant could be ejected without an action of removing. But s 34 left intact the rule of the common law that an action of removing could precede on the basis

1 Six months in the case of a year-to-year lease.

of 40 days' notice. In the present case the landlord had given notice of almost six months.

The Lord Ordinary, Lord Ericht, agreed with the landlord and granted decree of removal. This adopted the approach to s 34 taken in an Inner House case from 2014, *Lormor v Glasgow City Council*.[1] '*Lormor*, in accordance with the weight of prior authority, established the principle that the Act is a procedure act which does not alter substantive rights.'[2] The Lord Ordinary continued:[3]

> An examination of the consequences of the interpretations advanced by each party demonstrates that the [pursuer's][4] interpretation is the correct one. On the defender's interpretation, once the one-year deadline has passed without notice, tacit relocation has occurred once and for all purposes. If that were the situation, then tenants could not prevent tacit relocation taking place by subsequently giving notice of less than a year: that this is not the law is amply demonstrated by case law such as *Lormor*,[5] *Signet Group v C & J Clark Retail Properties Ltd*[6] and *Dundee City Council v Dundee Valuation Appeal Committee*.[7] On the other hand, on the pursuer's interpretation, tacit relocation will not necessarily occur a year before and parties can be aware of that and plan accordingly.

The point is that if a tenant does not serve notice on the landlord (and the landlord does not serve notice on the tenant) then tacit relocation will operate, which may be something welcome to the landlord and not welcome to the tenant. There is nothing in s 34 to suggest that the normal common law notice period, 40 days, does not apply to tenant-to-landlord notices. If s 34 were to be interpreted as claimed by the defender, the absurd result would be that inaction by the landlord would deprive the tenant of its right to bail out by 40 days' notice.

The Lord Ordinary added:[8]

> [The] proviso is not a freestanding provision. It is a proviso to the principal provision in the section. It must be read along with its principal provision. The scope of a proviso is determined and limited by its principal provision. In this case the principal provision is the introduction of a procedural remedy. The scope of the proviso is limited to that procedural remedy. … The well-established common law on tacit relocation is not substantively replaced by such unclear statutory drafting. Rather, the proviso supplements the common law of tacit relocation by setting out how tacit relocation is to apply when the new statutory procedure is used.

The decision seems reasonable, in so far as any decision can be reasonable which has to cope with the poorly-drafted sections of the 1907 Act. Reform is hoped for, perhaps even sometime in the next 100 years.

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1 [2014] CSIH 80, 2015 SC 213, 2014 SLT 1055, *Conveyancing 2014* Case (43).
2 [2019] CSOH 73 at para 18.
3 Paragraph 19.
4 The judgment says 'defender's' but this, presumably, is just a slip.
5 [2014] CSIH 80, 2015 SC 213.
6 1996 SC 444.
7 [2011] CSIH 73, 2012 SC 463.
8 Paragraphs 21 and 22.

SERVITUDES: THE SAID AND THE UNSAID

What is said

The wording

At one time grants of servitude were remarkably terse. Because the types of servitude allowed were limited, and because these permitted servitudes had, by and large, been around since Roman times and were well understood, it was common to say little more in a deed than that there was, for example, a 'right of way' or 'servitude of access' over or through a particular property. And in any event servitudes could, and still can, be created without using words at all by means of positive prescription. Things have, however, changed. Increasingly, those charged with drafting servitudes – with the inborn caution of the conveyancer – try to leave nothing to chance, seeking to provide their clients (if the dominant proprietors) with all rights which they might conceivably need now or in the future. Being risk-averse, however, means using a lot of words.

Take the servitude considered in *Snowie v Farish* (our lettering):[1]

> [A] a heritable and irredeemable servitude right of vehicular and pedestrian access and egress at all times over the Servitude Area [B] or such alternative route as the Burdened Owner shall determine acting reasonably; [C] declaring that (One) such servitude right of access and egress shall be (1) sufficient to allow such residential development by the Benefited Owner for which Planning Permission may be granted by Perth and Kinross Council and [D] (2) shall allow the accommodation of all necessary site/works traffic for the whole of any construction period and [E] (Two) the maintenance and repair of the Servitude Area shall be based on user and [F] if widening and/or upgrading of the Servitude Area is required at the instance of the Local Authority to facilitate any such development then the Burdened Owner shall agree thereto on the proviso that the proper costs of any upgrading and/or widening of the Servitude Area and any damage resulting therefrom shall be paid for by the Benefited Owner.

There were definitions of 'Benefited Owner', 'Burdened Owner' and 'Servitude Area', the last of these being 'the roadway hatched brown on the said plan forming part of the Burdened Property'. For good measure, and in case anyone had any doubts on the matter,[2] it was added that 'any rights reserved to the Benefited Owner are exercisable by the tenants, agents, employees, workmen and others authorised by him from time to time'. By way of background, the dominant tenement was a field at Middle Balado, Kinross, which the dominant proprietor (and defender in this action) hoped to develop for housing.

Most conveyancers reading this servitude would, we think, regard it as a good and careful piece of drafting. Not so, however, said the pursuers, who were the owners of the roadway affected by the servitude as well as of the four houses which the roadway currently served. On the contrary, so poorly drafted was the servitude that no sense could be made of it. Accordingly, the pursuers sought

1 [2019] SC PER 1, 2019 SLT (Sh Ct) 46. The decision was by Sheriff S G Collins QC.
2 For the law on this topic, see *Conveyancing 2015* pp 176–80.

declarator that the servitude was of no legal effect, reduction of the supposed servitude, and interdict against the defender from taking access by the roadway.

The attack

In the onslaught mounted by the pursuers against the servitude, the guns were trained mainly on parts B, C, E and F, but especially on part C. It is here that we will begin.

In terms of part C the servitude of access 'shall be sufficient to allow such residential development by the Benefited Owner for which Planning Permission may be granted by Perth and Kinross Council'. This, said the pursuers, was a condition suspensive of the servitude. More than that, it was a condition too vague to receive legal effect. It could be understood only by reference to the future, taking account of a body which was not a party to the deed, and then only by recourse to extrinsic evidence as to what planning permission was in fact granted. None of this would do.

The sheriff disagreed. The right of access existed regardless of whether planning permission was granted. 'It is the amount of that potential increase which is dependent on the planning decision, not the servitude right itself.'[1] Furthermore, the attack on uncertainty failed because 'the extent of use of a servitude in the future following its grant can never be predicted with certainty', and this case was no different from the normal.[2]

The sheriff, surely correctly, was equally dismissive of the other grounds of attack. There was nothing wrong (part B) with allowing the burdened owner to nominate such 'alternative route as the Burdened Owner shall determine acting reasonably'. In context it was plain that this had to be a route within the existing servient tenement and could not, as the pursuers suggested, be a route on some other land, even, they said, on other land nearby which was owned by the defender.[3]

Equally defensible – as conveyancers will be relieved to learn – was the time-honoured expression (in part E) that repairs of the roadway should be 'based on user'. This too had been attacked by the pursuers as imprecise:[4]

> It was said to be based on 'user', but whose? The pursuers? The developers? The occupiers of any new houses? And what was user? The number of times a person came and went in the course of the day, or the type of vehicle which they drove? In short, how was 'user' to be calculated?

Some imprecision must be conceded, and we have ourselves sometimes wondered about the enforceability of this kind of provision. The sheriff, however, was untroubled by doubt:[5]

1 Paragraph 56.
2 Paragraph 57.
3 In the sheriff's view (para 53), the pursuers' interpretation led to 'absurd consequences'. 'To empower the servient proprietor to nominate a route other than over the servient tenement would be in effect to empower him to discharge the servitude.'
4 Paragraph 31.
5 Paragraph 59.

> In my view this means simply that the amount of repair and maintenance which is to be carried out to the access road is to be determined by the nature and extent of the traffic using the access. It anticipates that the greater the traffic, due to development, the greater the need for repair and maintenance. It means that the access road must be maintained to a reasonable standard sufficient to accommodate the nature and volume of traffic that is using it. I do not consider that greater precision is necessary or realistic in practical terms. True, the grant is silent as to whom is to be responsible for this repair and maintenance, but the consequence of this is that the responsibility will fall on the proprietor of the dominant tenement. Should he fail to maintain the access road in the condition just mentioned the servient proprietors would, in my view, be entitled to enforce compliance. It would then be for the court to decide, as matters of fact, the state of the road, the nature and extent of user, and whether the defender has carried out repairs and maintenance to the requisite standard.

So far as we know, this is the first time that the validity of such a provision has been considered. Maintenance according to user will often be a suitable arrangement for servitudes of access, though not perhaps for servitudes such as drainage to a septic tank (where the problems of proof as to usage might turn out to be insuperable).

Finally, said the sheriff, there was nothing untoward in obliging the burdened owner (in part F) to agree to road-widening if that was required by the local authority as a condition of planning permission, although this might be subject to a reasonableness requirement.[1] And the requirement that the benefited owner must meet 'the proper costs' was also, in the circumstances, sufficiently certain.

Severability

We now come to the most important aspect of the decision. Even if the sheriff had taken a less accommodating view on interpretation, he would still have upheld the servitude. This was because the various conditions and amplifications which were the subject of the pursuers' criticisms were severable from the words creating the servitude in part A of the clause. Those words – 'A heritable and irredeemable servitude right of vehicular and pedestrian access and egress at all times over the Servitude Area' – were clear beyond reproach. Even if one or more conditions were invalid, therefore, the servitude itself would survive.[2]

This sends an encouraging message to conveyancers. Fill out your servitudes. Add in whatever you want. Take a risk or two. If one or more conditions fail, the servitude itself will be fine. So far as we know, this is the first case to have said so. Two caveats should be mentioned. First, *Snowie v Farish* is a decision by a single sheriff. It binds no one. A different court might yet take a different view. Secondly, whether a condition is severable will depend on how the

1 So that if 'the local authority were, for example, to stipulate that it was a requirement of planning permission that the road be doubled in width, then I very much doubt that this would be permissible in terms of the servitude' (para 61).

2 Paragraphs 49 and 55.

clause is drafted.[1] In the present case there was a clear division – indeed a semi-colon – between the creation of the servitude and most of the rest of the clause (beginning with the words 'declaring that'). There is much to be said for emulating this way of doing things. Nonetheless, if we read the sheriff correctly, the default rule, in his view, is that conditions *are* severable from the servitude proper – that, in other words, there is a presumption of severability which will be applied unless the drafting of the clause clearly implies that it should not be applied.[2]

Six rules

Lying behind this decision was the view that 'conventional servitudes are not to be construed with the same rigidity as is applicable to real conditions or burdens'[3] – a view for which there was clear prior authority.[4] Today the view is more accurately expressed as being that servitudes are not to be construed with the same rigidity as *used* to be applicable to real burdens, because s 14 of the Title Conditions (Scotland) Act 2003 now provides that: 'Real burdens shall be construed in the same manner as other provisions of deeds which relate to land and are intended for registration.' Still, some differences probably remain between servitudes and real burdens. As has been seen elsewhere in this volume,[5] real burdens must be set out in full within the four corners of the deed whereas with servitudes there is greater scope – just how great is not entirely clear – for the use of extrinsic evidence. And, perhaps because of the sheer familiarity of servitude types, so that future owners know already what it is that they are taking on or (as the case may be) receiving, courts are more inclined to interpret servitudes with a degree of indulgence.

This more indulgent principle of interpretation was the first (but only the first) of a set of rules for servitudes set out by the sheriff. The remaining five are worth quoting, at least in outline:[6]

> Second, if the meaning of the servitude obligation remains clear, the grant will not necessarily be invalidated by poor drafting … Third, the existence of a conventional servitude right of access is not dependent on clear specification in the deed of the route by which such access is to be exercised … Fourth, a deed may in principle both create a servitude right and stipulate conditions on the exercise of that right … [A] lack of precision in the drafting of a servitude condition or reservation does not mean that there is a lack of precision in the servitude right itself. The two can in principle be considered separately. It follows that an enforceable servitude right may be seen

1 For a case on real burdens from 2019 where a finding of severability was also reached, but on less plausible grounds, see *Greenbelt Group Ltd v Walsh* [2019] SAC (Civ) 9, 2019 Hous LR 45, discussed at pp 131–32 above.
2 Paragraph 55.
3 Paragraph 42.
4 Two of the leading cases were cited in the course of the sheriff's decision: *Hunter v Fox* 1964 SC (HL) 95 and *McLean v Marwhirn Developments Ltd* 1976 SLT (N) 47.
5 See pp 128–32 above.
6 Paragraphs 43–47. There is also a seventh rule in para 48 but this is less a general rule than one which is applicable to the particular facts of the case. A starting-point for the sheriff's rules were the ten 'principles' set out by counsel for the defender (para 10).

to exist, even if a specified servitude condition or reservation is unenforceable for want of clarity …

And what is not said

Ancillary rights: the relevant test

Although servitudes have tended to become ever longer, as the previous case shows, even the most extravagant of servitudes may not cover *all* ancillary rights which the dominant proprietor may turn out to want or need. In that event the dominant proprietor must rely on implied ancillary rights – on the rights which, while not expressed in the deed itself, are nonetheless implied by law as needed for the exercise of the servitude.

The modern law of implied ancillary rights began, in 2007, with the decision of the House of Lords in the great Shetland case of *Moncrieff v Jamieson*.[1] We say 'began' but it also largely ended there too because, since *Moncrieff*, the issue of ancillary rights seems rarely to have troubled the courts.[2] Suddenly, however, in 2019 there have come along not one new case but two. We will come to these cases shortly. Before we do so, however, we should summarise the test for implying ancillary rights which emerged from the detailed discussion by the House of Lords in *Moncrieff*.

The test has two limbs.[3] For an ancillary right to be implied it must be 'necessary for the convenient and comfortable use and enjoyment of the servitude';[4] and it must have been in the reasonable contemplation of the parties at the time when the servitude was created. The second requirement is easy to overlook. It exists because, in implying rights, the court must consider the terms of the servitude itself and the circumstances surrounding its creation. As the court is putting words into the mouths of the parties, so it must try to gauge the parties' original intentions. To some extent the second limb may rein in the first. It is true, as Lord Hope emphasised in *Moncrieff*, that a right may be within the parties' contemplation even if it is not in fact exercised at the time of the servitude's creation, for '[a]ctivities that may reasonably be expected to take place in the future may be taken into account as well as those that were taking place at the time of the grant'.[5] But parties – and especially the servient proprietor – cannot be taken to have contemplated activities for which there was no obvious need at the time of creation.

Johnston v Davidson[6]

We now turn to the cases. Like *Moncrieff v Jamieson*, the right sought to be added by implication in *Johnston v Davidson* was a right of parking. The facts

1 [2007] UKHL 42, 2008 SC (HL) 1.

2 A rare exception is *SP Distribution Ltd v Rafique* 2010 SLT (Sh Ct) 8, discussed in *Conveyancing 2009* pp 101–03. The court in that case refused to imply any ancillary rights. We will soon be much better informed, as Professor Roderick Paisley has completed a substantial book on *Rights Ancillary to Servitudes* which is expected to be published in the course of 2020.

3 For a discussion, see *Conveyancing 2007* pp 111–17.

4 Paragraph 29 per Lord Hope.

5 Paragraph 30.

6 29 August 2019, Forfar Sheriff Court. The decision was by Sheriff Gregor Murray.

were these. The pursuer owned number 16 Fox Street, Carnoustie, Angus, and the defenders number 14. Neither house had direct access to Fox Street, both being reached by (i) a private roadway followed by (ii) a concrete path which led from the roadway to number 14 and then beyond to number 16. In the late 1990s both properties came into the ownership of local builders who renovated the houses and then sold them. First to be sold was number 16. The disposition, in 1998, conferred in respect of the roadway 'a heritable and irredeemable[1] servitude right of access in common with … (the) proprietors of [number 14]'. Ownership of the roadway, however, remained with the builders and in due course was conveyed as part of number 14. In the result, therefore, the pursuer, as owner of number 16, had an access servitude over the roadway, which was the property of the defenders. The wording did not specify whether access was to be by vehicle or by foot alone, but the sheriff was ultimately to decide that access was by vehicle.[2]

Number 16 itself could not be reached by vehicles but there was room on the roadway to park up to four cars. For many years, the pursuer availed himself of this possibility, first of all from 2004 until he moved to Thailand in 2007, and then again, on his return from Thailand in 2012. By 2007, however, the defenders had started to challenge the pursuer's right to park and, in his absence abroad, they divided the roadway in two by erecting a fence, and also planted a fast-growing conifer tree. In February 2019 they went further, erecting lockable bollards between Fox Street and roadway and refusing to give the pursuer a key. The effect was to make it impossible for the pursuer to park, or indeed to take access by car at all.

In this action the pursuer sought declarator of his right to park on the roadway, and interdict against obstruction by the defenders. Parking, admittedly, was not mentioned in the pursuer's servitude, but the pursuer argued that a right to park was included within the access servitude by implication on the basis of the decision of the House of Lords in *Moncrieff v Jamieson*.

The facts of *Moncrieff* had been, to say the least, unusual. The successful pursuers owned a house which faced the sea and which could only be reached, from the landward side, by a private road over which they had a servitude of way. Due to a steep fall in the land, it was not possible to take a car from the end of the road on to the pursuers' property, and the road was too narrow for a vehicle to turn. Accordingly, the pursuers' practice was to use part of the defenders' land for turning and parking. A dispute arose as to their entitlement to do so. If the pursuers were not allowed to park, they would plainly suffer inconvenience, even hardship. As Lord Hope explained:[3]

1 The standard phrase, but a curious one. A heritable servitude, as opposed to a moveable one? An irredeemable servitude, as opposed to a redeemable one? We look forward to encountering a moveable redeemable servitude.

2 Somewhat surprisingly, this issue was treated, not as a straightforward matter of interpretation of the words used (as in, for example, *Parkin v Kennedy*, 23 March 2010, Lands Tribunal, discussed in *Conveyancing 2010* pp 178–79), but, like the right to park, as a case of implied ancillary right. Yet, unlike with parking, there were words ('servitude right of access') to interpret.

3 Paragraph 34.

> For the owners, use of their own vehicles would involve walking a distance of about 150 yards, in all weathers and in times of darkness as well as in daylight, over what the sheriff has described as a significantly steep descent or climb in open and exposed country. In the case of a mother with very young children, for example, this would mean leaving them unattended and unsupervised in the house while parking or collecting her vehicle, or alternatively taking her children with her on foot in such conditions to and from the place where she had to park her vehicle. Owners who had no difficulty in driving but found walking difficult because they were disabled or elderly would have to do this too, as the restriction on parking for which the defenders argue applies to everyone … In my opinion it is impossible to reconcile such hardships with the use that might reasonably have been expected to be made of the servitude right of vehicular access for the convenient and comfortable use of the property. It would mean, as Lord Philip said in the Extra Division, para 90, that the proprietor's right of vehicular access would effectively be defeated.

Against this background, the House of Lords was willing to concede that a right of parking existed by implication. Yet it was a close-run thing. Lord Rodger virtually dissented, while Lord Neuberger too had doubts.[1] Throughout the speeches, it was emphasised that the circumstances in *Moncrieff* were 'particular and unusual'[2] being based on 'unusual topography'[3] and amounting to 'unusual facts'.[4] The question to be considered in *Johnston v Davidson*, therefore, was whether these 'unusual facts' were replicated in the present case – whether, in other words, Carnoustie was like Shetland.

The sheriff held that it was. As was demonstrated by the evidence produced in the course of the proof, there could be no parking on the pursuer's own property. Nor could there be parking in Fox Street itself because it was too narrow. Finding a parking space elsewhere would not necessarily be easy. Meanwhile the house in Carnoustie, like its counterpart in Shetland, was suitable for a couple with young children, who could not be left unattended while their parent tried to find somewhere to park the family car.

In evaluating the evidence, the sheriff paid no attention to the second limb of the test in *Moncrieff* (ie that a right to park must have been in the reasonable contemplation of the parties at the time when the servitude was created). This was despite the fact that evidence existed which would have been helpful to the pursuer, namely that when the builders sold number 16 in 1998 (and granted the servitude), they considered that off-street parking would make both houses more attractive to potential purchasers and thus intended the purchasers of number 16 to have parking rights in the roadway.[5]

Instead the sheriff relied on the flimsier argument that, because the servitude granted in the 1998 disposition of number 16 was granted 'in common with … (the) proprietors of [number 14]', this meant 'that the owners of numbers 14 and 16 are to share identical rights over the disputed area and the path, notwithstanding

1 Paragraph 125.
2 Paragraph 36 per Lord Hope.
3 Paragraph 101 per Lord Mance.
4 Paragraph 124 per Lord Neuberger.
5 Finding-in-fact 32.

that number 14 owns it'.[1] Despite the broad terms used, it is assumed that the sheriff did not intend to say that the pursuer, despite not owning the roadway, had *all* the rights of an owner over it. After all, if that had been the intention, the driveway would have been made common property, as is often the case in this type of situation. But if the pursuer's rights were less than those of ownership, there remained the difficulty that the only such right specified in the servitude itself was a 'right of access'.

The pursuer was perhaps fortunate to have succeeded in this case, and we understand that the decision has been appealed. Those who live in towns cannot necessarily expect to have on-site parking, and the law should hesitate before conferring parking rights at the expense of a neighbouring owner. Lord Rodger's observations in *Moncrieff*, even if made in the course of a quasi-dissent, seem particularly apt in this context:[2]

> Especially in cities, there are many flats or houses without any adjacent land on which cars can be parked. That feature is often a significant factor for people when deciding whether to buy the flats or houses and, if so, at what price. Those who own such properties can get to them by car, but are very familiar with the need to drop off their shopping and passengers before trekking off to search for a resident's parking space some streets away. Those with young children and no one to watch them have to take the children to the parking place and then trail them back home, whether up or down a steep hill, whether through icy rain or in blistering sun. These are simply the inevitable everyday consequences of the owners' decision to buy the house or flat in question … Unlike your Lordships, I am, accordingly, utterly unmoved by the supposedly intolerable sufferings of owners of Da Store [the house in question] who might face that dire modern dilemma of leaving their children unsupervised or taking them on foot, back and forward, up or down a significant slope in open and exposed country.[3]

Macallan v Arbuckle[4]

If the decision in the previous case may seem over-generous in allowing ancillary rights, *Macallan v Arbuckle* may seem rather stingy in refusing them. Taken together, the decisions show the difficulty of predicting the outcome of particular cases, at least in the current undeveloped state of the law. Much will depend on the way in which the evidence comes out at proof. And while some judges may be inclined by temperament to lend a helping hand to servitude holders, others may be slower to award a right for which the holder did not bargain or pay, and which is likely to impact adversely on the servient proprietor.

The dispute in *Macallan v Arbuckle* arose from the splitting up of the Carphin Estate, Luthrie, Cupar, Fife, in 2016. Carphin House and its policies were disponed

1 Paragraph 105.

2 Paragraphs 85 and 86. As the owner of a flat in Dublin Street in Edinburgh's New Town, Lord Rodger was speaking from personal experience.

3 To this one might add Lord Hope's comment (at para 34) that: 'The situation in this case … is far removed from the urban situation to which Lord Rodger refers where people who buy flats or houses without adjacent car parking just have to put up with it.' Carnoustie, in this context, is also an 'urban situation'.

4 11 June 2019, Dundee Sheriff Court. The decision was by Sheriff George Way.

to the pursuers;[1] the surrounding farmland was disponed to the defenders. Access to Carphin House from the public road was by means of a single-track private roadway which was part of the subjects disponed to the defenders. The roadway had been metalled in 2012, before the sale.

The 2016 disposition in favour of the pursuers conferred:

> an unrestricted heritable and irredeemable right of pedestrian and vehicular access by to and egress from the Disponed Property [Carphin House and policies] from the public road over the private access roadway coloured green on plan no 1 and plan no 2 annexed and signed as relative hereto.

The plans, which were extracts from the OS map, indicated the roadway by means of dotted lines, and the green colouring ran strictly between these lines. This left a gap, for verges and field entrances, between the line coloured green and the fields on either side of the roadway. However, once the roadway entered the policies of Carphin House (ie the subjects of the disposition), the colouring of the roadway extended beyond the dotted lines, leaving no gap between roadway and fields.

The parties seem to have been on bad terms and one might speculate that this was because of the pursuers' intention of using Carphin House as a venue for weddings and other events.[2] The usability of the roadway would presumably be of some importance for the success of such a venture.

In this action the pursuers sought declarator that 'in exercise of their servitude right of pedestrian and vehicular access and egress over the access roadway … the pursuers are entitled to use all passing places and verges forming part of or adjacent to the said access roadway for the purposes of allowing other users of the said roadway to pass'.[3] The passing places and verges lay outside the green colouring on the plans, as already explained, but were part of the metalled surface of the roadway and therefore, it might be thought, intended to be used as part of it.

The pursuers had two main arguments. In the first place, they said that the servitude as granted applied to the full extent of the metalled road and hence included the passing places and verges. In the second place, and in the event of the first argument failing, they said that, even if the servitude proper was confined to the green colouring, the pursuers were entitled to use the passing places and verges, where necessary, in order to pass a vehicle coming in the opposite direction. This was an ancillary right which was implied in the initial grant of servitude.

The first argument was perhaps not a very strong one. The colouring, said the pursuers, indicated only the route of the servitude and not its extent. Its extent should be judged by the metalled surface of the road. This argument, however, encountered a number of difficulties.[4] In terms of the grant of

1 The pursuers' title was registered under title number FFE114227.
2 The local opposition to the use of Carphin House as a wedding venue has been enlivening the pages of the *Dundee Courier*: see www.thecourier.co.uk/tag/carphin-house/.
3 The pursuers also sought interdict against alleged obstruction by the defender.
4 Not all of these were discussed by the sheriff.

servitude, what was coloured green was not the route but 'the private access roadway' itself. That the colouring was done in this way deliberately and not by accident was shown by the change in the colouring in respect of the section of roadway which formed part of the pursuers' property. The terms of a servitude were to be interpreted strictly (though not of course malignantly).[1] Finally, the pursuers' argument was inconsistent with the decision of the First Division in *Stansfield v Findlay*.[2] The servitude under consideration in that case was:

> a heritable and irredeemable servitude right of pedestrian and vehicular access to and egress from the said subjects and others hereby disponed, for all purposes and over that section of road or track retained by us … indicated and coloured brown on the said plan annexed and signed as relative hereto.

As the section coloured brown on the plan excluded the verges at certain points, the First Division had little difficulty in deciding that the servitude did not confer a right to open additional accesses over such verges.

The argument as to ancillary rights was a different matter. If a vehicle on the roadway met a vehicle coming the other way, the only method by which the vehicles could pass was by making use of the verges and passing places. Such use might therefore plausibly be regarded as both necessary for the convenient and comfortable use and enjoyment of the servitude and also as having been in the reasonable contemplation of the parties at the time when the servitude was created. Of course, the owner of the farmland, and those travelling with his permission, could make free use of the verge. But those seeking access to and from Carphin House were not in the same fortunate position. Without an implied ancillary right, the use of the roadway would require either that no vehicle bound for Carphin House entered the roadway when a vehicle bound from Carphin House was already on the roadway, or that when an encounter took place one of the vehicles was willing to reverse to the end of the roadway. That this would make life difficult for wedding guests was all too evident.

The sheriff was unmoved by the argument. The pursuers 'do not suggest anywhere on record that they cannot have free access and ingress without moving out of the dotted green corridor'.[3] So the access roadway was perfectly usable. Admittedly, the narrowness of the road 'will, doubtless, be inconvenient for all users from time to time'.[4] But:[5]

> In the event that the pursuers wanted something more they should have negotiated for it as the vendor (Mr Wemyss) owned the entire estate. Equally, if on reflection the single track access was too restrictive for their needs, they should have bought another property.

1 Paragraph 49.
2 1998 SLT 784. Although the SLT report gives the pursuer's name as 'Stansfield', we are told that it was really 'Stansfeld'.
3 Paragraph 52.
4 Paragraph 52.
5 Paragraph 53. This passage has some affinity with the passage from Lord Rodger quoted above.

One factor which weighed with the sheriff was that, whereas in *Moncrieff v Jamieson* the ancillary rights (of parking) were to be exercised within the servient tenement, the present proposal would involve taking access beyond the track coloured green and hence beyond the servient tenement. *Moncrieff* was therefore 'not authority for invasive activity on adjacent land'.[1] The difference, however, is more apparent than real. In both cases the ancillary activity was to be beyond the roadway over which access was being taken. The point of distinction was merely that, whereas in *Macallan v Arbuckle* the route and extent of the servitude was specified (resulting in an exceptionally narrow servient tenement), in *Moncrieff* it was not (resulting in an exceptionally wide servient tenement which comprised the entire property of the relevant defenders).[2] That is a rather slender basis for distinguishing one case from the other.

MISSIVES AND IMPLIED TERMS ABOUT PHYSICAL CONDITION

Introduction

As well as express contractual terms, there can also be implied terms. The subject is too large even to sketch here. But it is well settled that certain recognised types of contract – the 'nominate' contracts as they are sometimes called – come with a default set of implied terms.[3] These terms apply unless the parties opt out.[4] Often such implied-in-law terms have their basis in legislation: there are many statutes dealing with particular types of contract, and they bristle with implied-in-law terms. Familiar examples include the Partnership Act 1890, the Marine Insurance Act 1906, the Sale of Goods Act 1979, and so on. But in the absence of legislation the common law too can provide implied-in-law terms. A familiar example in the sale of heritable property is that risk (*periculum*) passes when the contract is concluded. Of course, it is usual for risk to be subject to express provision, so that the rule implied by law is ousted. And there are other implied terms, related to the title and so on.

But what about the physical state of the property? Is there anything in the sale of heritable property that corresponds to the well-known implied terms as to quality that apply to the sale of moveable property, contained in the Sale of Goods Act 1979? In practice, it is assumed that there are no implied terms as to the state of the property: *caveat emptor.*

This is not a major problem for buyers. They can bargain for express terms in the missives, and indeed missives generally include such terms. As just one familiar example, the Scottish Standard Clauses have a provision about the

1 Paragraph 51.
2 The servitude in *Moncrieff* was 'a right of access from the branch public road through Sandsound'.
3 These are terms that are 'implied-in-law'. There is also such a thing as a term 'implied-in-fact'. The standard set by the courts for implied-in-fact terms is high (some would say too high). In any event we are not here concerned with the question of implied-in-fact terms in contracts of sale.
4 Sometimes, indeed, opting-out is not permitted: a well-known example occurs in the sale of goods by businesses to consumers, where certain implied-in-law terms cannot be opted out of.

state of the central heating system and other appliances.[1] The buyer may have the benefit of a survey; in residential purchases there will be a home report. For newly-built properties there will typically be an NHBC (Buildmark) certificate, or similar. So the 'implied terms about condition?' question is not usually important. Still, the question is interesting in itself and there can be unusual situations in which the question does become one of practical significance. So what is the law? These reflections are prompted by a case that has only emerged in 2019, though decided in 1980, *Barratt Developments (Falkirk) Ltd v Smith*.[2]

Barratt Developments

Mr Smith entered into missives with the pursuer, Barratt Developments, to buy a small field in or near Galston, Ayrshire.[3] When the date for settlement arrived Mr Smith declined to settle, on the basis that, since the date of conclusion of missives, the property had become flooded, this flooding being caused, said Mr Smith, by works carried out by Barratt Developments on an adjacent site that it owned. Barratt then raised an action of implement against the buyer. The defence was that the seller was in breach of an implied term that the land would be handed over in the state which it was in at the date of the missives:

> The changes in the field were … due to the fault of the pursuers [Barratt Developments]; they had rendered the field a different item from what was purchased, and therefore since the pursuers could not convey what was purchased, the defender was not bound to pay the price … He said that there must be an implied condition that the land would be handed over in the state in which it was at the date of the missives.

Barratt made two submissions to the court. The first was that risk passes at the time of contract,[4] unless otherwise provided in the missives, which was not the case here. The second was that 'there was no implied condition in a contract for the sale of heritage as to fitness', citing Bell's *Principles*[5] and Gloag's *Contract*.[6]

Decree of implement was granted in favour of Barratt. The sheriff,[7] in a brief judgment, did not accept that there was any such implied term. 'The obligation of the seller of land is to deliver a valid title to the buyer.' As to risk, it had passed on conclusion of missives.

So far, so simple. But there are two odd features. First, risk (*periculum*) concerns the question of who bears the risk of *accidental* damage in the course of a sale.

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1 Clause 4 of the current (4th) edition.
2 19 November 1980, Kilmarnock Sheriff Court. We are grateful to Professor Roderick Paisley for drawing this case to our attention and for providing a copy of the sheriff's Opinion.
3 The terms of the missives were significantly different from those that one would typically see nowadays, but that in fact adds to the interest.
4 *Sloans Dairies Ltd v Glasgow Corporation* 1977 SC 223, holding that in this area Scots law has received Roman law.
5 George Joseph Bell, *Principles of the Law of Scotland* (4th edn, 1839; reprinted Edinburgh Legal Education Trust, 2010) § 890.
6 William Murray Gloag, *The Law of Contract* (2nd edn, 1929) p 314.
7 Sheriff D B Smith.

Here the buyer was asserting that the damage (flooding) had not been accidental, but had been the fault of the seller – a point that could not be decided without proof. With respect, the decision seems wrong here.

But the more interesting point is the next. At the end of the judgment the sheriff seems to backtrack:[1]

> I am not saying that the defender has no remedy against the pursuer, if his field has been damaged by their operation. I am merely saying that whatever rights he may have to pursue the sellers for damages for loss caused by their *culpa* in damaging his field, these rights do not constitute a defence to this action for implement of the contract of sale. See … [James] Mackintosh, *The Roman Law of Sale* (2nd edn [1907]) page 72.[2]

In other words, the sheriff is saying that the seller may indeed have been liable, but that this, if a fact, would give to the buyer no more than a right to damages, as opposed to a right to refuse to settle. This is arguably inconsistent with the sheriff's view that there had been no breach of contract. Possibly he meant that the buyer's right to damages was delictual rather than contractual.

Whatever the answers to these puzzles may be, the point we wish to pick up is that the learned[3] sheriff suggests that implied terms as to physical condition, based on Roman law, might be relevant. Might that be generally true?

The contract of sale

What is the law of sale – that is to say, of the *contract* of sale – in Scotland? Nowadays it is split. There is the law relating to the sale of moveables, of goods, to be found in the Sale of Goods Act 1979, plus the applicable provisions of the Consumer Rights Act 2015. That is, for the most part, UK-wide law. The law relating to the contract of sale of immoveables – heritable property – remains a matter of common law. In other words, originally the law relating to the contract of sale was a unitary law, applicable to both moveables and immoveables (although with some inevitable differences), until that unity ended with the legislation of the nineteenth century about the sale of goods.[4] So what is the common law of the contract of sale, once applicable across the board, and now only to heritable property? Is it indeed a law in which the seller is presumed to warrant nothing as to the quality of what is sold?

Answer: nobody really knows. The common law of sale has, unsurprisingly, Roman roots – hence the sheriff's comments in *Barratt Developments* – but even

1 At p 6 of the transcript.

2 The passage by Professor Mackintosh is long, and we quote only one sentence: 'Though *periculum rei venditae nondum traditae est emptoris* yet there was an accessory obligation on the seller to take due care of the thing (*custodia plena*) until delivery.'

3 Here not merely an honorific adjective.

4 We stress the word 'contract'. Of course, the *property* aspects of sale differ and have always differed, as between goods and heritable property. The person who succumbs to the allure of a tasty hot vegan sausage roll at Greggs does not have to register his title thereto and therein in the Scottish Register of Sausage Rolls.

in Roman law the focus was on disputes about moveables. The same was true in Scotland, where the typical dispute tended to be about horses. It was clear that for moveables there did exist such implied terms. Logically such terms should be equally applicable to contracts for the sale of heritable property, given that the law of contracts of sale was essentially unitary. Stair[1] and Erskine[2] drew no distinction, though evidently their focus was on moveables. Bankton does draw the distinction.[3] In Bell one finds an implied distinction.[4]

There is an interesting passage in Hume's *Lectures*. After discussing the implied warranty of quality in the sale of goods,[5] he continues:[6]

> I have taken the whole of these illustrations from the sale of moveable subjects; but this is only because it is chiefly in that department that examples of latent faults and vices[7] happen, and by no means with any view of limiting that doctrine to the moveable class of things. The truth is that tenements of lands are not often visited by such latent vices and diseases as may afterwards break out and destroy the use of the subject. But put a proper case, and the same principle will rule. Suppose, for instance, that I buy a new house from a person for whom it was built by contract, and that in a month it tumbles down … I take it free of this bargain, or, if I have paid I have repetition of the price …[8]

It will be noticed that the buyer here is not buying direct from the builder (as to which special rules may apply – see below) but is buying a house that has been recently built, and which accordingly can be reasonably expected to be of 'satisfactory quality'.[9]

If the common law says that there is some sort of implied term as to quality, it has not been taken away by legislation. But at all events the law has failed to develop and there are plenty of *dicta* to be found against the notion of implied terms,[10] and, moreover, that has long been the general opinion of conveyancers. In 2019 there was published a book which examines the issue at some length, without, however, being able to come to a definite conclusion.[11]

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1 *Institutions* I.14.1. For Stair, sellers were liable only for defects of which they were aware.
2 *Institute* III.3.10.
3 *Institute* I.19.8.
4 In his coverage of the general contract of sale, Bell in his *Principles* says at § 95 that there is an implied term as to quality, but his wording indicates that he had only moveables in mind at that point, and when at § 889 ff he deals with special rules about the sale of land he says nothing on this matter.
5 This was of course prior to the Sale of Goods Act 1893; ie Hume is discussing the common law of sale.
6 *Baron Hume's Lectures 1786–1822* vol II (ed G Campbell H Paton, Stair Society vol 13, 1949) pp 42–43.
7 'Vice' in the sense of defect. The Latin *vitium* has a broad semantic range, including 'defect'.
8 Whether 'repetition' (ie repayment of what was paid) is correct, as opposed to damages (the amount of which might be less or more than the price paid) is an interesting one that will not be entered into here.
9 To borrow a phrase from s 14 of the Sale of Goods Act 1979.
10 The three sheriff court cases about to be mentioned presuppose that there is no implied term.
11 Chathuni Jayathilaka, *Sale and Implied Warranty of Soundness* (Studies in Scots Law vol 6, 2019) ch 4. See also K G C Reid, 'Warrandice in the Sale of Land', in D J Cusine (ed), *A Scots Conveyancing Miscellany: Essays in Honour of Professor J M Halliday* (1987) 152.

Newbuilds

Construction contracts and sale contracts

As already indicated, where there is a sale by a builder there is a special rule as to implied terms of quality. Authority is less than plentiful, but it seems reasonably clear that, depending on their terms, missives can be interpreted as being both (i) a contract for the sale of the property and (ii) a contract for the carrying out of building work, and that in the latter there is an implied term that the work will be carried out with reasonable competence.[1] But the mere fact that the property is a newbuild will not necessarily lead to that result: if the missives are simply for the sale of a property that has *in fact* been newly built, without being also a contract for construction, then there is no such contract and, accordingly, the implied terms of a construction contract cannot exist.[2] The various decisions footnoted are of some significance. But they tend to support the view that in the contract of sale *as such* there are no implied terms as to quality.

B–2–C?

Newbuild cases will commonly, though by no means always, involve 'B–2–C' contracts, that is to say, contracts between a business on the one hand and a consumer on the other. Is that fact relevant?

As far as the common law is concerned the answer is negative. But modern statute law often imposes special duties on B–2–C transactions. Might this be true of the sale of heritable property, such as, say, the sale of a new house in a new development? Of course such a sale may in fact involve express warranties of quality and may also be backed by third-party certification, for instance by NHBC. Still, the question remains, and in some cases can be of practical significance.

The candidate legislation is Part 2 of the Consumer Rights Act 2015.[3] This applies to contracts 'between a trader and a consumer'.[4] That would cover sales of new houses by developers to ordinary individual buyers. What is the effect? 'An unfair term of a consumer contract is not binding on the consumer.'[5] What is 'unfair'? 'Whether a term is fair is to be determined (a) taking into account the nature of the subject matter of the contract, and (b) by

1 See in particular *Adams v Whatlings plc* 1995 SCLR 185 and *Owen v Fotheringham* 1997 SLT (Sh Ct) 28. In the latter case Sheriff J V Paterson notes that the implied terms of satisfactory workmanship are based on the *locatio operis faciendi* of Roman law. As to the first case, *Adams*, we cannot resist quoting from the judgment of Sheriff B A Lockhart (at 186): 'The pursuers aver that after occupying the house cracks in the walls and ceilings appeared. These became progressively more severe. They appeared in all rooms and were visible both internally and externally. Cracks were pronounced at about the junction of walls and ceilings, window frames and staircases. Structural joints in the house began to open. Skirting boards became detached from walls and floors.'

2 *Goudie v Oceanic Development Ltd* 2005 SCLR 10. This was a refurbishment case rather than a newbuild case, but the distinction is not relevant for present purposes.

3 Replacing the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083.

4 Consumer Rights Act 2015 s 61(1).

5 CRA 2015 s 62(1).

reference to all the circumstances existing when the term was agreed and to all of the other terms of the contract or of any other contract on which it depends.'[1] Schedule 2 of the Act sets out a non-exhaustive list of unfair terms. The rights conferred on consumers by the 2015 Act are (subject to certain qualifications) non-waivable.

Part 2 of the 2015 Act will indeed govern B–2–C sales of heritable property. But does Part 2 imply conditions as to quality? To a limited extent the answer is affirmative. Going back to the distinction mentioned above, if the missives can be interpreted as involving a contract for construction, then any exclusion of liability for faulty work could potentially be challenged on the basis of the 2015 Act. But if the missives are simply for the sale of a building that is, or is to be, newly constructed, then the position is less clear. Suppose for example the missives say, with brutal frankness, 'the house may be in utterly rubbish condition but that makes no difference: you still have to pay in full and you will have absolutely no come-back against us'. That might seem an unfair term: see para 2 of schedule 2 to the 2015 Act, which gives the following as an example of an unfair term:

> A term which has the object or effect of inappropriately excluding or limiting the legal rights of the consumer in relation to the trader or another party in the event of total or partial non-performance or inadequate performance by the trader of any of the contractual obligations, including the option of offsetting a debt owed to the trader against any claim which the consumer may have against the trader.

But does the missive term 'exclude the legal rights of the consumer'? What legal rights? What if Scots law gives no such rights in the first place – which is what is generally assumed, in relation at least to contracts of sale?

Conclusion

The law seems to us uncertain. The distinction, for newbuilds, between those that are construed as involving a building contract and those that are not[2] seems a fine one, and perhaps unworkable. There may be an implied term as to quality at common law, though, if so, its interpretation might not be easy in practice.[3] Any attempt to contract out of such an implied term in B–2–C cases would be subject to the provisions of Part 2 of the Consumer Rights Act 2015.

Barratt Developments (Falkirk) Ltd v Smith, the case with which we started, is in itself of limited significance. What is significant is the issue it raises, as to the law that governs contracts for the sale of heritable property. What is needed now is an appellate case in which there is full citation of authority and good quality argument.

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1 CRA 2015 s 62(5).
2 *Goudie v Oceanic Development Ltd* 2005 SCLR 10.
3 Just as the word 'satisfactory' in the Sale of Goods Act 1979 presents problems of interpretation in concrete cases.

ENFORCEABILITY OF PRE-2004 REAL BURDENS

Introduction

Like servitudes, a burden requires (at least) two properties: a burdened property which is subject to the real burdens, and a benefited property the ownership or lease or proper liferent of which gives title to enforce the burdens.[1] There can be two or more benefited properties, and hence two or more enforcers, but it is indispensable that there be at least one. Except for personal real burdens (such as conservation burdens), which is a very narrow class,[2] a real burden without a benefited property is unenforceable and should be removed from the title sheet of the burdened property.

Real burdens created on or after the 'appointed day' (28 November 2004) are required to nominate and identify the benefited property (or properties) in the disposition or other constitutive deed, and the deed itself must be registered against both benefited and burdened properties.[3] So for post-2004 real burdens there is always a benefited property, and one which is generally easy to identify.[4]

The position is quite otherwise for pre-2004 burdens. In the first place, under the common law rules then in force, there was no requirement to nominate a benefited property at all. If none was nominated, a benefited property was often implied by law. For this the rules were complex and, to a degree, uncertain. In the second place, the status of benefited property by implication was abolished by s 49 of the Title Conditions (Scotland) Act 2003, so that many properties which were benefited up until the appointed day are no longer benefited properties today. In the third place, with the abolition of the feudal system, feudal superiors ceased to exist and, with them, the enforcement rights which superiors had formerly held.[5] So another significant enforcer under the old law was lost. Finally, and by way of partial exception to the second and third points, those who were on the brink of losing enforcement rights could sometimes preserve them by registering an appropriate notice in the Land or Sasine Register.[6] Few took the trouble to do so, and the time for registration is now long past. Taking these four points together, the overall result was to leave a large number of pre-2004 burdens without a benefited property.

But what the law took away with one hand it then to some extent restored with the other. In abolishing the common law rules of implied benefited properties, the Title Conditions Act provided replacement rules which applied to pre-2004 burdens (only) and took effect on the appointed day. The result was uneven. Many properties which had been benefited under the common law rules remained

1 Title Conditions (Scotland) Act 2003 ss 1 and 8.
2 The types of permitted personal real burden are listed in Title Conditions (Scotland) Act 2003 s 1(3).
3 TC(S)A 2003 ss 4(1), (2)(c)(ii), (5).
4 The main case where the benefited property may be hard to identify is with deeds of conditions, not least because there is often no dual registration in the normal sense. This is because, at the time of granting, the granter is likely to hold both the benefited and the burdened properties within the same title. The difficulties which can then result were explored at pp 128–34 above.
5 Abolition of Feudal Tenure etc (Scotland) Act 2000 s 17.
6 AFT(S)A 2000 s 18; TC(S)A 2003 s 50.

benefited properties under the new statutory rules. Many other properties which were not benefited under the common law rules at all, and whose owner had no enforcement rights, became benefited properties under the statutory rules. Equally, however, a large number of burdens which were enforceable before the appointed day were suddenly unenforceable after that day due to the absence of a benefited property.

Three principles

All of this is complicated, and has caused a great deal of trouble in practice. But things may seem a little easier when it is realised that the enforceability of pre-2004 real burdens today rests on three, and only three, principles.[1] First, real burdens are enforceable if a benefited property was nominated in the constitutive deed. Second, they are also enforceable if a benefited property was nominated by registered notice (though few were). Third, real burdens are enforceable if a benefited property can be identified under one of the new statutory rules set out in the Title Conditions Act. If none of these principles applies, there is no benefited property, and the burden is unenforceable.

In seeking to determine the applicability of these principles it is important to look at the burdens writ itself (or a copy) rather than relying on its partial transcription in the D (burdens) section of the title sheet. Not only is that transcription incomplete, and sometimes not wholly accurate, but it is difficult to gather the real sense of a deed, and hence its proper interpretation, from the extracts reproduced in the title sheet.[2]

The first of the three principles is straightforward, at least in the normal case. So is the second. The third principle, however, involves the distasteful and perplexing task of grappling with the relevant rules in the Title Conditions Act. There are three rules in all – in ss 52, 53 and 56 of the Act. By way of encouragement, we begin with the simplest.

Section 56

Section 56 concerns facility burdens and service burdens. Only the former are much encountered.

A 'facility burden' is 'a real burden which regulates the maintenance, management, reinstatement or use of heritable property which constitutes, and is intended to constitute, a facility of benefit to other land';[3] and it is such 'other land' which, under s 56, is declared to be the benefited property (or properties) in the burden.[4] Examples of facilities include recreational areas

1 For a more detailed account, see G L Gretton and K G C Reid, *Conveyancing* (5th edn, 2018) paras 14-14 to 14-16.

2 Nonetheless in two of the cases considered below the Lands Tribunal did seem to rely on the parts of the deed which happened to appear on the title sheet.

3 TC(S)A 2003 s 122(1).

4 The facility itself is also declared to be a benefited property, although in practice it is typically owned in association with land which is benefited by the facility (and hence is itself declared to be a benefited property by s 56).

in housing estates, the common parts of tenements, private roads, and boundary walls.[1]

A 'service burden' is 'a real burden which relates to the provision of services [such as heating] to land', the land in question being the benefited property in terms of s 56.[2]

Among the 2019 crop of cases is a simple example of a pre-2004 burden which was held to be a facility burden.[3] The burden, imposed on land being feued for division into plots for a residential development, was that:

> the said walls, fences and hedges erected or planted or to be erected or planted shall, where mutual, between individual plots, be erected, maintained and renewed by the adjoining proprietors thereof in good and sufficient order and repair at mutual expense in all time coming …

In respect of each boundary wall, the benefited (and also the burdened) properties in this burden were held to be the properties on either side of the wall.

Sections 52 and 53[4]

Two requirements

We now turn to the other relevant provisions of the Title Conditions Act, namely ss 52 and 53. Section 52 is intricate but not fundamentally difficult. As it is more or less a restatement of the former common law, there is some familiar ground here, and the previous case law continues to be of value. Section 53, by contrast, is inscrutable and, in some cases, hardly workable. Although case law is beginning to yield some of the provision's secrets, there is still a long way to go. The best hope is probably fresh legislation and, more particularly, implementation of the Scottish Law Commission's recent recommendations for reform (discussed below).

Such case law as there has been on ss 52 and 53 has come mainly from the Lands Tribunal, and over the years the Tribunal has been a little uncertain as to whether to interpret the provisions expansively or restrictively. Recently there was an expansive phase[5] but the three decisions from 2019 suggest that leaner days are on the way, for in none of the decisions was s 52 or s 53 held to apply. The cases are *Scottish Ministers v Brechin Healthcare Group*,[6] *Leehand Properties Ltd*,[7] and *O'Gorman v Love*.[8] We will have more to say shortly about each but especially about the last two.

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1 TC(S)A 2003 s 122(3).
2 TC(S)A 2003 s 122(1).
3 *Leehand Properties Ltd* 2019 GWD 29-468 at para 39.
4 For a detailed analysis, see K G C Reid, 'New enforcers for old burdens', in Robert Rennie (ed), *The Promised Land: Property Law Reform* (2008) 71.
5 The high-water mark of which was *Thomson's Exr* 2016 GWD 27-494, discussed in *Conveyancing 2016* pp 119–26.
6 2019 GWD 18-289. The Tribunal comprised R A Smith QC.
7 2019 GWD 29-468. The Tribunal comprised R A Smith QC and A Oswald FRICS.
8 2019 SLT (Lands Tr) 1. The Tribunal comprised R A Smith QC and A Oswald FRICS.

In order for s 52 or s 53 to apply, it is necessary for the burden to satisfy both a *threshold requirement* and also an *additional requirement*. The threshold requirement is the same for both provisions, and so it is here that we will begin.

The threshold requirement: a common scheme

It is an indispensable – a threshold – requirement of both s 52 and s 53 that the burden was imposed under a 'common scheme'; and the result, if either provision applies, is that the burdens are mutually enforceable within the community of properties which is subject to the common scheme. This creates what the Title Conditions Act calls 'community burdens',[1] that is to say, burdens in which each property in the community is both subject to the burdens (ie is a burdened property) and also carries title to enforce the burdens (ie is a benefited property as well). Typical communities are housing estates and tenements, but there can also be smaller communities including communities as small as two properties.

Although 'common scheme' is not defined in the legislation, the term was already familiar from the pre-2004 common law. A standard definition is the one offered by the Lands Tribunal in *O'Gorman v Love*:[2]

> It is generally accepted that the requirements for a common scheme include[3] that at least two properties are subject to the burdens, that the burdens affecting the properties be identical or substantially similar, or in some sense equivalent, and probably also for the burdens to derive from a common source.[4]

'Internal' and 'external' common schemes

In considering the applicability of ss 52 and 53, the focus is always on a particular property – typically the client's property – which is subject to the burdens (the 'target' property), and the question being asked is: what *other* properties are included within the same common scheme as the target property (and so are potential benefited properties)? Sometimes these other properties are burdened[5] by the very same deed as the target property.[6] That would be the case, for example, where a deed of conditions burdened a housing estate, or a feu disposition conveying land for development was followed by subdivision. This we may refer to as an 'internal' common scheme – a common scheme which is internal to the deed which burdens the target property. But there can also be

1 TC(S)A 2003 s 25.
2 *O'Gorman* para 31.
3 'Include' here really means 'are'.
4 In similar vein, the statutory definition proposed by the Scottish Law Commission is: 'the imposition of the same, or similar, real burdens on two or more properties, whether or not by one person': see s 4 of the Draft Bill appended to Scottish Law Commission, *Report No 254 on Section 53 of the Title Conditions (Scotland) Act 2003* (2019).
5 Ie made subject to the common scheme.
6 The distinction which we go on to make here was traditionally expressed as the two types of case identified by Lord Watson in *Hislop v MacRitchie's Trs* (1881) 8 R (HL) 95 at 102. See eg Scottish Law Commission, *Report No 254* paras 2.7–2.10.

'external' common schemes – cases where each property subject to the common scheme was made so subject by separate dispositions or feu dispositions. And it is even possible, if not especially common, to have both – to have a common scheme which is partly internal and partly external.[1] This unwelcome possibility is sometimes overlooked.[2]

Internal common schemes are easy to spot. If (i) real burdens were imposed by a deed, and (ii) the land which is subject to the deed comprises what are, or are now, two or more separate properties (including the target property), then there is an internal common scheme. For there are two or more properties, and each is subject to the same real burdens imposed by the same deed. Of the three new cases, this was the situation in *Leehand Properties Ltd*, where a site had been feued for a residential development, and a number of houses had subsequently been built and sold.[3]

External common schemes are more elusive. It might, sometimes, be reasonably obvious from the deed burdening the target property that there are, or are likely to be, similar deeds imposing the same or similar burdens on other properties. That was the case in *O'Gorman v Love* where the target property was one of a row of Victorian villas in Helensburgh. On inspecting the titles of other villas in the row it was found that they too had similar burdens. The result was an external common scheme:[4]

> The requirements in the successive feu dispositions for each property to erect and maintain a dwellinghouse built of stone and lime and covered with slates 'of a neat and tasteful design' of a certain value, with a building line of not less than 20 feet from East King Street, are all factors indicative of a common scheme.

Conversely, it might sometimes be equally obvious that similar deeds are unlikely to exist. That was the position in *Scottish Ministers v Brechin Healthcare Group*, which concerned a feu granted in 1866 for the purpose of erecting an infirmary in Brechin. This was so clearly a one-off grant that it was unnecessary to search the register for other similar grants.[5] There was no external common scheme and that was the end of the matter. Between these two cases, however, there is often considerable uncertainty and, for the conscientious conveyancer, a great deal of unproductive scrutiny of the titles of other properties in the neighbourhood.

The uncovering of a common scheme is not enough of itself. For s 52 or s 53 to apply, a second requirement must also be met. But this requirement is not the same in the case of each provision.

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1 This possibility was briefly contemplated in *Leehand Properties* at para 22. The facts of that case involved an internal common scheme whereby a single feu disposition applied to a development known as Bracken Wood, but a neighbouring development known as Ramsay Wood was subject to 'similar' burdens and so might potentially have been part of the same common scheme. The issue was not pursued.

2 For an example, see *Conveyancing 2016* pp 125–26.

3 *Leehand Properties* para 35.

4 *O'Gorman* para 32.

5 *Scottish Ministers* para 23.

The additional requirement for s 52: notice of the common scheme

For s 52 to apply, there must, in addition, be notice within the deed which imposed the burdens on the target property that these burdens are part of a common scheme which affects other properties as well. With internal common schemes this requirement is automatically fulfilled; for if the same deed imposes burdens not just on the target property but on other properties as well, then the existence of the common scheme is obvious. By contrast, it is relatively unusual for this requirement to be satisfied by external common schemes – unusual, in other words, for a deed which burdens only the target property to indicate that other properties are also bound by the same conditions but by means of a different deed or deeds.[1] In practice, therefore, s 52 is largely restricted to internal common schemes.

Leehand Properties Ltd is an example. Land at Bracken Wood in Gatehouse of Fleet, Kirkcudbrightshire, was feued in 1994 for residential development. Real burdens were imposed in the feu disposition. Matters then proceeded slowly. By the time of the application to the Lands Tribunal, only 17 houses had been built and sold although further houses were in prospect. At this point of time there was therefore a community of 18 units (ie the 17 houses plus the land still left with the developer), each subject to the same burdens by virtue of the same deed (the 1994 feu disposition). And the existence of this common scheme was immediately obvious from the deed itself. Hence the requirement of notice was met.

As it turned out, the Lands Tribunal in *Leehand Properties* treated this as a harder question than it perhaps really was. The Tribunal drew attention to the provision in the feu disposition that:

> The Feuars shall be bound and obliged to present to the Superior, before commencing with the development of the Feu, a Feuing plan, indicating the division of the Feu into plots, which Feuing plan will not be deemed definitive and may be subject to variation by the Feuars subject to the approval of the Superiors.

This, said the Tribunal, 'tends to suggest an implied notice of the existence of a common scheme. All feuars would have knowledge from the deed of the need for a feuing plan over the whole area to be developed.' But a 'feuing plan', ie a physical plan as to which plot should be located where, is a different thing from a 'common scheme'. There can easily be one without the other. In many common schemes there is no feuing plan at all. That is unlikely to matter. What does matter is whether there is notice of a community of properties which are subject to the same real burdens; and that is something which is established by the very fact of an internal common scheme – by the very fact, in *Leehand Properties*, of the existence of the feu disposition.

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1 Traditionally, two methods of giving notice were, and are, recognised where the common scheme is internal to the target property's deed. One is where the deed obliges its granter to include identical or equivalent burdens in subsequent grants from the same estate. The other is where the deed refers to a common scheme or plan. For details and case law, see K G C Reid, *The Abolition of Feudal Tenure in Scotland* (2003) para 5.15.

Disabling s 52: a reserved right of waiver

For s 52 to apply, therefore, there must be both a common scheme and also notice of the scheme's existence. Yet even where both requirements are met s 52 might still be defeated. This is because s 52 does not apply if the deed, expressly or impliedly, excludes neighbours' enforcement rights. An express exclusion would be highly unusual. As for implied exclusion, the single example given by s 52(2) is 'by reservation of a right to vary or waive the real burdens'; and this example, which derives from the common law,[1] has come to be treated as the main or even sole example of implied exclusion.

The feu disposition in *Leehand Properties* was replete with reservations of this kind. Of particular significance, said the Lands Tribunal, was the provision quoted above in relation to a feuing plan 'which may be subject to variation by the Feuars subject to the approval of the Superiors'. The Tribunal continued:[2]

> This ability to vary tends to go against the idea of the conditions being mutually enforceable since, arguably – the clause is not entirely clear on this point – an individual feuar would be unable to prevent the alteration if proposed by other feuars and approved by the superior.

'Absent arguments to the contrary', the Tribunal concluded (the case was undefended), 'it appears that there is a reasonable argument that the conditions are not mutually enforceable by feuars – now proprietors – for the purposes of s 52.'

This conclusion seems open to question. As already explained, the provision particularly relied on by the Tribunal concerned a physical plan rather than real burdens and so was not really in point. More importantly, as the case law on the former common law shows, each individual burden in a deed must be considered on its merits.[3] Thus the fact that *some* burdens are subject to a waiver by the superior or other granter does not affect *other* burdens where the waiver is absent.[4] The feu disposition contained a number of burdens without a right of waiver.[5] It is hard to see why they were not enforceable by virtue of s 52.

The additional requirement for s 53: that the properties be 'related'

In the case of s 53, the additional requirement is that the properties subject to the common scheme must be 'related'. The difficulty, of course, is to know what is meant by 'related'. Plainly it must mean more than that the properties were subject to the same burdens, because 'relatedness' is a requirement additional to

1 See in particular A J McDonald, 'The enforcement of title conditions by neighbouring proprietors', in D J Cusine (ed), *A Scots Conveyancing Miscellany: Essays in Honour of Professor J M Halliday* (1987) 9, 22–24. The idea behind it is that if the granter of a deed reserved a unilateral right of waiver, the granter cannot have intended that third parties should have enforcement rights.

2 *Leehand* para 36.

3 *Turner v Hamilton* (1890) 17 R 494.

4 Deeds of conditions often reserve a global right of waiver, in which case s 52 is excluded in respect of all of the burdens: see the survey of deeds of conditions in Scottish Law Commission, *Report No 181 on Real Burdens* (2000) pp 501–02.

5 For example, burdens (fifth) and (sixth) but also parts of the other burdens.

the presence of a common scheme. The Title Conditions Act fights shy of giving a definition, but s 53(2) does at least contain a number of hints in the form of a non-exhaustive list of factors which may indicate 'relatedness'. The factors, which have a miscellaneous or even random appearance, are as follows:

(a) the convenience of managing the properties together because they share –
  (i) some common feature; or
  (ii) an obligation for common maintenance of some facility;
(b) there being shared ownership of common property;
(c) their being subject to the common scheme by virtue of the same deed of conditions; or
(d) the properties each being a flat in the same tenement.

The status of these factors has never been very clear.[1] If all are satisfied, then presumably the properties are 'related'. But that will be rare. What is the position if only one of the factors is satisfied, or maybe two? Are all the factors of equal weight? How much hangs on the significance of the factor when set against the burdens as a whole? And finally, what is the position where none of the factors is satisfied? Does that mean that the properties cannot be 'related' or, given that the factors are non-exhaustive, can properties be 'related' by virtue of factors that are not on the statutory list?

There are easy and obvious cases where properties are 'related'. One is a modern housing estate (typically fulfilling factors (a)–(c)). Another is flats in a tenement (fulfilling factor (d)). But both *O'Gorman v Love* and *Leehand Properties* were harder cases. The former was a row of Victorian villas, the latter a partially completed housing estate where the burdens at issue were not those in the developer's deed of conditions[2] but burdens imposed in the feu disposition by which the developer acquired the land. In *Thomson's Exr*,[3] the most recent significant case, the Lands Tribunal took an expansive view of s 53, holding that two houses were related merely because the boundary wall between them was common property and, under the burdens, to be commonly maintained. The new decisions suggest a rowing back from this position.[4] In any event, in neither case were the properties found to be related.

O'Gorman v Love

We begin with *O'Gorman*. The applicant, who owned the Victorian villa at 80 East King Street, Helensburgh, sought (i) a determination as to the enforceability of real burdens contained in a feu disposition of 1862 and (ii) in the event that they were enforceable, the discharge of the burdens. The application was opposed

1 For discussion, see K G C Reid, 'New enforcers for old burdens' 82–85.
2 There was such a deed of conditions but these were not the burdens at issue.
3 2016 GWD 27–494, discussed in *Conveyancing 2016* pp 119–26.
4 The Scottish Law Commission goes so far as to say that the correctness of *Thomson's Exr* 'can be increasingly doubted': see *Report No 254* para 2.53. Insofar as it relates to boundary walls it will be reversed if the Scottish Law Commission's proposals for reform are implemented: see the proposed new s 53A(4)(d) which would be inserted into the TC(S)A 2003 by s 1 of the draft Bill appended to the Commission's *Report No 254*.

by the next-door neighbours at number 82, whose property was held on a feu disposition of 1865 with broadly similar burdens. This was thus an example of an external common scheme.

In respect of 'relatedness', the only possible indication (as in *Thomson's Exr*) was the stone wall that separated the parties' properties. But the case was weak. The wall was not mentioned in the feu dispositions; it was owned to the mid-point from each side rather than as common property; and there was no provision for shared maintenance. The best that could be said was that the wall was a feature common to the properties within factor (a)(i) of s 53(2). But, in a point which, the Tribunal noted, had not been made in *Thomson's Exr*,[1] factor (a)(i) was subject to the opening words of factor (a), which restricted its relevance to where the common feature bore on 'the convenience of managing the properties together'. In the present case it was hard to see how that requirement was satisfied:[2]

> The reference to 'the convenience of managing the properties together' suggests a degree of management for the properties themselves, either real or hypothetical. The words do not say, for example, 'the convenience of managing a common repair …' of some specific item.

Without factor (a), the case for the properties being 'related' fell away. Hence the owners of number 82 had no title to enforce the burdens against the applicant.

Leehand Properties

Matters were less clearcut in *Leehand Properties*. In that case, as previously mentioned, land at Bracken Wood in Gatehouse of Fleet had been feued in 1994 for residential development. This was an application by the developer, which still owned part of the site, for a determination that the real burdens in the feu disposition were unenforceable. The application was unopposed. The feu disposition brought about an internal common scheme, applicable also to the 17 houses already built and sold, but it was a scheme to which s 52 was held not to apply (see above). The question was whether the same was true of s 53. That depended in turn on whether the houses and the developer's remaining share of the site could be said to be 'related'.

None of the four factors set out in s 53(2) applied directly. Yet, on the authority of a Lands Tribunal decision from 2007, *Brown v Richardson*,[3] it was possible to argue that factor (c) ('their being subject to the common scheme by virtue of the same deed of conditions') applied by analogy because the 1994 feu disposition, just like a deed of conditions, set out the real burdens applicable to the whole community.[4] As the Tribunal explained in *Brown*:[5]

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1 With the implication that, if it had been made, the outcome of that case might have been different: see *O'Gorman* para 35.
2 *O'Gorman* para 36.
3 2007 GWD 28-490, discussed in *Conveyancing 2007* pp 77–80.
4 Or, to put it another way, both deeds created an internal common scheme.
5 At pp 16–17 of the transcript.

> It seems to us that a feu charter conveying the ground to the builder and establishing a scheme of conditions to be applied to the housing units to be erected may be of the same character. It may be that all the detail of many modern deeds of conditions is not to be found in this Feu Charter, and if it had merely regulated the initial development, with no ongoing burdens, we do not think that would have advanced the argument much. However, it seems to us that it did provide an analogous scheme of continuing burdens, in particular regulating further building and requiring maintenance, insurance and (if necessary) rebuilding of the individual houses. These seem to us to make this provision comparable in this context with a deed of conditions. The Feu Charter may be said to have provided an element of communal protection of amenity.

Much the same could be said of the feu disposition in *Leehand Properties*. But *Brown v Richardson* does not appear to have been cited to the Tribunal in *Leehand Properties*, and the Tribunal in any event took a different view of things:[1]

> [S]trictly speaking a deed of conditions is not the same as a conveyance. The legislative history is different and the former could take effect immediately on recording (s 19 Land Registration (Scotland) Act 1979) and before any conveyance took place. In an unopposed application we are not disposed to give the words of the Act a broad interpretation. Moreover although the feu disposition does to an extent deal with relations between the 'to be feued-off' units within Bracken Wood, to a significant extent it was intended to manage the relationship with the adjoining development being operated by the over-superior. In this respect its content was not entirely typical of a deed of conditions. So, absent submissions to the contrary, and without seeking to establish a precedent, it is not clear that the individual Bracken Wood properties are 'related' for the purposes of s 53. It follows, albeit with some hesitation, we are prepared to find that the conditions are unenforceable.

Given what has already been said about the potential applicability of s 52, the applicant can probably count itself as fortunate to have achieved this outcome.[2] It might be added that, under the Scottish Law Commission's proposals for reform, considered below, it is the approach taken in *Brown v Richardson* that is followed: properties under the proposals will be treated as 'related' where each of the properties in question 'is subject to the common scheme by virtue of the same deed', whether that deed is a deed of conditions, feu disposition or deed of some other kind.[3]

Proposals for reform

The Scottish Law Commission has been looking into s 53 of the Title Conditions Act, and its final report was published in April 2019.[4] Among the weaknesses

1 *Leehand Properties* para 38.

2 On the other hand, if the applicant had simply sought a discharge of all the burdens, the application, being unopposed, would have been granted without further inquiry under s 97 of the Title Conditions (Scotland) Act 2003. At least with hindsight, that would have been an easier way of proceeding.

3 Section 1 of the draft Bill appended to Scottish Law Commission, *Report No 254* (inserting a new s 53A into the TC(S)A 2003: the relevant provision is s 53A(4)(c)).

4 Scottish Law Commission, *Report No 254.*

identified by the Law Commission with s 53 were uncertainty, complexity, lack of publicity on the burdened property's title, and over-generosity.[1] The Commission's recommendation is that both s 52 and s 53 should be replaced by a single new provision, s 53A.[2] For s 52 this would re-enact the current law but restrict benefited properties (and therefore enforcement) to properties within 20 metres of the burdened property. Section 53, by contrast, would be substantially recast. In place of the existing statutory hints as to 'relatedness' in s 53(2), the new s 53A gives an exhaustive list of four factors, any one of which will be sufficient to create 'relatedness'. These factors are based on, but seek to clarify and improve upon, the factors listed in the current s 53(2). The list of proposed new factors is given below ('unit A' and 'unit B' are units subject to a common scheme):[3]

(a) each of units A and B is a flat in the same tenement;
(b) the common scheme provides for units A and B (whether or not with all or any of the other units of the group) to be managed together for the purposes of some or all of the burdens;
(c) each of units A and B is subject to the common scheme by virtue of the same deed;
(d) units A and B share ownership of common property (not being common property which constitutes a line of demarcation between units A and B, such as a fence or a boundary wall).

As the proposed new rules are different from the current rules, some properties which are benefited properties at the moment would cease to be benefited properties if the proposals come to be enacted. Owners of such properties would, however, be given the opportunity to preserve their current status by registration of an appropriate notice.[4]

Overall these are excellent proposals which should make this area of law a great deal simpler than it is at present. We must hope that the Scottish Government will take up the proposals as quickly as possible.

BUYING CHEAP: IS THERE A RISK?

Types of gratuitous alienation

Buying a property below market value – like selling a property above market value – is generally good news. But might there be possible downsides? If a client puts that question, what answer should be given? On this matter there has been an important Supreme Court decision in 2019 in a Scottish appeal, *MacDonald v Carnbroe Estates Ltd*.[5]

Someone who is insolvent is not allowed to make gratuitous alienations, for the simple reason that the assets ought to be preserved for the benefit of the

1 *Report No 254* paras 2.55–2.76.
2 *Report No 254* ch 3.
3 Proposed new s 53A(4) of the TC(S)A 2003, which would be inserted by s 1 of the Scottish Law Commission's draft Bill.
4 *Report No 254* ch 4.
5 [2019] UKSC 57, 2019 SLT 1469. When the case was before the Inner House ([2018] CSIH 7, 2018 SC 314, *Conveyancing 2018* Case (84)) it was called *Joint Liquidators of Grampian Maclennan's Distribution Services Ltd v Carnbroe Estates Ltd*.

creditors. Gratuitous alienations can be challenged by a subsequent trustee in sequestration or liquidator,[1] typically by way of reduction.

Gratuitous alienations are usually thought of as straightforward donative transfers, as where Aeneas, seeing that bankruptcy is looming, decides to transfer his house into the name of his sister, Euphemia, for no consideration. And gratuitous alienations often do take that simple form.

But in insolvency law the concept of gratuitous alienation is much broader than that of a simple donative transfer. Any transaction that has the effect of lessening the net value of the estate (the patrimony) can count as a gratuitous alienation. For example, suppose that Euphemia owes a debt to Aeneas, and he waives it: that is a gratuitous alienation. So would be a purchase at overvalue, as where Aeneas buys a flat from Euphemia, paying her £500,000, even though the fair market value is only half that amount. Another type of gratuitous alienation is where an asset is sold, but for less than its fair value, as where Aeneas sells to Euphemia a flat that is worth £300,000 for just £100,000. All such transactions can be attacked, once Aeneas has been sequestrated, by his trustee in sequestration. And the same rules apply to companies.

Usually gratuitous alienations are made in favour of persons close to the debtor, such as relatives, friends, lovers or spouses. Aeneas knows that he cannot survive financially, and that when he is sequestrated his creditors will take everything. 'What a waste', he reflects, and decides that it would be better to divert what he has to those he wishes to favour. But the law is not limited to gratuitous alienations of that common type. The law applies regardless of who the benefited person may be.[2] In some cases a gratuitous alienation has behind it a secret understanding that the benefited person will in fact return the benefit once the storm has come to an end.

If Euphemia accepts property from Aeneas as a gift, there is a sense in which she has nothing to fear. The worst that can happen is that she will lose the property to his future trustee in sequestration. She is then no worse off than she was when the story began. But what if she *buys* the property from him at undervalue, paying just £100,000 for a flat that is worth £300,000? Then it will be seen at once that there may be a problem. Suppose that Aeneas is sequestrated and that his trustee raises an action of reduction, and is successful. Euphemia loses the property but, importantly, she may also have lost the £100,000. It is true that she can lodge a claim for the return of that money. But Aeneas is bankrupt, so she will receive little or nothing.[3] Is this in fact the law?

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1 Challenges can sometimes be made by other parties too.

2 Though the law does make a distinction in relation to what is often called (though not in legislation) the 'vulnerable' or 'suspect' or 'hardening' period, ie the period going back in time before the sequestration during which transactions can be challenged. For 'associates' (eg spouses) the period is five years, but for others it is two: Bankruptcy (Scotland) Act 2016 s 98. The law for insolvent companies is essentially the same: Insolvency Act 1986 s 242. (This footnote gives the gist of the law but does not go into the detailed rules.)

3 The claim is seemingly a postponed claim: see s 129(4)(c) of the Bankruptcy (Scotland) Act 2016. This provision is not directly referred to in the litigation about to be discussed, but its equivalent for companies (Insolvency (Scotland) (Receivership and Winding up) Rules 2018, SSI 2018/347, r 7.27) is discussed at para 54.

The bankruptcy legislation says that, on a successful challenge, 'the court must grant decree (a) of reduction, or (b) for such restoration of property to the debtor's estate, or such other redress, as may be appropriate'.[1] The wording for company insolvency is the same, apart from in insignificant details.[2] This gives, or seems to give, to the court a certain discretion as to remedy. For example, instead of reducing the disposition by Aeneas to Euphemia, the court might order Euphemia to pay to Aeneas's trustee the balance of value, ie £200,000. That would achieve what most people would regard as a fair result. It is worth observing that if, after the sale, but before the trustee's challenge, Euphemia had sold the property to a *bona fide* third party, Serafina, Serafina would have an unchallengeable title, and so claiming £200,000 from Euphemia would be the one and only remedy available to the trustee.[3]

Yet the authorities hitherto were clear: reduction was the primary remedy, so that if it could be used it must be used.[4] When *MacDonald v Carnbroe Estates Ltd* was in the Outer House and the Inner House the issue of remedies was not raised. That did not happen until the case reached the Supreme Court, and even then it was raised not by the defender but by the court itself. But first, the story.

The facts of the case

On 24 July 2014 Carnbroe Estates Ltd concluded missives to buy a commercial property at 9 Stroud Road, East Kilbride, for £550,000, the seller being Grampian Maclennan's Distribution Services Ltd. The purchase was to be financed by a loan from Bank of Scotland plc in the sum of £600,000. But the bank had a concern. D M Hall had valued the property at £1,200,000 on the open market, or £800,000 if a restricted 180-day marketing period were assumed. On 28 July 2014 the bank wrote to the solicitors for Carnbroe Estates Ltd to express concern at the apparent discrepancy between the open-market value and the purchase price. The bank explained that it feared that its standard security might be adversely affected if a liquidator of Grampian sought to challenge the transaction as a gratuitous alienation. The reply from the solicitors was that National Westminster Bank plc (NatWest), a major creditor of the seller, was on the point of enforcing its standard security over the property, and so there was simply no time for the property to be marketed in the usual way. In the circumstances the price was, it might be said, a reasonable one. The bank was satisfied with this reply.[5] On 15 August 2014 it released the £600,000, and on 18 August the transaction settled. So this was a quick, off-market below-value sale, a distress sale, or what is sometimes called a fire sale. The managing directors of the two companies were, it seems, old

1 Bankruptcy (Scotland) Act 2016 s 98(5).
2 Insolvency Act 1986 s 242(4): 'The court shall grant decree of reduction or for such restoration of property to the company's assets or other redress as may be appropriate.'
3 Bankruptcy (Scotland) Act 2016 s 98(7); Insolvency Act 1986 s 242(4), proviso.
4 *Short's Tr v Chung* 1991 SLT 472; *Cay's Tr v Cay* 1998 SC 780; *Baillie Marshall Ltd (in liquidation) v Avian Communications Ltd* 2002 SLT 189. Two of these were personal insolvency cases, and the third was a company insolvency case, but the law in this area is the same on both sides of the personal/company fence.
5 It is unclear whether the bank used solicitors of its own.

friends. As well as the debt owed to NatWest, Grampian Maclennan's Distribution Services Ltd had extensive other debts, especially to HMRC.

Although the price was £550,000, what was actually paid was only £473,604.68. This was the sum that was owed by the seller to NatWest. It was paid over to NatWest, which as a result granted a discharge of its standard security.[1] The following month, September 2014, the seller went into insolvent liquidation, and the liquidators raised an action to reduce the disposition as a gratuitous alienation.

The action necessarily involved evidence as to value. Both sides produced evidence from valuers, which turned out to be well below the £1,200,000 figure produced originally by D M Hall. But both were well above the actual price of £550,000. The pursuers' expert valued the property at £820,000 while the defender's expert valued it at £740,000. 'Both of these were market values, which assumed a bargain between a willing seller and a willing buyer at arm's length with a proper marketing period and no element of compulsion.'[2]

The key question in the case was whether, in all the circumstances, the sale was indeed at undervalue. Just as the pursuer's argument was straightforward – that this had been a sale at undervalue, by an insolvent company, and thus unlawful – so the defence was straightforward, namely that this was a distress sale, and that the figure achieved was not unreasonable given that fact.

At first instance the defence was accepted.[3] The liquidator reclaimed, and the First Division reversed the decision and granted decree of reduction.[4] So decree reducing the disposition was pronounced. The defender appealed to the Supreme Court.

In the Supreme Court

The appeal was unsuccessful. The judgment of the court was given by Lord Hodge; long and impressive, it will constitute a leading case in Scots insolvency law. Being about insolvency law more than about property law we will not analyse it in detail here. Like the court below, the Supreme Court accepted that the sale had been at an undervalue, but, unlike the court below, it was troubled by the implications of granting a decree of reduction:[5]

> There is … a significant risk that a *bona fide* purchaser without knowledge of the seller's insolvency or the reason why the seller is willing to sell at a price substantially below open market value may be exposed to a challenge which he or she cannot defend. It is not realistic in a commercial negotiation to expect a purchaser to ask a seller why

1 Whether Bank of Scotland plc was told that the sum actually paid by the buyer to the seller was not £550,000 but only £473,604.68 is unclear. The balance was, in fact, eventually paid, but only after the seller had gone into liquidation – indeed, only after the proof in the Outer House had been completed: see [2019] UKSC 57 at para 41.
2 [2018] CSIH 7 at para 8.
3 [2017] CSOH 8, 2017 GWD 3–37.
4 [2018] CSIH 7, 2018 SC 314. The decision is discussed in *Conveyancing 2018* pp 211–13.
5 [2019] UKSC 57 at para 45.

he or she is not demanding a higher price. It was this concern that caused the court during the hearing to raise the question of the court's discretion in giving a remedy under s 242(4) of the 1986 Act.

As Lord Hodge noted:[1]

> Commentators on the statutory provisions have criticised the disproportionate consequence of annulling the transaction when the transferee has paid a significant albeit inadequate sum for the alienated property and is made to rank as an ordinary creditor in relation to his claim for unjustified enrichment: St Clair and Drummond Young, *The Law of Corporate Insolvency in Scotland* (4th edn, 2011) para 3.10. An order for the restoration of the property to the insolvent company, which leaves the transferee to prove in competition with other creditors for the price which it originally paid, not only is harsh on the transferee but also gives the general body of creditors an uncovenanted windfall as the company would not have received the price but for the impugned sale.

Lord Hodge continued:[2]

> There will be cases in which, as the commentators have suggested, it would be wholly disproportionate and unfair to annul the property transfer without giving the *bona fide* purchaser credit for the consideration which it has paid. In my view, s 242(4) gives the court sufficient power to devise an appropriate remedy. This does not involve a general equitable jurisdiction to take account of the personal and financial circumstances of the defender … The question for the court is simply whether in devising a remedy for the gratuitous alienation by restoring property or value to the insolvent's estate in a particular case it should order that credit be given in some way for the consideration which a *bona fide* purchaser has paid. In so far as *Short's Tr v Chung* and *Cay's Tr v Cay* held that the court did not have this power, I respectfully conclude that they were wrongly decided and should not be followed.

This view had implications for the disposal of the case:[3]

> In the light of this judgment … it is necessary to afford the First Division an opportunity to consider whether it is appropriate in the circumstances of this case to qualify the remedy of reduction which it has given to take account of all or part of the consideration which Carnbroe gave for the purchase, for example by requiring the liquidators to pay a specified sum to Carnbroe as a condition of the reduction.

Lord Hodge says only 'for example', thus leaving the final decision to the Inner House. Another route that would be available to the Inner House would be to leave the disposition unreduced, but instead order the defender to make payment of 'a specified sum' to the liquidators. In either case it would seem to be for the Inner House to decide the amount that should be paid.

1 Paragraph 51.
2 Paragraph 65.
3 Paragraph 69.

Some reflections

Legal practitioners will welcome this decision, in that one particular risk on buying property has been removed – or, rather, lessened. Whilst the decision does confer on a buyer at undervalue an important protection against uncompensated loss of the whole purchase price, the position of such a buyer, if the transaction is challenged, is still unenviable. Loss of the property, even with compensation, may be a serious problem, and if the other solution is adopted – requiring the buyer to pay a further sum – that may also cause problems. And there is the trouble and expense of litigation. So even after the Supreme Court's decision, buying a property suspiciously cheap may prove an unwise decision.

PRE-EMPTIONS

Still alive?

When the title of property which is to be sold contains a right of pre-emption, the first question to determine is whether the pre-emption is still alive. Given the complexity of the relevant legislation, the answer to that question is by no means straightforward.[1] An initial distinction falls to be made between (i) pre-emptions created in a grant in feu, and (ii) pre-emptions created in an ordinary (ie non-feudal) disposition.

Pre-emptions created in a grant in feu

All pre-emptions created in a grant in feu were extinguished, with the feudal system itself, on the 'appointed day' (28 November 2004).[2] But this was subject to two qualifications. First, superiors were able to preserve pre-emptions, if they so wished, by serving and registering a notice in the appropriate form before the appointed day. Such a notice could either 'reallot' the pre-emption to some other property in the neighbourhood which was owned (as *dominium utile*) by the superior or it could preserve the right, without reference to any property, as a personal pre-emption burden.[3] Neither was done to any great extent, with the result that pre-emptions preserved by notice are rare.[4] And of course they are readily detectable from the Land or Sasine Register.

The second qualification is more important and was central to the new case discussed below. As the legislation makes clear, pre-emptions (and other conditions) were only extinguished on the appointed day *as real burdens*; if and insofar as they were *contractual* in effect, they remained perfectly enforceable.[5] Some background may help here. When first created in a grant in feu, pre-emptions were enforceable both as contracts (because a conveyance is a type of

1 For details, see G L Gretton and K G C Reid, *Conveyancing* (5th edn, 2018) para 14-30.
2 Abolition of Feudal Tenure etc (Scotland) Act 2000 s 17.
3 AFT(S)A 2000 ss 18 and 18A.
4 In all, 642 notices were registered under s 18A in respect of personal pre-emption (or redemption) burdens: for these and other figures as to notices, see *Conveyancing 2004* pp 95–96.
5 AFT(S)A 2000 s 75.

contract) and also as real burdens (because the effect of registration was to create a real burden). But a conveyance is a contract only as between the original parties to it, or their assignees or universal successors.[1] What this means in practice is that, once the original grantee dispones the property, contractual liability is at an end. For the contract cannot bind a new owner, such owner not having been a party to the deed constituting the contract; nor can it sensibly continue to bind the original owner, who is no longer in a position to comply with the pre-emption.[2]

Pre-emptions created in an ordinary (ie non-feudal) disposition

So much for feudal pre-emptions. It is also possible, indeed not uncommon, for pre-emptions to be included in ordinary dispositions. Such pre-emptions only bind as real burdens if the benefited property in the pre-emption is expressly nominated. That is true not only of real burdens created after the appointed day – which, under s 4(2)(c) of the Title Conditions (Scotland) Act 2003, must always nominate a benefited property – but also for older real burdens. This is because the rather indulgent common law rules as to implied benefited properties do not, it has been held, apply to rights of pre-emption.[3] Like pre-emptions in grants in feu, pre-emptions in dispositions also bind the original parties to the deed as a matter of contract. But this applies only to dispositions registered before the appointed day; for those registered on or after that day, s 61 of the Title Conditions Act extinguishes contractual liability at the moment of registration.

Extinction by s 84 of the Title Conditions Act

Even if a pre-emption is, in principle, still enforceable as a real burden, it might have ceased to be enforceable because the property had previously been offered back to the pre-emption holder under s 84 of the Title Conditions (Scotland) Act 2003. In cases like this, some evidence of such offering-back should, hopefully, have been preserved. Section 84 is discussed in more detail below. It applies only to pre-emptions which are real burdens.

The new case in outline

This, then, is the rather complicated legal background to the new case, *West Lothian Council v Clark's Exrs*.[4] The facts were as follows. By a feu disposition recorded GRS Midlothian on 7 November 1985, Lothian Regional Council feued West Muir Farm in West Calder to a Mr George Clark. Among the real burdens in the deed was the following right of pre-emption:

> There is reserved in favour of the superiors a right of pre-emption of the feu or any part thereof in the events and on the terms and conditions following namely: (One) in the event that the feuars may at any time desire to dispose of the feu or a specified

1 See below for assignees and universal successors.
2 For discussion of this issue, see Scottish Law Commission, *Report No 181 on Real Burdens* (2000) paras 3.40 and 3.41.
3 *Braes v Keeper of the Registers of Scotland* [2009] CSOH 176, 2010 SLT 689.
4 [2019] SC LIV 58, 2019 GWD 24-378.

part thereof whether by way of sale, transfer, exchange or otherwise (not being a disposal by way of heritable security or mortgage or lease) the feuars shall give to the superiors notice in writing of their desire to do so: (Two) if after the feuars have given notice as aforesaid, the superiors shall desire to repurchase the feu or such specified part thereof and shall give to the feuars within twenty one days of receipt from the feuars of the said notice, a notice in writing signifying such desire then the feuars shall forthwith reconvey or otherwise retransfer the feu or such specified part thereof to the superiors for a price equal to the current open market value of the feu or such part thereof as the case may be.

Various events then occurred which had a potential bearing on the enforceability of this pre-emption. First, Lothian Regional Council was abolished in 1996 and replaced, so far as West Muir Farm was concerned, by West Lothian Council. Then the feudal system was abolished in 2004. Finally, Mr Clark died, with the farm passing to his executors by virtue of confirmation.

The effect of these events was as follows. As the superior (West Lothian Council) had not, apparently, registered a notice to preserve the pre-emption, the pre-emption ceased to be enforceable as a real burden with the abolition of the feudal system in 2004. Nonetheless, it remained enforceable as a contract. This was because, while neither of the original parties to the feu disposition (Lothian Regional Council and Mr Clark) survived, West Lothian Council and Mr Clark's executors were their respective universal (as opposed to singular) successors. Unlike singular successors (such as a purchaser of the property), a universal successor takes on the liabilities as well as the rights of his author.[1] So far as Mr Clark's executors were concerned, the obligations under the pre-emption were among Mr Clark's liabilities. Thus the executors were as much subject to the pre-emption as Mr Clark had been before them.

The trigger event and the responses to it

Mr Clark's executors proposed to sell part of West Muir Farm. As the pre-emption still bound the executors as a matter of contract,[2] such a sale would potentially trigger the pre-emption. Hence it was necessary for the executors to comply with the procedure which the pre-emption set out. Like most pre-emptions, the clause in the feu disposition (quoted above) envisaged a two-stage process. First, the person subject to the pre-emption (ie the executors) had to give 'notice in writing' to the pre-emption holder (West Lothian Council) of their 'desire to dispose of the feu or a specified part thereof'. Secondly, if the pre-emption holder wished to buy the property, it must indicate this intention by a notice in writing given within 21 days.

1 For the distinction, see K G C Reid, *The Law of Property in Scotland* (1996) para 598; Jan Peter Schmidt, 'Transfer of Property on Death and Creditor Protection: The Meaning and Role of "Universal Succession"', in A J M Steven, R G Anderson and J MacLeod (eds), *Nothing so Practical as a Good Theory: Festschrift for George L Gretton* (2017) 323.

2 Rather unsettlingly, the sheriff (at paras 44 and 47) talks of 'contract *or quasi contract*', the latter a term which today has, deservedly, largely disappeared from legal analysis.

The dispute in *West Lothian Council v Clark's Exrs* turned on whether this procedure had been properly complied with. What happened was this. On 17 December 2015 solicitors acting for the executors wrote to West Lothian Council in the following terms:

> We act on behalf of the Executors of the late George Anderson Aitken Clark ('the Executors'). Following the death of Mr Clark, the Executors are the uninfeft proprietors of the above mentioned subjects ('the Feu'). The late Mr Clark was the original feuar by virtue of a Feu Disposition granted by the Lothian Regional Council in his favour dated 7th November 1985 and recorded in the Division of the General Register of Sasines applicable to the County of Midlothian on 30th May 1986 ('the Feu Disposition'). We understand that West Lothian Council is the successor to any interest which Lothian Regional Council had under the Feu Disposition.
>
> As required in terms of the Feu Disposition, we hereby give you notice, on behalf of the Executors, that the Executors desire to dispose of that part of the Feu shown coloured red and brown on the plan annexed, by way of a sale.

At first sight, this seems to comply with the procedure set out in the clause of pre-emption. But there was a problem. While the plan annexed to the letter showed an area coloured red, it did not – or so it was averred[1] – show any area coloured brown. It was thus unclear which precise area was to be sold by the executors, and hence which precise area the Council would have to offer for if it wished to exercise the right of pre-emption.[2]

This uncertainty prompted the following reply from the Council, sent just before Christmas, on 23 December 2015:

> I refer to your letter dated 17 December 2015 indicating that your clients wish to sell the land shown coloured red and brown on the plan annexed to your letter. The area coloured brown is not clearly visible on plan. Please confirm where this is located.
>
> As you are aware, the Council has a right of pre-emption in terms of clause (SIXTH) of the feu disposition recorded on 30 May 1986. The Council may be interested in exercising its right of pre-emption but will require to seek authority to do so. To allow the Council to consider its position, please issue an offer to sell in terms of section 84 of the Title Conditions (Scotland) Act 2003. This should include price and such other terms as would reasonably allow the Council to consider the offer.
>
> The offer should be open for acceptance for a period of twenty one days. I look forward to hearing from you.

Over the Christmas period there was silence, but early in the New Year, on 25 January 2016, the solicitors for the executors sent a bombshell letter:

1 At this stage of the proceedings no proof had yet been held.

2 The issue of a plan which is, or is said to be, unsatisfactory crops up quite often. Such problems are varied, and include missing north signs, north signs that do not point north, incorrect scales, floating shapes, boundaries marked with a broad brush, and so on. Colours are often problematic, for instance plans that are said to be in colour but in fact are monochrome, plans that are in colour but the colouring does not tie in with the accompanying documents, and so on.

> We thank you for your letter of 23 December 2015. That letter does not give the requisite notice in terms of the relevant Feu Disposition. The time limit within which you had to give the relevant notice has now expired. Your interest in the subjects of our letter of 17th December 2015 is at an end and our clients do not have to make an offer to you.

It was this letter which prompted the litigation. The executors said they were free of the pre-emption. The Council said that they were not. The Council raised an action of declarator coupled with an interdict to prevent the sale of the property. The current proceedings were concerned only with whether interim interdict should be granted and the issues were not brought into full focus.

The sheriff[1] had no hesitation in granting interim interdict. Without reaching a concluded view on the matter, her preliminary position was that the executors' letter of 17 December 2015 did not amount to proper notice of their intention to sell. This was because of their failure to specify, by reference to the plan, the precise area that was to be sold. In the absence of proper notice, the 21-day period had not started running. Hence the Council was not out of time for exercising the right of pre-emption.[2]

Two comments

This decision is undoubtedly correct as far as it goes. But two comments seem worth making. First, suppose for the sake of argument that the letter of 17 December 2015 had, after all, constituted proper notice, so that the 21-day period had started to run. In that case the Council's letter of 23 December would not have been an adequate response and the Council would have been out of time to exercise the pre-emption. Underlying that conclusion is an important general issue on which it is easy to go wrong. Pre-emptions are potentially governed by two parallel regimes. There is the regime set out in the clause of pre-emption itself; and there is the regime set out in s 84 of the Title Conditions (Scotland) Act 2003.

With the first regime the parties are bound to comply. That is what the clause says, and that is what the parties must do.

By contrast, compliance with s 84 of the Title Conditions Act is a matter of choice, but it is a choice which a person burdened by the pre-emption will normally wish to exercise because, through compliance, the pre-emption ceases to be a real burden and hence ceases to govern *future* sales. Section 84 requires the burdened proprietor to send a formal offer to sell to the pre-emption holder, an offer which must be in accordance with the terms of s 84 itself. If such an offer is sent, then the pre-emption immediately ceases to be a real burden and will no longer run with the land, although it still governs the current sale.

1 Sheriff S A Craig.

2 For an evidential issue arising in the course of the subsequent proof, see *West Lothian Council v Clark's Exrs* [2019] SC LIV 97, 2020 GWD 1-4. There, so far as we know, matters rest for the moment.

It can be easy to overlook s 84. The temptation is just to send a general inquiry to the pre-emption holder as to whether the pre-emption is to be exercised. Such an inquiry does not comply with s 84 and hence does not bring the real burden to an end.

We said that two parallel regimes apply, but this is not always the case. For s 84 only applies if the pre-emption is a real burden, and even then it only applies – for historical reasons which need not trouble us here – to pre-emptions created in grants in feu, or created in dispositions where the disposition was executed after 1 September 1974.[1] Now in the present case the pre-emption was *not* a real burden, as we have seen. Hence s 84 did not apply. Hence the Council's request, in its letter of 23 December 2015, that the executors submit 'an offer to sell in terms of section 84 of the Title Conditions (Scotland) Act 2003' was beside the point. In truth, the executors' original letter of 17 December was (but for the alleged muddle about the colouring on the plan) a full and proper compliance with the only regime which applied to the pre-emption, namely the regime set out in the clause itself. In principle, that letter set the 21-day period running. The proper response from the Council would have been either to offer to buy the property, or to indicate that it had no interest in buying it.

The second comment relates to one of the sheriff's grounds for granting interim interdict:[2]

> If interim interdict was not granted that would have the practical effect of determining the competing claims. Standing the position that it adopted, the defender [the executors] would be free to offer the property for sale to the whole world, taking, of course, the risk that the court would ultimately find in its favour. If the property was sold to a third party at arm's length any possibility of the pursuer [the Council] purchasing it would be completely lost.

In the absence of interdict, said the sheriff, the Council's 'only remedy' would be a claim against the executors for damages – a claim which would be hard to quantify.[3] This, however, is incorrect. In the event of a sale in breach of the pre-emption, the title acquired by the third party would be voidable at the instance of the Council. The Council, in other words, would still be able to pursue the property rather than make do with a claim for damages. This rule is well established.[4] It turns on the fact that, as the pre-emption is on the Register, so the third-party acquirer will know (or be deemed to know) of its existence and hence will have acquired in bad faith, in the knowledge of the seller's breach.[5]

1 Title Conditions (Scotland) Act 2003 s 82.
2 Paragraph 65.
3 Paragraph 66.
4 *Matheson v Tinney* 1989 SLT 535; *Roebuck v Edmunds* 1992 SLT 1055.
5 This is an example of what is sometimes called the 'offside goals' rule: see K G C Reid, *The Law of Property in Scotland* (1996) para 698.

STANDARD SECURITIES – STRICT COMPLIANCE NECESSARY?

The decision in *Royal Bank of Scotland plc v Jamieson*[1] seems unlikely to be greeted by legal practitioners with much enthusiasm. The Conveyancing and Feudal Reform (Scotland) Act 1970 is a highly prescriptive enactment – some would say excessively so. When it comes to the formalities of standard securities, there exists no right to roam. There are specified paths, sometimes taking puzzling directions. A little, very little, latitude is available, for s 53(1) says:

> It shall be sufficient compliance with any provisions in this Act which require any deed, notice, certificate or procedure to be in conformity with a Form or Note, or other requirement of this Act, that that deed, notice, certificate or procedure so conforms as closely as may be, and nothing in this Act shall preclude the inclusion of any additional matter which the person granting the deed or giving or serving the notice or giving the certificate or adopting the procedure may consider relevant.

The second part of this, from '… and nothing in this Act …' to the end, is itself indicative of a certain rigid mindset: why on earth should 'additional matter' even be *thought* to result in invalidity? Has it not always been the case that *superflua non nocent*? Be that as it may, the latitude offered by s 53(1) does not amount to much. 'As closely as may be' means that you can only stray from the marked path if you have to, and then only as little as is necessary. An inch or two only may be allowed, and even then *not* allowed unless necessary. In a sense s 53(1) actually underlines the rigidity of the Act.

What is the attitude of the courts? Do they insist on strict compliance with the statute? Or do they say: 'Chillax! Substantive compliance is all you need, dudes!' The answer is that there is no clear pattern. In some cases the courts have insisted on strict compliance, while in others a less strict view has been taken. It is unpredictable. The most dramatic example took place on 24 November 2010, when the Supreme Court decided that, contrary to uniform interpretation for 30 years, including Inner House authority, the words '*shall* serve a calling-up notice' in s 19(1) must be taken literally, applicable in virtually every type of enforcement.[2] Many readers will recall the chaos that followed that decision. More recently, there has been much ado about the correct style of assignation of a standard security, with three cases in quick succession in 2017, one taking a strict view and the others a less strict view.[3] There is a similarity between these cases and the situation in *Wilson*, in that law firms had been doing things as they had done for years, and with reasonable grounds for thinking themselves safe, only to find serious doubts suddenly opening up. A case from 2019 is somewhat similar: a standard security being enforced in a way that was in common use,

1 [2019] SAC (Civ) 29, 2019 SLT (Sh Ct) 203, 2019 Hous LR 84.

2 *Royal Bank of Scotland plc v Wilson* [2010] UKSC 50, 2011 SC (UKSC) 66, discussed in *Conveyancing 2010* pp 129–49.

3 *Onesavings Bank plc v Burns* 2017 SLT (Sh Ct) 129; *Shear v Clipper Holding II SARL*, 26 May 2017, Court of Session Outer House; *Promontoria (Henrico) Ltd v Portico Holdings* [2018] SC GRE 5, 2018 GWD 6-87. See *Conveyancing 2017* pp 118–27.

but the enforcement method now being challenged. The case is *Royal Bank of Scotland plc v Jamieson*.[1]

How is a calling-up notice served? Section 19(6) of the 1970 Act says:

> For the purposes of the foregoing provisions of this section, the service of a calling-up notice may be made by delivery to the person on whom it is desired to be served or the notice may be sent by registered post or by the recorded delivery service to him at his last known address, or, in the case of the Lord Advocate, at the Crown Office, Edinburgh, and an acknowledgment, signed by the person on whom service has been made, in conformity with Form C of Schedule 6 to this Act, or, as the case may be, a certificate in conformity with Form D of that Schedule, accompanied by the postal receipt shall be sufficient evidence of the service of that notice; and if the address of the person on whom the notice is desired to be served is not known, or if it is not known whether that person is still alive, or if the packet containing a calling-up notice is returned to the creditor with an intimation that it could not be delivered, that notice shall be sent to the Extractor of the Court of Session, and shall be equivalent to the service of a calling-up notice on the person on whom it is desired to be served.

As a matter of good legislative technique, two criticisms might be made of this provision. The first is that a single sentence of 210 words is hardly acceptable. That criticism concerns simplicity of form. The other concerns simplicity of substance. The service of documents is hardly something unique to standard securities. That overused but helpful expression, 'reinventing the wheel' comes to mind. Why have a special regime just for calling-up notices? Why not say something like 'the rules for the service of documents in ordinary causes in the sheriff court shall apply'? Having standalone special rules, without any obvious need, invites difficulties.[2] For instance one might think that service of a calling-up notice by sheriff officer should be competent. Not so: see *Santander UK plc v Gallagher*.[3]

In *Royal Bank of Scotland plc v Jamieson* a calling-up notice was sent by recorded delivery. But nobody accepted the letter. The creditor saw, by the tracking system, that delivery had failed. Accordingly it effected service on the Extractor of the Court of Session. When, thereafter, it raised an action to enforce the security by sale, the debtor – a party litigant – raised numerous defences, all of which failed, except for the defence that the calling-up notice had not been validly served.

The debtor's position on this point was straightforward. Referring to s 19(6) of the 1970 Act, quoted above, he argued thus: 'His address was known, he was clearly alive, and there was no evidence to show that the packet had been returned.'[4] The bank countered: 'Agents were aware that service had failed by checking the "track and trace" online facility provided by Royal Mail. In that knowledge, they were entitled to serve on the extractor. This, he [counsel for the

1 [2019] SAC (Civ) 29, 2019 SLT (Sh Ct) 203, 2019 Hous LR 84.

2 Actually, the problem lies not just with the 1970 Act. Why are the service rules for the Sheriff Court and the Court of Session not the same? What about the service rules in Interpretation Act 1978 s 7? And those in the Interpretation and Legislative Reform (Scotland) Act 2010 s 26? As with the 1970 Act, many sector-specific enactments set up their own service regime. A random example is the Consumer Credit Act 1974 s 176.

3 2011 Hous LR 26 (*Conveyancing 2011* Case (63)).

4 [2019] SAC (Civ) 29 at paragraph 3.

pursuer] explained was common, modern practice.'[1] The bank had also served through a sheriff officer, though (see above) that was of no value.

The Sheriff Appeal Court found in favour of the defender (ie the debtor):[2]

> What the respondents' agents did was to attempt recorded delivery service, check to see if it had been signed for, and when it had not been signed for, they proceeded to serve on the extractor. This, in my opinion, they were not entitled to do. It was going too far to deduce, as they must have done, that the address was unknown, merely because a recorded delivery letter had not been signed for, or there was 'no answer'. If the comment had been 'Gone Away', as is sometimes the case, then service on the extractor would be permitted. They did not wait to see if the packet was returned, which again would have allowed for service on the extractor. What, then, is the effect on this action of the failure to serve in accordance with s 19? A calling up notice is the foundation of the respondents' application to the court. Accordingly it is important that it be served in accordance with the provisions of s 19. It is not enough to say that s 19(6) provides that service on the extractor is equivalent to service on the person on whom it is desired to be served and thus the calling up notice procedure becomes valid. It does not. One can only proceed to serve on the extractor in defined circumstances, not present here. A strict interpretation of the statute is required.

The 1970 Act is much in need of review, and happily the Scottish Law Commission has begun that process, with a first discussion paper having been published in 2019.[3] But unless and until reform arrives, practitioners must live with the 1970 Act as it is, and what the case law, including the latest case, reveals is that all too often the actual text of the Act is not being carefully read.

OVERLOOKING INHIBITIONS

What happens if an owner is inhibited and then sells the property, and the legal report fails to disclose the inhibition? Someone is likely to suffer loss, unfairly. Either (i) the buyer suffers because the inhibition strikes at the title, yet the buyer knew nothing of it. Or (ii) the inhibiting creditor suffers because the buyer is protected by good faith, so that the effect of the inhibition is lost. Whichever is the result, can the party that suffers claim against the firm of searchers on the basis that the legal report was wrong? These issues came up in *Commodity Solution Services Ltd v First Scottish Searching Services Ltd*.[4]

Is a *bona fide* buyer protected from an unseen inhibition?

In a perfect world, a legal report would always pick up an inhibition. But this world is not perfect. One problem is that of matching entries in the Register of Inhibitions with parties involved in a property transaction. There can be variations in the form of name, and it may be that an inhibitee has more than

1 Paragraph 3.
2 Paragraph 9 per Sheriff A G McCulloch.
3 See p 101 above.
4 [2019] SAC (Civ) 4, 2019 SC (SAC) 41, 2019 SLT (Sh Ct) 63.

one address, for instance a main home and a second home, or a business address, and so on, and the inhibition designs him with reference to one address but the property transaction relates to another address. As well as difficulties of that sort there can be simple human error on the part of the searchers.

In the wake of the decision in *Atlas Appointments v Tinsley Ltd* back in 1997[1] there was concern that a buyer's title might be reducible on account of an inhibition not disclosed in the legal report. The eventual response was s 159 of the Bankruptcy and Diligence etc (Scotland) Act 2007 which says that:

> (1) An inhibition ceases to have effect … in relation to property if a person acquires the property (or a right in the property) in good faith and for adequate consideration …
>
> …
>
> (4) A person is presumed to have acted in good faith if the person –
>
> (a) is unaware of the inhibition; and
>
> (b) has taken all reasonable steps to discover the existence of an inhibition affecting the property.

So if a buyer relies on a legal report that says that the Register of Inhibitions is clear in relation to the seller, when in fact there is indeed an inhibition against the seller, the buyer is protected (unless the buyer happens to know of the inhibition by some other means, which would be most unusual). That is good news for the buyer. But for the inhibitor it is bad news. The position here, as quite often in the law, is that there are two innocent parties, the inhibitor and the buyer, and the law cannot protect them both. The law has chosen, since 2007, to protect the buyer. Does that then leave the inhibitor without a remedy? This was the issue that came up in *Commodity Solution Services Ltd v First Scottish Searching Services Ltd*.

What happened?

Mr and Mrs Gardner owned a property at 6 Arbirlot Place, Arbroath, Angus. In December 2011 Commodity Solution Services Ltd obtained decree against Mr Gardner in the sum of £50,000. In February 2012 it registered an inhibition against him. Soon thereafter Mr and Mrs Gardner sold the property to Paul Gardner and Louise Jones. Paul Gardner was the son of the sellers. A legal report was obtained from First Scottish Searching Services Ltd. The report did not disclose the inhibition. In August 2012 the disposition to the buyers was registered in the Land Register. Like the legal report, the updated title sheet did not mention the inhibition. Why the search firm failed to disclose the inhibition in the legal report is not known.

The inhibitor took the view that s 159 protected the buyers and that accordingly there was no point in raising an action to reduce their disposition. Instead it raised an action for damages against the search firm, the basis being the law of delict. It said that the search firm owed a duty of care to the inhibitor, a duty that had been breached by the non-disclosure of the inhibition. It said

1 1997 SC 200.

that if the search firm had disclosed the inhibition, the sale would not have happened or, alternatively, that it would have happened on the basis of the inhibition being discharged by payment.[1] As a result, the opportunity of recovering the debt from the property had, said the inhibitor, been lost.

The defence was: no duty of care. It was on that issue that the case was fought, first in the sheriff court and then, in 2019, in the Sheriff Appeal Court. An important distinction between the facts of the present case and the line of authority beginning with *Hedley Byrne & Co Ltd v Heller & Partners Ltd*[2] is that in those other cases the duty of care was said to be owed to the person who had *reasonably relied on an erroneous statement* – the representee. But in this case the pursuer was not a representee: the pursuer had not relied on the erroneous legal report. There had indeed been reliance on it, but that reliance had been on the part of the *buyers*, and the buyers were not suing.[3] So the pursuer did not have an easy task in satisfying the court that there existed, as between it, as inhibitor, and the search firm, a duty of care.

The decision

Nevertheless the pursuer succeeded, both at first instance[4] and on appeal.[5] Below we quote at length from the long and careful judgment of Sheriff P J Braid.[6] The reason for the length of the quotation is that the decision is to some degree innovative, in terms of the development of the law of delict. In policy terms it seems to us that the decision is right, but that does not alter the fact that in technical terms it is bold.

> The court was not referred to any textbooks but I have noted that in Charlesworth and Percy, *Negligence* (para 2.94)[7] it is stated that:
>
> > 'Taking on or starting a task can give rise to a duty to persons who are sufficiently closely and proximately affected by a failure properly to carry it out. There must be an assumed responsibility for a particular activity or task in relation to a particular person or class. In addition, the cases tend to indicate that the claimant should in some sense be dependent upon the defendant acting or intervening or otherwise vulnerable to the risk of harm.'
>
> This passage thus focuses on assumption of responsibility for a *task* as distinct from assumption to a particular person, albeit taking on a task is said to give rise to an assumption of responsibility to a particular class affected by it. *Customs and Excise Commissioners v Barclays Bank plc*[8] is given by the authors as an example of a

1 A third possibility would have been that the sale could have gone ahead with the inhibition undischarged, but in that case, in the absence of s 159 protection, the inhibitor could simply have proceeded with an action of reduction.
2 [1964] AC 465.
3 The possibility of liability on the part of a search firm, for loss suffered by someone who has reasonably relied on the legal report, still exists in the law. But that was not the issue in the present case.
4 [2018] SC DUNF 14, 2018 SLT (Sh Ct) 117 (*Conveyancing 2018* Case (53)).
5 [2019] SAC (Civ) 4, 2019 SC (SAC) 41, 2019 SLT (Sh Ct) 63.
6 Paragraphs 45–48.
7 C Walton and others (eds), *Charlesworth and Percy on Negligence* (13th edn, 2014) para 2.94.
8 [2006] UKHL 28, [2007] 1 AC 181.

case where no duty was held to arise from a failure to comply with an externally imposed rule or requirement as opposed to an undertaking by a person to perform a task followed by a failure to perform it. *White v Jones*[1] is given as an example of a case where there was a vulnerable claimant. If that analysis is correct, it tends to support the view that it would not be an unjustifiable leap to impose a duty in the present case. Rather, the imposition of a duty of care would maintain the coherence of the law, since the respondents [the inhibiting creditor] were entirely reliant, for the efficacy of their inhibition, on a searcher of the register finding it and reporting its existence to a potential purchaser. Additionally, the appellants [the searchers] could be said to have voluntarily taken on the task of searching the register (for profit), and, as such, to have assumed responsibility to the class of persons affected by that task, namely, inhibiting creditors whose inhibition were on the register. The only real impediment to the existence of a duty of care remains the absence of any known relationship between the appellants.[2] However, when it is remembered that the respondents were in fact on the register which the appellants were to search, and that the appellants' task was to find them, coupled with the fact that the number of persons in that position is by definition restricted to creditors who had registered an inhibition against the seller, that perhaps becomes less of an issue. Put another way, viewed objectively, there was in fact a relationship between creditors who had registered an inhibition, and the searchers tasked with finding them. The fact that, subjectively, the searchers were unaware of that relationship, because they did not carry out the search with care, does not mean that there was no relationship as a matter of law. As I have pointed out, the very function of the search was to discover the existence of inhibiting creditors who were there to be found, and having regard to the fact that the appellants voluntarily undertook the search, in my view that does give rise to the sort of special relationship mentioned by Lord Browne-Wilkinson, being a relationship of sufficient proximity as to give rise to a duty of care.

Accordingly, I consider that the application of the incremental approach, and of established principles, to the facts here, could justify the imposition of a duty. Having reached this stage, the crucial question to decide is that at the last stage of the *Robinson* approach:[3] is it fair, just and reasonable to impose a duty on the appellants? Or, to paraphrase Lord Mance, in his discussion of *Sharp*,[4] would it be unjust if no compensation could be obtained for the adverse consequences on property rights of negligence of a private firm of searchers, undertaking that task for profit? This brings us full circle to the issue foreshadowed at the outset of this opinion, namely, that the 2007 Act brought about a change whereby Parliament decided that an inhibiting creditor should lose his inhibition where a purchaser acquired a property in good faith and for value. Should the imposition of a duty be a matter for Parliament, as the appellants contend? The fact that Parliament did not legislate for a duty of care to be owed to creditors does not, of course, mean that no duty exists. Parliament may simply have been of the view that it was unnecessary to do so because there was already a duty of care owed (as contended by the respondents) or, more likely, simply ducked the issue and left the question for the courts to resolve. In this regard, parties did not refer us to any Scottish Law Commission report or any other papers which might have shed light on what Parliament intended. It may be assumed that it was not intended

1 [1995] 2 AC 207.
2 This should perhaps read 'between the parties' rather than 'between the appellants'.
3 *Robinson v Chief Constable, West Yorkshire Police* [2018] UKSC 4, [2018] AC 736.
4 *Ministry of Housing and Local Government v Sharp* [1970] 2 QB 223.

> that creditors would lose the protection of inhibitions, lock stock and barrel. Rather, there is an inherent assumption in the 2007 Act (and in conveyancing practice) that inhibitions will be disclosed, at the point of sale, by properly instructed and conducted searches. It is a fact that such searches are in practice carried out by firms such as the appellants. The system therefore relies on such searches being carried out with due care. If no duty of care is owed by the appellants to the respondents, then not only do Lord Goff's comments in *White v Jones* apply, but there would in fact be little incentive on searchers to carry out searches with care. Failure to find, and disclose, an inhibition would not result in any party (other than the creditor) suffering loss. Conversely, if a duty of care is owed, searchers are in reality in no worse a position, as far as exposure is concerned, than they were in before the passing of the 2007 Act, since their liability can never exceed the value of the property being searched against, whether that liability is owed to the purchaser or the inhibiting creditor. Further factors which are relevant to the imposition, or otherwise, of a duty are the ability of searchers to insure against the risk, and the inability of an inhibiting creditor to do likewise. I acknowledge that the searcher cannot exclude or limit liability, but I consider that this factor is outweighed by the other factors including the ability to insure, and the fact that the extent of the risk must always be limited by the value of the property being searched against.
>
> In summary, where the task of searching has been undertaken voluntarily, for profit in circumstances where the economic well-being of inhibiting creditors is known to be dependent on searches being carried out with care, in my view it is just and reasonable that a duty of reasonable care is incumbent upon the searcher.
>
> Accordingly, my view is that in holding that the appellants owed the respondents a duty of care, the sheriff reached the correct decision on the principal issue, and I would refuse the appeal to that extent.

So the court accepted the pursuer's position that a duty of care existed. That was the chief issue at stake. But there were three other issues. First, given that there was indeed a duty of care, had the defender in fact breached that duty? The sheriff at first instance 'appears to have proceeded on the basis that there was admitted breach of duty on the part of the appellants, whereas that remains to be established' (para 49). That would be a matter for the proof which was now to be allowed.

Secondly, liability on the part of the defender would presuppose that the inhibition could not be enforced against the buyers, something that in turn would depend on whether they had acted in good faith. On this point, para 49 says: 'On the subsidiary issue of whether the respondents have averred sufficient in relation to good faith, I have sympathy with their contention that they simply do not know whether or not the purchasers were in good faith. They are certainly unable to aver that they were not.' One could wish that this passage were longer. Is the question of the good faith of the buyers (one of whom was the inhibitee's son) to be determined by proof?

Thirdly, assuming that damages are due, there could be tricky issues about quantification.[1] For instance, take the following unlikely but illustrative example. The property was worth £300,000 and was subject to a standard security in favour

1 Some of these are discussed in para 50.

of XYZ Bank plc, securing a debt of £500,000. The security was not discharged on the sale. The bank is now seeking to enforce its security by sale. In that case the inhibition would seem to be in practical terms worthless, in which case the damages due would presumably be zero – *injuria sine damno*.

Finally, while we have quoted Sheriff Braid at some length, the opening paragraphs of Sheriff Derek C W Pyle's judgment should not be missed by anyone with an interest in the law of delict, or by anyone who is fortunate enough to remember that distinguished scholar, Professor W A Wilson.

TENEMENT REPAIRS

Boatland Property Trs v Abdul[1] raises two matters of importance for tenement repairs. One is the interaction between title provisions and the statutory Tenement Management Scheme ('TMS').[2] The other is the effect on liability and governance of dividing one of the flats.

At issue was the liability for repairs carried out to the tenement at 37–41 North Methven Street, Perth, following a major fire. As originally built the tenement comprised four flats – two on the ground floor (which were used as shops)[3] and two on the first floor (including the attic).[4] In 2003 the attic was separated from one of the first-floor flats and conveyed as a separate flat,[5] with the result that there were now five flats. No additional real burdens were imposed in the split-off disposition of the attic.

The pursuers owned the shops. The defenders owned the three upper flats. The defenders carried out the repairs without consulting the pursuers. Now they sought (by way of counterclaim) payment of the share said to be due by the pursuers.[6] The pursuers disputed both the right of the defenders to carry out repairs without consultation, and also the precise amount said to be due to the defenders in payment of the repairs.

Repairs without consultation

Where a repair goes to questions of either support or shelter (eg a repair of the roof), the proprietor of any flat in the tenement which includes the part in question is entitled, if often ill-advised, to carry out the repairs unilaterally and to look to the other proprietors for a share of the cost. That is the effect of ss 8 and 10 of the Tenements (Scotland) Act 2004, and was confirmed by a case decided a couple of years ago and covered in a previous volume.[7] Otherwise the default

1 30 June 2014, Perth Sheriff Court. The decision was by Sheriff Kenneth J McGowan.
2 The Tenement Management Scheme ('TMS') is set out in sch 1 of the Tenements (Scotland) Act 2004.
3 Respectively title numbers PTH36406 and PTH10948.
4 Respectively title numbers PTH20700 and PTH19930.
5 Title number PTH22054.
6 The pursuers' original action was for declarator that the defenders had encroached into their flats by erecting steel supporting beams.
7 *Donaldson v Pleace*, 22 September 2017, Stirling Sheriff Court, discussed in *Conveyancing 2017* pp 127–31.

position under the TMS rule 2[1] is that repairs cannot proceed unless (i) they are agreed to by the proprietors of a majority of the flats, and (ii) every proprietor is consulted whether by calling a meeting or by some other means. In *Boatland Property* there was no consultation and hence no compliance with the TMS. Assuming the TMS to apply, therefore, the result would be for the repairs to be unauthorised, and the cost irrecoverable under the TMS provisions.[2]

But the TMS is only a default regime, to be used when the title deeds are silent. The relationship between titles and TMS is carefully charted by s 4 of the 2004 Act. *Boatland Property* is the first case to consider these provisions. The way s 4 works is to have a different subsection for each rule of the TMS. This is because the end result is likely to be that some rules of the TMS apply to any given tenement and some do not.

For rule 2 the relevant provision is subsection (4) of s 4. This provides that:

> Rule 2 of the Scheme shall apply unless –
>
> (a) a tenement burden provides procedures for the making of decisions by the owners; and
>
> (b) the same such procedures apply as respects each flat.

In the present case the split-off deeds of the individual flats did indeed have a provision which was arguably relevant; and the same provision was indeed repeated in the title of each flat. The provision read:

> (Fourth) Declaring that when the proprietor or proprietors of a majority of the houses and shops in the said tenement of which the subjects hereby disponed form part consider it necessary or desirable to have any mutual repairs executed they shall have power to order the same to be done and the whole other proprietors of said tenement whether consenters or not shall be bound to pay their respective shares of the expenses thereof in the same way as if their consent had been given.

This was admittedly rather a minimalist scheme. A majority could decide, and there was then no need to consult anyone else. Nonetheless, the sheriff held, correctly in our view, that the scheme was sufficient to oust TMS rule 2:[3]

> Now it is clear that in the present case Clause (Fourth) does not provide anything very elaborate by way of procedure. It appears to give *carte blanche* to the majority to do as they wish. The only limitation on what works the majority of owners may instruct derives from the word 'repairs'. The clause has been deliberately framed so as to avoid the need for consent of the party in the minority, who becomes obliged to pay a share of the costs thereby incurred.
>
> It appears to me that the issue as to whether Clause (Fourth) can be said to contain or amount to a procedure is whether it is capable of allowing a workable 'scheme decision' to be taken: Schedule 1, rule 1.4.

1 See also TMS r 3(1)(a).

2 This assumes that the repairs did not concern matters of shelter and support. To the extent that they did so concern, the defenders would have been entitled to carry out the repairs unilaterally, as already mentioned.

3 Paragraphs 69–73.

> In my view, it can. Plainly there will need to be some communication and sharing of information – at least among those who provide the eventual majority – but in my opinion it is significant that the absence of consent does not give any minority any right to resist the implementation of the repair works or resist paying a share of the cost thereof.
>
> Therefore, I have concluded that Clause (Fourth) is capable of providing a working scheme decision, which is on the face of it both valid and enforceable.
>
> On that basis, it appears to me that as the titles cannot be said to be lacking a procedure for achieving a scheme decision, it follows that by reason of section 4(4) of the Act, rule 2 is not engaged.

But there was also another difficulty. As originally built, there were only four flats in the tenement of which the defenders owned only two. Two out of four was not a majority. It was true that the defenders had divided one of their flats, but could this unilateral act of division give them the majority which they did not previously have? The sheriff held that it could. Relying on *PS Properties (2) Ltd v Callaway Homes Ltd*,[1] a case apparently directly in point, he found that, 'whatever may have been the position historically, the position now was that there were five flats and the defenders as proprietors of three of them had the majority which they required to proceed in accordance with the titles'.[2] But there is also another way of looking at this. *PS Properties (2) Ltd* was decided on the basis of the TMS. But where the decision-making regime is contained, not in the TMS, but in a real burden the position may be different. In particular, it can be argued that a real burden falls to be interpreted according to the state of things at the time when it was imposed;[3] and at the time this real burden was imposed, in the 1940s, there were four flats and not five.

The amount due

The split-off dispositions for each of the four original flats imposed an obligation to pay a 'one-fourth share of the expense of upholding, renewing and keeping in repair' the roof and other common parts of the tenement. But now there were five flats. Were the pursuers, as owners of two of those flats, liable for one-half of the cost of the repairs (ie the one-quarter share for each flat as per the titles) or rather were the pursuers liable merely for two-fifths (ie a fifth share for each of the (now) five flats)? Having expressed some doubts as to the second of these positions, the sheriff left the matter open to be determined at proof.

The sheriff's doubts were justified. The liability of the pursuers was determined solely by their titles, no more but also no less, and what their titles said was that each of their two shops had a liability of one-quarter, making one-half in total. The defenders' act in dividing one of the first-floor flats had not created any additional liability. No new burdens were imposed in the split-off disposition of the attic flat. Thus the now-divided flat (ie the first-floor flat and

1 [2007] CSOH 162, 2007 GWD 31-526, discussed in *Conveyancing 2007* pp 139–41.
2 Paragraph 51.
3 For this argument, see *Conveyancing 2010* pp 93–94.

attic flat) was, taken together, liable for precisely the same share as when the flat was in an undivided state, ie for a one-quarter share. Under the Title Conditions (Scotland) Act 2003 s 11, each proprietor of a divided property is jointly and severally liable to the other proprietors for the original share imposed by the titles; as between themselves they are liable in proportion to floor area.

RECTIFYING ERRORS ON FIRST REGISTRATION

How it works

Billy buys property. His purchase induces first registration in the Land Register. In a fit of generosity (or because of errors in the OS map), the Keeper registers Billy as owner of a larger area than he is entitled to. All of this happens before the designated day (8 December 2014), so that the transaction is governed by the Land Registration (Scotland) Act 1979. That is good news for Billy. It means that, due to the Midas touch which operated under the 1979 Act,[1] he became owner of all of the property for which he was registered, including the extra bit – what we may call 'the disputed area' – to which he was not actually entitled. Of course, the Register was 'inaccurate' insofar as it included the disputed area within Billy's title.[2] In principle, there could be rectification to restore that area to Anna, the next-door neighbour from whom the area has been wrested. But under the 1979 Act there could not normally be rectification to the prejudice of a proprietor in possession.[3] Admittedly there were one or two exceptions to this rule – for example where the Keeper had excluded indemnity, or where the inaccuracy had been caused by Billy's fraud or carelessness. But in the normal case, once Billy's title was registered, and he had taken up possession, he was as safe as houses. Anna, unable to displace Billy from the disputed area by rectification, had to make do with compensation in the form of indemnity from the Keeper.[4] Even that assumes that Anna knew of the contents of Billy's title. But Anna, having better things to do even on wet Sunday afternoons, is unlikely to know about Billy's title unless Billy's acts of possession were especially obvious.

Now flash forward to today, or at least to a time after the designated day. Anna finds out the awful truth.[5] She confronts Billy. He will not relent. The disputed area is his and that is the end of the matter. Anna next tries the Keeper. 'Billy's title', says Anna, 'is inaccurate. Please rectify.' The Keeper acknowledges the fact of the initial inaccuracy but refuses to rectify. As this is after the designated day, applications for rectification are governed by the Land Registration etc (Scotland) Act 2012 and in particular by s 80 of that Act. In terms of s 80 the Keeper can – and indeed must – rectify only where the inaccuracy is 'manifest'. Where an

1 Land Registration (Scotland) Act 1979 s 3(1)(a).
2 On this whole topic, see K G C Reid and G L Gretton, *Land Registration* (2017) paras 2.7–2.10.
3 LR(S)A 1979 s 9(3)(a).
4 LR(S)A 1979 s 12(1)(b).
5 This will often be because Anna is selling her property. This then gives rise to the problem of overlapping titles, as to which see *Conveyancing 2018* pp 148–55.

inaccuracy is alleged but is not 'manifest', the Keeper must, under s 80, refuse the request to rectify.

What is the relevance of all of this to the Anna–Billy case? Surely, it might be said, the inaccuracy in that case is as manifest as manifest can be. It was a simple error on first registration. The Keeper has admitted the error. Why should rectification not go ahead?

The answer lies in the provisions in schedule 4 of the 2012 Act which govern the transition of titles registered under the 1979 Act to the new regime of the 2012 Act.[1] The aim of these provisions is to keep faith with the 1979 Act by preserving any gains conferred by that Act. If, under the 1979 Act, Billy's title was *in practice* impregnable (usually because he was a proprietor in possession), then that impregnability is safeguarded by the transitional provisions.

The way the provisions work is this. Although the application for rectification takes place after, maybe long after, the designated day, Billy's position is scrutinised as at the day *preceding* the designated day, ie as at 7 December 2014.[2] The provisions ask: was the Keeper empowered, on that day, to rectify Billy's title? If the answer is 'yes', there is, on the designated day, a reallocation of property rights by which the disputed area is returned to Anna – although it remains, for now, in Billy's title sheet and will continue to remain there until there is rectification.[3] If the answer is 'no', the inaccuracy is extinguished on the designated day, Billy's title to the disputed area is confirmed once and for all, and Anna's only remedy is to claim compensation from the Keeper.[4] Whether the Keeper was or was not entitled to rectify on 7 December 2014 will depend, in most cases, on whether Billy was in possession, as already explained. And to help matters along the transitional provisions create a presumption that Billy, as the registered proprietor, was indeed in possession immediately before the designated day.[5] If Anna wishes to challenge that presumption, she will have to bring contrary evidence.

Now go back to the Keeper's response to Anna's request for rectification. That there was an error on first registration is clear and admitted. But whether there is *still* an error – whether Billy's title is inaccurate today – depends, by and large, on the state of possession on 7 December 2014, and that is a matter on which the Keeper is unlikely to have any knowledge.[6] The Keeper, in other words, is not in a position to tell whether the Register is accurate or inaccurate. Hence in a large majority of cases the Keeper will simply refuse the application for rectification on the ground that the alleged inaccuracy is not manifest.

Faced with this refusal, what is Anna to do? Assuming that Billy remains unco-operative there are only two possibilities. One is to give up the disputed

1 On these important provisions, see Reid and Gretton, *Land Registration* paras 11.9–11.12.
2 The use of this date was challenged but confirmed in *Grant v Keeper of the Registers of Scotland* 2019 SLT (Lands Tr) 25. It is perfectly clear from the legislation.
3 Land Registration etc (Scotland) Act 2012 sch 4 para 17.
4 LR(S)A 2012 sch 4 paras 22 and 23.
5 LR(S)A 2012 sch 4 para 18.
6 Unless, as in *McAdam's Exr v Keeper of the Registers of Scotland*, 16 May 2018, Lands Tribunal, the disputed area has actually been built upon. For discussion, see *Conveyancing 2018* pp 149–50.

area and to ask the Keeper for a cheque instead.[1] The other is to challenge the Keeper's refusal by applying to the Lands Tribunal under s 82 of the 2012 Act. Every year brings a crop of such applications, and some of those from 2019 are considered below.

An easy case

Dabski v Tyrrell[2] is an easy case which gives a particularly clear idea as to how the transitional provisions work. Numbers 7 and 9 Linsey MacDonald Court, Dunfermline, were neighbouring properties. There was a gap of six feet between the respective houses. Under the Sasine titles the boundary between the properties was at the mid-point of this gap, leaving a passage of three feet on either side which could be used by the owners to pass from the back of the house to the front without having to traipse through the house itself or the garage. The position on the ground corresponded, more or less, to the position under the titles. That was certainly the position in respect of the back garden, where a large and sturdy fence ran along the centre line of the gap, continuing as far as the side of each house. In the front garden there was a hedge which was planted, just, on number 9's side of the centre line.

First registration took place in 1995 for number 7 and in 1997 for number 9. In both cases the title plan showed the boundary, incorrectly, as running immediately adjacent to the side gable of number 7 extending in a straight line between the front and rear gardens. The effect was to award the full six-feet gap to number 9. Characteristically, no one noticed this error for many years, but noticed it eventually was by the owners of number 9, in September 2017 (we do not know how or why). By this time the owners had lived in number 9 for 18 years, seemingly content with the state of the boundaries. But they were content no more. Within a few months they had removed the front hedge and replaced it with a sturdy wooden fence about three feet high on the line indicated on the title plan on the Land Register. By this means they incorporated into their property, at the front of the house, the three feet of gap which had previously been attributed to number 7. The effect was to deny the owners of number 7 their previous access route from front garden to back.

The owners of number 7 applied to the Lands Tribunal under s 82 of the Land Registration etc (Scotland) Act 2012 for a determination as to the accuracy of the boundary as shown on the Land Register. As with Anna and Billy (above), it was plain that the Keeper had got the boundary wrong, and the Keeper admitted as much. The only question remaining was whether that inaccuracy had survived the designated day or whether, on the contrary, the inaccuracy had been extinguished by the transitional provisions in schedule 4 of the 2012 Act. As already mentioned, for such extinction to have taken place, the owners of

1 Even that may not be straightforward, however. Compensation will only be due if LR(S)A 2012 sch 4 para 17 applied, ie if the Keeper was not able to rectify Billy's title immediately before the designated day, typically because Billy was in possession of the disputed area. The Keeper is likely to want evidence of Billy's possession.

2 2019 GWD 37–603. The Lands Tribunal comprised R A Smith QC and C C Marwick FRICS.

number 9 would require to have been in possession of the whole of the six-feet gap immediately prior to the designated day. Even without hearing evidence, it was obvious to the Lands Tribunal that no such possession had been taken. This was because, on 7 December 2014 and for some years before and after, the owners of number 9 were hemmed in on their side of the boundary by a combination of the fence at the back and the hedge at the front. They could not have possessed the additional three feet. It followed, therefore, that the title sheets of both properties were inaccurate, and that they should now be rectified to reinstate the correct boundary, ie a boundary lying at the centre point of the six-feet gap.

A harder case

MacGregor v Keeper of the Registers of Scotland[1] is a harder case on the facts but the applicable law is much the same as in *Dabski v Tyrrell*. Beginning in the 1980s, East Wyndygoul farmhouse and steading in Tranent, East Lothian, were split by their owner, Lothian and Borders Cooperative Society Ltd, into what were eventually five separate units: of these, the farmhouse itself and the property now known as East Windygoul adjoined one another; the three East Windygoul cottages lay on the other side of a private access road leading to the steading from the public road. The original split-off writs were Sasine deeds but in the course of time all of the properties had found their way on to the Land Register with the exception of East Windygoul.

The application to the Lands Tribunal was by the owners of East Windygoul. Their main case concerned the access road. Under their split-off writ, a disposition of 1993, there was conveyed:

> a right in common along with the proprietors for the time being of the subjects known as Nos One, Two and Three East Windygoul Cottages, and East Windygoul Farm Cottage, Ormiston Road, Tranent and any other proprietors having an interest therein to the private access road leading from Ormiston Road aforesaid to the subjects of sale, all as the said access road is coloured blue on the said plan annexed and executed as relative hereto.

Yet, in due course, one small part of the access road ('the brown area') had found its way into the title sheet of the farmhouse as the farmhouse's exclusive property while another small part ('the mauve area') had found its way into the title sheets of the three cottages as common property of the cottages (only). In the case of the mauve area this was contrary to the Sasine titles even of the cottages and so was plainly a mistake on first registration. In the case of the brown area, this was consistent with the plan attached to the Sasine split-off disposition but, the disposition having been granted after the 1993 disposition of East Windygoul, it could not convey the *pro indiviso* share which had already been conveyed to the applicants. So this too was a mistake on first registration.

1 2019 GWD 32-505. The Lands Tribunal comprised R A Smith QC and C C Marwick FRICS.

A mistake on first registration, however, was not necessarily an inaccuracy today, because the initial inaccuracy might have been cured by the transitional provisions in schedule 4 of the 2012 Act. But that could only be so if those registered as proprietors had been in possession on 7 December 2014. The evidence of possession turned out to be complex and disputed. In relation to the brown area the Tribunal was satisfied that it was possessed by the applicants for the purposes of parking and access and so was not in the exclusive possession (or perhaps in the possession at all) of the owners of the farmhouse. Hence the inaccuracy persisted and could be rectified.

As for the mauve area, the Tribunal accepted 'that the owner of Cottage No 1 has used the mauve area for parking for many years, and that the owners of Nos 2 and 3 have given their consent for this, ie a form of civil possession on their part'.[1] Conversely the mauve area had not been specifically used by the applicants although they had made use of the access road in general. This gave rise to the question of whether, by using and so being in possession of a substantial part of the access road, they could be regarded as being in possession of all of it. This idea has a long pedigree, going all the way back, in Scotland, to Viscount Stair,[2] and there is more recent authority in the specific context of land registration.[3] But for this rule to apply it is necessary for the disputed part (the mauve area) to be an integrated part of the property as a whole. As the Lands Tribunal pointed out, 'An example of where a part of subjects was found not to be an integral element of the registered subjects viewed as a whole was where the area in dispute comprised two distinct elements, namely garden ground and a track, so that possession of one element could not be regarded as possession of the other: *Rivendale v Keeper*.'[4] The present position, thought the Tribunal, fell into the same category with the result that the owners of the cottages were unchallenged proprietors in possession on 7 December 2014 of the mauve area:[5]

> Here we think that most of the mauve area is distinct from the rest of the access as it runs along the boundary of cottage No 1. It is demarked from the cobbled access carriageway since it comprises gravel and a flower bed. It has been used for parking rather than general access. So we do not think that the applicants can rely on the concept of partial possession for this area. As the applicants have not possessed it in the necessary sense, and two cottage owners have possessed it for many years on 1979 Act registered titles, rectification in favour of the applicants was precluded as at the designated day for the 2012 Act, 8 December 2014.

One complication might be mentioned. First registration of one of the cottages had taken place after the designated day and hence under the Act of 2012. For

1 Paragraph 65.
2 Stair II.1.13.
3 See the authorities in support of the seventh rule listed in Reid and Gretton, *Land Registration* para 11.12.
4 Paragraph 67. The reference is to *Rivendale v Keeper of the Registers of Scotland*, 30 October 2013, Lands Tribunal, at paras 54 and 55.
5 Paragraph 68. This referred to most but not quite all of the mauve area. The cottage owners were found not to have been in exclusive possession of the hatched bellmouth, with the consequence that rectification for this part of the mauve area was allowed: see para 70.

purely practical reasons, the Tribunal decided that this made no difference to the outcome:[1]

> The concept of 'proprietor in possession' is not relevant to the No 3 title which has been registered under the 2012 Act. However, to 'rectify' the No 3 title by stating that the mauve area should also be shared with the applicant would lead to absurdity, since the area is also in common ownership with Nos 1 and 2, whose titles cannot be rectified in such manner. So we do not propose to require rectification of the mauve area.

That approach can, however, be questioned. As registration in respect of the third cottage occurred under the 2012 Act and not the 1979 Act, there was no question of the Midas touch curing the absence of an underlying Sasine title. Hence, although the owner of the third cottage had been registered as a one-third *pro indiviso* owner of the mauve area (ie owner along with the other two cottages), the absence of an underlying title meant that she could not acquire more than a one-fifth share (ie along with the other two cottages plus the farmhouse plus East Windygoul). While rectification to reduce the size of her share would complicate an already complicated set of titles, there can be little doubt that the applicants were entitled to have this done.[2]

An undefended case

Finally, what if the person who has gained from an error on the Register (Billy, in the opening example), while unwilling to co-operate with the person whose property has been taken (Anna), is also unwilling to defend any action raised by that person? What, in other words, if the policy is simply one of inactivity and silence? That was the position in *White v Jackson*.[3]

The applicant averred that some of his land at Charlesfield, St Boswells, Roxburghshire, had found its way into a neighbour's title sheet (ROX9548) by mistake on first registration of the neighbour's title. This had occurred before the designated day (8 December 2014) and hence under the 1979 Act. The Keeper accepted that an error had been made but refused to rectify it on the basis that, as the neighbour was presumed under the transitional provisions to have been in possession on 7 December 2014,[4] the inaccuracy was presumptively cured on the designated day. Hence the need for this application to the Lands Tribunal under s 82 of the 2012 Act.

The application was unopposed. As the Tribunal explained:

> In the present case Mr Jackson [the neighbour] has declined to consent to the rectification, having been invited to do so by the applicant, but neither has he entered this process to oppose the application. In these circumstances the only information available to the Tribunal is the applicant's averment, at para 4 of the application, that

1 Paragraph 69.
2 This, however, is subject to s 86 of the LR(S)A 2012 which, in certain circumstances, might have conferred a good title to a one-third share. We do not have sufficient information to know whether s 86 applied.
3 2019 GWD 36–579. The Lands Tribunal comprised Lord Minginish.
4 LR(S)A 2012 sch 4 para 18.

> he, the applicant, has been the proprietor in possession since at least March 1996. Since that averment is unchallenged the Tribunal is entitled to give effect to it. Moreover, even if Mr Jackson does enjoy the statutory presumption, there is no averment before us that rectification would cause him prejudice.

In these circumstances the Tribunal granted the application and indicated that the Keeper should make the necessary rectification of the neighbour's title sheet.[1]

The heartening possibility that a Tribunal application might be unopposed is something that a person in the position of Anna should always bear in mind. But neighbours tend not to be so quiescent in yielding property which has been allocated to them. An absence of opposition is only likely if the neighbour (Billy) accepts that he has not possessed the disputed area and hence accepts that there is nothing to be gained, and something to be lost in terms of expenses, in defending the application.

PROPERTY TAXES IN SCOTLAND[2]

Introduction

Politics and much else besides over the past 12 months have been dominated by Brexit, while the result of current exit negotiations may have a significant bearing on the ongoing process of Scottish tax devolution – or its eventual replacement by an independent tax system, within the European Union or otherwise. In the meantime, the impact of tax policy and its resultant rules continue to flow northwards through the one-way valve of the devolution settlement. The various changes announced in the 2018 Scottish Budget, particularly affecting income tax rates and thresholds, have been running throughout the 2019–20 tax year; and important changes to LBTT non-residential and additional dwelling supplement rates came into force even earlier, on 25 January 2019.[3]

It is devolved income tax that will produce the greatest individual and overall economic impact, despite the powers available to the Scottish Parliament being limited to rates and thresholds. But as well as legislative changes to the fully devolved LBTT, 2019 brought a large number of tax tribunal decisions on important substantive matters, as well as an Upper Tribunal decision in favour of the taxpayer on daily penalties. Those dealing with Scottish land may not want to become tax lawyers, but the need to do so is growing.

There were limited developments towards a new process for Scottish tax legislation. In March 2019, the Scottish Government and Scottish Parliament established a Devolved Taxes Legislation Working Group.[4] Also in March 2019

1 Any order issued by the Tribunal is subject to r 18 of the Lands Tribunal for Scotland Rules 2003 (SSI 2003/452) in terms of which a party who fails to appear at a hearing can, within seven days of intimation of the order, apply to the Tribunal to set the decision aside. The Tribunal must be 'satisfied that there was sufficient reason for such absence'.

2 This section is contributed by Alan Barr of the University of Edinburgh and Brodies LLP.

3 See below.

4 For the Group's terms of reference, see www.gov.scot/publications/devolved-taxes-legislation-working-group-terms-of-reference/.

a further consultation was opened on devolved taxes.[1] The Working Group published an interim report in February 2020[2] and a final report is expected in the summer of 2020.

The holding of a UK parliamentary election in December 2019 had the effect of delaying the UK Budget until 11 March 2020 (which, at the time of writing, still lay in the future). In turn, the Scottish Budget was also delayed, but was eventually delivered on 6 February 2020 and passed on 5 March, before the UK Budget. That means that spending measures were based on even less accurate estimates than usual; and it is possible, although unlikely, that taxing measures may also have to be revised in the wake of any substantial changes made by the UK Budget. But subject to those uncertainties, changes for Scottish tax for 2020–21 (and in at least one case[3] before the new tax year) have now been announced.

Land and buildings transaction tax

New non-residential rates

As announced in the 2018 Budget, a new rate-structure was introduced for non-residential purchases for transactions settling on or after 25 January 2019. The lower rate of non-residential LBTT was reduced from 3% to 1%, the upper rate increased from 4.5% to 5%, and the starting threshold for the upper rate reduced from £350,000 to £250,000.[4]

Here are the rates which came into effect following that change:

Purchase price	*LBTT rate*
Up to £150,000	0%
Above £150,000 to £250,000	1%
Above £250,000	5%

There was some surprise that further changes to non-residential LBTT were announced in the Scottish Budget in February 2020. For any lease with an effective date on or after 7 February 2020 (subject to a very limited transitional provision), a new 2% LBTT band will apply to the amount of any rental net present value (NPV) exceeding £2 million.[5] This represents a significant increase in the LBTT bill for commercial tenants compared to the old rates. It also means

1 See *Devolved taxes: policy framework consultation* (www.gov.scot/publications/devolved-taxes-policy-framework/). The analysis of responses is available at www.gov.scot/publications/devolved-taxes-policy-framework-consultation-analysis/.
2 See www.parliament.scot/parliamentarybusiness/CurrentCommittees/114453.aspx.
3 The new LBTT rate for non-residential leases, as to which see below.
4 Land and Buildings Transaction Tax (Tax Rates and Tax Bands Etc) (Scotland) Amendment Order 2018, SSI 2018/372, art 2.
5 *Scottish Budget: 2020–21* pp 20–21.

that leases of Scottish commercial property will bear a higher tax cost than equivalent leases entered into in England and Northern Ireland where the higher rate becomes chargeable at £5 million (so a potential difference of up to £30,000 on a single lease). The statutory instrument effecting the changes was laid before Parliament on 6 February 2020 following the Budget announcement.[1]

Additional dwelling supplement

As has been noted in previous volumes, since its introduction in 2016, ADS has been a runaway success in terms of revenue-raising.[2] It was therefore perhaps not surprising that the rate of ADS was a target for increase, and this duly occurred: transactions settling on or after 25 January 2019 are subject to ADS of 4% rather than, previously, of 3%.[3]

But while the tax may be considered a success for Revenue Scotland and the Scottish Government, solicitors and their clients may take a different view. Many purchasers find themselves paying the supplement in circumstances where they find it hard to believe that it was intended to bite. One perceived anomaly concerned couples buying together where they have previously each owned their respective main residence. In general terms, the mere replacement of a main residence should mean that ADS is not payable, or if the previous residence is sold after the purchase of the new one, the supplement is repaid.[4] That anomaly was partially cured in 2017.[5] This was aimed at ensuring that spouses, civil partners or cohabitants who jointly buy a main residence are considered to be replacing their main residence when their previous main residence is sold, even where that residence was owned by only one of them. It prevents tax being charged at the outset when what will now be deemed to be the couple's main residence was sold before the purchase; and it allows for repayment when that previous residence is sold after the purchase. But, as noted last year, the revised relief is very limited and in particular requires there to be a sale of a property which has been occupied as the main residence of both of the joint buyers.[6]

New case law confirms the limitations and demonstrates that unwelcome anomalies persist with purchases following the end of relationships as well as at their outset. The facts in *Walter v Revenue Scotland*[7] are all too typical. Mr Walter lived with Mrs Walter in the marital home (which they owned in common) until 10 July 2016. They split up; and on 4 January 2018 Mr Walter and his new partner Miss Robb purchased a property together. Although Miss Robb had never owned any other property, additional dwelling supplement of £3,600 was,

1 See the Land and Buildings Transaction Tax (Tax Rates and Tax Bands) (Scotland) Amendment Order 2020, SSI 2020/24.
2 *Conveyancing 2018* p 232.
3 Land and Buildings Transaction Tax (Tax Rates and Tax Bands Etc) (Scotland) Amendment Order 2018, SSI 2018/372, art 3
4 Land and Buildings Transaction Tax (Scotland) Act 2013 sch 2A paras 8 and 9.
5 See Land and Buildings Transaction Tax (Additional Amount-Second Homes Main Residence Relief) (Scotland) Order 2017, SSI 2017/233, made retrospective by the Land and Buildings Transaction Tax (Relief from Additional Amount) (Scotland) Act 2018.
6 See *Conveyancing 2018* pp 233–34; *Goudie and Sheldon v Revenue Scotland* [2018] FTSTC 4.
7 [2019] FTSC 9.

properly, paid at that point. On 3 December 2018, Mr Walter transferred to the now ex-Mrs Walter his half of the former matrimonial home. By any normal lay understanding, Mr Walter had replaced what had been his main residence, well within the strict time limit of 18 months. He thus set about reclaiming the additional dwelling supplement; but his claim was refused.

It is worth setting out how the relevant legislation reads, taking into account the assumptions that can now be made following the amendments made in 2017. The relevant provisions are sch 2A paragraphs 8 and 8A of the Land and Buildings Transaction Tax (Scotland) Act 2013. The former paragraph sets out the conditions for exemption from ADS. The latter paragraph makes certain changes to paragraph 8 for the case where there are only two buyers, and the buyers (i) are (in relation to each other) spouses, civil partners or cohabitants, and (ii) are or will be jointly entitled to ownership of the dwelling that is or forms part of the subject-matter of the transaction. As so changed, the (three) conditions for exemption from ADS in paragraph 8 are as follows (changes italicised):

(a) within the period of 18 months beginning with the day after the effective date of the transaction, *either of the buyers* disposes of the ownership of a dwelling (other than one that was or formed part of the subject-matter of the chargeable transaction),
(b) that dwelling was *both of the buyers' together* only or main residence at any time during the period of 18 months ending with the effective date of the transaction, and
(c) the dwelling that was or formed part of the subject-matter of the transaction has been occupied as *both of the buyers together* only or main residence.

It would, to put it at its mildest, be rather surprising if both of the buyers here (Mr Walter and Miss Robb) had occupied Mr Walter's former marital home together. Mrs Walter might have been cross. But the legislation, as the First-tier Tribunal affirmed, is clear. The Tribunal referred to the case of *Goudie and Sheldon v Revenue Scotland*,[1] where the limited nature of the legislative change had been analysed with reference to the avowed policy intentions. This emphasised the need for cohabitants replacing their main residence to have both lived in the property.[2]

The Tribunal in *Walter* understood that the appellant considered the legislation to be unfair, but noted (as in many Scottish tax tribunal decisions already) that considerations of fairness or otherwise were not within the Tribunal's jurisdiction.[3] It also noted that if Mr Walter had purchased the new property alone, he would have qualified for repayment of ADS.[4]

That this situation is relatively common and perceived to be wholly unfair can be confirmed by the fact that, despite LBTT still having a relatively limited reported litigation history, virtually the same facts have given rise to another

1 [2018] FSTC 3, considered at *Conveyancing 2018* pp 233–34.
2 [2018] FSTC 3 at paras 17–33.
3 [2019] FSTC 9 at para 17.
4 Paragraph 14.

three (failed) appeals.[1] In one of these case, *Ross v Revenue Scotland*,[2] the appellant, a very organised party litigant, added contentions that the legislation was not only unfair, but also unclear and unreasonable; and that the decision not to repay ADS was 'ludicrous'. To no avail – again the Tribunal confirmed that it had no general supervisory jurisdiction and refused the appeal.

There have been cases on other topics. A more prosaic appeal against a refusal to repay ADS of £18,300 following the sale of a couple's previous main residence was rejected in *Hunter v Revenue Scotland*.[3] The taxpayer and his wife purchased a house on 16 September 2016; after a great deal of difficulty, including several aborted deals, they eventually sold their previous main residence on 11 January 2019, more than 27 months after the purchase.

The delay in sale was not their fault and the First-tier Tribunal expressed 'considerable sympathy'. But the legislation was clear and inflexible – the 'window' was 18 months, not '18 months or such other period as is reasonable in the circumstances', a formulation which could only come with legislative change.[4] The appeal was necessarily dismissed.

A further basic point was explored in *Chumas v Revenue Scotland*.[5] On 4 August 2017, Ms Chumas purchased a new home (the 'Second Property') while she still owned her previous main residence (the 'First Property'). She paid ADS of £5,205. On 3 August 2018 she sold the Second Property and moved back into the First Property. She claimed repayment of the ADS. This claim was refused. It is a requirement of the Land and Buildings Transaction Tax (Scotland) Act 2013 sch 2A paragraph 8(1)(a) that the taxpayer disposes of a dwelling '… other than one which was or formed part of the subject-matter of the chargeable transaction'. Furthermore, the Second Property could not have been the taxpayer's main residence at any time in the 18 months prior to its purchase, as required by paragraph 8(1)(b). Again, the appeal was dismissed.

Although no changes were announced to ADS in the 2020 Scottish Budget, it was revealed that 'following the Scottish Parliament's Finance and Constitution Committee's consideration in 2019, the Scottish Government is undertaking work to consider the range of views in relation to the operation of the ADS'.[6]

Penalties

It seems that penalties form an increasingly important proportion of the total revenue collected by Revenue Scotland, rising to over £1 million in 2018–19.[7] While case law on devolved taxes remains in its relative infancy, a substantial

1 These were *Ross v Revenue Scotland* [2019] FSTC 11; *Doherty v Revenue Scotland* [2019] FTSTC 14l; and, on similar facts without the element of marital breakdown, *Wallace and Hogg v Revenue Scotland* [2019] FTSTC 13.
2 [2019] FSTC 11.
3 [2019] FTSTC 7.
4 Paragraph 19.
5 [2019] FTSTC 10.
6 *Scottish Budget: 2020–21* p 20.
7 See Revenue Scotland (www.revenue.scot/), *Annual Report and Accounts for the year ended 31 March 2019* p 6.

proportion of the relatively limited case base continues to derive from the imposition of penalties.

2019 brought a further range of such decisions across a broad range of penalty matters, again often accompanied by cries of 'unfair' from disgruntled taxpayers (and probably their solicitors). It also brought the first reported decision of the Upper Tax Tribunal on a fully devolved tax, as well as the first outright success for taxpayers in relation to the penalty regime, although that success seems likely to be limited and short-lived.

Begbies Traynor (Central) LLP v Revenue Scotland[1] and *Harrison and Ross v Revenue Scotland*[2]were heard at the same time and involved the same issues. In both cases, no LBTT was due on the transaction in question, but a return was required. When returns were eventually submitted, they were extremely late; and a range of penalties for late submission was then invoked. These included the £100 penalty which is chargeable for a return submitted after the filing date (generally 30 days after settlement), and – the substantive subject of both appeals – a penalty of £10 for each day that the return remained outstanding for a period of up to 90 days after the filing date (total £900). There were also potential penalties due once each of six months and 12 months had passed after the filing date, but Revenue Scotland had issued each of these at £0. This was within the discretion of Revenue Scotland, although the First Tier Tribunal held that the appropriate course was not to issue a penalty at all and discharged these penalties.

That left the daily penalties, levied under the Revenue Scotland and Tax Powers Act 2014 s 161:

> (1) P [the purchaser] is liable to a penalty under this section if (and only if) –
> (a) P's failure continues after the end of the period of 3 months beginning with the penalty date,
> (b) Revenue Scotland decides that such a penalty should be payable, and
> (c) Revenue Scotland gives notice to P specifying the date from which the penalty is payable.
> (2) The penalty under this section is £10 for each day that the failure continues during the period of 90 days beginning with the date specified in the notice given under subsection (1)(c).
> (3) The date specified in the notice under subsection (1)(c)—
> (a) may be earlier than the date on which the notice is given, but
> (b) may not be earlier than the end of the period mentioned in subsection (1)(a).

At the hearing before the First-tier Tribunal, Revenue Scotland were not able to point to any individual decision to levy the daily penalties, nor to any policy decision (which would in their view have been sufficient) that such penalties would be levied if certain conditions were met. Further, no preliminary notice or warning had been issued within s 161(1)(c). The

1 [2019] FTSTC 4.
2 [2019] FTSTC 5.

First-tier Tribunal then considered and rejected arguments based on reasonable excuse and special circumstances, but nonetheless decided to discharge the daily penalties. The Tribunal also criticised the whole notion of a daily penalty regime, where there is no continuing record and no notice to file has been issued.[1]

The reports of the FTT decisions in both cases state that the judgments were released on 1 February 2018. However, they do not appear to have been published in any form until 2019, by which time Revenue Scotland had taken conjoined appeals to the Upper Tribunal. The judgments in the appeals were issued at the same time as those in the First-tier Tribunal. Although separate Upper Tribunal judgments were issued, they were to the same effect and in substantially the same form.[2]

Revenue Scotland argued that there was enough evidence to show that in fact a decision had been taken within s 161(1)(b) (based on the fact of the issue of the penalty assessment notice itself, as well as high-level decisions, at Revenue Scotland Board level); or alternatively that they should have been allowed to submit further evidence to that effect. On s 161(1)(c), they argued that there was no need for the taxpayer to receive a warning before the first day on which daily penalties become payable, or that in fact the penalty assessment notice itself gave sufficient notice of the start date.

Very little of this was accepted by the Upper Tribunal. In the UT's view, the First-tier Tribunal was entitled to find that Revenue Scotland had failed to produce sufficient evidence of a decision that daily penalties should be levied. The Tribunal was also justified in not permitting Revenue Scotland to lead further evidence that the decision had actually been taken. However, in contrast to the view of the First-tier Tribunal, the Upper Tribunal found that Revenue Scotland were not bound to issue advance warning of the imposition of daily penalties before the 90-day period of daily penalties began; but they did have to issue a notice, separate from the issue of the penalty assessment notice itself. The Upper Tribunal accepted that such a two-stage process would be largely redundant and practically unnecessary – but that is what the legislation provided and any departure from it would require legislative change.[3]

One would have expected that in the absence of a further (successful) appeal (which is not being undertaken in these cases), and until the anticipated legislative change, Revenue Scotland would have changed their approach – and indeed refunded daily penalties issued based on that approach. After all, if there had been no 'decision' to issue daily penalties (or evidence of such a decision), surely any penalty assessment notice issued should be treated as if was a 'blank piece of paper', like a certain purported order for the prorogation of Parliament. That however was not the view of Revenue Scotland.

1 [2019] FSTC 5 at paras 43–46.
2 *Revenue Scotland v Begbies Traynor (Central) LLP* [2019] UT 35; *Revenue Scotland v Harrison and Ross* [2019] UT 36.
3 See *Revenue Scotland v Harrison and Ross* [2019] UT 36 at para 86.

In August 2019, Revenue Scotland announced that 'it will not repay daily penalties applied in previous late return cases because it considers those matters to have been finalised due to the fact that penalty assessments have been paid without dispute or, for a small number, they have previously been upheld by decisions of the FTTS or UTS'.[1] The same announcement also confirmed that Revenue Scotland would continue to charge daily penalties for a failure to submit a return more than three months after the filing date but will review the administrative process for doing so. Late reviews of cases will be considered and appeals may be made in appropriate cases; but Revenue Scotland do not consider the fact that the Upper Tribunal decision was not available as being a reasonable excuse for any late action taken by taxpayers in the face of daily penalties to which they wish to object. It has to be said that Revenue Scotland's attitude to their defeat on this issue seems highly questionable and scarcely likely to encourage respect for a penalty system which so many affected taxpayers already consider to be fundamentally unfair – particularly in cases where no actual tax is payable.

One particular situation where a return may well be due with no tax payable relates to three-year lease reviews. These require a return to be made within 30 days of the third anniversary of the effective date of a new lease (and on certain other events, such as assignation or termination).[2] Given the introduction of LBTT in April 2015, the first such returns could only be required from April 2018,[3] but as time passes more and more leases will be affected. But perhaps particularly in early years, it is extremely likely that nothing will have changed and that, while a return will be due, no additional tax will be payable.

This was (probably) the position in *Kot v Revenue Scotland*.[4] The effective date of the original transaction was 10 August 2015; a three-year review return was thus due by 9 September 2018. Revenue Scotland issued a reminder and, the return not having been received in time, a penalty of £100 was issued (with terrifying efficiency) on 13 September 2018. The three-year LBTT return was received on 24 September. The appeal was made on 28 September 2018, with the taxpayer, who lived in Hong Kong, claiming she had not received anything before the penalty notice and did not know about the deadline.[5]

The First-tier Tribunal accepted (against the argument of Revenue Scotland) that ignorance of the law could in certain circumstances constitute a reasonable excuse.[6] But here Revenue Scotland had demonstrated that the penalty had been properly imposed. The appellant then had the burden of demonstrating that there was a reasonable excuse or special circumstances, to justify the penalty being reduced or cancelled. She had not discharged

1 LBTT *Technical Bulletin 5,* August 2019, p 3.
2 Land and Buildings Transaction Tax (Scotland) Act 2013 sch 19 para 10.
3 See *Conveyancing 2018* pp 236–37.
4 [2019] FTSTC 1.
5 In fact, there were significant discrepancies between the original LBTT return and the three-year return, but the appeal did not address these.
6 Following in particular *Perrin v HMRC* [2017] UKFTT 870: see [2019] FTSC 1 at paras 35–38.

that burden – on the contrary, despite her being based abroad, she would be reasonably expected to have familiarised herself with relevant local legislation. It seemed likely that she would have received the Revenue Scotland reminder to make the three-year return; but even if she had not, Revenue Scotland were under no duty to issue such reminders. The taxpayer had neither a reasonable excuse nor any special circumstances and the penalty was confirmed.

Exactly the same result was reached in relation to a taxpayer based in Australia in *Qamar v Revenue Scotland*.[1] It was up to the taxpayer to ascertain the relevant legal requirements (readily available from the Revenue Scotland website) and to honour those.

The theme of ignorance of the law leading to a possible reasonable excuse but in particular circumstances not amounting to such runs through penalty cases in 2019. In *LT Manufacturing Ltd v Revenue Scotland*[2] a self-described 'novice non-LBTT expert' submitted the return due for a commercial lease 55 days late and incurred a £100 penalty. He claimed that he did not realise he could submit the return without the property reference number or official postal address, and that Revenue Scotland's Guidance notes were confusing and intimidating. Neither argument was accepted as constituting a reasonable excuse.

In addition to appeals on penalties for late submission of returns, there has also been litigation on penalties for late payment of tax. *Munro v Revenue Scotland*[3] involved a purchase transaction settling on 10 August 2018. An LBTT return was submitted electronically by the taxpayer's solicitor on 13 August, but the agent did not pay the tax at that time (or within the short period permitted under rules on 'arrangements satisfactory' for payment).[4] The tax was eventually paid on 17 September. This led to a penalty being issued, in the sum of £803, including £11 interest, on the basis that the tax should have been paid at the same time as the submission of the return.

In *Munro* the appellant's principal argument drew attention to what might be seen as an anomaly deriving from conveyancing necessities. The return did not require to be submitted until 30 days after the effective date (9 September), and if this had been done penalties would not have been due in respect of non-payment until 9 October. According to the appellant, it could not have been the intention of the legislation to treat a payment as late if it was made several weeks before this, on 17 September.

The Tribunal did not agree. Section 40 of the Land and Buildings Transaction Tax (Scotland) Act was unambiguous: when a return was submitted, tax must be paid at the time of submission or within the short period permitted in accordance with Revenue Scotland guidelines about payment by electronic means. There were no special circumstances or reasonable excuse, and the penalty was confirmed.

1 [2019] FTSTC 3.
2 [2019] FTSTC 2.
3 [2019] FTSTC 6.
4 See Land and Buildings Transaction Tax (Scotland) Act 2013 s 40(4).

That late payment in particular can lead to much larger penalties is illustrated in *Avocet Agriculture Ltd v Revenue Scotland*.[1] Here a penalty assessment notice had been issued to Avocet Farms Ltd on 5 October 2018. Avocet Farms Ltd was the new name of Avocet Agriculture Ltd, which was the purchaser of a property for a consideration stated to be £5 million. LBTT amounted to £187,500.15 and, by the date of the penalty assessment notice, penalties amounted to some £58,000. A review decision confirming the penalties incorrectly addressed to Avocet Agriculture Ltd was issued on 20 December 2018. An appeal was lodged on 18 January 2019. The grounds were far from clear, but centred on a contention that the company currently known as Avocet Agriculture Ltd had no connection with the transaction, and that the consideration was in fact much less than £5 million. This did not go far towards meeting the directions obtained from the Tribunal, at the request of Revenue Scotland, that the appellant clarify the decision(s) being appealed, the reasons for the appeal, and the result sought. The appellant's representative (whoever he was representing) had failed to produce a valid notice or grounds of appeal and thus the appeal ('such as it is', in the words of the Tribunal) was dismissed.

Repayment

An ambitious attempt to get LBTT repaid failed in *Grotlin v Revenue Scotland*.[2] The taxpayer bought a property from Taylor Wimpey on 27 November 2015 for £325,000. He was dissatisfied with its quality and, on 1 December 2017, Taylor Wimpey bought it back for £375,000. An entirely different property was then bought and LBTT was paid on this. The taxpayer tried to claim back the LBTT paid on his original purchase. When this was refused, the taxpayer appealed. The grounds were vague but included alleged 'exceptional circumstances', a claim that neighbours had been successful in claiming back SDLT in similar circumstances, and the particularly optimistic view that 'common sense should be applied'.[3] This was treated as a claim for repayment under the Revenue Scotland and Tax Powers Act 2014 s 107. As the tax had indeed been properly chargeable when paid, the appeal was dismissed, again with sympathy.

Scottish income tax

While income tax is not of specific relevance to the taxation of land, income from land is one of the categories of income of Scottish taxpayers which is affected by the differing rates (and thresholds) applied to Scottish taxpayers. For 2019–20, the revised structure of income tax rates and thresholds introduced in 2018–19 was maintained, with increases by inflation for the first two thresholds while the two higher ones were frozen.[4] This produced the following rates for different levels of affected income:

1 [2019] FTSTC 8.
2 [2019] FTSTC 12.
3 Paragraph 9.
4 See Scottish Rate Resolution, 19 February 2019.

Bands	*Band name*	*Rate*
Over £12,500–£14,549*	Starter Rate	19%
Over £14,549–£24,944	Scottish Basic Rate	20%
Over £24,944–£43,430	Intermediate Rate	21%
Over £43,430–£150,000	Higher Rate	41%
Above £150,000**	Top Rate	46%

For 2020–21 the following revisions to the first two thresholds were announced in the 2020 Scottish Budget, with the upper two thresholds again frozen.[1]

Bands	*Band name*	*Rate*
Over £12,500–£14,585*	Starter Rate	19%
Over £14,585–£25,158	Scottish Basic Rate	20%
Over £25,158–£43,430	Intermediate Rate	21%
Over £43,430–£150,000	Higher Rate	41%
Above £150,000**	Top Rate	46%

* Assumes individuals are in receipt of the standard UK personal allowance.
** Those earning more than £100,000 will see their personal allowance reduced by £1 for every £2 earned over £100,000.

Other Scottish property taxes

Scottish landfill tax

Rates of Scottish landfill tax (SLfT) for 2019–20 were set by the Scottish Landfill Tax (Standard Rate and Lower Rate) Order 2019[2] at £91.35 per tonne (standard rate) and £2.90 (lower rate). The credit rate for the Scottish Landfill Communities Fund (SLCF) was maintained at 5.6%. The 2020 Scottish Budget set the standard and lower rates of SLfT for 2020–21 at £94.15 per tonne and £3 per tonne respectively. This planned increase ensures consistency with the planned changes to landfill tax rates in the rest of the UK.[3] Following an earlier announcement that full enforcement of the ban on the landfilling of biodegradable municipal waste (BMW) should be delayed until 2025, the Scottish Government is currently exploring the role that SLfT can play in reducing the practice and a further announcement can be expected in 2020–21. This may alter the forecast, made

1 As the Scottish Budget took place before the UK Budget (see above), the possibility of further changes in the light of the latter cannot be completely excluded.
2 SSI 2019/58.
3 *Scottish Budget: 2020–21* pp 22–23.

in 2018, that Scottish landfill tax receipts would reduce substantially over the following five years, as more and more waste is prohibited from entering landfill;[1] and the forecast reductions in the tax take in the medium term have been reduced somewhat.[2]

Aggregates levy

There have been no further developments in the devolution of aggregates levy. Devolution is on hold pending the results of a comprehensive review of the levy currently being undertaken by the UK Government, which follows the conclusion of long-standing litigation. The Scottish Government confirms it will continue to work with the UK Government and stakeholders in anticipation of the eventual devolution of the levy.[3]

Non-domestic (business) rates

Responsibility for non-domestic rates is fully devolved to Scotland, and the regime continues to diverge from the position in the rest of the UK. The amount of non-domestic rates paid is the rateable value of the property (ie its open market rental) multiplied by the 'poundage'. Rateable values are set at periodic revaluations; the last one for Scottish property was in 2017. The non-domestic rates poundage for 2019–20 was set at 49p, which caps the increase at 2.1%.[4] In addition, there is now an enhanced 100% fibre broadband relief for a 10-year period to 31 March 2029.[5]

There have been a number of rating reforms implementing aspects of the Barclay Review,[6] and more have now been introduced. The Scottish Budget 2020 introduced a number of changes to non-domestic (business) rates:[7]

- an Intermediate Property Rate for properties with a rateable value between £51,000 and £95,000, which will now only be charged an additional 1.3p on rates on top of the standard poundage;

1 *Scottish Budget: 2019–20* p 35.
2 *Scottish Budget: 2020–21* p 23.
3 *Scottish Budget: 2020–21* p 27.
4 The Non-Domestic Rate (Scotland) Order 2019, SSI 2019/35.
5 On this and telecommunications rating more generally, see the Non-Domestic Rates (Telecommunication Installations) (Scotland) Amendment Regulations 2019, SSI 2019/41; Non-Domestic Rating (Telecommunications New Fibre Infrastructure) (Scotland) Order 2019, SSI 2019/42; Non-Domestic Rates (Telecommunications New Fibre Infrastructure Relief) (Scotland) Regulations 2019, SSI 2019/43.
6 *Report of the Barclay Review of Non-Domestic Rates* (www.gov.scot/publications/report-barclay-review-non-domestic-rates/). See, for examples, the Non-Domestic Rates (Levying) (Scotland) Regulations 2019, SSI 2019/39; Non-Domestic Rates (Relief for New and Improved Properties) (Scotland) Regulations 2019, SSI 2019/40; Non-Domestic Rates (Transitional Relief) (Scotland) Amendment Regulations 2019, SSI 2019/44; Non-Domestic Rating (Valuation of Utilities) (Scotland) Amendment Order 2019, SSI 2019/45); Non-Domestic Rates (Relief for New and Improved Properties) (Scotland) Amendment Regulations 2019, SSI 2019/116.
7 *Scottish Budget: 2020–21* pp 24–26.

- properties with a rateable value (RV) above £95,000 will continue to be charged the Higher Property Rate (formerly and confusingly called the Large Business Supplement) of 2.6p plus the poundage;
- the 100% relief for Enterprise Areas is extended to 31 March 2022;
- as recommended by the Barclay Review, an extension to the reset period for Empty Property Relief from six weeks to six months, reducing the possibility of avoidance; and
- the introduction of a requirement for self-catering property to be actually let for 70 days to be considered non-domestic and liable for NDR rather than council tax, as recommended by the Barclay Review.

The Non-Domestic Rates (Scotland) Bill, which was introduced to deliver a number of the recommendations of the Review that require primary legislation, completed its passage through the Scottish Parliament on 5 February 2020.[1] Key provisions of the Bill (soon to be an Act) include:

- three-yearly valuations from 2022 to ensure that valuations are more closely aligned to current market values;
- a two-stage appeals system (proposal and appeal) to improve the administration and timeliness of the appeals system;
- greater information-gathering powers for assessors and a new civil penalty for non-provision of information in order to increase 'right first-time' valuations and improve ratepayers' trust in the rating system;
- the power to introduce general anti-avoidance regulations in order to improve fairness for all; and
- removing charitable rates relief from mainstream independent schools, whilst retaining the relief for independent special schools.

UK taxes on land

Capital gains tax

From 6 April 2020, the final period of ownership qualifying for capital gains tax relief irrespective of occupation will be reduced from 18 to nine months.[2]

New and demanding rules have been introduced requiring that a return is made of the disposal of UK land within 30 days of settlement. The rules apply to most non-resident taxpayers for disposals from 6 April 2019; and they will apply to residents disposing of (chargeable) residential property as well as to all other non-residents (generally those carrying out a trade, profession or vocation within the UK) from 6 April 2020.[3] Payment of tax on at least a provisional basis will also be required within the same deadline.[4]

1 www.parliament.scot/parliamentarybusiness/Bills/111337.aspx.
2 Taxation of Chargeable Gains Act 1992 s 223(1) with change announced in *Budget 2018*.
3 Finance Act 2019 s 14, sch 2 para 1.
4 FA 2019 sch 2 paras 6–8.

In relation to the annual tax on envelope properties ('ATED'), there are increases by CPI inflation (2.4%) in the amounts chargeable for 2019–20.[1]

Capital allowances

A new capital allowances regime in relation to certain construction expenditure has been introduced. This is the Structures and Buildings Allowance (SBA), which SBA applies to capital expenditure on non-residential buildings under contracts entered into after 29 October 2018.[2] The SBA provides a 2% straight-line writing-down allowance against construction or renovation costs for buildings or structures used for a qualifying business purpose. This allowance will thus be available for the first 50 years after the building is first brought into use by persons carrying on a qualifying trade, profession, vocation or property business.

Eligibility for allowances will transfer with the underlying property, and purchasers will simply inherit the remaining tax written-down amount of the initial spend. For leased buildings, entitlement remains with the landlord where the lease is less than 35 years and transfers to the tenant in longer leases, subject to some restrictions.

Special rules apply in cases where structures or buildings are destroyed, or substantially refurbished following significant damage, interacting with the capital gains tax position.[3]

1 Annual Tax on Enveloped Dwellings (Indexation of Annual Chargeable Amounts) Order 2019, SI 2019/401.

2 See Finance Act 2019 s 30 and the Capital Allowances (Structures and Buildings Allowances) Regulations 2019, SI 2019/1087, reg 2, introducing a new Part 2A (ss 270AA–270IH) to the Capital Allowances Act 2001.

3 See amendments made to Taxation of Chargeable Gains Act 1992 s 24, and insertion of s 24A, by the Capital Allowances (Structures and Buildings Allowances) Regulations 2019, SI 2019/1087, reg 4.

PART V

TABLES

TABLES

CUMULATIVE TABLE OF DECISIONS ON VARIATION OR DISCHARGE OF TITLE CONDITIONS

This table lists all decisions since 1 January 2019 on opposed applications under the Title Conditions (Scotland) Act 2003 for variation or discharge of title conditions. Decisions on expenses are omitted. A table of decisions prior to that date can be found at the end of *Conveyancing 2018*. Note that the full opinions in Lands Tribunal cases are usually available at http://www.lands-tribunal-scotland.org.uk/.

Servitudes

Name of case	***Servitude***	***Applicant's project in breach of burden***	***Application granted or refused***
Leehand Properties Ltd 2019 GWD 29-468	1994 feu disposition. Pedestrian right of way.	Building houses on site of the projected route	Granted (unopposed).
Nicol v Crowley 2019 GWD 40-646	1973 disposition. Pedestrian right of way.	Rerouting of path as part of garden redesign.	Refused (opposed).
Mahoney v Cumming 2019 GWD 32-506	1907 feu charter. Pedestrian right of way.	Blocking of route to increase privacy.	Refused (opposed).

CUMULATIVE TABLE OF APPEALS

A table at the end of *Conveyancing 2008* listed all cases digested in *Conveyancing 1999* and subsequent annual volumes in respect of which an appeal was subsequently heard, and gave the result of the appeal. A second table, at the end of *Conveyancing 2018*, covered the years from 2009 to 2018. This is a continuation of the tables, covering the years from 2019 onwards.

Anderson v Wilson

[2018] CSOH 5, 2018 GWD 4-62, 2018 Case (39) *affd* [2019] CSIH 4, 2019 SC 271, 2019 SLT 185, 2019 Case (44)

Commodity Solution Services Ltd v First Scottish Searching Services Ltd

[2018] SC DUNF 14, 2018 SLT (Sh Ct) 117, 2018 Case (53) *affd* [2019] SAC (Civ) 4, 2019 SC (SAC) 41, 2019 SLT (Sh Ct) 63, 2019 Case (51)