CONVEYANCING 2013

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PREFACE

This is the fifteenth 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/records.html), or have otherwise come to our attention, since *Conveyancing 2012*. The next two parts summarise, respectively, statutory developments during 2013 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 three tables. A cumulative table of decisions, usually by the Lands Tribunal, on the variation or discharge of title conditions covers all decisions since the revised jurisdiction in part 9 of the Title Conditions (Scotland) Act 2003 came into effect. Then there is a cumulative table of appeals, designed to facilitate moving from one annual volume to the next. Finally, there is a table of cases digested in earlier volumes but reported, either for the first time or in an additional series, in 2013. This is for the convenience of future reference.

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, Alistair Bowman, Sarah Meanley, Roddy Paisley, Elspeth Reid, Neil Tainsh, and Scott Wortley.

Kenneth G C Reid
George L Gretton
20 March 2014

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MISSIVES OF SALE

(1) The Harbro Group Ltd v MHA Auchlochan [2013] CSOH 8, 2013 GWD 4-114

A company bought a site near Lesmahagow, Lanarkshire, on which to build a factory. The missives required the sellers to carry out certain site preparation works including the re-routing of cables and the construction of an access road. The company claimed that the sellers were in breach of these obligations, and sued for damages of £304,000. At this stage of the litigation the focus of the dispute was on whether the pursuer (the holding company) could claim for losses which might have been suffered, not directly by that company itself, but by its subsidiaries. Proof before answer allowed.

(2) AMA (New Town) Ltd v Law [2013] CSIH 61, 2013 SC 608, 2013 SLT 959

If a buyer fails to pay when the date of settlement arrives, can the seller simply obtain a decree for payment for the price? That apparently simple question is in fact anything but simple. This Inner House decision answers the question in the affirmative. See **Commentary** p 124.

COMMON PROPERTY

(3) Collins v Sweeney 2013 GWD 11-230, Sh Ct

Ever since Lord McCluskey, in *Scrimgeour v Scrimgeour* 1988 SLT 590, allowed one co-owner of the matrimonial home to buy out the share of the other rather than have the home sold on the open market, the courts have tended to retreat from this position, emphasising that in *Scrimgeour* there was no opposition to the arrangement. See in particular *Berry v Berry* 1989 SLT 292 and *Ploetner v Ploetner* 1997 SCLR 998. This is the latest such case. Both parties wanted the house which they co-owned to be sold, but while the pursuer wanted a sale on the open market, the defender (who alone was in a financial position to do so) wanted to buy out the other share at valuation so as to provide a home for

the child of the relationship. In rejecting the defender's proposal, the sheriff (J N McCormick) seems also to have rejected the accepted distinction between right (ie to division or sale of the property) and remedy (ie the question of how division or sale should take place). The defender did not challenge the pursuer's *right* to division or sale; her argument was simply that that right could be given effect to by a private purchase of the pursuer's half share. That, however, was not the sheriff's approach. He emphasised the absolute right of a co-owner to division or sale. The defender's proposal was, he said, inconsistent with such a right. Hence it must be refused.

The correctness of the decision may be doubted: see G L Gretton and A J M Steven, *Property, Trusts and Succession* (2nd edn, 2013) para 9.15.

TENEMENTS

(4) Garvie v Wallace
2013 GWD 38-734, Sh Ct

When repairs to the gable wall of a tenement were completed, the owners of two of the flats refused to pay their share on the ground that the decision-making provisions in the title deeds had not been properly complied with. Circumstances in which **held** that the owners were nonetheless liable. See **Commentary** p 157.

[Another aspect of this case is digested at (12) below.]

(5) K2 Restaurants Ltd v Glasgow City Council
[2013] CSIH 49, 2013 GWD 21-420

On 8 September 1995 Glasgow City Council served a notice under s 13 of the Building (Scotland) Act 1959 on the owners of the four-storey tenement at 229 and 235 North Street, Glasgow. This required specified repairs to the upper stories which failing demolition to ground-floor level. When the owners failed to act, the demolition works were carried out by the Council. The premises on the ground floor were the Koh-I-Noor restaurant. One result of the demolition was to expose to the elements most of the mutual gable wall with the adjoining tenement. The following year, on 6 November 1996, strong winds led to the collapse of the chimney and part of the brickwork of the apex section of the exposed wall. Brickwork fell through the roof of the Koh-I-Noor and caused serious damage. Its owner sued the Council in delict for £175,000. The action was defended on liability but not quantum.

After a proof in 2011 – an astonishing 15 years after the incident complained of – it was held by the Temporary Lord Ordinary (Morag Wise QC) that liability was established: see [2011] CSOH 171, 2011 Hous LR 92 (*Conveyancing 2011* Case (20)). In the Lord Ordinary's view, once the Council had made the decision to demolish part of the tenement, a relationship was created between it and at least the neighbouring proprietors which gave rise to a common-law duty of care. This was squarely within category (C) of Lord Browne Wilkinson's four categories in *X v Bedfordshire County Council* [1995] 2 AC 633. That duty had been breached. In

carrying out the demolition the Council had ignored the strong view within its own organisation that measures were required to tie-in or otherwise stabilise the exposed wall. Walls of this kind were not designed to be exposed to the elements. Although the wind on 6 November had been very strong – the kind of wind that occurs only every five years or so – it was not a freak event, and 'it was reasonably foreseeable that such an event could occur in Glasgow in early November' (para 87).

The Council reclaimed, mainly on the question of whether a common-law duty of care was established in what was essentially a statutory context. The reclaiming motion was refused by an Extra Division. In giving the Opinion of the Court, Lord Brodie (at para 42) emphasised that:

> the claim is not one of breach of statutory duty nor of a failure of duty of care in the manner in which the first defenders exercised a statutory discretion … but, rather, a claim where a duty is alleged to arise from the manner in which the statutory duty had been implemented in practice. What the pursuers found on here and what the Temporary Lord Ordinary held that they were entitled to found on was a purely operational duty arising after the discretionary decision was made, that being a duty not to create a reasonably foreseeable risk of harm by reason of the way in which they carried out the works.

SERVITUDES

(6) Garden v Arrowsmith
2013 GWD 4-120, Sh Ct

In a split-off disposition a right of access was reserved 'to any garage to be erected' on the dominant tenement. Such a right could not of course be exercised unless or until a garage was actually built, as it finally was some 18 years later. But by that time both properties had changed hands. That, said the sheriff-principal, did not matter. Although its exercise was postponed, the right itself was real from the start and bound successors. See **Commentary** p 162.

An oddity of the drafting was that the right was described not as a servitude but as 'a real and preferable burden'. Nonetheless, it was held that a servitude had been created. After all, it was clear that the right was intended to bind, and transmit to, successors. That could be inferred from the reference to successors in title, the obligation to insert in future transmissions, and from the evidently permanent nature of the right. See **Commentary** p 167.

(7) Smith v McLaren
18 October 2013, Arbroath Sheriff Court

A dispute as to damage allegedly inflicted by the dominant proprietors in a servitude of way on a gate across the road. This raised issues as to the right of servient proprietors to install a springed gate, and the obligation of dominant proprietors to shut the gate after use. See **Commentary** p 169.

(8) Thomas v Stephenson's Exr
4 October 2013, Dunoon Sheriff Court

Circumstances in which a servitude right of way was held to have been abandoned. See **Commentary** p 171.

(9) Livingstone of Bachuil v Paine
[2013] CSIH 110, 2014 GWD 2-40

In a petition for interdict against taking access through the petitioner's property (other than by agricultural traffic), the first respondent averred that, as 'uninfeft' proprietor of a croft, he had a servitude right of way which had been established by prescription. Access rights over the same route had been contested in court in 1899 by predecessors of the parties, at which time the access was allowed to continue on the basis of a public right of way. That public right, it was accepted, had now ceased to exist (because the route no longer led to a public place), but an alternative defence in 1899 had been based on servitude and, while the sheriff had not found it necessary to decide the case on that point, the decision was at any rate evidence of use of the route by the owner of the croft. Since 1899, or so the first respondent averred, the route had been in constant use. The petitioner disputed both the extent and the quality of the use, arguing in particular that use in modern times had been of consent and not as of right, and so was not sufficient to establish a servitude by prescription.

In a debate on relevancy the Lord Ordinary (Lord Turnbull) allowed a proof before answer but under exclusion of averments relating to (i) certain aspects of use in earlier years and (ii) the argument that, following the 1899 decision, the present litigation was *res judicata*. In addition, (iii) he found that the second respondent, who was the tenant of the first, had no title to defend on the basis that she neither owned the putative benefited property nor held a lease with an express right to the servitude. See [2012] CSOH 161, 2012 GWD 35-707 (*Conveyancing 2012* Case (12)). The respondent appealed (other than in respect of *res judicata*).

The appeal was allowed in part. Although just a tenant, the second respondent was entitled to defend the action because she would be 'clearly affected' by an interdict (para 26). On the other hand, the effect of the 1899 case, and the interaction of public right of way and servitude, were not as straightforward as the respondent supposed (para 28):

> So far as any interrelation between a public right of way and a private servitude right of access over the same route is concerned, we are not persuaded that, when the route ceases to be a public right of way, prior use of that public route (or part of it) automatically, as a proposition in law, gives rise to a private servitude right of access. In our opinion, *McRobert* [*v Reid* 1914 SC 633] and *Lord Burton* [*v Mackay* 1995 SLT 507] confirm that in certain circumstances, use of a route as a public right of way may co-exist with use by an individual of a private servitude right of access over all or part of that route: but that does not detract from the basic requirements for the constitution of such a servitude right as detailed in Cusine and Paisley, *Servitudes and*

Rights of Way, Chapter 10. Thus we do not accept as a proposition of law that, where a route was a public right of way for a period, and then ceased to be a public right of way, all or part of it can in law be deemed to constitute a private servitude. On the contrary, the normal requirements outlined above must be established. Thus the fact that the route was, for a time, a public right of way, does not in our opinion assist in the proof of the constitution of a private servitude right of access. Indeed it may hamper such proof (as it would be necessary to establish that the use of the route was attributable to the private rather than the public element of the route).

(10) Motion v Binnie
[2013] CSOH 138, 2013 GWD 28-555

The pursuers sought to interdict the defenders from interference with their servitude of access. The pursuers' title was registered in the Land Register and included an express reference to the servitude right. Nonetheless, part of the case for the defence was that the servitude had been granted *a non domino* in respect of a section of the road and so was invalid. The defence was **held** irrelevant and not admitted to probation. Quoting the Scottish Law Commission's exposition of the Midas touch in its Report No 222 on *Land Registration* para 13.9 ('Everything that the Keeper touches turns to valid'), Lord Bannatyne pointed out that, even if the grant had indeed been *a non domino*, the servitude was made good by registration. If the defenders wished to challenge the position, they would have to do so by seeking rectification of the Register (which would then meet the problem that the pursuers claimed to be proprietors in possession).

[Another aspect of this case is digested at (37) below.]

REAL BURDENS

(11) Hill of Rubislaw (Q Seven) Ltd v Rubislaw Quarry Aberdeen Ltd
[2013] CSOH 131, 2013 GWD 27-545

By a minute of agreement registered in 2005 between the owner of development subjects and the owners of neighbouring office premises, the former agreed to restrict the amount of office space to be built on its property to 2,025.29 square metres. The purchaser under missives of the development subjects challenged the status of the restriction as a real burden, principally on the basis that it conferred no praedial benefit. **Held**: that there was sufficient praedial benefit to qualify as a real burden. See **Commentary** p 121. It was further **held** that the pursuer had title to sue despite having no greater right than a right under missives.

It is understood that this decision has been appealed to the Inner House.

(12) Garvie v Wallace
2013 GWD 38-734, Sh Ct

When the owner of one of the flats in a tenement sought to recover a share of repairs alleged to be due by the owners of two other flats, the defenders challenged the pursuer's title to sue (para 143). As the pursuer was seeking to

enforce a real burden contained in a deed of conditions, the issue resolved into whether the pursuer had title to enforce the burden. The sheriff (K J McGowan) was under no doubt that she had (paras 230–31):

> Clause SIXTH of the Deed creates a real burden: section 1 [of the Title Conditions (Scotland) Act 2003]. A real burden is enforceable by a person who has both title and interest: section 8. The pursuer has title as a proprietor of the benefited property: section 8(2).

What is not explained, or justified, however, is why the pursuer's flat should be a benefited property. The pursuer's suggestion that the answer might lie in s 52 of the Act (para 115) was rejected by the sheriff on grounds that are hard to follow (para 229):

> Mr Quin sought to place reliance on section 52 of the 2003 Act. However, my understanding is that that section is a codification of the *ius quaesitum tertio*. So it does not extend the rights of enforcement.

Section 52 having been rejected, no other ground was given.

In fact it is possible that s 52 *did* apply, although that would depend on the full terms of the deed of conditions (which we have not seen) and in particular on whether, as often, the granter reserved a right to waive the conditions (which would exclude s 52). But whether or not s 52 applied, it is certain that s 53 applied, because flats within a tenement are one of the examples marked out (by s 53(2)(d)) for properties being 'related' (a prerequisite for s 53). There can be no doubt, therefore, that the pursuer did indeed have title to enforce the burden.

It does not perhaps increase confidence in the decision that the sheriff refers to the Title Conditions Act as, first, the 'Titles to Land (Consolidation) Act 2003' (para 4) and then as the 'Titles to Land (Scotland) Act 2003' (para 229).

[Another aspect of this decision is digested at (4) above.]

(13) Franklin v Lawson
2013 SLT (Lands Tr) 81

The respondent was held to have an interest to enforce a real burden against the applicants, who owned a house on the opposite side of the street, in order to prevent the applicants from building a two-storey extension which would impact unfavourably on the view from the respondent's house. See **Commentary** p 123.

[Another aspect of this case is digested at (16) below.]

(14) Stewart v Sherwood
7 June 2013, Lands Tr

There is 'room for doubt', said the Lands Tribunal (at para 18), as to whether a prohibition on leasing can be constituted as a real burden; instead, it might be 'repugnant with ownership' and hence excluded by s 3(6) of the Title Conditions

(Scotland) Act 2003. The point, however, was not argued and the Tribunal's view was *obiter*.

We would go further. At common law, which s 3(6) aims to replicate, it seems not to have been possible to prohibit exercise of a juridical act by real burden. In the particular case of leasing, Lord Young had this to say in *Moir's Trs v McEwan* (1880) 7 R 1141 at 1145:

> I think that to insert in a proprietary title – a feu-charter conferring a right of property in fee-simple – a prohibition against letting altogether would be bad from repugnancy, just as a prohibition against selling would be bad from repugnancy. You cannot make a man proprietor and yet prohibit him from exercising the rights of proprietorship. There are certain restrictions which may be imposed. These are generally of a well-known character, and illustrated by well-known decisions, but a restriction against alienation, or a restriction against letting – that is, alienating for a term – would, I think, as at present advised, be bad from repugnancy.

This strikes us as good law as well as being sound as a matter of policy.

[Another aspect of this case is digested at (21) below]

(15) Cumbernauld Housing Partnership v Leary 2013 GWD 37-713, Sh Ct

In a housing development in Cumbernauld the pursuer owned 1,730 properties which it let on social tenancies, and the defender owned 19 of the 1,130 properties in private ownership. As well as managing the common parts on behalf of its tenants, the pursuer was also the factor of the development. As such, it served invoices on the defender over a number of years in respect of management charges (£9,035.21) and common repairs (£1,696.61). When the defender failed to pay the pursuer raised this action for payment. The defence was obscure but amounted to saying that, in respect at least of management charges, the pursuer was only permitted to recover at 'actual cost' as opposed to at 'budget cost'. The burden in the titles imposed an obligation to pay the factor 'the usual remuneration for his services'. **Held**, after a proof, that the defender had failed to mount an effective challenge to the sums due, and decree for payment was granted.

VARIATION ETC OF TITLE CONDITIONS BY LANDS TRIBUNAL

(16) Franklin v Lawson 2013 SLT (Lands Tr) 81

One of the most important Lands Tribunal decisions in recent years, this case reformulates some of the approaches which the Tribunal has adopted in the past. It is presumably not a coincidence that this is one of the few title conditions cases to be presided over by the President of the Tribunal, Lord McGhie.

The application concerned a 100-house estate in Dalgety Bay, Fife, built around 1980. The application was for variation or discharge of a real burden in a split-off feu disposition in order to allow the building of a two-floor extension at the side of the applicants' house. It was opposed by a neighbour who lived opposite, on higher ground, on the basis that it would obstruct his views over the Firth of Forth to Edinburgh. The neighbour's enforcement rights were derived from s 53 of the Title Conditions (Scotland) Act 2003.

As so often, the decision turned on the balance between the two key factors in s 100 of the 2003 Act, namely factor (b) (extent of benefit to the benefited property) and factor (c) (extent that enjoyment of the burdened property is impeded). Factor (c), as usual, was plainly established, because the burden was preventing the applicant from making a reasonable use of his property. Whether the application would be granted, therefore, depended on the strength of factor (b), and in particular the extent of the interference with the respondent's view. In assessing this factor, the Tribunal emphasised that the matter must be regarded objectively and not from the perspective of the respondent, who was naturally troubled by what he might lose (para 23):

> We have to try to assess matters from the viewpoint of a typical homeowner. The main difference is that this takes the emphasis away from the impact of the change as such. We have no doubt that Mr Lawson quite properly focuses on what would be lost. We do not doubt his evidence that it was the view which attracted him to the house. Inevitably he has come to cherish the whole view as it is. However, an occupier coming new to the subjects would be attracted by the view which remained.

It is true that there would be some loss of view from the study, but 'people do not expect to have views from every room' and the excellent view from the living room was unimpaired. The application, therefore, would be granted.

In the course of reaching that decision the Tribunal did a certain amount of re-thinking of two of the other factors, (f) and (h). At one time, factor (f) (purpose of the condition) was read as confining factor (b) to benefits which fell within the original purpose, so that benefits of some other kind were disregarded. See G L Gretton and K G C Reid, *Conveyancing* (4th edn, 2011) para 16-10. As applied to the present facts that would have meant discounting factor (b) altogether because the purpose of the condition was evidently not to preserve the views of neighbours but rather, the Tribunal found, to promote general amenity as well as to provide revenue for waivers for the superior. The recent, if not entirely consistent, trend, however, has been to admit factor (b) even if the benefit is not within the original purpose, although such benefit will then carry less weight. That trend is confirmed in the present case (para 27):

> Identification of a clear purpose behind a title condition can be important. Put shortly, if the benefit which would be interfered with is precisely that which the burden was imposed to preserve, that fact will add significant weight to factor (b).

But where, as here, this is not the case, 'we do not consider that the issue of purpose has any great bearing on the merits' – a departure, at least in tone, from the assertion of the centrality of factor (f) which is found in many previous cases.

The purpose of factor (h) (whether the burdened owner is willing to pay compensation) is obscure, and it was not included in the list of factors in the draft legislation prepared by the Scottish Law Commission. Helpfully, the Tribunal engages in some thinking out loud on factor (h) (para 29):

> It is not easy to determine what weight can be given to this factor. If the tribunal decides that payment of compensation should be a condition of any variation, applicants have a choice. If they decline to pay the sum assessed, the condition will not be varied. Their unwillingness to pay could hardly be a factor bearing on the merits of the application itself. Where an applicant contends that there is no substantial loss but accepts that, if the tribunal takes a different view, he or she will have to reconsider the position, this would simply be part of the evidence to be assessed under factor (b). This factor may be important in cases where the change may be likely to cause specific expense for the benefited proprietor as might follow, say a variation in rights of access. It might well be relevant for an applicant to contend that any loss of benefit can be fully matched by payment. There might, possibly, be circumstances where an applicant was contending that the nature of the title condition was such that a modest payment would easily cover any perceived loss. For example, an offer to pay such a sum to acknowledge that their development would have some impact on their neighbour might be a factor to weigh in favour of the reasonableness of variation. Where, as in the present case, an applicant simply says that they are not prepared to make such payment, we do not think that this can be given any weight, one way or another. As we have said, it would be up to an applicant to consider what to do in light of any sum by way of compensation we determined to be appropriate.

The application having been granted, the respondents claimed compensation under s 90(7)(a) of the 2003 Act (compensation for 'substantial loss or disadvantage'). The Tribunal explained its general approach as follows (paras 43 and 44):

> It is plain that Parliament did not intend that a benefited proprietor would always be entitled to compensation for any loss following variation of his rights under a title condition. In particular it is not for any loss that compensation can be made but only for 'substantial loss' and it is to be noted that even where there is a substantial loss there is no entitlement to direct compensation as such. The tribunal is given a discretion to award such sum as it thinks just.
>
> As always, statutory language has to be construed in context. There are contexts in which a loss of less than £1,000 would clearly be substantial. Anyone losing a wallet with that amount would be expected to describe the loss as loss of a substantial sum, no matter how wealthy he was. However, the immediate context in the present case is loss of value of the property. We are satisfied that loss of one or two per cent in overall value would not normally be described as a substantial loss.

As for the present claim, the Tribunal was critical of the vagueness and lack of focus of the valuation evidence (para 34):

> We think it appropriate to make a general comment on the quality of evidence we heard bearing on the valuation. It may be that where the main aim of parties is to lead evidence on the merits of a discharge, broad assertions as to whether there will, or will not, be a loss of value may suffice. But where there is a disputed issue of compensation a surveyor should recognise the need to support his figures with evidence which can be tested. In a case about value of subjects forming part of a development of over 100 houses in place since the late 1980s, evidence of comparable sales ought not to have been difficult to obtain. Even if it was impossible to provide evidence of a comparison of prices between houses bearing direct comparison with the before and after views under discussion in this case, it would have been helpful to have evidence of sales of houses of the same type as No 10 with no open view at all. This would have been expected to provide a solid start point for comparison.

As it was, while a degree of loss was accepted, the Tribunal 'could not find sufficient material … to justify us in making an award' (para 45).

On expenses, the Tribunal signalled a change of direction. Prior to the 2003 Act, expenses would not normally be awarded against an unsuccessful respondent. Today, however, while the Tribunal, like any court, has a discretion, it is directed by s 103(1) to 'have regard, in particular, to the extent to which the application, or any opposition to it, is successful'. The approach adopted hitherto has been for expenses to follow success except to the extent that the applicant was at fault (see Gretton and Reid, *Conveyancing* para 16-05). This approach, however, has been criticised as unfair to the respondent (even if consistent with the legislation: see p 24) and, in a separate note on expenses issued on 15 July 2013, the Tribunal proposes a significant modification (para 2):

> It is clear that despite the sympathy a Tribunal may have for a respondent who may be doing no more than seeking reasonably to preserve title conditions which are important to him, Parliament must be taken to have required a change from that approach. A party who has had complete substantive success can expect to be found entitled to expenses. In the *West Coast* case [*West Coast Property Developments Ltd v Clarke* 2007 GWD 29-511], the Tribunal appeared to express the view that this principle would be applied unless there was something about the conduct of the successful party which was open to criticism. We think that is too narrow. Although it will not be enough for an unsuccessful opponent to say that he or she acted reasonably, there may be particular circumstances which allow an exercise of discretion based on the particular position of the respondent. We are satisfied that the present is such a case. We have no doubt that any reasonable person in the respondent's position would suffer personal upset from the impact of the new building on the outlook he had previously enjoyed. We are also satisfied that there will be a loss of value to his property. We think these are factors which we can properly take into account.

(For decisions in 2013 made on the 'too narrow' basis, see Cases (27) and (28) below. But the new approach is anticipated by certain remarks by the Tribunal, Lord McGhie also presiding, in Case (29) *Cope v X*, decided the previous month.) To the objection that this was really a form of backdoor compensation, the Tribunal pointed out that the respondent will still have to cover his own expenses and, in most cases, part of those of the applicant as well. 'He will be well out

of pocket. We do not think that he would regard such a result as equivalent to compensation by the back door' (para 8). At the original hearing the Tribunal had been inclined to make no award of expenses (para 56) but, following representations by the parties, it awarded expenses against the respondent but limited to 50%. Apart from the issue of loss of enjoyment and value, this also reflected the inadequacy of the applicant's expert witnesses.

[Another aspect of this case is digested at (13) above.]

(17) Macneil v Bradonwood Ltd 2013 SLT (Lands Tr) 41

For many years the Victorian semi-detached houses at 5 and 7 Comely Park, Dunfermline were used as council offices. Eventually, they were sold for development, and the developer obtained planning permission (i) to convert the main building into five flats and (ii) to build a further three mews houses at the foot of the garden. There was nothing in the title deeds to prevent (i), but the original grant in feu limited building at the foot of the garden to a single-storey building ten feet in height (plus roof). The buildings contemplated by the developer would be of one and a half storeys, and with an eaves height of 16 feet.

As the burdens were more than 100 years old, the developer was able to serve a notice of termination under s 20 of the Title Conditions (Scotland) Act 2003 (the so-called 'sunset' rule). Close neighbours responded by applying to the Lands Tribunal for renewal of the burdens, under s 90(1)(b). As with standard applications for variation and discharge, the Tribunal decides applications for renewal on the basis of the factors set out in s 100 of the Act.

In respect of factor (b) (extent of benefit to the benefited property), the Tribunal thought that the proposed buildings would have only a 'very limited' impact on the amenity of even the closest neighbour. Conversely, in relation to factor (c) (extent that enjoyment of the burdened property is impeded) the Tribunal concluded that the impediment of not being able to develop the land in this way was 'substantial', even if this was largely a financial (as opposed to a private-use) matter. The overall purpose of the burdens (factor (f)) was to preserve the general amenity of the garden areas of the various houses, but its importance was now diminished by some 'very substantial' changes in the immediate vicinity, including a major dual carriageway and a number of modern buildings interfering with the view (factor (a)). 'The reasonableness of a proposal to build slightly higher mews houses than originally permitted, to the standard which has clearly been required in planning, has to be seen in the context of that degree of change. Having regard to the degree of change since the 1860s, we must ask ourselves whether the variation sought would lead to any material alteration of the amenity of the garden areas' (para 37). Finally, both the age of the burdens (factor (e)), and the fact of planning permission (factor (g)), counted 'slightly' against a renewal of the burdens, the former because 'development of the mews to this limited extent is more consistent with current-day circumstances' (para 41).

Overall, the Tribunal had little difficulty in deciding that the application for renewal should be refused. However, following a concession by the developer,

the Tribunal allowed the burdens to remain in place but subject to a new height restriction which was sufficient to allow the development to go ahead.

(18) Cook v Cadman
2014 GWD 3-66, Lands Tr

This is another case of an application for preservation, following the service of a notice of termination under the 'sunset' rule.

A substantial feu 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. So matters remained until recently when the owner of Dunmail concluded conditional missives to sell the property to Cala Homes. An indicative plan showed Dunmail being demolished and replaced by four houses, although an application for planning permission was yet to be made. The owner of Dunmail having served a notice of termination in respect of the burden, the owners of Glendarroch and Silverdale applied to the Lands Tribunal for the burden's preservation. The applicants' title to enforce the burden appears to have been founded on s 52 of the Title Conditions (Scotland) Act 2003; other neighbours had also joined as co-applicants but failed to demonstrate a title to enforce. The application was opposed by the owner of Dunmail.

At first the parties' positions were uncompromising, with the applicants seeking retention of the burden in its entirety and the respondent seeking its removal. But in the course of the proceedings the applicants indicated a willingness to accept two houses on the site, while the respondent argued for six. The Tribunal compromised with four (the number on the indicative plan), but with a restriction to a single storey within ten metres of Glendarroch and five metres of Silverdale.

This result reflected a balancing of benefit and burden, in the usual way. The burden was plainly of considerable benefit to the applicants insofar as it gave them not only protection against over-development but also the certainty that it could be stopped (factor (b)). As the Tribunal explained (para 47):

> Owners of Glendarroch and Silverdale can (at least if they satisfy the test, in the particular case, of interest to enforce) block any extensive residential development by enforcing the burden rather than having to take their chances in any planning dispute. Any prospective purchasers would also take comfort from it. Without this burden, there would be an unwelcome uncertainty.

Nonetheless, the development proposed by the respondent would have only limited impact on the applicants, and particularly on the owners of Glendarroch. Furthermore, the 1876 feu disposition provided only limited protection. As it did not stipulate how or where the one permitted house was to be built, there would be nothing to stop the respondent from demolishing Dunmail and replacing it with something much more intrusive. In other words, 'the burden gives no right to light, view, or any other specific amenity' (para 48). Indeed, while it

was possible to see in the burden the purpose of preserving 'spacious general amenity' (factor (f)), 'this would clearly be primarily at least in the interests of the superior' (para 44). Against the benefit to the applicants must be set the burden on the respondent (factor (c)). A restriction on a development which was likely to receive planning permission was a significant impediment.

The Tribunal also pointed to changes in circumstances (factor (a)) and the age of the burden (factor (e)). In respect of the former, a great deal of building had taken place since 1876 and the area had lost some (although not all) of the spaciousness contemplated in the original burden. On the other hand, the introduction of public planning did not remove a role for private planning of the kind which the burden sought to achieve (para 42):

> [I]nsofar as the respondent argues that this title condition has simply been 'superseded' by modern development control, we reject that submission. It is not the law that, as the respondent submitted, 'planning control is now a matter for the planning authority rather than private contract': real burdens, in effect private planning control, may be more restrictive than public planning control and remain valid. It may, or it may not, be reasonable to retain them.

In relation to age (para 50):

> This burden was clearly created in a very different era, under a system of planning which has gone and, for example, when views in the more expensive part of the housing market about the size of gardens was quite different. This does, however, have to be placed in the balance alongside the fact that this burden has substantially held and is of some continuing benefit.

Finally, the Tribunal resisted the applicants' plea that, if the burden were to be varied, this should be accompanied by stipulations as to the type and layout of any development. 'This is particularly so in this case because the burdens did not confer any such right of control. It is reasonable to limit further development, but not to stipulate its form' (para 58).

(19) McCabe v Killcross
2013 SLT (Lands Tr) 48

Burdens within 'communities' such as tenements, sheltered housing developments and housing estates are perhaps particularly prone to becoming out of date. In recognition of the problem, two distinct mechanisms are provided in the Title Conditions (Scotland) Act 2003 for the variation of community burdens. Under s 33 a deed of variation can be granted by the owners of a majority of units or by such other number as may be specified in the title deeds, subject in both cases to a right of appeal to the Lands Tribunal by way of an application for preservation of the burdens unchanged. Alternatively, the owners of a mere 25% of units can apply to the Tribunal for a variation under s 91. Importantly, both methods have the effect of altering the conditions for all units in the community and not just for the units owned by the signatories or applicants;

anything less, of course, would hardly be workable. Normally, owners can be expected to try for a voluntary deed under s 33. But where there is strong opposition or large numbers, an application under s 91 is likely to be the better option. Yet it has taken a while for s 91 to enter into the consciousness of the legal profession. In the whole period from 2004 to 2012 only two applications under s 91 were disposed of by the Lands Tribunal (one granted, one refused). But suddenly, in 2013, there have been no fewer than four applications, of which this is the first.

Broughton Place is an A-listed mansion in Broughton (near Biggar) designed by Sir Basil Spence in the 1930s. In 1976 the main house was divided into three flats: one on the ground and first floors, and one on each of the two upper floors. Under the titles, common parts were maintained on the basis of equality. In 2012 the large flat on the ground and first floor was divided into two flats (one on each floor), and the question then arose as to the division of liability. As each of the four flats was now more or less the same size, it was agreed to proceed on the basis of equality. But there was a dispute as to the stairs which led to the two turrets. In the scheme proposed by the owner of the flat which was being divided, only the (new) flat on the first floor would have liability, with the result that costs would be divided three ways (and not four). The owners of one of the upper flats disagreed. The result was that, instead of proceeding consensually by deed of variation, the scheme was put before the Lands Tribunal for approval under s 91. The owner of the flat which was to be divided was the applicant, and the application was opposed, in respect of liability for the stairs (only), by an upper proprietor.

The Tribunal found for the respondent. Unlike the lift (in respect of which it was accepted that the ground-floor proprietor should not be liable), the turrets and their stairs were 'not simply an access to the upper flats' but rather 'an integral part of this quite special building which is enjoyed by all four proprietors' (para 27). Although the ground-floor proprietor might not use the turreted stairs, he enjoyed them at least in an architectural sense. Indeed, 'all the owners of the main part of the building benefit from it [the stairs] in the same way as they benefit from maintenance of the roofs over the stairs and from maintenance of the common entrance and toilet' (para 28).

(20) Gilfin Property Holdings Ltd v Beech 2013 SLT (Lands Tr) 17

One of the two previous cases dealing with s 91 was *Paterson v Drouet* 2013 GWD 3-99, decided in 2012, where the Tribunal altered the apportionment of liability for maintenance of common parts within a tenement. The circumstances were rather special. (For further details and commentary, see *Conveyancing 2012* pp 137–42.) Maintenance under the titles was by rateable value. The applicants, who owned the two flats on the ground floor of an eight-flat tenement, were liable for around 75% of the cost of common maintenance, because, at the time the burdens were imposed, the flats were used as shops and so attracted a high valuation. The flats had since reverted to residential use. Under the maintenance scheme

this ought to have resulted in a sharp reduction of liability (and a corresponding increase in the liability of the upper flats) because there would have been a sharp fall in valuation. But domestic rates were abolished in 1989, and, for the purposes of maintenance obligations, all valuations were frozen as at 1 April 1989: see Local Government Finance Act 1992 s 111. So the maintenance scheme was no longer working as originally intended. In these circumstances the Tribunal was willing to alter the liabilities within the tenement so that the share falling to the applicants was reduced to 35%.

The facts of the new case, *Gilfin Properties*, bear some resemblance to those of *Paterson v Drouet*. Under a deed of conditions, from 1986, the three flats on the ground floor of a nine-flat tenement in St Mirren Street, Paisley, were liable for 83% of the cost of common maintenance. The owners of the three flats made an application under s 91 to have their liability reduced to 49%. This was opposed by the owners of one of the upper flats, who were not, however, legally represented.

The application was granted, apparently on the basis of *Paterson v Drouet*. One factor weighing with the Tribunal was that everyone in the building, including the respondent, accepted that the current apportionment of liability was unfair.

The decision seems rather generous to the applicants. On the facts, there were two crucial differences from *Paterson v Drouet*. First, liability for maintenance was apportioned by percentage and not by rateable value (although the percentage figures did apparently reflect rateable values at the time of the deed of conditions). This was not, therefore, a case in which the applicants had suffered because of the valuation freeze of 1989. On the other hand, it seems as if the apportionments were not necessarily meant to be permanent, because a mechanism (not so far utilised) was provided for them to be adjusted by majority vote. Secondly, there was no change from commercial to residential use. The applicants continued to use their flats for commercial purposes. That being so, it is not clear why they thought they were entitled to such a big reduction in liability, or indeed to any reduction at all. The decision in *Paterson* was based mainly on change of circumstances (factor (a)) – ie the statutory freezing of valuations followed by a switch from commercial to residential use. In *Gilfin Properties*, by contrast, there was little or nothing in the way of change of circumstances (at least as far as the Tribunal's judgment discloses), and nothing to suggest that any of the other statutory factors was engaged (other than factor (h) mentioned below).

Insofar as the Tribunal hesitated, it was on other grounds. Substantial common repairs were long outstanding, and the Tribunal was concerned that a principal object of the application was to reduce liability for repairs which should already have been carried out. That worry was removed when the applicants entered into an undertaking to carry out the most essential works and to recover the cost on the basis of the original apportionments. That, thought the Tribunal, amounted virtually to an offer of compensation (factor (h)), and cleared the way to allowing the application.

(21) Stewart v Sherwood
7 June 2013, Lands Tr

This too was an application under s 91 of the Title Conditions (Scotland) Act 2003, although the circumstances were very different.

When Mrs Sherwood moved into a care home in 2012, she rented out her flat. This was part of a 23-flat sheltered housing development in Bridge of Allan, and a number of the other owners were unhappy that one of the flats – for the first time – should be rented rather than owner-occupied. Worried that their development might be attractive to the buy-to-let market, and that over time it would be overrun by tenants, a majority of owners applied to the Lands Tribunal for variation of the deed of conditions by the addition of a prohibition on renting ('None of the Dwellinghouses shall be let').

The application failed. Balancing the benefit and burden of the title conditions as they stood at present (ie without the prohibition on letting), the Tribunal concluded that the burden imposed by the *status quo* (factor (c)) was greatly outweighed by the benefit of being able to exercise 'a substantial natural element in ownership' (para 24), ie the power to let (factor (b)). In relation to the former, the Tribunal noted that (para 25):

> The corresponding burden on other owners of having to accept lettings at the development is said by the applicants to be likely to have adverse long term effects on marketability and indeed the whole character of the development. It appears to us that, although letting may change the character of the development to an extent, there are competing views on any effect on marketability and the applicants have not established their contention. They have not advanced any support which can be seen from the materials to be based on either experience or expertise. They have not advanced any real evidence of any deleterious effect at such a development of tenancies compared to owner-occupation or occupation by elderly members of owners' families.

There was some discussion as to whether the provision in the deed of conditions by which new occupants were to be vetted by the mid-superior (no less: the function was now carried out by the manager) would work as well with tenants as with owner-occupiers. The Tribunal thought that it would, at least if a clearer procedure were to be established.

Finally, the Tribunal (under factor (j): anything else material) made something of the fact that only a bare majority of owners had supported the application, and that three of those had since changed their minds. A proposal 'which involves a significant restriction on ownership' was 'some way short of commanding full support' (para 31).

[Another aspect of this case is digested at (14) above.]

(22) Scott v Applin
16 May 2013, Lands Tr

Ericht Court in Blairgowrie is a sheltered housing development built in 2006 by McCarthy & Stone and now factored by Peverel. Of its 48 flats, one is set

aside, in terms of the deed of conditions, for the house manager to live in. It is owned by McCarthy & Stone. Condition 4.5 of the deed of conditions provides that:

> There shall be at all times a full time House Manager for the Building. This is a Core Burden in terms of Section 54 of the 2003 Act. The House Manager shall be resident in the Building. This is a Core Burden in terms of Section 54 of the 2003 Act.

'Core burden' is a concept which only occurs in sheltered and retirement housing developments. It is defined in s 54(4) of the Title Conditions (Scotland) 2003 as a real burden which regulates facilities or services of the kind which make the development particularly suitable for occupation by elderly people. The burdens just quoted are thus correctly identified as core burdens. One of the purposes of the labelling is to restrict the application of s 33 of the Act in respect of variation or discharge of community burdens. In its normal version, s 33 allows variation or discharge by the owners of a majority of the units in the community; for core burdens, however, only variation (and not discharge) is possible, and the required majority is two-thirds.

The application in the present case concerned various core burdens but especially condition 4.5 (quoted above). Although Ericht Court had a full-time house manager, as required by the clause, no manager had been resident since 2009. Seemingly it was difficult to find managers who were willing to live in; and in any case the residents had become used to doing without a resident manager, especially as they had the benefit of a 'Careline' alarm system which was connected to a remote centre. The application, which was made under s 91 of the Act, was for the variation of the deed of conditions to the effect of removing the requirement for a resident manager, for liberating the manager's flat for use as an ordinary flat, and for consequential amendments to the deed of conditions (which included extending liability for maintenance of common parts to the manager's flat). The application was supported by three quarters of the owners and opposed by only two. Although the respondents claimed that some of the applicants were put under pressure to sign, the Tribunal concluded, without inquiry, that the residents were generally robust enough to make up their own minds and that 'a requirement to vouch the mental capacity of each applicant would be going too far' (para 24).

The Tribunal granted the application. The benefit from having a resident manager, as opposed to the full-time non-resident manager who would continue to serve, was small (factor (b)). As the Tribunal explained (para 28):

> No doubt there may be differing views about a call service, but the reality is that although a manager resident in Flat 6 may be expected to act as a good neighbour in any out of hours emergency, such a manager is clearly under no duty or obligation to assist in any particular way, or even to be present, out of hours. The deed does not give rise to any such expectation … This is not a care establishment. Without a resident house manager, individual flat occupiers would still have neighbours, many of whom may also be able to provide reasonable neighbourly assistance.

On the other hand, the requirement to maintain a resident manager did involve additional expense (factor (c)), although this had not been properly quantified by the applicants.

No doubt the very short life of the burdens was an argument against variation (factor (e)), but the broad support for the application was an argument in its favour (factor (j)). Of course, the Tribunal continued (para 22), 'there may be cases in which a not unreasonable proposal has failed, after full and proper consideration by the body of proprietors, to secure the majority required under the titles, and the application may be considered unreasonable'. But in the present case the deed imposed a requirement of unanimity, which set 'a very high bar', and one which it was understandable that the applicants had failed to clear.

In one respect, however, the application was unsuccessful. Condition 5 of the deed of conditions, which made detailed provision for meetings of proprietors, majorities for decisions, and so on, was guarded by a final provision (5.13.6) that 'the Proprietors shall not have any power to vary any part of this condition 5 except by unanimous decision of all Proprietors'. The application sought to delete this final provision. In substance, the Tribunal noted, this would mean that, 'notwithstanding the provisions agreed in 2005 in relation to the competency of decisions, including variations or discharge of conditions in the Deed of Conditions, proprietors could be free to make such changes without having to take an application such as this to the Tribunal' (para 39). The Tribunal was 'not satisfied that this is reasonable' (para 39):

> We agree with the respondents that these provisions have an identifiable purpose. This aspect of the application could have quite major consequences in relation to the powers of meetings of proprietors, in comparison with the restriction presently in place by virtue of Condition 5.13.6. The requirement of unanimity, subject to the jurisdiction of the Tribunal, does not seem unreasonable.

(23) Branziet Investments v Anderson 2013 GWD 31-629, Lands Tr

When a farmhouse near Glasgow was separated from the steading buildings in 1968, the disposition conferred a servitude of vehicular access over part of a driveway and part of a courtyard area. The width of the access presented a problem to the current owner of the steading, who wished to convert the buildings into four houses. In particular, the access, which lay to the rear of the houses, prevented the creation of back gardens. This application was to reduce the width of the access to five metres. It was opposed by the owners of the farmhouse who, while willing to concede a reduction, were holding out for a larger width.

In determining the issue, the Tribunal sought to balance factor (b) (extent of benefit to the benefited property) against factor (c) (extent to which the enjoyment of the burdened property was impeded). On the one hand, the servitude was necessary for the respondents; on the other hand, it did limit the ability of the applicant to develop its property. 'There is', noted the Tribunal (para 36), 'a balance between benefit and burden, but the main consideration appears to us

to be the extent of ground which the respondents reasonably need to continue to enjoy the benefit of the servitude.' That extent, the Tribunal concluded, could be met by the five metres offered by the applicants except at either end, where more space was needed, for example for turning. Hence the application was granted to that extent.

(24) Mackay v Bain
2013 SLT (Lands Tr) 37

The semi-detached council houses at 13 and 14 Sibell Road, Golspie, Sutherland, are built with the end-gable of number 13 facing the road. As a result, there is only pedestrian access to the properties, and access to number 14 is by way of two paths over number 13, one at the front and one at the rear of the house. When the properties were sold by Sutherland District Council in 1989, the access rights were constituted as servitudes. The current application was by the owners of number 13 to have discharged the servitude at the front of their house.

The application was refused. It was true that the servitude affected the privacy of the applicants, and to some small degree the safety of their children, as gates might be left open in taking access (factor (b)). But this could hardly compare with the importance to the respondents of having access to their house by their front door (factor (a)). 'To deprive owners of access to the front door of their property, confining them to the back seems somewhat unrealistic' (para 20).

(25) Smith v Martin Alan Properties Ltd
12 July 2013, Lands Tr

An application to discharge a servitude was withdrawn four weeks before the hearing. The respondents sought expenses on the 'agent/client, client paying' (indemnity) basis rather than on the normal 'party and party' basis. (For the difference, see *McKie v Scottish Ministers* [2006] CSOH 54, 2006 SC 528.) It was held that (subject to minor adjustments) expenses were indeed due, for 'an applicant who withdraws an application without having agreed the issue of expenses may normally be taken as accepting that he is unsuccessful, ie the opposing party should receive expenses on the basis that "expenses follow success", in accordance with s 103(1) of the Title Conditions (Scotland) Act 2003' (para 3). But there was no reason for awarding expenses on other than a 'party and party' basis. No doubt the applicants might have thrown in the towel a little earlier, but they did initially have a plausible basis for bringing the application.

(26) Wilson v Scottish Borders Housing Association Ltd
2013 SLT (Lands Tr) 31

When Mr and Mrs Wilson applied to buy their upper flat in a four-in-a-block unit in Galashiels from Scottish Borders Housing Association ('SBHA') they were 'very surprised and chuffed' to find that the disposition included an adjoining plot which had neither been part of their tenancy nor in the missives (para 14).

Nor was it reflected in the purchase price which, at £21,620, was based on an overall valuation of £47,000 less a discount of 54%. The truth was that the transfer of the plot was 'probably' a mistake (para 25).

Subsequently, the Wilsons were successful in an application for planning permission to build a house on the plot. But as the plot, like the rest of the estate, was subject to a deed of conditions which restricted development, the Wilsons applied to the Lands Tribunal for the necessary variation. This was opposed by SBHA but only for the purposes of claiming compensation.

Two potential bases for compensation are provided by s 90(7) of the Title Conditions (Scotland) Act 2003 (copying in this respect the previous legislation). The one generally claimed is compensation for 'any substantial loss or disadvantage' caused by the variation. The next case is an example. But in the present case the claim was based on the alternative basis, namely 'a sum to make up for any effect which the title condition produced, at the time when it was created, in reducing the consideration then paid or made payable for the burdened property'. The evidence was to the effect that at the time of the sale, in 2006, the plot was worth £1,000 with the burdens and £15,000 without, so that the SBHA claim was for £14,000.

The claim was refused. There was, said the Tribunal, an obvious difficulty about applying the compensation provision to a transaction where, 'as there was no explicit consideration of this site, there cannot have been any consideration of its development potential' (para 31). But even if the provision were read less literally, so as to encompass cases where the burdens were simply imposed, without any thought as to the value of the property without them – an approach to which the Tribunal did not commit itself – it could still not be made applicable to the current transaction. For even on this 'more liberal construction', it was still necessary for the burdens to have reduced the consideration (whether or not the parties were conscious of this effect at the time). And the trouble was that the Wilsons were 'special purchasers, entitled to buy the house and garden at the substantially discounted price' (para 38). The Tribunal continued (para 40):

> The applicants, the only possible purchasers in this transaction, knew, at least when the transaction was being completed, that they were getting the extra land, subject to the conditions, for nothing. That does not show that, without the condition, the ground would have had this additional value in the context of this transaction … Can we infer that in 2006 the subjects which the applicants bought, with the burden of this title condition lifted from this plot, would have been worth £14,000 more to them than the price of £21,620 which they paid? We think not. They went through the 'right to buy' transaction and, to their surprise, found themselves given this extra ground, to which they had no entitlement, at no extra cost.

The claim for compensation was therefore refused. Had it been allowed, the Tribunal indicated that, just as it made no allowance for inflation (see eg *Watt v Garden* 2011 Hous LR 79), so it would make no allowance for deflation. The amount of compensation was to be measured at the time of the transaction, ie in 2006. The fact that, due to the recession, the value of the plot had since halved could not be taken into account.

(27) McNab v Smith
7 December 2012 and 30 April 2013, Lands Tr

In a decision issued on 15 June 2012 (*Conveyancing 2012* Case (24)) the Tribunal discharged a servitude of access which the respondent, the owner of a dairy farm, used for his cows over a stretch of road belonging to the applicant. In consequence the cows would need to be led on a different route and through different gates. In the Tribunal's view, this would require compensation to be paid for the respondent's loss (Title Conditions (Scotland) Act 2003 s 90(7)(a)), on which topic the parties were invited to seek agreement or, failing agreement, to make submissions. Although the normal measure of compensation has been the reduction in value of the benefited property, the Tribunal indicated that this might be a case where the measure ought to be the cost of carrying out various works needed to use the alternative route. The parties having failed to reach agreement, the issue was the subject of a further hearing, in which the respondent claimed £105,473 and the applicant contended for £15,000. The main reason for the difference in these amounts lay in the nature of the improved surface on a road: the respondent contended for concrete and the applicant for a woodchip surface. On that point, and on most others, the Tribunal found for the applicant. In an Opinion issued on 7 December 2012, the respondent was awarded compensation of £23,380.

In a further decision issued on 30 April 2013 the Tribunal decided to make no award on expenses. This was because, while the applicant was successful on the merits, the whole dispute, and the necessity for the Tribunal application, was caused by the action she and her late husband took in 2004, without consulting the respondent, to change the farm track into a tarmacked road and remove the grass verges. Other relevant factors were the applicant's spurned offer to settle on a basis close to that reached by the Tribunal, and the respondent's 'wildly excessive' claim for compensation (para 22).

(28) Stephenson's Exr v Thomas
1 March 2013, Lands Tr

This is the first of two cases on expenses. Both were decided prior to the refinement of the rules on expenses in the decision of 15 July 2013 in *Franklin v Lawson* (Case (16) above).

In this case the applicants narrowly failed in their attempt to have a purported servitude of way discharged on the basis that the respondents had long abandoned the route and had an adequate alternative access: see decision of 21 November 2012 (*Conveyancing 2012* Case (27)). In a separate action in the sheriff court, it has since been determined that the servitude had in any event been extinguished by abandonment: see *Thomas v Stephenson's Exr* 4 October 2013, Dunoon Sheriff Court (Case (8) above).

In now determining the question of expenses for the Lands Tribunal application, the Tribunal indicated that, while the starting point was for expenses to follow success, this could be modified in the light of the cause of

the expense. In the present case the Tribunal awarded expenses to the (successful) respondents, but reduced by 50% in the light of the respondents' conduct (para 11):

> It seems to us that in the particular circumstances the respondents contributed to the bringing and pursuing of this application. Firstly, considering that the access right had obviously not been exercised for a lengthy period of time prior to their purchase, the respondents in our view contributed by their inaction for several further years. Secondly, we think that their failure during the proceedings to advance any clear evidence of the feasibility of resuming exercise of the right (in the face of the applicants' evidence about that) had some effect on the proceedings. In short, while there can be no certainty in the matter, we think that the applicants are entitled to suggest that they might not have proceeded as they did in this application but for the respondents' conduct.

(29) Cope v X
6 June 2013, Lands Tr

The applicants, having succeeded in their application to have a servitude of way discharged (2013 SLT (Lands Tr) 20, *Conveyancing 2012* Case (25)), now sought expenses from the respondent. The Tribunal explained the relevant rules, and the background to them, as follows:

> We do have some sympathy for people in the position of the respondent. Prior to the 2003 Act it was the practice of the Tribunal to find no expenses due to or by either party where a respondent had acted reasonably in opposing an application to discharge or vary the conditions under which they held their titles. This was because they were defending their existing rights. However, section 103 showed that Parliament wished to change that approach. They wished to bring matters into line with other litigation. The normal, very well established principle, is that the winner is entitled to his or her expenses. This applies no matter how finely balanced the issues and how reasonable the conduct of the losing party. The reason is clear. An award of expenses is not a punishment. Where a person has been put to the expense of litigation to establish a right, that expense should be paid by the person who caused it. The true right in question is the statutory right to variation where this is reasonable having regard to all the factors set out in sec 100 of the 2003 Act.
>
> Like other courts, the Tribunal has a discretion in relation to the award of expenses. But that discretion has to be exercised in accordance with established principle. We cannot depart from the principle that expenses follow success unless there are good grounds to do so. It is not enough to say that a respondent has acted reasonably. It is normally necessary to find that the successful party acted unreasonably. The reasonableness in question is reasonableness assessed by reference to the conduct of the application itself. It may be observed that this falls to be distinguished from allegations of unreasonableness in relation to prior conduct or in relation to proposals for settlement.

The Tribunal added, anticipating to some extent the modified policy which was to be adopted in *Franklin v Lawson*, decided on 15 July 2013 (Case (16) above), that:

> While there may be circumstances in which loss to the respondent at a level which has not been found to justify an award of compensation, could be an element in assessment of expenses, this would be unusual. But, in any event, in the present case dispute over compensation was not a significant element in the overall conduct of the litigation. Ms X did not lead evidence to quantify any additional cost. While we accept that she may, indeed, face some modest increase in maintenance costs it may be added that the benefit of a shorter straighter road might well add value to her property.

And as there was nothing in the applicants' conduct which was unreasonable, it followed that (unmodified) expenses should be awarded against the respondent. The Tribunal, however, rejected the applicants' argument for an uplift in the fees.

STATUTORY NOTICES

(30) Sinclair v Fife Council 2013 GWD 17-364, Sh Ct

'Never in a million years', said Mike Loftus, an engineer employed by Fife Council, in the course of giving evidence, 'would I buy a house with a retaining wall' (para 85). That advice, however, came too late for Mr and Mrs Sinclair. In 2008 they bought a house at 166 High Street, Dysart, Fife. At the end of the garden was a Victorian sandstone wall, some 4.2 metres high, which supported a road 3.1 metres above. The road was adopted by Fife Council and carried some heavy traffic including buses and lorries. Just after Christmas Day 2009 a substantial section of the wall collapsed. The debris landed in the Sinclairs' garden, and the road suffered subsidence.

Fife Council served a notice on the Sinclairs under s 91(2) of the Roads (Scotland) Act 1984 requiring them (i) to replace the collapsed wall and (ii) to reinstate the damaged road. Section 91(2) provides that

> where it appears to the roads authority … that a retaining wall (whether or not near the road) is in such condition that there is constituted a danger to the road or to road users, they may, by notice served either on the owner of the … wall, or on the occupier of the land on which it is situated, require him within 28 days from the date of the service of the notice to carry out such work as will obviate the danger.

Although by s 91(5) a Council is allowed to 'make such contribution as they think fit towards any expenses reasonably incurred by a person in carrying out necessary work in pursuance of subsection (1) or (2) above', no such contribution was offered. The Sinclairs responded by referring the matter to the sheriff under s 91(8).

At an earlier hearing it was found that the notice could not competently require the Sinclairs to repair the road as it was not their property. The question now for determination, after proof, was whether, as the Sinclairs argued, the notice should also be quashed in respect of the wall. The cost of a new wall to current specifications was estimated at around £200,000.

The proper approach in determining the issue, said the sheriff (J H Williamson), was 'to apply a reasonableness test'; and there was no requirement as such to 'find some act or omission on the part of the defenders that can be labelled as culpable' (para 84). Applying that test, the sheriff concluded that the notice should be quashed, for three reasons. First, it was the responsibility of the Council to manage and maintain the road and to keep it in a safe condition. That responsibility had not been properly discharged in relation to the retaining wall. Despite having identified a bulge in the wall as long ago as 1998, the Council had failed to investigate or to take any further action. 'Had that been done then it is possible that the collapse could have been avoided' (para 87). Secondly, the evidence was that an important factor in the collapse was the nature of the wall's backfill, something which was entirely in the ownership and control of the Council. Thirdly, the Sinclairs had not themselves contributed to the collapse of the wall, either by act or by omission.

PROPERTY ENQUIRY CERTIFICATES

(31) Manorgate Ltd v First Scottish Property Services Ltd [2013] CSOH 108, 2013 GWD 25-491, [2014] PNLR 1

Over the years there have been a number of claims in respect of defective property enquiry certificates: see G L Gretton and K G C Reid, *Conveyancing* (4th edn, 2011) para 4-25 n 64. This is another such claim.

In 2006 Manorgate bought a site in Perth with the intention of demolishing the existing buildings and erecting new commercial premises. The missives provided that a PEC from First Scottish Property Services would be exhibited before the date of entry; in the event that it disclosed any matter materially prejudicial, Manorgate would be able to resile. The letter of instruction from the seller's solicitors to First Scottish read: 'We act in connection with the sale of [the Site] and have been asked by Hannay Fraser & Co [the buyer's solicitors] to obtain from you a Property Enquiry Certificate.' One was duly supplied and was clear. The transaction then proceeded to settlement.

Later it transpired that the site had formerly contained the (Carmelite) Friary of Tullilum, including its extensive burial site. (The name of the street gave a clue: Whitefriars Street.) As a result it had been designated as a site of archaeological significance under part II of the Ancient Monuments and Archaeological Areas Act 1979. This First Scottish had failed to pick up. (In evidence it was explained that a standard search for a PEC takes 20 minutes: see para 45.) The result was to cause so much delay and trouble – including having to deal with the human remains by excavation or other means – that Manorgate abandoned the development and mothballed the site. It then raised this action against First Scottish seeking more than £1 million in damages.

First Scottish accepted that it had been negligent but argued (i) that its negligence had not caused the loss (because Manorgate either did not rely on the PEC or would have purchased the site even if the PEC had been accurate); (ii) that

Manorgate had caused or at least contributed to the loss (because it had failed to carry out a site survey, ground investigations, and other steps which might be expected of a prudent purchaser); and (iii) that Manorgate had failed to mitigate its loss. All three defences were rejected. However, the Lord Ordinary (Lord Woolman) struck out two heads of damage (loss of value caused by demolition of the building, and loss of development profit) on grounds of remoteness.

COMPETITION OF TITLE

(32) McGraddie v McGraddie [2013] UKSC 58, 2013 SLT 1212

Towards the start of his consideration of this appeal, Lord Reed noted that (para 7):

> Lord President Dunedin remarked of the facts of *Brownlee v Brownlee* [1908 SC 232 at 236] that the story seemed more like the closing scenes of the life of Père Goriot than the history of a middle class family in Glasgow. The present case prompts similar reflections.

The pursuer and his wife had lived for many years in Albuquerque, New Mexico. When his wife became seriously ill, the pursuer determined to return to Glasgow and commissioned his son, the first defender, to buy a flat. Money was sent for that purpose. The flat was duly bought and the pursuer came home to live in it. The son had, however, taken title in his own name. A year or so later, the pursuer gave his son a second sum of money (£285,000). Within a few weeks this too had been used to buy a house, with title this time taken in the name of the son and his wife (the second defender). The litigation was a result of disagreement as to the basis on which the money was handed over. The pursuer's case was that his son was simply being appointed as agent, to buy the houses on the pursuer's behalf. Accordingly, the pursuer sought an order that the houses be conveyed to him. The defenders' position was more complicated but in its essentials amounted to saying that the first house was to be used for the benefit of the defenders' family, and that the second cheque was an outright gift.

Following a proof, the Lord Ordinary found for the pursuer: see [2009] CSOH 142, 2009 GWD 38-633 (*Conveyancing 2009* Case (60)), and [2010] CSOH 60, 2010 GWD 21-404 (*Conveyancing 2010* Case (48)). On appeal, the defenders conceded in respect of the first house (though without admitting any wrongdoing) but continued to argue that the money used to buy the second had been an outright gift. Reversing the Lord Ordinary ([2012] CSIH 23, 2012 GWD 15-310, *Conveyancing 2012* Case (38)), an Extra Division of the Court of Session began by emphasising the weight that should be given to the trial judge's assessment of the evidence. An appeal should be allowed on the facts only where the trial judge had 'plainly gone wrong'. In the present case, however, the Lord Ordinary had perhaps been too much influenced by the demeanour of the witnesses and had not paid sufficient attention to 'non-contentious and objective facts' surrounding

the purchase of the second house (para 40). Because the appeal was concerned only with this house, it was possible for the evidence to be subject to 'a highly intensive scrutiny' by the appeal court (para 39). That scrutiny suggested that the non-contentious facts were far more consistent with the evidence of the defenders than that of the pursuer.

The pursuer appealed to the Supreme Court. In allowing the appeal, Lord Reed (with whom the other judges agreed) emphasised the privileged position of the trial judge and counselled against overturning his assessment of the evidence except in highly unusual cases. This was not such a case. Far from having gone wrong, the Lord Ordinary's Opinion was 'careful and fair'. The 'non-contentious and objective facts' on which the Extra Division had relied were either of no consequence or had been taken into account by the Lord Ordinary. A trial judge can and must consider the evidence as a whole. 'The Extra Division however focused solely on those particular aspects of the evidence. There is no indication in their opinion that they gave any weight to the extent to which the Lord Ordinary's conclusion was affected by the way in which the principal witnesses gave their evidence: a matter which the Extra Division were unable to assess for themselves from the printed record' (para 29). In summary (para 33):

> In the whole circumstances, the Extra Division had no proper basis for concluding that the Lord Ordinary had gone plainly wrong, let alone that on a reconsideration of the whole evidence the opposite conclusion should be reached. The case illustrates an important point made by Iacobucci and Major JJ, delivering the judgment of the majority of the Canadian Supreme Court in *Housen v Nikolaisen* [[2002] 2 SCR 235] para 14, when explaining why appellate courts are not in a favourable position to assess and determine factual matters: '… appeals are telescopic in nature, focussing narrowly on particular issues as opposed to viewing the case as a whole'.

LAND REGISTRATION

(33) Santander UK plc v Keeper of the Registers of Scotland [2013] CSOH 24, 2013 SLT 362

Samia Anjum bought a flat in Glasgow with the assistance of a loan from the Alliance and Leicester Building Society (later absorbed into Santander). After six months Ms Anjum forged a discharge of the Alliance and Leicester security, and registered it, through personal presentment. She then took out a new secured loan, with the Bank of Scotland. When the fraud was uncovered, Santander was able to have the discharge reduced and the security restored to the Register by rectification. But such a restored security could only rank second to the Bank of Scotland's security, and none of the loan was recovered. As Santander had succeeded in its application for rectification, no claim lay against the Keeper for indemnity under s 12(1) of the Land Registration (Scotland) Act 1979. Instead Santander sued the Keeper for common-law negligence in respect of her registration of the forged discharge. The action

was dismissed, the Lord Ordinary (Lord Boyd of Duncansby) holding that it would not be fair, just and reasonable to impose a duty of care on the Keeper. See **Commentary** p 178.

(34) Nicol v Keeper of the Registers of Scotland 2013 SLT (Lands Tr) 56

Although in form an appeal against a refusal by the Keeper to rectify, this was in substance, as so often, a dispute between neighbours – in this case between the owners of the lower and upper flats in a building at Lumphanan, Aberdeenshire. At one time the building's garden was held as common property, but in 1989 it was divided by a contract of excambion. Of the two garden sheds, one (the southmost) was allocated to the upper flat and the other (the northmost) to the lower flat. (In fact the parties were in disagreement as to the proper interpretation of the deed, but there does not seem to have been much doubt that this allocation of outhouses was the correct interpretation). When first registration of the upper flat took place, in 1998, the Keeper by mistake included both outhouses on the title plan. The mistake having come to light, the owner of the lower flat sought rectification of the Register. As is so often the case, both parties claimed to be in possession of the misplaced outhouse. In accordance with her usual practice, the Keeper then refused the application on the basis that rectification would, or at least might, prejudice a proprietor in possession (ie the owner of the upper flat) and hence be beyond the Keeper's power: see Land Registration (Scotland) Act 1979 s 9(3)(a). The owner of the lower flat appealed.

The evidence was (i) that the owner of the lower flat was in possession of the outhouse and (ii) that, apart from an unsuccessful attempt to seize the outhouse one day in 2010, which resulted in the police being called, the upper proprietor had had no dealings with it. Accordingly, the Tribunal **held** that the proprietor of the outhouse was not in possession, and allowed the appeal. See **Commentary** p 187.

(35) Rivendale v Keeper of the Registers of Scotland 30 October 2013, Lands Tr

This was another appeal against a refusal to rectify which, again, was in substance a dispute between neighbours at Baluachrach, Tarbert, Argyll. The problem arose out of overlapping Sasine titles. A successor of the disponee of the second of the titles to be granted – which was thus *a non domino* in respect of the area of overlap – applied for first registration. The title plan issued by the Keeper included the overlap area. A successor of the disponee of the first of the titles then applied for rectification of the Register to the effect of removing the overlap area. The registered proprietor disputed the inaccuracy as well as claiming to be in possession.

The Tribunal found that the title plan was inaccurate although not to the extent claimed by the appellant, and that the registered proprietor was in

possession of some but not all of the area to which the inaccuracy related. Accordingly, rectification was allowed in respect of the part which was not possessed. See **Commentary** p 187.

[Another aspect of this case is digested at (66) below.]

(36) Lundin Homes Ltd v Keeper of the Registers of Scotland 2013 SLT (Lands Tr) 73

When the 54 houses in the Deanburn Gardens estate in Seafield, Bathgate, West Lothian, were sold about a decade ago, the split-off dispositions conveyed a right of common property in the 'common ground', defined as 'the Development with the exception of any parts thereof disponed to Proprietors and to any other disponees'. Much later, there was found to be an additional plot which could be used for building a house. Lundin Homes bought it from the receiver of the original developer, but on registration the Keeper excluded indemnity on the basis (i) that the plot was part of the common ground and (ii) that the common ground, or at least some *pro indiviso* shares in it, had ceased to be the property of the developer. Lundin Homes appealed against the exclusion of indemnity. The appeal was allowed. As the common ground was neither shown on the title plans of the individual houses nor sufficiently described in some other way, any registration in respect of the ground was inept. Consequently the ground had remained the property of the developers, who could thus confer a good title on Lundin Homes. See **Commentary** p 105.

One other matter deserves mention. Clause 13 of the deed of conditions provided that:

> There is expressly reserved to us the right to alter or modify at any time in whole or in part the reservations, real burdens, conditions, provisions, limitations, obligations, stipulations and others herein contained and in the event of us so doing, the Proprietors shall have no right or title to object thereto and shall have no claim in respect thereof any such alteration or modification in respect of any one or more of the subjects shall not imply any similar alteration or modification in respect of any other subjects; Further there is hereby retained to us the right to make whatever alterations or deviations as we consider proper upon any of the plans of the Development or even to depart entirely therefrom and we expressly reserve the right to dispose of any part of the Development for such purpose as we may think fit or to alter or modify in whole or in part the foregoing conditions and in the event of our so doing, no Proprietor shall have any right or title to object thereto and shall have no claim in respect thereof.

(The absence of punctuation between 'thereof' and 'any' on line four faithfully reproduces the clause as quoted in the Opinion.) A provision along these lines is common in deeds of conditions. Yet, as the Tribunal pointed out (at para 44), it is less far-reaching than it might seem; for, once a particular unit has been disponed, the developer may usually be taken to have lost any power to transfer or burden it.

(37) Motion v Binnie
[2013] CSOH 138, 2013 GWD 28-555

This was a straightforward application of the Midas touch. In terms of their registered title the pursuers held a servitude of way. The defenders challenged its existence on the basis that it had been granted *a non domino*. It was held that, even if the defenders were correct as to the grant, the servitude was created by the fact of registration. The most that could be said for the defenders' position was that it might provide the basis for an application for rectification.

[Another aspect of this case is digested at (10) above.]

RIGHT-TO-BUY LEGISLATION

(38) McIntosh v Castle Rock Edinvar Housing Association Ltd
2013 Hous LR 74, Lands Tr

The 'right to buy' may be on its way out (the current Housing (Scotland) Bill would lead to its final disappearance – see p 69) but it has not disappeared yet. In this case the applicant was a warden in a sheltered housing scheme in Edinburgh's Royal Mile. She applied to buy her flat. The landlord rejected the application on the ground that it was a charity and that accordingly the applicant had never had the right to buy. This defence was upheld by the Lands Tribunal. The judgment contains a careful analysis of the complex statutory provisions.

LEASES

(39) RPS RE II LLP v CBS Outdoor Ltd
[2013] CSOH 7, 2013 GWD 4-121

This case (which in some respects resembles *Trygort (No 2) Ltd v UK Home Finance Ltd* [2008] CSIH 56, 2008 SLT 1065 (*Conveyancing 2008* Case (59)) concerned the validity of the exercise of a break option.

In 2008 an eight-year lease was entered into for property at Almondview Office Park in Livingston, West Lothian. There was a half-way break option for the tenant. When the tenant purported to exercise this option, the landlord argued that it had not been validly exercised, and raised the present action of declarator that the lease remained in force for its full eight-year term. The landlord's position was that the tenant was barred from exercising the break option because it was in breach of its repairing obligations (a breach that the tenant did not deny). The dispute turned on the wording of the break-option clause. This provided:

> The Tenant shall have the option to terminate this Lease with effect from 21 April, Two Thousand and Twelve (such date being hereinafter referred to as the 'Termination Date'). In order to exercise such option to terminate this Lease the Tenant shall require to give the Landlord at least nine months written notice prior

> to the Termination Date of its intention to exercise the said option to terminate this Lease (time being of the essence) and any such termination shall be without prejudice to any right of action or remedy or any claim of the Landlord against the Tenant for any antecedent breach of the Lease and in the event of the said CBS Outdoor Limited wishing to terminate the Lease as aforesaid the said CBS Outdoor Limited shall require to pay on or prior to the Termination Date, and any such option to terminate is wholly and essentially subject to the said CBS Outdoor Limited paying to the Landlord the sum equivalent to a payment of four months rent in terms of this Lease (exclusive of Value Added Tax) said sum to be in addition to all other sums and obligations due by the said CBS Outdoor Limited in terms of this Lease up to the Termination Date and the said (exclusive of Value Added Tax) is to be paid in full on or prior to the Termination Date.

This text is garbled: the nineteenth word from the end is 'said' and it is evident that some words here must have gone missing. The Lord Ordinary (Woolman) analysed the provision in great detail and against a wide background of authority. He concluded that the missing words could not be supplied by textual inference, or from what a reasonable tenant would have expected, and he held that the breach of the repairing obligation was no bar to the exercise of the break option. Whilst the point does not seem to have been argued, we note the words: 'any such termination shall be without prejudice to … any claim of the Landlord against the Tenant for any antecedent breach of the Lease'. These words seem to contemplate that the lease might be terminated despite the existence of an outstanding claim.

(40) Bridge Street Partnership Trustees v William Hill (Scotland) Ltd 2013 SLT (Sh Ct) 62, 2013 Hous LR 38

This was a dispute about how the dilapidations provisions in a commercial lease should be interpreted. The lease required the tenant:

> At the Date of Expiry to remove from and leave vacant and clear the Premises … in such good and substantial repair and condition as shall be in accordance with the obligations undertaken by the Tenant under the Lease; provided that if at the Date of Expiry the Premises shall not be in such good and substantial repair and condition the Tenant shall carry out at its expense the works necessary to put the Premises into such repair and condition and if the Tenant fails to do so, the Landlord shall be entitled to carry out such works at the reasonable expense of the Tenant.

One issue was whether (given the last line or two of the quoted passage) the landlord could claim against the tenant before actually carrying out the necessary repairs. At first instance, the sheriff held that the landlord could not do so, and that accordingly the action was, she held, premature. This view was rejected on appeal to the sheriff principal (Derek C W Pyle).

The other issue concerned the state to which the property was to be restored. At first instance, the sheriff had noted that, at the beginning of the lease, the tenant was to put the property into 'a satisfactory tenantable state and adequate for the Tenant's purposes', and went on to hold that that was also the required

standard at the end of the lease. In the appeal the sheriff principal took a different view, concluding, after reviewing the lease as a whole, and also after taking account of usual practice in the commercial-leasing sector, that the standard required was 'a satisfactory tenantable state' without the addition of the words 'adequate for the Tenant's purposes'.

(41) BAM Buchanan Ltd v Arcadia Group Ltd [2013] CSOH 107A, 2013 Hous LR 42

The defender held a 25-year lease of three (out of seven) floors on a property in Glasgow's Buchanan Street. The lease expired in 2009. The parties disagreed about a number of issues including the amounts due in respect of dilapidations. The landlord raised the present action, in the course of which the parties agreed to remit certain matters to the decision of a chartered building surveyor. When the reporter issued a draft report, the landlord objected to some of the draft findings, and as a result of this objection the reporter sought the directions of the court. Whilst the case is fact-specific, the Opinion of the Lord Ordinary (Hodge) contains valuable observations on the role of the court in such cases. 'Absent a reservation in the remit of the right to have a further proof, which would defeat the cost-saving purpose, the reporter's decision governs questions of fact' (para 4). However (para 5):

> As the reporter has received a contractual remit, any failure to implement the directions of his remit, including a failure to exhaust the remit, would ground a legal challenge. If the reporter misconstrued a legal document, such as the lease, in a material way, that would be an error of law which would invalidate his determination to the extent that the error affected his decision. So also would be a material misunderstanding of a non-legal document, although the court allows the decision-maker greater discretion in interpreting such documents and will not treat a tenable interpretation as an error of law … Where there required to be a factual basis for a decision, the absence of such a basis would support a legal challenge to the decision. Taking into account an irrelevant matter or failing to take into account a relevant matter are familiar grounds of challenge … Another way of analysing those grounds is to say that the decision maker has acted on the basis of a mistaken view as to the facts … *Wednesbury* unreasonableness is another ground of legal challenge … So also is the failure to give an adequate statement of reasons for a decision so that the informed reader and the court are left in no substantial doubt as to the reasons for the decision.

(42) Sane Investments Ltd v Astrazeneca UK Ltd [2013] CSOH 81, 2013 GWD 19-386

The facts of this case were similar to those of the previous case, and the judge was the same (Lord Hodge). A 25-year lease had expired in 2007 and the parties were in disagreement as to the amount due in respect of dilapidations. There was an agreed remit to an expert reporter (the same person as in the previous case) and, as before, there were objections to the draft report. Lord Hodge **held**

that the reporter had not erred in law and that accordingly the objections were unfounded.

(43) Regus (Maxim) Ltd v Bank of Scotland plc [2013] CSIH 12, 2013 SC 331, 2013 SLT 477

In the course of a complex development at Eurocentral in Lanarkshire, the defender issued the following letter:

> It may assist the proposed tenant to have confirmation from us that, on behalf of the landlord (Tritax Eurocentral EZ Unit Trust) and TAL CPT, we hold the sum of £913,172 to meet the landlord's commitment to fit-out costs. These funds will be released in accordance with the drawdown procedure agreed between the parties, whereby the proposed tenant's contractors will issue monthly certificates. This is subject always to agreement of wider commercial terms with the incoming tenant.

Because of the insolvency, in 2011, of the pursuer's immediate landlord (the catchily-named TAL CPT HUB Co Ltd), the pursuer did not obtain the benefit of fit-out costs, and it sued the defender for direct payment of the relevant funds, founding on this letter as the basis for the defender's alleged liability. At first instance the action failed, it being held that the letter was not a promise, nor could it be regarded as an actionable misrepresentation: see [2011] CSOH 129, 2011 GWD 27-600 (*Conveyancing 2011* Case (52)). The pursuer reclaimed, but the decision was affirmed. The case contains an interesting discussion, by Lord President Gill, of the nature of promise: indeed, this case may come to be regarded as a significant authority on the law of promise. There is also a valuable account of the complex arrangements entered into in developments of this kind.

(44) R M Prow (Motors) Ltd Directors Pension Fund Trustees v Argyll and Bute Council [2013] CSIH 23, 2013 GWD 12-260

This case concerned the validity of a rent-review notice, or rather, two rent-review notices, concerning a property in Helensburgh. The landlords had served a rent-review notice that was riddled with errors. 'This purported notice contained several errors, notably that: (i) the landlords were "now" Proven Properties (Scotland) Ltd; (ii) the rent review was to occur on 1 November 2010, thereby giving less than the required three months notice; and (iii) the fair market rent was stated as at 1 November 2010 instead of the relevant term (1 October 2010)' (para 4). Having noticed these errors, the landlords then served a second notice. When the defender did not pay the higher rent, the landlords raised this action for declarator that the higher rent was payable. The defence was that the second notice, though without errors, was inherently confusing given the existence of the first notice, and thus not valid. This defence was rejected by the Lord Ordinary (see [2012] CSOH 77, 2012 GWD 21-438 (*Conveyancing 2012* Case (44)) and has now also been rejected by the Inner House.

(45) Gilcomston Investments Ltd v Speedy Hire (Scotland) Ltd 2013 GWD 15-322, Sh Ct

This was a dispute about a lease of commercial premises at Ann Street, Aberdeen. In September 2006 the parties concluded missives for a ten-year lease. The missives had a formal draft lease attached. The defender entered into possession and began paying rent. But no formal lease was ever signed by the parties. In 2011 the defender decided not to continue with the lease and, after notice to that effect to the landlord, gave up possession in September 2011. The landlord then raised an action of declarator that the lease was a valid and binding lease for the full ten years, ie up to September 2016.

The defence was that the missives contained a two-year supersession clause. Accordingly, pled the defender, the missives ceased to be enforceable in September 2008. Although the defender had continued in possession as tenant after that date, the basis for that ongoing possession was a yearly tenancy renewed each year through tacit relocation. This defence was upheld by the sheriff (Graham Buchanan). No authority was cited; *Gilcomston Investments Ltd* seems to be the first decision on this type of situation.

(46) Forest Bio Products Ltd v Forever Fuels Ltd [2013] CSIH 103, 2014 GWD 1-7

Forest Bio Products Ltd held a 20-year lease of property at Balboughty Farm, Scone, Perthshire. After going into administration, the company, through its administrators, entered into a contract for the sale of its assets, including the lease, to Forever Fuels Ltd. The buyer's liability to pay one tranche (£100,000) of the price depended on 'the unconditional written consent of the Landlord … to the grant of the Assignation of the Seller's interest in the lease'. The landlord consented to the assignation, but only on condition that the rent arrears (£22,171.32) were paid up. That did not happen. The buyer refused to pay the seller, arguing that the landlord's consent was not 'unconditional'. The seller sued for the £100,000, arguing that on a proper interpretation of the, admittedly obscurely-drafted, contract the requirement for unconditional consent had been met because the landlord's condition was one that affected the seller only, not the buyer. This argument persuaded the sheriff, who accordingly found in favour of the seller. The buyer appealed to the sheriff principal, who reversed the decision, holding that 'unconditional' meant what it said. The seller then appealed to the Inner House, which has now affirmed the decision of the sheriff principal.

(47) Manchester Associated Mills Ltd v Mitchells & Butler Retail Ltd [2013] CSOH 2, 2013 SCLR 440

This seems to be the first decision on turnover rent leases. See **Commentary** p 116.

(48) Edinburgh Woollen Mill Ltd v Singh
2013 SLT (Sh Ct) 141, 2013 Hous LR 54

The Tenancy of Shops (Scotland) Act 1949, though not well known, remains in force and from time to time is invoked. (On this statute see generally Angus McAllister, *Scottish Law of Leases* (4th edn, 2013) ch 14.) The pursuer held a tenancy of a shop in the Lawnmarket in Edinburgh's Royal Mile, the lease being for 20 years, and ending on 31 December 2013. The current rent was £36,000 per annum. The business at the shop was almost wholly based on the tourist trade. In or about 2007 the landlord's interest came up for sale on the market and was bought by the defender, who ran several shops in Edinburgh, all Scotland-themed, and appealing to the tourist trade. Thus the tenant and its new landlord were competitors. The defender declined to renew the lease beyond its contractual ish in December 2013, for the simple reason that he wished himself to trade out of the shop. The pursuer invoked the 1949 Act. The Act, drafted in a terser style than is familiar today, provides (s 1(2)) that, on the application of a shop tenant, 'the sheriff may … determine that the tenancy shall be renewed for such period, not exceeding one year, at such rent, and on such terms and conditions as he shall, in all the circumstances, think reasonable'.

The sheriff's power is essentially discretionary. In the present case the sheriff (N A Ross) reviewed the whole circumstances of the case. He quoted at length from Hansard (something that very seldom happens), to gain some light from the debate that had taken place when the 1949 Act was still a Bill. He also cited previous case law, and concluded that he should reject the application:

> The types of protection envisaged [by the 1949 Act] includes allowing the trader time to relocate to another property … to preserve his business and goodwill … or to avoid the trader being forced out of business altogether through removal of premises from which to trade. Turning to the present case, it is … apparent that no such considerations exist. The parties have both known, since the defenders acquired the landlord's interest … that the lease would not be renewed consensually. That has left the pursuer plenty of time to anticipate and prepare for the trading realities that this would bring. The pursuer's business will be somewhat diminished by ceasing trade from the premises, but otherwise continues uninterrupted, from its 300 other outlets. There is no threat to its goodwill or good name … The present dispute represents no more than an attempt to retain a highly successful site, and to keep it from a direct competitor. Such an attempt is understandable, and I have no doubt that Mr Clark's gloomy view of the effects of leaving is heartfelt. It is, however, only an economic blow. It is not an injustice, and there is nothing unreasonable in requiring the pursuer to remove at the end of the lease. On the other hand, the lease is approaching its contractual expiry date … There is nothing sudden, unexpected or unfair about the lease coming to an end. There is nothing unreasonable in the defender's motivation or conduct. The contract has run its course.

The sheriff also discussed whether the 1949 Act was incompatible with the ECHR, even though this had not been asserted by the defender. He concluded that it was not incompatible.

(49) Fraser v Meehan
2013 SLT (Sh Ct) 119

This seems to be the first decision on the Tenancy Deposit Schemes (Scotland) Regulations 2011, SSI 2011/176. See **Commentary** p 118.

(50) Salvesen v Riddell
[2013] UKSC 22, 2013 SC (UKSC) 236, 2013 SLT 863

This case concerned the Agricultural Holdings (Scotland) Act 2003, and since we do not cover the law of agricultural tenancies, it falls outside our remit. But its importance as a constitutional law case, and human rights case, means that it should not be passed over in silence, especially because a provision in a statute of the Scottish Parliament (s 72 of the 2003 Act) was held invalid as being incompatible with the property protection clause (Article 1 Protocol 1) of the ECHR. Section 72 was an anti-avoidance provision in a package aimed at favouring tenant farmers as against their landlords, but s 72 was held to be arbitrary and excessive.

The decision reverses, in part, the decision of the Inner House: [2012] CSIH 26, 2012 SLT 633 (*Conveyancing 2012* Case (51)). It has generated a substantial amount of commentary: see eg Daniel Carr, 'Not law (but not yet effectively not law)' (2013) 17 *Edinburgh Law Review* 370, and Malcolm Combe, 'Peaceful enjoyment of farmland at the Supreme Court' 2013 SLT (News) 201. For the Scottish Government's proposed legislative response to the decision, see www.scotland.gov.uk/Publications/2013/11/4471/0.

STANDARD SECURITIES

(51) Hoblyn v Barclays Bank plc
[2013] CSOH 104, 2013 GWD 26-533

Mr and Mrs Hoblyn lived in a large house in Renfrewshire owned by Mr Hoblyn. They parted in 1994 and were divorced in 2004. It is unclear whether anything was arranged about the house either in a separation agreement (if there was one) or in the divorce. At all events exclusive title was retained by Mr Hoblyn, while exclusive possession was retained by Mrs Hoblyn. (Whether her occupation was rent-free is unclear.) There was a standard security over the property. The secured loan was in arrears, even though over the years significant sums had been paid by the social security system and also, it was averred, by Mrs Hoblyn. Eventually the creditor, Barclays Bank plc, sought to enforce the security. By this stage Mr Hoblyn had been sequestrated. Barclays obtained decree against Mr Hoblyn, including warrant to take possession. Mrs Hoblyn then raised the present action, seeking to reduce the decree against her husband. She alleged irregularities in connection both with the enforcement of the security, and with the sequestration. She was unsuccessful. The Lord Ordinary (Drummond Young) noted that the enforcement procedure by Barclays was wholly separate from the

question of sequestration, so that even if there had been any irregularity about the latter, it would be irrelevant to the present action. As to the former, he noted that the procedures adopted by Barclays had fully complied with all statutory requirements.

(52) Persimmon Homes v BJR Realisations Ltd 2013 GWD 33-649, Sh Ct

The first pursuer held a standard security over residential property in Larkhall, Lanarkshire. (The case does not disclose which of the 29 companies called 'Persimmon Homes' was the pursuer.) The owner, and first defender in the action, was a company that was now in liquidation, and the pursuers raised this action to enforce the security. The first defender did not defend, but the second defender, who was in occupation, did. The defender claimed to have tenanted the property since 1999, and averred a minute of agreement to that effect. The case was concerned with procedural questions raised when a property subject to enforcement action has a third-party occupant.

One factual puzzle is that it is said (para 4) that 'the first pursuers disponed the property to the second pursuers [Charles Church Developments, not identified but perhaps a partnership or LLP or company] on or about 28 August 2012. The second pursuers are accordingly now the heritable proprietors of the subjects'. But that is hard to understand given that this was an action to enforce a heritable security and therefore by a heritable creditor rather than by a heritable proprietor. One legal puzzle is that the pursuers pled (in the sheriff's words): 'Whatever the position may be about that minute of agreement, it was the first pursuers' position that, as standard security holders in the standard security, they did not consent to the lease of the subjects. Accordingly no right had been vested in the second defender' (para 7). But a pre-existing tenancy or lease normally has priority over a subsequent heritable security, by virtue of the Leases Act 1449, whether the creditor consents or not. The Act may perhaps have been overlooked. Possibly on the facts of the case it was not applicable anyway: the case says nothing about whether the security was granted before or after the lease. Finally, even assuming that the standard security did trump the lease, it would not be true that 'no right had been vested in the second defender'. The existence of a prior standard security does not mean that a subsequent lease is void.

(53) Bank of Scotland plc v Gallacher 2013 Hous LR 36, Sh Ct

The Home Owner and Debtor Protection (Scotland) Act 2010 made major changes to the Conveyancing and Feudal Reform (Scotland) 1970 in relation to the enforcement of standard securities over residential property: see *Conveyancing 2010* pp 150–54. This is the first of a series of 2013 cases on the new provisions. For some discussion of these cases, see Samantha Brown et al, 'Security of your home' (2013) 58 *Journal of the Law Society of Scotland* July/16.

The creditor in a standard security over residential property raised an enforcement action. In such cases the court must be satisfied that it is reasonable to grant decree, and in considering that issue must take account of certain factors listed in s 24 of the Conveyancing and Feudal Reform (Scotland) Act 1970, as amended. Here the defender said little as to his circumstances in relation to those factors. That being the case, the sheriff granted decree. The defender appealed to the sheriff principal (Edward F Bowen QC), who reversed, saying (para 8):

> The short question raised by this appeal is whether the sheriff went too far too quickly by granting decree on the basis of the information he had before him. I consider that he did. I have sympathy with the view that the circumstances as disclosed were sufficient to raise substantial doubt as to whether there was any real prospect of the defender meeting his obligations under the standard security within a reasonable time. But I am clear that the requirement to 'have regard to' the ability of the defender to secure alternative accommodation cannot be met by a lack of information or the absence of a request for a continuation to secure accommodation.

(54) Mortgages 1 Ltd v Chaudhary 2013 GWD 39-745, Sh Ct

The creditor in a standard security over residential property raised an enforcement action. The debtor lodged answers but made no appearance when the case called. Decree by default was granted. The debtor appealed, and decree was recalled by the sheriff principal, B A Lockhart. The sheriff was bound, notwithstanding the debtor's failure to appear, to give substantive consideration to the provisions of s 24 of the Conveyancing and Feudal Reform (Scotland) Act 1970. This case is broadly similar to the preceding case.

(55) Accord Mortgages Ltd v Cameron [2013] CSIH 31, 2013 Hous LR 22

The pursuer sought to enforce a standard security over residential property at Gartness Road, Drymen, Stirlingshire, the sum outstanding being about £600,000. Under the Conveyancing and Feudal Reform (Scotland) Act 1970 as amended, reasonableness is a prerequisite for enforcement where the property is residential. The owner claimed that enforcement would not be reasonable. He failed before the sheriff. He appealed to the sheriff principal, again without success. He then appealed to the Inner House, yet again without success. The case is noteworthy because it was held that in such cases the first instance decision on reasonability will normally be regarded as final. 'The Sheriff's decision was a discretionary one having regard to all the circumstances put before him, including those specifically mentioned in the statute. As a general rule, the court can only interfere with discretionary decisions of this nature upon the recognised bases for the review of the exercise of a discretion' (para 3).

(56) Accord Mortgages Ltd v Dickson
2013 Hous LR 2, Sh Ct

Under the Heritable Securities (Scotland) Act 1894 s 5B(2) and the Conveyancing and Feudal Reform (Scotland) Act 1970 ss 24 and 24A, a creditor seeking to enforce a standard security over residential property is subject to certain 'pre-action requirements'. Details are given in the Applications by Creditors (Pre-Action Requirements) (Scotland) Order 2010, SSI 2010/317, para 2(4) of which says that 'the information required to be provided to the debtor . . . must be provided as soon as reasonably practicable upon the debtor entering into default'. What does 'default' mean in this context? The question is important because 'default' sets the time framework for the provision of the information.

In *Northern Rock (Asset Management) plc v Millar* 2012 SLT (Sh Ct) 58 (*Conveyancing 2012* Case (57)) and also in *Northern Rock (Asset Management) plc v Doyle* 2012 Hous LR 94 (*Conveyancing 2012* Case (58)) it was held that that 'default' in para 2(4) of the 2010 Order should be interpreted as meaning expiry of the calling-up notice. In the present case the sheriff (D M Bicket) disagreed with that approach, holding (para 62) that 'once the debtor is in arrears with the payments that he has contracted for, he is in default within the meaning of the 2010 Act and Order. The expiry of a calling up notice which is a prerequisite to the taking of repossession proceedings is a different and subsequent default'. See also the next case.

(57) Firstplus Financial Group plc v Pervez
2013 Hous LR 13, Sh Ct

In this case the sheriff (S Reid) disagreed with the approach taken in the preceding case, and adhered to the approach taken in the *Northern Rock (Asset Management) plc* cases.

(58) Citifinancial Europe plc v Rice
2013 Hous LR 23, Sh Ct

Where a standard security over residential property is to be enforced, and the loan agreement is subject to the Consumer Credit Act 1974, then not only must all the procedures under the Conveyancing and Feudal Reform (Scotland) Act 1970 as amended, be complied with, but so must the procedures under the 1974 Act, and in particular there must be a valid 'default notice'. Here a default notice had been served, but it had been botched in a variety of ways, and the sheriff (Anthony F Deutsch) held that it departed so far from the statutory requirements that it was invalid.

(59) Royal Bank of Scotland v O'Donnell
[2013] CSOH 78, 2013 GWD 19-388

'As a case study of the causes and consequences of the property crash in 2008, this litigation is probably as good as any', remarks the Lord Ordinary, Lord

Malcolm (para 33), in his careful examination of the facts of the case, facts which make for fascinating reading.

The two defenders, O'Donnell and McDonald, saw a development opportunity at Strone Farm, Glenbrae Road, Greenock. They obtained a valuation in July 2007 at £3.2 million, and set up a company, Whinhill Developments Ltd, to develop the site. The company bought it in the autumn of 2007 for £1.5 million, the price being funded by a £1.65 million loan from RBS, secured by a standard security over the site. The intention was to build around 100 residential units. During 2008 the property market began to struggle. O'Donnell and McDonald could have walked away, since they had no personal liability and, it seems, had put in little capital of their own. The alternative was to stay with the project in the hope that it would eventually be successful. This was the approach preferred by the bank, but since the equity cushion in the property was reduced following the economic downturn, it would have to be supplemented by further security. An agreement was reached with the RBS whereby the bank would continue the loan but O'Donnell and McDonald would guarantee that loan personally, up to a maximum of £300,000. As part of the discussions leading to this agreement, RBS told O'Donnell and McDonald that a re-valuation of the property had been received, valuing it at £2 million.

The property market continued to be depressed, and eventually Whinhill Developments Ltd went into administration. The administrator marketed the site and sold it for £65,000 – as compared with the original valuation of £3.2 million. Thereafter RBS sued O'Donnell and McDonald for its loss, the sum sued for being capped at £300,000 (with the addition of interest and expenses).

The defence was that there had been misrepresentation by the bank as to what the second valuation (at £2 million) had said, and that if it had not been for that misrepresentation they, the defenders, would not have signed the guarantee. The second valuation had not itself been sent to them, but they had been told about it. The actual valuation had been not £2 million but 'somewhere between £1.75 million and £2 million'. It was, moreover, based on highly optimistic assumptions about the development, assumptions that were not communicated to the defenders. Accordingly, the defenders counterclaimed for the reduction of the guarantee. The Lord Ordinary, after hearing evidence, found for the defenders.

SOLICITORS AND ESTATE AGENTS

(60) Henderson v Wotherspoon
[2013] CSOH 113, [2013] PNLR 28, 2013 GWD 25-475

Drafting deeds of conditions is difficult. Mistakes happen. The consequences can be costly. The pursuer, a property developer, bought a site in Rothes in Moray, and engaged the defenders for the conveyancing. The site was to be developed as about 22 residential units with certain common parts. The defenders drafted a deed of conditions that said that 'the whole area' would

be owned in common, that expression being defined as meaning 'the whole of the said area of ground including all plots and public open areas thereon'. When set out like that, the mistake is obvious. The deed of conditions is saying that *everything* is to be co-owned by *everyone*. It is true that deeds of conditions are about burdens, not rights, but it is usual for split-off deeds to refer to the deed of conditions to define what is conveyed. Presumably that is what happened here, though no details are given. At some point a purchaser refused to proceed because of the problem. Remedial conveyancing ensued. The developer now sued his (ex-)solicitors for damages, both for the cost of the remedial conveyancing and for consequential loss. The defenders queried the pursuer's approach to the quantum of loss suffered. The law of damages was reviewed and proof before answer allowed. (Much of the debate related to Lord Hoffmann's article, 'The Achilleas: Custom and Practice of Foreseeability?' (2010) 14 *Edinburgh Law Review* 47.)

(61) Frank Houlgate Investment Co Ltd v Biggart Baillie LLP [2013] CSOH 80, 2013 SLT 993, [2013] PNLR 25

John Cameron, a fraudster, stole the identity of a landowner and granted a forged standard security over the property to the pursuer. On the basis of the security he borrowed large sums. The time arrived when Cameron's law firm, the defender, discovered the true position. But it failed to act. Thereafter Cameron borrowed a further £100,000 from the pursuer. Cameron never repaid any of the money. The pursuer sued the defender to recover the whole sums advanced. Its claim, based in (i) negligence and, alternatively, (ii) breach of warranty of authority, failed. But it then added a claim based on (iii) the idea that the defender was liable as having been accessory to fraud. The Lord Ordinary (Hodge) **held** that the defender was liable for £100,000 as accessory to fraud. For critical discussion of the decision, in the context of the law of delict, see Elspeth Reid, '"Accession to delinquence": *Frank Houlgate Investment Co Ltd v Biggart Baillie LLP*' (2013) 17 *Edinburgh Law Review* 388.

For the astonishing facts of this case, and also the earlier stages of the litigation, see [2009] CSOH 165, 2010 SLT 527 (*Conveyancing 2009* Case (80)) and [2011] CSOH 160, 2012 SLT 256 (*Conveyancing 2011* Case (68)).

(62) Milligan's Exrs v Hewats [2013] CSOH 60, 2013 SLT 758, [2013] PNLR 23

Mrs Milligan owned a house in New Galloway. She wished to give it to her niece, the pursuer, but to be able to continue to live in it during her lifetime. Her solicitors, the defenders, advised her to dispone the property to her niece, while at the same time taking a letter back from the niece permitting her (the aunt) to continue to live in the property, rent-free. The disposition was registered in 1997. In 2006 a conveyancing mistake came to light: Mrs Milligan had held both the property and the superiority on separate titles, and the 1997 disposition had conveyed to the niece only the superiority. (There also came to light an error in

the tax planning, but we will not deal with that issue here.) The conveyancing mistake was put right in 2006, with a new disposition being granted by the aunt. But in 2008 the aunt died. The result was that the inheritance tax liability was higher than it would have been had the 1997 arrangement been properly carried out. Two actions were raised against the solicitors, one by the aunt's executors and the other by the niece (see next case). The action by the aunt's executors was dismissed as irrelevant. The Lord Ordinary (Tyre) said (para 12): 'Where no loss has been sustained during the lifetime of the deceased, there is … nothing that could transmit to the executor and form the basis of an action by the latter.' This view of matters seems convincing.

(63) Steven v Hewats
[2013] CSOH 61, 2013 SLT 763

See the previous case: this was the action by the niece. The defenders' efforts to have it dismissed as irrelevant at debate stage were unsuccessful, and a proof before answer was allowed.

(64) Bruce & Co v Ferguson
2013 GWD 32-640, Sh Ct

This was an action for payment of an estate agency commission. The defenders owned several pubs in West Lothian, which they let out. They decided to sell one of them, 'The Lounge' in Bathgate. An estate agency agreement was entered into with the pursuers, for the property to be marketed at an upset price of £300,000. One clause read:

> Bruce & Co shall become entitled to payment of its remuneration upon conclusion of a contract for the sale of or other disposal of the business and premises or any part thereof, share, shares or other interests therein, however informally constituted, and that notwithstanding and [*sic*] suspensive or other condition.

Eventually there was no sale. But when the existing tenant gave up his tenancy, the defenders granted a five-year lease to another person. The pursuers now claimed that this five-year lease triggered payment of commission. At first instance the sheriff held that the clause quoted meant a disposal capable of being registered, ie either a disposition or a long lease. The pursuers appealed, but the sheriff principal (Mhairi M Stephen) dismissed the appeal.

JUDICIAL RECTIFICATION

(65) Mirza v Salim
[2013] CSOH 73, 2013 GWD 17-348

Khalil Ahmed, the owner of premises at 398 Cumbernauld Road, Glasgow, agreed to lease them to Suriya Khan for 25 years, but under exception of the

yard. By mistake the lease as drafted, signed and registered failed to exclude the yard, ie it included the whole area owned by the landlord. Later the landlord transferred the whole property to the current pursuer, Mohammed Mirza, and the tenant transferred the tenancy to the current defender, Fozia Salim. Mrs Salim used the premises for a newsagents and grocer's business but did not occupy the yard.

In 2007, eight years after the lease was granted and five years after it was assigned, Mr Mirza began building on the yard with the intention of opening a licensed grocer's business. The eventual cost was about £300,000. During the construction process Mrs Salim raised an action of declarator and interdict to assert her right to the yard. Interim interdict was obtained but was eventually lifted of consent in order to allow the building to be completed. Meanwhile, Mr Mirza had lodged a counterclaim seeking to have the lease rectified under s 8 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 so as to exclude the yard. To such a counterclaim Mrs Salim might seem to have had a good defence under s 9 of the Act as having relied on the lease in its unrectified form and – it may be – taken the assignation in good faith. Whether that defence was mounted we do not know; at any rate the counterclaim was successful and the lease was rectified to exclude the yard. As is usual in such cases, the rectification was retrospective in nature, being backdated to the date on which the lease was created (1985 Act s 8(4)). The interdict action accordingly fell away.

Mr Mirza now raised the present action for damages for the loss said to have been caused by the interim interdict, which had been obtained, he pled, in bad faith. A preliminary application for disclosure of correspondence failed on the ground that it was privileged: see [2012] CSOH 37, 2012 SCLR 460 (*Conveyancing 2012* Case (53)). The action involved difficult questions as to the retrospective effect of rectification. At the time when the interdict was originally sought, Mrs Salim was the tenant of the yard and so *prima facie* entitled to her remedy. But now, following rectification, it turned out that she was not tenant of the yard after all. History having been re-written, she had had no business seeking interdict.

Sensibly, the Lord Ordinary (Lord Woolman) refused to allow the re-written facts to influence an assessment of the interim interdict at the time when it was obtained. In his view (para 29), 'rectification altered the deed and the register, but it did not airbrush history. It did not convert a rightful interdict into a wrongful one'. The claim for damages was refused.

BOUNDARIES AND PRESCRIPTION

(66) Rivendale v Keeper of the Registers of Scotland 30 October 2013, Lands Tr

In Gilbert and Sullivan's *HMS Pinafore* (1878) two babies are mixed up by a nursemaid with the result that the wrong baby, raised in comfortable

circumstances to which he was not entitled by birth, becomes the Captain of the *HMS Pinafore*. This absurd plot may possibly have been a tribute to Verdi's *Il Trovatore* (1853), although there the baby mix-up had the alarming (and suitably melodramatic) consequence of the gypsy, Azucena, in a moment of inattention, throwing her own baby son into the fire instead of the baby son of a hated enemy. No one, so far as we know, has written an opera about conveyancing, though the subject is plainly a promising one. But if conveyancers do not, on the whole, mix up babies, far less throw them into fires, they do – just occasionally – mix up the descriptions of properties, whether by word or by plan. *Rivendale* was an example of a mix-up by plan.

In 1950 a landowner sold two cottages in Baluachrach, south of Tarbert in Argyll. Unhappily, the plan which showed South Cottage was attached to the disposition of West Cottage, and the plan for West Cottage was attached to the disposition of South Cottage. It was to be a full decade before the error was noticed and the necessary corrective conveyancing carried out. The corrective disposition of South Cottage – now with the right plan – described the property as follows (our lettering):

> All and Whole [A] that area of ground at Baluachrach, near Tarbert, in the Parish of South Knapdale and County of Argyll [B] as occupied and possessed by the said Catherine McQuilken the former tenant thereof, [C] which subjects hereby disponed are delineated in red and coloured pink on the plan annexed and subscribed by me as relative hereto (a duplicate of which plan shall be recorded along with these presents in the Division of the General Register of Sasines applicable to the County of Argyll) but which plan, though believed to be correct, is not guaranteed …

Later the question to be determined was whether this description was *habile* for the purposes of acquiring, by positive prescription, a track which lay outside the lines depicted on the plan.

The relevant law is not in doubt. A description is sufficient for the purposes of prescription if it is capable of being read as including the target property even if that is not its natural or most plausible interpretation. On the other hand, a description which clearly excludes the property will not do.

The description in the disposition comprised three distinct elements. Element [A] was so general as to be capable of encompassing any property at all at Baluachrach. Element [B] depended on extrinsic evidence of possession and so was, presumably, irrelevant for the purposes of prescription. The difficulty arose with element [C], the plan. On the one hand, the track lay outside the boundary lines. On the other hand, the plan was only 'believed to be correct' and was 'not guaranteed'. Were these expressions of doubt sufficient to overcome the awkward fact that the track lay beyond the boundaries? In the opinion of the Lands Tribunal the answer was no (para 48):

> [T]he description of the subjects refers to the plan as indicative of, not just the precise measurements, which it does not guarantee, but also the extent of the tenanted subjects being conveyed. The plan cannot simply be ignored. It is the way the title indicates the extent of the tenancy and therefore of the grant. It shows an

> intention not to include the solum of the track … Put shortly, in our opinion, there is nothing in the wording of this dispositive clause which justifies ignoring the clear limitation on the plan of the extent of the subjects. The title is not conceived in terms capable of being construed so as to convey the solum of the track, and is not habile to found title to the area of the track as it was by prescriptive possession.

The issue, as the Tribunal concedes (para 48), is not 'altogether easy'. If the plan had been declared 'demonstrative not taxative', as is so often the case, we would have tended to agree with the Tribunal's view, because even a demonstrative plan is intended as an accurate description of the subjects conveyed (albeit one which must give way to the verbal description in the event that there is a discrepancy). But the present wording goes further than this. The plan is only 'believed to be correct' and 'not guaranteed', and something which is 'believed to be correct' may also be incorrect. In this very possibility of error – however slight it may be – lies the possibility that the track might, after all, be included within the subjects; and if it *might* lie within the subjects, then the description could perhaps be regarded as *habile* for the purposes of prescription.

[Another aspect of this case is digested at (35) above.]

INSOLVENCY

(67) Joint Liquidators of the Scottish Coal Co Ltd [2013] CSOH 124, 2013 SLT 1055, rev [2013] CSIH 108, 2014 SLT 259

Scottish Coal Co Ltd had extensive environmental obligations in respect of its open-cast mining. When it went into liquidation, the liquidators took the view that the mines now had a negative value – the environmental costs being greater than the value of the extractable coal – and accordingly wished to abandon the various properties. The question was whether they could do this. See **Commentary** p 196.

(68) Accountant in Bankruptcy v Balfour and Manson LLP 2013 GWD 31-632, Sh Ct

The defenders had failed to register a notice of litigiosity when raising an action of reduction on behalf of a trustee in sequestration, and were sued for the resulting loss. See **Commentary** p 195.

(69) Rose's Tr, Applicant 2013 GWD 22-424, Sh Ct

This case is, in itself, a technical and relatively minor decision on sequestration procedure, but it raises significant issues of insolvency conveyancing. See **Commentary** p 191.

(70) Liquidator of Letham Grange Developments Ltd v Foxworth Investments Ltd [2013] CSIH 13, 2013 SLT 445

This case is doubly remarkable: it is remarkable for its facts, and it is remarkable for its litigation history. Although it is essentially an insolvency case, it has some interest for conveyancers.

In 1994 a property in Angus, Letham Grange, was bought by Letham Grange Development Co Ltd ('LGDC') for £1.8m. The company was controlled by a man who used a variety of names for different purposes, including 'Dong Guang Liu', 'Tong Kuang Liu', 'Peter Liu', 'Toh Ko Liu' and 'J Michael Colby'. As well as LGDC, Mr Liu controlled at least two other companies, Foxworth Investments Ltd ('Foxworth') and 3052775 Nova Scotia Ltd ('NSL'). By 2001 LGDC was in financial difficulties. Mr Liu arranged for the Letham Grange property, which had been bought seven years earlier for £1.8m, to be sold to NSL for a sum stated in the disposition to be £248,100. He was told at the time by his solicitors that this disposition might be reducible, on account of the law relating to gratuitous alienations. At the end of 2002 LGDC went into liquidation, and a few weeks later, at the beginning of 2003, NSL granted an all-sums security to Foxworth. It is not disclosed by the court's Opinion whether the disposition and the standard security were registered.

The liquidator raised an action to reduce the disposition on the ground that it was a gratuitous alienation. In 2009 decree was granted but without a full hearing. For reasons of which we are unaware, that action did not deal with the standard security. The liquidator then raised this second action, in relation to the standard security. There were two grounds of attack. One was that, as the disposition had been reduced, and as Foxworth had not (as it was averred) acted in good faith, the standard security fell as well. The other was that the standard security was itself invalid anyway, regardless of any question as to the validity of the granter's title. A key issue was the good faith or otherwise of Foxworth, and that depended on whether the knowledge that Mr Liu had in his capacity as director of one company was attributable to the other companies as well.

At first instance, the Lord Ordinary (Glennie) had 'no doubt that … the knowledge of Mr Liu about the circumstances of the disposition to NSL can be attributed to Foxworth' (para 24). That might seem to dispose of the case. However, the Lord Ordinary rather surprisingly held that the LGDC/NSL disposition had in fact been a perfectly valid one, so that if the first action of reduction had been defended, the defence would have been successful: see [2011] CSOH 66, 2011 SLT 1152 (*Conveyancing 2011* Case (64), where something is said about the extraordinary history of this case, involving great delay and expense. In this series we have often commented on inordinate delay in property cases, but few property cases can rival the personal injury case, *Abrahm v British International Helicopters Ltd* [2013] CSOH 69, 2013 GWD 17-347, which has been ongoing since 1990.)

The liquidator reclaimed, and the Inner House (Lady Paton, Lord Menzies and Lord Marnoch) has reversed the decision, thus granting decree of reduction.

The Inner House considered it beyond dispute that the LGDC/NSL disposition had been a gratuitous alienation, and that accordingly the decree of reduction that had been pronounced had been correct, and that it would have made no difference if the action had been properly defended.

(71) Brown v Stonegale Ltd [2013] CSOH 189, 2014 GWD 2-47

This case – an action to reduce gratuitous alienations – will chiefly be of interest to insolvency lawyers, but will nevertheless have some interest for conveyancers. The Pelosi family had numerous properties in the Glasgow area, letting them out. There were six commercial properties in the portfolio, all let out to a vehicle-hire business. There were also 120 residential properties ('unfit for human habitation' – see para 2 of the opinion of the Lord Ordinary, Lord Malcolm). The family acted through a variety of companies, including Oceancrown Ltd, Ambercrest Ltd, Ambercroft Ltd, Lakecrown Ltd, Loanwell Ltd, Questway Ltd, Strathcroft Ltd and Stonegale Ltd. All were controlled by R N Pelosi, except that another member of the family, N R Pelosi, had some role in the last company. The companies (except possibly the last) were run as if they were a single entity. For instance there was only one bank account. Most or all of the properties had standard securities over them, initially in favour of Anglo Irish Bank (which collapsed in 2009) and later, following the assignations of the securities, by Hadrian Sàrl (a Luxembourg bank in the Banco de España group). The total lending involved was about £17m. All of the companies had joint and several liability (or solidary liability, to use an academic term), with the exception (though this is not wholly clear) of Stonegale Ltd.

Following the economic downturn, the companies, with, it seems, the exception of Stonegale Ltd, were in financial difficulties, and indeed were all, other than Stonegale, eventually placed in administration. The present case was an action by the administrators to reduce, as gratuitous alienations, the dispositions (granted in 2010) of four of the properties, namely 110 Glasgow Road, 210 Glasgow Road, 260 Glasgow Road, all in Rutherglen, and 64 Roslea Drive, Glasgow. (It appears that there may have been other, connected actions, possibly concerning other properties, but if so we have no specific information about them.) The three properties in Glasgow Road, Rutherglen, were disponed to Stonegale, and 64 Roslea Drive, Glasgow, was disponed to N R Pelosi personally (and was soon sold on to a Mr Lazari.)

As well as the four properties just mentioned, the Pelosis sold a fifth property (also in Glasgow Road, Rutherglen, namely No 278) to a public-sector company, Clyde Gateway, for about £2.4m. This was a price much higher than valuation. ('The reason for the difference between that valuation and the sum paid by Clyde Gateway was not explored at the proof. Either the valuation was unduly low, or, for whatever reason, Clyde Gateway, which is a publicly funded organisation involved in the regeneration of the east end of Glasgow in connection with the Commonwealth Games, paid well over the market price' (para 10).)

The family saw the opportunity to use this sale to get value out of the hands of the companies that were in financial difficulty and into the hands of Stonegale Ltd. They adopted a circuitous route to achieve this aim, disguising what they were doing. They told the bank that all five properties were being sold, and said that £2.4m was the collective price for all. A letter to the bank's law firm from the Pelosi family law firm set forth the following prices: 278 Glasgow Road (£762,000); 210 Glasgow Road (£934,000); 260 Glasgow Road (£450,000); and 110 Glasgow Road (£200,000). (It is unclear whether this letter mentioned the fifth property, 64 Roslea Drive, Glasgow, which was being disponed to N R Pelosi, but it seems likely that it did so, for the bank's law firm proceeded to include that property in the list that it sent to the bank, the 'price' at which it was being 'sold' being stated as £68,000.) The bank was asked for discharges of the standard securities on the basis that it would be paid the sale proceeds of the properties. Unsurprisingly, it granted the discharges. To help conceal what was happening, the only actual sale (278 Glasgow Road) was done as a back-to-back transaction, with the property being 'sold' to another Pelosi company, Strathcroft Ltd, at a 'price' coinciding with valuation (£762,000), and then immediately resold to the real buyer, Clyde Gateway, for about £2.4m. The securities were thus cleared not only off the property that was actually being sold (278 Glasgow Road, to Clyde Gateway) but also off the four properties that were being disponed gratuitously.

In the action the defender produced a document (the details of which are unclear) which was said to show that the transfers had in fact been made for value. The Lord Ordinary rejected this document as a fabrication. He also rejected the argument made for the defender (para 28) that 'the alienating company received a value for that disposal – here in the form of the commensurate reduction in their indebtedness to the bank. There was no detriment to the general body of their creditors'. The Lord Ordinary was surely right to do so, this argument being evidently groundless. The alienating company received no value for the disposal of the four properties that it disposed of without consideration. There was thus evidently a detriment to the general body of creditors.

This was a complex case, which we have presented only in abbreviated form. But four particular points seem worth mentioning. In the first place, at one stage (seemingly after the action had begun) N R Pelosi attempted to have Stonegale dissolved. 'Had the company been struck off, it would have forfeited ownership of the Glasgow Road properties to the Crown' (para 9). This manoeuvre was defeated by the administrators, but one wonders what its motivation was in the first place.

Next, the administrators sought and obtained interdict against Stonegale Ltd from disposing of the properties. Perhaps this is common practice, but if so we have not come across it before. Evidently when there is an action of reduction the pursuer may wish to be sure that, while the action is in dependence, the defender does not dispose of the property, but the traditional remedy in such cases is a notice of litigiosity, registered in the Register of Inhibitions. For more on this, see **Commentary** p 194.

The third point concerns the terms of the final order, which presumably reflected the terms of the summons. The Lord Ordinary said (para 48): 'I shall

reduce the dispositions … and order the defenders to execute dispositions of the subjects to the pursuers within 21 days, failing which, warrant is granted to the Deputy Principal Clerk of Session to execute and deliver dispositions in appropriate terms.' (For the property that had been sold on to Mr Lazari, the order was that N R Pelosi was to pay its value to the administrators.) Traditionally, reductions took effect of their own force; no act of reconveyance was asked for, though the decree of reduction was recorded in the Register of Sasines. But the Land Registration (Scotland) Act 1979 made it harder for reductions to work in the traditional way. This aspect of the 1979 Act came into focus as a result of the great saga of *Short's Tr*, in which the solution eventually hit upon was a personal action demanding reconveyance: see *Short's Tr v Chung* 1991 SLT 472; *Short's Tr v Keeper of the Registers of Scotland* 1996 SC (HL) 14; *Short's Trustee v Chung (No 2)* 1999 SC 471 (discussed in *Conveyancing 1999* pp 68–71). It may be that this 'reconveyance' approach is becoming standard. The problems about enforcing reductions for properties registered in the Land Register will disappear when the Land Registration etc (Scotland) Act 2012 comes into force.

The state of knowledge of the Pelosis' law firm, at the time that it wrote to the bank's law firm (see above), though a most interesting question, was not a point at issue in this litigation. Reconstruction of that state of knowledge might not be easy, especially given that the relevant staff member said that he kept no file notes on his telephone conversations with R N Pelosi (see para 13).

CRIMINAL PROPERTY LAW

(72) Scottish Ministers v K
[2013] CSOH 129, 2013 GWD 26-524

This appears to be the first case in Scotland in which the Crown has invoked the Proceeds of Crime Act 2002 against a borrower who made a deliberate misstatement on a mortgage loan application form. See **Commentary** p 182.

MISCELLANEOUS

(73) Robinson v Danks
16 July 2012, Haddington Sheriff Court

This unreported case from 2012 has only recently come to our attention. In 2005 the pursuer, Ms Robinson, lent to Mr Marshall £38,000 to help him buy his council house. He signed and delivered to her a probative undertaking:

> I William Lumsden Marshall … considering that Agnes Robinson has made a loan to me of £38,000 to assist me in the purchase of my house at 47 North Seton Park, Port Seton, from East Lothian District Council and in consideration of the said Agnes Robinson undertaking not to ask for payment of the principal loan nor interest thereon, nor to institute calling up or default proceedings at any time during my ownership of the said property, and undertaking responsibility for the maintenance

> costs of said property as is evidenced by her execution hereof, I the said William Lumsden Marshall do hereby bind myself and my executors and representatives for all time coming as follows:- (One) I undertake that I will not sell the said house without the consent of the said Agnes Robinson; And (Two) I declare that in the event of the said house belonging to me at the date of my death the ownership of the said house shall pass to the said Agnes Robinson; and I declare these presents to be irrevocable and not to be altered either by inter vivos or mortis causa deed without the written consent of the said Agnes Robinson …

At the same time he granted Ms Robinson a standard security. It is not disclosed whether this was registered, but we presume that it was. It is not clear whether it secured just the loan of £38,000, or whether it also secured the obligations in the undertaking.

In 2010 Mr Marshall became *incapax*, the defender, Mr Danks, being appointed guardian. Mr Danks wished to sell, and as a result Ms Robinson raised the present action, seeking declarator of her rights under the undertaking, and interdict against sale. While the case was at avizandum, Mr Marshall died, but the sheriff (Peter Braid) nevertheless issued judgment dealing with certain of the issues.

One argument for the defender was that the pursuer had not signed the document. That was important because of the words 'as is evidenced by her execution hereof'. The argument was that the document imposed onerous mutual obligations on each party (Mr Marshall not to sell, Ms Robinson to pay for upkeep etc), that accordingly neither party could be bound unless both were bound. The document itself called for two signatures. Hence the document had no legal effect. This argument, though evidently rather strong, was unsuccessful. One reason was that the pursuer's obligations were not such as required subscribed writing under the Requirements of Writing (Scotland) Act 1995. (That point is correct, but it could be replied that the question at issue was not what the 1995 Act required, but what the document itself called for.) Moreover, and perhaps more importantly, the sheriff took the view (para 22) that the 'delivery of the document to her, and her acceptance of it, would in itself be sufficient to infer that she had given the undertakings referred to'. That the acceptance by X of a document signed by Y can amount to agreement by X to be bound by its terms is certainly good law. But is it so where the document specifically calls for X's signature, but X does not sign? That seems open to debate.

The actings of X might be relevant. Were there such actings here? It is true that Ms Robinson did not demand repayment of the loan, but that non-demand might have happened anyway. As for paying for upkeep, it was, it seems, a matter of concession that she had not done so, a fact that might perhaps be taken as suggesting that she had *not* undertaken the obligations in the document. (It will be recalled that the underlying logic is that Mr Marshall could not be bound by the obligations in the document unless Ms Robinson was *also* bound.)

Having held that the undertaking bound both Ms Robinson and Mr Marshall, the sheriff then considered whether it bound the defender, as Mr Marshall's

guardian. The sheriff concluded that it did. This conclusion, in itself, seems reasonable, and may be a significant contribution to the law of guardianship.

The sheriff also expressed the tentative view that an obligation never to sell was 'inconsistent with the … right of ownership' (para 27). He did not, however, conclude that such an obligation is necessarily invalid but left that question open. Had Mr Marshall not died, the next step would, it seems, have been a debate as to whether there was an implied term that Ms Robinson's consent was not to be unreasonably withheld.

This 'incompatible with ownership' issue is perhaps a result of a muddle that runs through the case, namely the idea that Mr Marshall's obligation not to sell was a real burden. A real burden is certainly invalid if 'repugnant with ownership' (Title Conditions (Scotland) Act 2003 s 3(6)) and so if this had been a purported real burden it would have been invalid *as a real burden*. But the obligation did not purport to be a real burden. It could not have been a real burden without registration, and no attempt had been made to register it, wisely, since registration would have been refused by the Keeper, for several obvious reasons. The whole issue of whether the obligation was a real burden was a red herring. It never purported to be more than a contractual undertaking.

(74) Thomson v Mooney [2013] CSIH 115

In 2005 the pursuer and the defender became engaged. They bought a house together in Airdrie and began cohabiting. Two years later they broke up. The aftermath was acrimonious, each side making financial claims against the other. One claim arose out of the house purchase. Part of the funding for the purchase was raised by means of a joint loan from a bank. The balance, £70,000, was contributed by the pursuer alone. After the breakup, the pursuer argued that his ex-fiancée had been unjustifiably enriched to the extent of half of that amount. The defender argued (*inter alia*) that this claim had been raised too late because, she said, more than five years had passed since the date of enrichment in 2005.

As so often with prescription claims, a key issue was when the prescriptive clock began to tick. The defender claimed that it had begun to tick when the house was bought in 2005. The pursuer argued for the date in 2007 when they broke up. His position was that, although she had been enriched in 2005, the defender had not been *unjustifiably* enriched until 2007. His position was that the transaction in 2005 had been in contemplation of marriage. At that stage the transfer was not unjustified enrichment, because it had a legal basis (a *causa*, to use the academic term), the legal basis being preparation for marriage. But when the relationship ended, and marriage was no longer in contemplation, the legal basis ceased to exist. The pursuer therefore argued that at *that* stage the defender came under an obligation to return the money. Since that had happened in 2007, the action was not barred by prescription.

At first instance ([2012] CSOH 177, 2012 GWD 39-769, *Conveyancing* 2012 Case (63)) the defender's argument was upheld. The pursuer reclaimed. In what is an important decision on the law of unjustified enrichment, the Inner House

has now reversed, holding that the prescriptive clock did not begin to tick until 2007. The court cites the valuable criticism of the first-instance decision made by Martin Hogg: 'Unjustified enrichment claims: when does the prescriptive clock begin to run?' (2013) 17 *Edinburgh Law Review* 405.

(75) Royal Bank of Scotland plc v Carlyle [2013] CSIH 75, 2013 GWD 31-617

The defender was a property developer, using loan finance from the bank on a project-by-project basis. In the summer of 2007 the RBS advanced two loans, of £845,000 and £560,000, to help the developer buy land at Gleneagles. The developer needed more than this to carry through the development, and expected to obtain a further loan during 2008. But when the financial crisis of 2008 broke, the RBS refused to lend more. Soon thereafter the RBS sued for repayment of the loan. The defence was that the RBS had, through conversations between its staff and the developer, committed itself to make available the further funding necessary to carry through the development. The developer counterclaimed for damages of £1.5m for breach of that commitment. At first instance the Lord Ordinary, after hearing evidence, found in favour of the developer: see [2010] CSOH 3, 2010 GWD 13-235 (*Conveyancing 2010* Case (67)).The RBS reclaimed, successfully. The Inner House took the view that the conversations had indicated the bank's intentions but did not amount to a commitment.

NON-SCOTTISH CASES

(76) Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa) [2013] 3 CMLR 5

Mohamed Aziz borrowed money from a bank, the loan being secured over his house. He defaulted on the loan. The bank enforced its security. Mr Aziz wished to argue that the secured loan agreement was in breach of the Unfair Terms in Consumer Contracts Directive (Directive 93/13/EEC), transposed into Spanish law by the Real Decreto Legislativo 1/2007. Under the Spanish law about the enforcement of security rights in immovable property, Mr Aziz could not raise this issue as a defence to the enforcement process. He could do so only in separate proceedings, and even if he was successful in those separate proceedings, the result might give him monetary compensation but would not save his house. The Spanish court made a reference to the Court of Justice of the European Union, asking whether Spanish law was, in this respect, disconform with the requirements of the Directive. It was **held** (by the First Chamber) that Spanish law did indeed breach the Directive.

It is often overlooked that Directive 93/13/EEC (transposed in the UK by the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083) applies as much to heritable transactions as to moveable transactions. 'Builders missives' are an example, yet when developers seek to enforce missives this aspect of the

matter is sometimes forgotten by agents acting for purchasers. See G L Gretton and K G C Reid, *Conveyancing* (4th edn, 2011) para 30-02.

On the specific question of whether the law in Scotland about the enforcement of standard securities (against 'consumers') is fully compliant with EU law, there is no doubt room for debate, though we incline to the view that it is compliant (which is not to say that all the documentation churned out by financial institutions is compliant). The planned review of the law of heritable security by the Scottish Law Commission will no doubt consider this issue. Finally, there is a valuable article by Ken Swinton, 'Reviewing fairness in standard securities' (2013) 81 *Scottish Law Gazette* 52, which includes discussion of *Aziz*.

PART II

STATUTORY DEVELOPMENTS

STATUTORY DEVELOPMENTS

High Hedges (Scotland) Act 2013 (asp 6)

On application from the owner or occupier of a 'domestic property', this Act allows local authorities to issue a notice (a 'high hedge notice') requiring a neighbour to reduce the height of a high hedge. If the notice is not complied with, the local authority can arrange for the work to be carried out and can recover the cost. See **Commentary** p 163.

Crofting Amendment (Scotland) Act 2013 (asp 10)

One of the changes made by the Crofting Reform (Scotland) Act 2010 was to introduce a new category of 'owner-occupier crofter' into the Crofters (Scotland) Act 1993. But by a drafting infelicity – the interaction of s 24(3) of the 2010 Act with s 23(10) (as amended) of the 1993 Act – it turned out that owner-occupier crofters were unable to apply to the Crofting Commission to decroft land except where the croft was vacant. That, at any rate, was the view taken by the Commission when, on 26 February 2013, it announced that it could not competently make decrofting directions. The view was disputed by Brian Inkster, but even as his article was being published, in the March issue of the *Journal of the Law Society* (at p 34), Paul Wheelhouse, the Minister for Environment and Climate Change, made a statement to the Scottish Parliament, on 28 March 2013, setting out the Scottish Government's intention to bring forward at the earliest opportunity a Bill to remedy the problem. The Crofting Amendment (Scotland) Bill was introduced to Parliament on 10 May, passed all its stages on 25 June, and received Royal Assent on 31 July, when it came into force. The Act inserts new provisions (ss 24A–24D) into the 1993 Act to make it clear that owner-occupier crofters can apply for decrofting directions. The provisions are back-dated to 1 October 2011, the date of commencement of the troublesome provision of the 2010 Act, so that they can apply to the 159 decrofting applications already determined by the Commission and the 50 applications pending at the time when the Commission ceased to process applications.

Land and Buildings Transaction Tax (Scotland) Act 2013 (asp 11)

The Scotland Act 2012 devolved to the Scottish Parliament the right to levy taxes on land transactions. The plan is that on 1 April 2015 stamp duty land tax will

be replaced by a new Scottish equivalent with the (hardly catchy but soon to be familiar) name of 'land and buildings transaction tax' (LBTT). Hence this Act, and also the Landfill Tax (Scotland) Act 2014 and the Revenue Scotland and Tax Powers Bill, currently before the Scottish Parliament. At 71 sections and 20 schedules, the Land and Buildings Transaction (Scotland) Act 2013 is neither short nor simple. The new tax, as might be expected, bears a close resemblance to SDLT, but there are important differences, the most significant of which is the replacement of the 'slab' structure of the latter by a series of thresholds so that, rather like income tax, it is only the consideration *above* a particular threshold which attracts the higher rate. See **Commentary** p 199.

Finance Act 2013 (c 29)

Among the many provisions of this Act are some changes to stamp duty land tax especially as respects leases and the sub-sale relief. See **Commentary** p 207.

Registration of company charges

With effect from 6 April 2013, the previous rules on the registration of company charges, contained in part 25 of the Companies Act 2006, have been replaced by new rules in a new version of part 25 substituted by the **Companies Act 2006 (Amendment of Part 25) Regulations 2013, SI 2013/600**. This provides a uniform system of registration for all of the UK jurisdictions. For details, see **Commentary** p 172.

Energy Performance of Buildings (Scotland) Regulations

The Energy Performance of Buildings (Scotland) Regulations 2008, SSI 2008/309, transposed in part the Energy Performance of Buildings Directive (Directive 2002/91/EC): see *Conveyancing 2008* pp 47–48. Among other things, the Regulations introduced a requirement for buildings to have an energy performance certificate which must be made available to prospective buyers and tenants. Partly in response to a further directive, Directive 2010/31/EU on the energy performance of buildings, the 2008 Regulations were amended in 2012 by (i) the Energy Performance of Buildings (Scotland) Amendment Regulations 2012, SSI 2012/190 (ii) the Energy Performance of Buildings (Scotland) Amendment (No 2) Regulations 2012, SSI 2012/208, and (iii) the Energy Performance of Buildings (Scotland) Amendment (No 3) Regulations 2012, SSI 2012/315. For details, see *Conveyancing 2012* p 67.

Further amendments are now made by the **Energy Performance of Buildings (Scotland) Amendment Regulations 2013, SSI 2013/12**, with effect from 27 January 2013. This is to take account of properties which are subject to the 'Green Deal'. In particular, the 'recommendations report' which, since 1 October 2012, has supplemented the energy performance certificate by giving further details of recommendations for improvement (including on cost effectiveness) must now, for Green Deal properties, include the 'green deal information' set out

in a new sch 2 to the 2008 Regulations. This includes a statement indicating (i) that improvements have been installed under a Green Deal plan, (ii) that the plan is a type of unsecured loan, (iii) the name and contact details of the Green Deal provider, (iv) the amount payable under the Green Deal plan per day and per annum, and (v) the rate of interest. For the Green Deal more generally, see **Commentary** p 150.

Registration of residential private landlords

Subject to some exceptions, private landlords must register with the local authority before they let a house. The original rules are contained in part 8 of the Antisocial Behaviour etc (Scotland) Act 2004 supplemented by the Private Landlord Registration (Information and Fees) (Scotland) Regulations, SSI 2005/558 (as amended by the Private Landlord Registration (Information and Fees) (Scotland) Amendment Regulations 2012, SSI 2012/151: see *Conveyancing 2004* pp 92–95). Significant amendments, however, were made by part 1 of the Private Rented Housing (Scotland) Act 2011, the final provisions of which have now been brought into force, with effect from 1 April 2013 and (in the case of s 6) 1 June 2013, by the **Private Rented Housing (Scotland) Act 2011 (Commencement No 6 and Savings Provisions) Order 2013, SSI 2013/82**.

Much of the focus of the amendments made by part 1 of the 2011 Act is on identifying and penalising unregistered landlords. The previous practice of providing landlord registration numbers is put on a statutory basis (s 3, amending s 84 of the 2004 Act), and that number must be included when advertising property for let (although 'to let' sales boards, being generic, are excused) (s 6, inserting a new s 92B). Penalties on unregistered landlords are increased to a maximum fine of £50,000 (s 7, amending s 93(7)), and local authorities are given new powers to obtain information from private individuals (such as tenants), letting agents, and the Private Rented Housing Panel (s 9 inserting a new s 97A, and s 11 inserting into the Housing (Scotland) Act 2006 a new s 22A). Only someone who is judged 'a fit and proper person to act as a landlord' (s 84 of the 2004 Act) is eligible for registration, and the 2011 Act amends the list of factors to which the local authority is to have regard in making that judgment, for example by adding firearms and sexual offences to the list of offences which fall to be considered (s 1, amending s 85).

Tenant information packs for assured tenancies

The new ss 30A and 30B of the Housing (Scotland) Act 1988 (inserted by s 33 of the Private Rented Housing (Scotland) Act 2011), which require tenant information packs to be provided for assured tenancies, was brought into force on 1 May 2013 by the **Private Rented Housing (Scotland) Act 2011 (Commencement No 5 and Transitional Provision) Order 2013, SSI 2013/19**. The form and content of the packs are prescribed in the **Tenant Information Packs (Assured Tenancies) (Scotland) Order 2013, SSI 2013/20** as amended by the **Tenant Information Packs (Assured Tenancies) (Scotland) Amendment Order 2013, SSI 2013/90**.

Fees for the provision of services by Registers of Scotland

Section 108 of the Land Registration etc (Scotland) Act 2012, in force since 1 November 2012, empowers the Keeper to provide consultancy, advisory or other commercial services, including services which do not relate to the law and practice of registration. By s 108(3), the terms for and costs of such services are a matter for agreement. The **Fees in the Registers of Scotland (Consequential Provisions) Amendment Order 2013, SSI 2013/59**, repeals the previous basis for fees for such services, contained in the Fees in the Registers of Scotland Order 1995, SI 1995/1945 (as amended), part XI, para 4, which was to the effect that the fee for 'other services' was based on the full value of the work and materials involved. The repeal took effect on 1 April 2013.

New conservation bodies

Conservation bodies are bodies which are able to create and hold conservation burdens under s 38 of the Title Conditions (Scotland) Act 2003. A conservation burden is a personal real burden which preserves or protects the natural or built environment for the benefit of the public. The first list of conservation bodies, prescribed by the Title Conditions (Scotland) Act 2003 (Conservation Bodies) Order 2003, SSI 2003/453, was amended by the Title Conditions (Scotland) Act 2003 (Conservation Bodies) Amendment Order 2004, SSI 2004/400, the Title Conditions (Scotland) Act 2003 (Conservation Bodies) Amendment Order 2006, SSI 2006/110, the Title Conditions (Scotland) Act 2003 (Conservation Bodies) Amendment (No 2) Order 2006, SSI 2006/130, the Title Conditions Scotland) Act 2003 (Conservation Bodies) Amendment Order 2007, SSI 2007/533, the Title Conditions (Scotland) Act 2003 (Conservation Bodies) Amendment Order 2008, SSI 2008/217, and the Title Conditions (Scotland) Act 2003 (Conservation Bodies) Amendment Order 2012, SSI 2012/30. The **Title Conditions (Scotland) Act 2003 (Conservation Bodies) Amendment Order 2013, SSI 2013/289**, further amends the list by adding Perth and Kinross Heritage Trust.

The complete list of conservation bodies is now:

All local authorities
Aberdeen City Heritage Trust
Alba Conservation Trust
Castles of Scotland Preservation Trust
Dundee Historic Environment Trust
Edinburgh World Heritage Trust
Glasgow Building Preservation Trust
Glasgow City Heritage Trust
Highlands Buildings Preservation Trust
Inverness City Heritage Trust
New Lanark Trust
Perth and Kinross Heritage Trust
Plantlife – The Wild-Plant Conservation Charity
Scottish Natural Heritage

Sir Henry Wade's Pilmuir Trust
Solway Heritage
St Vincent Crescent Preservation Trust
Stirling City Heritage Trust
Strathclyde Building Preservation Trust
Tayside Building Preservation Trust
The John Muir Trust
The National Trust for Scotland for Places of Historic Interest or Natural Beauty
The Royal Society for the Protection of Birds
The Scottish Wildlife Trust
The Trustees of the Landmark Trust
The Woodland Trust
United Kingdom Historic Building Preservation Trust

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, but one which may only be used over rural land, ie land other than 'excluded land'. 'Excluded land' has the same meaning as in the Land Reform (Scotland) Act 2003, namely settlements of over 10,000 people.

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, and 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**, now adds West Harris Trust as well as acknowledging the change of name of 'Down to Earth Scottish Sustainable Self Build Housing Association Limited' to 'Down to Earth Solutions Community Interest Company'.

The complete list of rural housing bodies is now:

Albyn Housing Society Limited
Argyll Community Housing Association
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
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
Lochaber Housing Association Limited
Muirneag Housing Association Limited
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

Changes to the Building (Scotland) Regulations 2004

Minor amendments to the Building (Scotland) Regulations 2004, SSI 2004/406 (for which see *Conveyancing 2004* p 37), the Building (Procedure) (Scotland) Regulations 2004, SSI 2004/428, and the Building (Forms) (Scotland) Regulations 2005, SSI 2005/172, are made by the **Building (Miscellaneous Amendments) (Scotland) Regulations 2013, SSI 2013/143**, with effect from 1 October 2013.

Suspension of access rights over core paths

It is now more than a decade since access rights were conferred on the general public by part 1 of the Land Reform (Scotland) Act 2003. These access rights are not, of course, unlimited. For example, they cannot be exercised in respect of the types of property listed in s 6 of the Act. But, hitherto, access rights have always been exercisable over 'core paths', ie a path identified by the local authority under s 17 of the Act as one of a system of paths 'sufficient for the purpose of giving the public reasonable access throughout their area'. The position was made clear by s 7(1) of the Act which provided, succinctly, that 'Section 6 above does not prevent or restrict the exercise of access rights over any land which is a core path'.

Section 7(1), however, has now been amended, following consultation, by the **Land Reform (Scotland) Act 2003 (Modification) Order 2013, SSI 2013/356**, with effect from 20 December 2013, so as to add two exceptions. As amended s 7(1) now reads:

> Section 6 above does not prevent or restrict the exercise of access rights over any land which is a core path unless it is land –
>
> (a) to which public access is prohibited or restricted by or under any enactment in consequence of an outbreak of animal disease; or
>
> (b) in respect of which access rights are not exercisable, having been specified (whether as part of a larger area or not) in an order under section 11.

The first of these exceptions is self-explanatory and unlikely to be controversial. Some background on the second exception, however, may be helpful.

Section 11 of the Act allows local authorities to suspend statutory access rights over land, typically to allow the holding of some sort of event such as a car rally or an outdoor concert. If the suspension is for six or more days the approval of the Scottish Ministers is needed. The consequence of a s 11 order is that access rights cannot be exercised over the land in question for the period in question: see s 6(1)(j). As the legislation previously stood, this suspension of rights did not apply to core paths. That, however, came to be thought of as too inflexible. In a consultation document published in October 2011 (*Land Reform (Scotland) Act 2003: Consultation on Draft Order to Permit Temporary Closures of Core Paths*) the Scottish Government argued that it might 'occasionally' be desirable to close a core path (p 2):

> For example, the Forestry Commission Scotland have a condition attached to the use of the forest estate for motor sport that requires a section 11 closure for the management of public safety. They do not want to take any risk that members of the public will seek to exercise their rights along a core path through an event area. In addition a managed closure on an orderly basis with proper advance notification can also assist those seeking to plan access to an area which is closed for a specific time bound period.

The response to the consultation having been generally favourable, the necessary amendment has now been made.

Long Leases (Scotland) Act 2012: implementation

On the 'appointed day', says s 4(1) of the Long Leases (Scotland) Act 2012, all 'qualifying leases' are upgraded to rights of ownership, and the title of the landlord is extinguished. A 'qualifying lease' is (with some exceptions) a registered lease granted for more than 175 years and with an unexpired duration, immediately before the appointed day, of more than 175 years (or 100 years in the case of dwellinghouses) (s 1(3)). No conveyancing will be needed; on the appointed day the leasehold title automatically becomes an ownership title, and the current landlord loses ownership. Further details can be found in *Conveyancing 2012* pp 132–37.

By s 70, the 'appointed day' is 'the first Martinmas occurring on or after the day 2 years after the day on which this section comes into force'. As s 70 has now been brought into force on 28 November 2013 by the **Long Leases (Scotland) Act 2012 (Commencement No 1) Order 2013, SSI 2013/322**, it follows that the appointed day will be 28 November 2015. The Order also provides for the commencement of most of the rest of the Act either on 28 November 2013 or on 21 February 2014. But s 78 (certain documents registrable despite initial rejection) does not come into force until 6 March 2014, and s 73 (extinction of right of irritancy in certain leases) until 28 September 2015.

Like the Abolition of Feudal Tenure etc (Scotland) Act 2000, on which it is modelled, the Long Leases Act makes provision for compensation and for the preservation of certain rights, typically by the service and registration of notices between the commencement day of the provisions in question (21 February 2014) and the appointed day (28 November 2015). See **Commentary** pp 139–40. Forms of notice are prescribed by the **Long Leases (Prescribed Form of Notices etc) (Scotland) Regulations 2014, SSI 2014/9**, while the **Long Leases (Appeal Period) (Scotland) Order 2014, SSI 2014/8**, fixes at eight weeks the period allowed for an appeal under s 78 of the Act against rejection of a notice by the Keeper.

Helpfully, chapter 4 of the Scottish Government's consultation document on notices (available at www.scotland.gov.uk/Publications/2013/08/4913/0) gives a timeline for the entire process of implementation of the Act, starting from now:

Before the appointed day	Section 8	Before the appointed day, the landlord may execute and register a notice to preserve sporting rights (ie rights to take game and fish).
	Sections 14–20	Before the appointed day, an entitled person may serve a notice on a tenant seeking to convert leasehold conditions into real burdens, agree the conversion with the tenant and register the agreement.
	Section 21	If agreement cannot be reached, an application may be made to the Lands Tribunal within one year of section 21 coming into force
	Section 23	Before the appointed day, an entitled person may execute and register a notice to convert a right of pre-emption or redemption into a personal real burden.
	Sections 24, 25, 26, 27, 28	Before the appointed day, notices may be executed and registered to turn relevant conditions into the following personal real burdens: economic development burdens; health care burdens; climate change burdens and conservation burdens.

Before the appointed day	Section 39	Before the appointed day, the landlord may allocate *cumulo* rent.
	Section 56	Not later than six months before the appointed day, a landlord who wishes to claim more than £500 from a tenant (either by way of a compensatory payment or by way of an additional payment or payments) has to serve a notice on the tenant. Failure to do so means that compensatory and additional payments are each capped at £500.
	Section 63	Not later than two months before the appointed day, a tenant may execute and register a notice to exempt a qualifying lease from converting to ownership.
	Section 64	Not later than two months before the appointed day, a landlord may register an agreement with the tenant or an order by the Lands Tribunal that the annual rental of the lease is over £100. The lease is then exempt from conversion.
The appointed day	Section 70	The appointed day is the first Martinmas [28 November] on or after the day two years after section 70 comes into force. The Government intends to commence section 70 so that the appointed day is 28 November 2015.
	Section 4	On the appointed day, qualifying ultra-long leases will convert into ownership.
	Section 29	On the appointed day, leasehold conditions regulating the maintenance, management, reinstatement or use of property other than the land being converted into ownership automatically become facility burdens.
	Section 29	On the appointed day, leasehold conditions relating to the provision of services to land other than the land being converted into ownership automatically become service burdens.
	Section 30	On the appointed day, leasehold conditions conferring a power of management over a group of related properties automatically become manager burdens.
	Section 31	On the appointed day, leasehold conditions imposed under a common scheme on a group of related properties automatically become real burdens.

After the appointed day	Section 35	The prescriptive period in relation to breaches of qualifying conditions which become real burdens will be the shorter of five years from the appointed day or 20 years from the breach.
	Sections 40, 41, 42, 43	Within two years from the appointed day, the landlord must allocate • *cumulo* rent and *cumulo* renewal premium in respect of a continuing lease; and • rent and renewal premium in respect of partially continuing leases.
	Section 44	Within 56 days of an allocation being made under sections 39, 40, 41, 42 and 43, the tenant may apply to the Lands Tribunal for an order if the tenant disputes the allocation.
	Section 44	Once two years after the appointed day have elapsed, if the landlord has not allocated *cumulo* rent or *cumulo* renewal premium or allocated rent or renewal premium the tenant may apply to the Lands Tribunal for an order.
	Section 45	Within two years from the appointed day, the former landlord may serve a notice on the former tenant seeking a compensatory payment (for loss of rental and of renewal premium of £100 or less).
	Section 50	Within two years from the appointed day, the former landlord may serve a notice on the former tenant seeking an additional payment or payments (for loss of rights outlined in section 51).
	Section 55	Within five years of the appointed day, the landlord or tenant, if they do not agree the amount of the additional payment, may refer the matter to the Lands Tribunal.
	Section 60	The obligation to pay the compensatory or additional payment prescribes after five years.
Without limit of time	Section 67	At any time, a tenant may execute and register a notice recalling an exemption notice registered by the tenant so that the lease may convert. At any time, the tenant may also recall an exemption in respect of a lease which is unregistered but is then subsequently registered (section 65 of the Act refers). Provision is made so that there is at least 6 months for landlords to consider whether to register any notices converting leasehold conditions into real burdens. The requirement at section 56 on landlords to serve a preliminary notice if compensatory or additional payments claimed will be over £500 is disapplied.

PART III

OTHER MATERIAL

OTHER MATERIAL

Housing (Scotland) Bill

This Government Bill, which was introduced to the Scottish Parliament on 21 November 2013, is the latest of what has now become a regular series of Housing Bills/Acts (the last one being in 2010), each covering a wide range of subjects.

As was widely trailed (see *Conveyancing 2012* pp 90–91), part 1 of the Bill seeks to abolish the right to buy. Already, no social-housing tenancy granted on or after 2 March 2011 carried such a right: see Housing (Scotland) Act 2010 part 14. Now the right would be abolished for all tenancies, by the simple expedient of repealing the relevant legislation (part III of the Housing (Scotland) Act 1987). For ECHR reasons tenants are to be given a period of three years, beginning with Royal Assent, in which to buy their houses; thereafter the right will be lost for ever.

The Tribunals (Scotland) Bill (discussed below), which is also before the Scottish Parliament, provides for the transfer of existing devolved tribunals into a single 'First-tier Tribunal' albeit with separate 'chambers'. Among the first of the tribunals to be so transferred would be the Private Rented Housing Panel which, under the Housing (Scotland) Act 2006 s 22, has jurisdiction in cases where, in private-sector tenancies, the landlord has failed to carry out repairs. Part 3 of the Housing (Scotland) Bill would greatly extend the jurisdiction of what is to be the First-tier Tribunal by transferring to it virtually all private-rented-sector disputes which are currently heard in the sheriff court. These include repossession cases (currently running at around 500 a year) as well as cases involving a wide range of disputes between landlord and tenant. The idea is to provide a more specialised and rapid disposal of cases which matches the often brief duration of such tenancies.

The other major initiative, found in part 4 of the Bill, is to introduce a registration system for the 750 or so letting agents for private-sector residential tenancies. This follows, and indeed is modelled on, earlier schemes for the registration of private-sector landlords (Antisocial Behaviour etc (Scotland) Act 2004 part 8) and property factors (Property Factors (Scotland) Act 2011). This acknowledges both the size of the private-rented sector – it has doubled in the last decade and now stands at 11% of the housing stock – and also problems which some agents cause. The official Policy Memorandum lists some of them

(para 211): 'agents going out of business and losing all monies held on behalf of landlords and tenants; the use of poorly drafted and legally inaccurate tenancy agreements; and tenants being charged illegal premiums for accessing privately rented accommodation'. As with property factors, there is also to be a Code of Conduct, and a mechanism for dispute-resolution.

Tribunals (Scotland) Bill

As just mentioned, the purpose of this Bill is to bundle up the ragbag of existing (devolved) tribunals into a single new tribunal, to be known as the 'First-tier Tribunal'. Among the tribunals affected – and scheduled to be transferred in the first wave (probably by the end of 2015) – are the Lands Tribunal for Scotland, the Private Rented Housing Panel, and the Homeowner Housing Panel. But while this means that the Lands Tribunal would disappear as such, it is likely to remain as a distinct organisation because provision is made in the Bill for the First-tier Tribunal to be split into 'chambers' each headed by its own President. Appeal from the First-tier Tribunal will be to a new 'Upper Tribunal', which itself will be divided into different 'divisions' according to the subject-matter of the appeals. The new structure mirrors the reorganisation of English and UK tribunals by the Tribunals, Courts and Enforcement Act 2007.

The Bill was introduced to the Scottish Parliament on 9 May 2013 and completed stage 1 on 7 November 2013.

Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill

This short Bill was introduced to the Scottish Parliament on 4 April 2014 by Labour Highlands and Islands MSP, David Stewart, and is currently being scrutinised by the Local Government and Regeneration Committee at stage 1 of the legislative process. As a member's Bill, it is unclear whether it will gain enough support to pass into law.

Its purpose is simple. When the Building (Scotland) Act 2003 replaced the Building (Scotland) Act 1959 it did not carry forward the provisions which allowed local authorities to recover by charging order (ie a heritable security over the property) the cost of repairs which they had carried out. The Bill seeks to amend the 2004 Act by providing for charging orders in respect of work carried out by local authorities under ss 28 (defective building notice), 29 (urgent action to deal with a dangerous building), and 30 (dangerous building notice) of the Act.

City of Edinburgh Council (Portobello Park) Bill

This is the latest, and surely final, stage in the battle as to whether the City of Edinburgh Council should be able to build a new school in Portobello Park, which is a public park. Having been defeated in the courts on the ground that the Park, as part of the common good, could not be appropriated for a different purpose – see *Portobello Park Action Group Association v City of Edinburgh Council* [2012]

CSIH 69, 2013 SC 184, discussed in *Conveyancing 2012* pp 172–75 – Edinburgh Council has now sought to promote private legislation which would allow the project to go ahead. Introduced to the Scottish Parliament on 25 April 2013, the Bill attracted a large number of objections. Nonetheless, at the Preliminary Stage debate, held on 9 January 2014, the Bill attracted cross-party support, even from the Green Party, and was allowed to proceed.

Community Empowerment and Renewal (Scotland) Bill

Listed in the Scottish Government's legislative programme for 2013/14 but not yet introduced to Parliament, the Community Empowerment and Renewal Bill will contain measures designed to promote community involvement in a number of different areas. Following an earlier consultation (for which see *Conveyancing 2012* pp 97–98), the Government engaged in a more detailed consultation on specific matters, some of which had been prepared as a draft Bill: see www.scotland.gov.uk/Publications/2013/11/5740/0. The consultation closed on 24 January 2014. From a conveyancing point of view, the most important proposals concern the community right to buy contained in part 2 of the Land Reform (Scotland) Act 2003. As well as streamlining the existing procedure, the Bill may extend the right to buy from rural areas to the whole of Scotland. More controversially, the right, which is currently only pre-emptive in nature, may become one of compulsory purchase in cases where land is neglected or abandoned.

Other measures are likely to include powers for community bodies to be formed to buy or lease property from local authorities and certain other public bodies following an 'asset transfer request', as well as a duty on local authorities, in the interests of certainty and transparency, to establish and maintain a register of common good property.

Conclusion of Contracts (Scotland) Bill

Also included in the Scottish Government's legislative programme but not yet introduced to Parliament is a short Bill to implement the Scottish Law Commission's Report on *Formation of Contract: Execution in Counterpart* (Scot Law Com No 231) which was published in April 2013. The Bill will make clear that execution in counterpart (ie where different parties sign different copies of the same document) is competent. It will also remove the doubts raised by *Park Ptrs (No 2)* [2009] CSOH 122, 2009 SLT 871 (for which see *Conveyancing 2009* pp 85–89) by providing that 'traditional' (ie paper) documents can be delivered by a PDF attached to an e-mail, by fax, or by other electronic means. By the time that this becomes law, however, it may be that traditional documents no longer have to be used for missives. This is because the Land Registration etc (Scotland) Act 2012 ss 96–98 amend the Requirements of Writing (Scotland) Act 1995 with effect from 11 May 2014 so that missives and other juridical acts for which writing is needed can be constituted by electronic documents, ie electronic documents, electronically signed. See the Land Registration etc (Scotland) Act 2012 (Commencement No 2 and Transitional Provisions) Order 2014, SSI 2014/41.

Mortgage Credit Directive

Finally in this section on forthcoming legislation, early warning may be given of the Mortgage Credit Directive (Directive on credit agreements relating to residential immovable property) which has been making its way through the EU legislative machine. Or, as the *Daily Telegraph* preferred to inform its readers (11 September 2013), 'Controversial new EU mortgage rules that will bombard borrowers with "useless and confusing" information have been given the green light by policymakers in Brussels'. The European Parliament gave its final approval to the Directive on 10 December 2013. No doubt transposition is still some years away.

The Directive is in part a response to the recent outbreak of hazardous lending and in part an attempt to create a single market in secured lending. There is a strong consumer focus. Lenders will have to provide a standardised information sheet ('ESIS') which will allow consumers to shop around for the best loan. To alert consumers to potential rate variations, the ESIS will include worst-case scenarios as far as variable-interest and foreign-currency loans are concerned. There will also be Europe-wide standards for assessing the credit-worthiness of mortgage applicants.

Registers of Scotland

RoS e-zine

Registers of Scotland (RoS) now publishes an electronic newsletter – an 'e-zine' – providing a quick and convenient way to keep up to date with developments at the Registers. See http://ezine.ros.gov.uk/ezine/home.

2012 Act campaign website

RoS has created a website as an information hub for the Land Registration etc (Scotland) Act 2012: www.ros.gov.uk/2012Act. At the same time, RoS has been consulting on the implementation of the Act (the consultation period closing on 9 December 2013). The website contains a great deal of helpful information on the Act, and it will be kept updated until the day (the 'designated day') on which the Act is brought fully into force. Although the exact date has not yet been decided, RoS expects the designated day to be in late autumn of 2014.

Mandatory registration in the Crofting Register

With effect from 30 September 2013, registration has been needed to the new Crofting Register in respect of certain trigger events. These mainly relate to events that require a regulatory application to the Crofting Commission, for example, the assignation or division of a croft. See RoS *Update 39* (http://www.ros.gov.uk/pdfs/update39.pdf).

Servitudes now running through a solid feature

In http://ezine.ros.gov.uk/ezine/articles/Historic_Servitudes, RoS gives advice on the following problem:

If during the course of examining an application for first registration in the Land Register, a servitude or right of way shown on a plan annexed to a prior deed recorded in the General Register of Sasines is found to now run through a solid feature, for example a garage or a property extension such as a conservatory, we will, in the absence of any additional information supplied by the applicant:

a. consider whether there is any reason to doubt its constitution before deciding whether it is appropriate to enter it on the title sheet for the affected property, and:
b. if it is appropriate to enter it we will reflect the full extent of the servitude as granted in the deed on the Land Register title plan.

Issues for consideration

Solicitors can assist us by providing information on the servitude as part of their application for registration.

Applicant for registration has the benefit of the servitude right. If your client has the benefit of the servitude right, it is open to them to confirm on the application form that the right has been extinguished through negative prescription or varied with the consent of the burdened proprietor (though we would want to see evidence of this variation before we take a view as to whether it is possible to reflect any variation on the title sheet). Alternatively you may wish to advise the Keeper that the servitude should be reflected as per the position shown in the deed in which it was established on the basis that negative prescription has not yet completed.

Applicant for registration is the burdened proprietor. If you are acting for the burdened proprietor, you should consider whether or not there is evidence to demonstrate that the servitude has been varied or extinguished and if such evidence is available it should be submitted with the application. (For instance, a letter from the purported benefited proprietor acknowledging that the servitude has been extinguished by non-use.) If, in any case, there is doubt as to the sufficiency of the available evidence, you may wish to put the matter beyond doubt by considering recourse to formal conveyancing in the form of a deed of servitude, deed of variation or discharge (as the case may be) granted by the appropriate parties.

If the solicitor does not provide any specific advice we will, subject to being satisfied as to the constitution of the servitude, reflect the underlying conveyancing in the Land Register. In doing so, we offer no comment on the current status of the right in question. We will apply a similar approach in the event that the scenarios described above occur in relation to an interest that is already registered in the Land Register.

Turnaround times

In the May 2013 issue of the *Journal of the Law Society* (at p 9) RoS announced that it no longer had arrears of first registration applications. In its *Corporate Plan 2013–2016* (www.ros.gov.uk/pdfs/cp_2013–16.pdf) RoS sets new 'service standards' for turnaround times. For first registrations this is 40 days in 'standard' cases (ie where 'pre-work' has already been carried out) and six months in other cases. Dealings with whole will be dealt with within 30 working days and transfers of part within nine months.

Getting help

In the April 2013 issue of the *Journal of the Law Society* (at p 11), RoS reminded readers of the different types of service that it offers. As a 'rule of thumb':

- General enquiries, eg those regarding fees and forms, should be directed to customer services.
- Enquiries relating to current transactions which will shortly be forwarded to the Keeper for registration should be directed to Pre-Registration Enquiries. Fee is £50 plus VAT.
- More complex enquiries requiring comprehensive examination and identification of title should be directed to the Title Investigation Service. Title Investigation enquiries are charged for on a time-on-line basis at an hourly rate of £44.63 plus VAT, and a daily rate of £330.24 plus VAT. Further details of this service can be found at www.ros.gov.uk.

In addition, by working with Taylor Wimpey over the past 12 months, RoS has further developed its **development plan approval mapping service**. It is explained in the January 2013 issue of the *Journal of the Law Society* (at p 9) that:

> Where the developer is acquiring land for immediate development, we will undertake to complete the registration within 60 days. If the development has previously been recorded in the Sasine Register, we would encourage the developer to voluntarily register the title to the development. This means that both the developer and any prospective purchaser are clear as to the legal extent of the development.
>
> In order to then provide assurances or to identify any problems with the planned estate, we can compare a proposed deed of conditions plan with the legal title for the development. This will highlight whether or not there are any underlaps or overlaps with neighbouring titles, which will enable them to be addressed before any sales take place. This is a chargeable service in line with the P16 comparison service.
>
> The developer is encouraged to use the deed of conditions plan as the basis for future deed plans for individual conveyances. By providing the reassurance that all properties fall within the development, this enables the Keeper to prepare a title plan more efficiently, thus speeding up the registration process for individual house plots to a matter of weeks.

Absorption of lenders: Central Building Society and ING Direct NV

Two transfers of the rights and liabilities of lenders took place in 2013. (i) With effect from 1 February 2013 there was a transfer from the Century Building Society to the Scottish Building Society by virtue of the Instrument of Transfer of Engagements between the Century Building Society and Scottish Building Society registered by the Financial Services Authority on 25 January 2013. (ii) With effect from 6 March 2013 there was a transfer from the UK branch of ING Direct NV to Barclays Bank plc by virtue of the Transfer Scheme between the ING Direct NV and Barclays Bank plc approved by Order of the High Court

of Justice on 20 February 2013. The implications for the drafting of standard securities and discharges are explored, respectively, in

- http://ezine.ros.gov.uk/ezine/articles/bsuiness_memo
- http://ezine.ros.gov.uk/ezine/articles/ing_to_barclays.

Separate representation in security transactions

2013 was the year of 'sep rep'. No issue took up more space in the legal press or excited more debate. Yet just when it seemed that sep rep might be a done deal, it was rejected at a Law Society SGM held in September. As a result, the combatants have retreated from the field, the Law Society has deleted its web pages devoted to the subject, and conveyancers will have to find a new topic of conversation in 2014.

The sequence of events

The background to all this is, of course, rule B.2.1.4(f) of the Practice Rules which, contrary to the normal position on conflict of interest, allows the same solicitor to act both for borrower and lender where 'the terms of the loan have been agreed between the parties before the regulated person has been instructed to act for the lender, and the granting of the security is only to give effect to such agreement'. Although this exception applies to commercial as much as to residential conveyancing, the effect of Law Society Guidance issued in 1994 has been to make separate representation the norm in commercial transactions. Thus the issue of whether to keep the exception is overwhelmingly one for residential conveyancing.

That issue had been raised by Ian C Ferguson, a Council member of the Scottish Law Agents Society, in an article which appeared in the *Scottish Law Gazette* in 2011 (p 60). Following a motion from the Scottish Law Agents Society at the Law Society AGM in May 2012, a Separate Representation Working Party was set up under the chairmanship of Ross MacKay. To no one's surprise, when it reported in January 2013 the Working Group (with one dissenter) voiced its support for mandatory separate representation. The report was debated at the Society's AGM on 22 March. Those who favoured separate representation had 360 proxy votes (85% of the total) in their pockets, just in case; in the event they were not needed, for a motion calling for an amendment to the Practice Rules to make separate representation mandatory was carried by a floor vote of 58 to 27.

The AGM vote drew a strong response from the Council of Mortgage Lenders followed by a war of words with the Law Society. CML Director General, Paul Smee, expressed his disappointment 'that a measure which is so blatantly against consumer interests and will impose added costs and added scope for confusion and delay has been voted through, with not even the pretence of wider consultation. At a time when housing and mortgage markets are still recovering, this is a protectionist measure with little regard for the interests of consumers'.

The Law Society, as it was now bound to do, arranged an SGM for September to consider the necessary change to the Practice Rules. But meanwhile, on 18 June,

it launched a public consultation on the issue which drew 279 responses, mainly from the legal profession but also from bodies such as *Which?* and the CML, with the latter complaining that 'the consultation document has not been written in a balanced way, overtly favouring the arguments for separate representation with little evidence to support the assertion of routine problems with joint representation' (http://www.cml.org.uk/cml/media/press/3593). The result, however, was a little unexpected: by a narrow majority (51% to 49%) the idea of separate representation was rejected by consultees.

The scene was now set for the SGM on 23 September. After a debate lasting around 90 minutes the votes were cast. The largest single block of proxy votes was held by the Scottish Law Agents Society and its supporters. Nonetheless the motion for separate representation was lost by 847 votes (56%) to 571 votes (44%). A year which had begun with a Working Party report highly favourable to separate representation thus ended with its unequivocal defeat.

The arguments

At the heart of the debate was the question of whether acting for both lender and borrower involved a conflict or a commonality of interests. That commonality had existed at one time was accepted on all sides. But, or so the proponents of change argued, this had now ceased to be so. Solicitors no longer acted for lenders merely on an 'execution basis', ie without providing legal advice. On the contrary, the torrent of requirements in the CML *Lenders' Handbook* involved giving not only advice but information, sometimes of a confidential nature. And in thus serving two masters – the 'real client' and an increasingly demanding second client – solicitors were inevitably exposed to conflicts of interest, ranging from how to respond to blemishes in the title to the vexed question of whether to disclose to or withhold from lenders information about the borrower which might (or might not) bear on the decision to lend. Enough was enough. Both lender and borrower were entitled to impartial advice; and that was the very thing which could not be delivered by the current system. In response, those supporting the *status quo* accepted that things had changed, and, like much change, this was for the worse. Nonetheless they did not recognise the unremittingly bleak picture presented by the other side. Of course conflicts of interest did arise (as they always had). In that case the solicitor must cease to act for one of the parties. But as one solicitor, Robert Fraser, put it (bit.ly/18ZYMXe), '99% of residential property transactions don't require separate representation but rather have a commonality of interest between the solicitor, lender and client'. Above all, there was a common interest in achieving a good and marketable title to the property, and as quickly and efficiently as possible.

Naturally, the assessment of such arguments was coloured by an assessment of the consequences of change. At one level, separate representation was highly attractive to conveyancers. A few firms would be retained to act for lenders in what would be a high-volume (and no doubt low-fee) business. But for the rest there would be liberation from the horrors of the CML *Lenders' Handbook*, and from the risk of claims for failure to comply with its terms as lenders sought to

make up their losses from poor lending decisions. The report of the Working Party (p 4) pointed to a 'substantial' rise in claims intimated to the Master Policy brokers arising from residential security transactions. There would be liberation, too, from the burden of form-filling and information-disclosure needed to stay on lenders' panels, and from the humiliation and financial loss of failing to make the grade. In place of all this misery, conveyancers could get on with what they saw as their proper job, namely to carry out the conveyancing transaction on behalf of the person who was paying their fee.

But there would be downsides too. For consumers, the unalloyed loyalty of their solicitor would come at the price of having to pay for the second solicitor who acted for the lender. The transaction, moreover, would be slower and more complicated. Already conveyancers were unwilling to commit their client to concluded missives until the loan offer was to hand. In future they would have to wait, not just for the lender, but for the lender's solicitors, for until their solicitors had pronounced on the title there was no guarantee that the funding would be made available. That would be the end of what was left of the traditional Scottish system of quick contracts and binding agreements. At the same time it would increase the workload and stress levels of conveyancers without offering the hope of a commensurate rise in fees. Beyond all this, however, there was a fear of the unknown, and a sense of preferring the *status quo*, however unsatisfactory, to the uncertainties of so radical a departure from current practice. In the shakeout which was bound to follow there would be winners and losers. Who could be confident that they would be among the former?

Implications

It may be a while before the full implications of the decision to reject separate representation become apparent. There has been talk of some kind of accreditation system for residential conveyancing, perhaps along the lines of the Conveyancing Quality Scheme (www.lawsociety.org.uk/accreditation/specialist-schemes/conveyancing-quality-scheme/) in England. Further, if the defeated side were correct to see conflict of interest as a serious problem, even in residential conveyancing, then we may expect to see some guidance from the Law Society on the topic. Two other initiatives are explored in more detail in the immediately following sections.

Review of residential conveyancing practice

Even as the debate on separate representation was raging, in June 2013, a Law Society working group headed by Ross MacKay was set up to carry out a full review of the sale and purchase of homes in Scotland and bring forward proposals for improvements. As Mr MacKay indicated in an interview in the August issue of the *Journal* (p 32), the scope is 'pretty wide ranging'. Among other topics, the working party will 'look at the factors causing delay in concluding contracts, at issues of service and quality, benchmarking what we can provide in terms of service and quality to our clients, at the whole area of branding as

Scottish conveyancers, at how IT fits into aspects of service and procedures'. As an example of current problems, mention was made of the 'huge reluctance on the part of solicitors to advise clients to conclude contracts at the moment' unless or until a loan is firmly in place. An interim report is expected to be produced after six months.

Re-writing the CML *Lenders' Handbook*

Following the 'no' vote in respect of separate representation a small Working Party of the Law Society's Council was established to meet with the Council of Mortgage Lenders (CML) with a view to seeking amendments to the CML *Lenders' Handbook*. An idea of the kinds of issue which might be considered is given by a particularly forthright, forceful, valuable and detailed letter sent on 3 April 2012 by Ross MacKay to CML Scotland's policy consultant, Kennedy Foster:

> It would, of course, be an understatement to say that the current terms of the Handbook are causing the profession some concern, for a variety of reasons. Whilst I would accept that some of the concerns are perhaps misconceived and misdirected, there remain a large number of conditions within the Handbook, which, in the view of the Law Society Property Law Committee are still causing difficulty, either because they are unclear in content, cut across long standing practice, arguably incorrect in law, or indeed are almost impossible to implement.
>
> It was suggested, therefore, that I drop you a line as being the primary point of contact in this regard, to highlight a number of specific clauses which, in our view, need amendment, clarification or even deletion.
>
> Part of the difficulty, of course, is that we have really not been given the opportunity of being involved in the exact wording of the Handbook. That problem is then enhanced due to the fact that the original concept of the Handbook as being a set of standard instructions has moved from that simple position to becoming more of an, arguably, anti-fraud/risk management/credit scoring set of requirements.
>
> I would be grateful, therefore, if you could let me have your comments on the following current clauses contained within the present version of the Handbook (1st August 2011):
>
> **1.6** At no stage is the word 'proprietor' actually defined. One may assume that it is intended to be the party with registered title to the secured property, but clarification would be appreciated.
>
> **1.9 & 1.10** The Handbook continues to refer to the word 'mortgage', although it is intended for use in Scotland, where this phrase is not generally recognised. We would suggest that for a set of Scottish instructions, reference should be made to Standard Security, Heritable Creditor, Loan Offer etc, where appropriate.
>
> **2.1** This should clarify, for the avoidance of doubt, that written communications can include the use of email or fax.
>
> **2.3** Concern has been expressed that an agent should not complete a transaction having intimated some matter until further written instructions are received. In practice, however, many agents have found themselves in a position where, having intimated some issue, funds are then released by the lender without further comment.

At a much later stage, lenders have been seeking to rely on the lack of written confirmation, despite releasing funds, as grounds for challenging the action of an agent. In our view, this is inequitable and that it should be made clear that where an intimation is made and lenders see fit to release funds, then the lender should be deemed satisfied as to the position. That would certainly seem to be a reasonable expectation.

3.1 As the last firm of independent qualified conveyancers ceased trading several months ago, we would suggest that the last sentence of this clause can be simply deleted as no longer applicable.

4.1 If lenders are seeking to rely on the terms of any valuation report, it is surely incumbent upon them to provide a copy of that same report to the agent. It is unreasonable to expect agents to be bound by a report which they have never been given a copy of. This issue is compounded in that whilst a purchaser and their agent may be reliant on a Home Report, or indeed on their own independent survey and valuation, a lender, at the present time, may have their own third version, on which they are actually reliant. There should be a clear duty on the part of the lender, therefore, to disclose that report.

4.1.3 If there is to be verification of assumptions, those assumptions have to be spelt out in the report. It should be made clear that if no assumptions are disclosed, that, in turn, there is no duty on the part of the agent to verify.

4.1.4 This is stated merely to be a recommendation, and logically, therefore, should not appear in a set of instructions to agents. If this is considered appropriate advice to borrowers, we would suggest that it should be copied within the lender's own paperwork with which they provide borrowers directly throughout the loan process.

5.1.1 Although the intent of this clause is well known, concerns have been expressed that the use of the verb 'owned' is unclear. Does it mean beneficial ownership, registered ownership or something else? The view has been expressed that, properly, it should equate to substantial completion, as phrased within SDLT legislation. As mentioned above, there is also concern about the lack of definition of the word 'proprietor' which presumably in this clause means something different from the proprietor envisaged in clause 1.6 ?

5.3.1 An unfortunate growing number of lenders are stipulating in part 2 that searches from private firms are not acceptable. This reflects English practice whereby most searches are obtained from local authorities. We think this would be a good time to make clear that in Scotland usual practice equates to provision of a search from a private firm of searchers. Indeed, it is now virtually unheard of to obtain such searches directly from local authorities, and the lenders which do adopt that practice are causing considerable confusion and difficulty. The same point applies, of course, in relation to 5.3.4.

5.4.1 There has always been some concern at the open ended nature of this clause, and in practice, as you will be aware, solicitors have now adopted a practical 20-year cut off point in respect of historic works to any property. It would be of assistance if this clause could be duly updated to reflect that current practice, which, in my view, operates to the benefit of all concerned.

5.7.1 It has always been somewhat of a mystery as to what steps can be taken to check that a real burden is not enforceable. The position, however, is effectively now

covered by the terms of the Title Conditions (Scotland) Act 2003 (and indeed the use of the phrase 'real burden' should be replaced with 'title condition'). It would seem appropriate for this clause to be updated in light of current legislation.

5.9.1 There has been an ongoing debate as to exactly what this clause means in respect of the phrase 'own funds' in relation to what is also known as 'gifted deposits'. The majority view of practitioners is that if a third party (usually parents) gift funds to a purchaser/borrower prior to settlement, these funds immediately become the property of the borrower at that point in time. If funds in respect of a deposit come entirely from the purchaser/borrower, we do not believe it is necessary, nor appropriate, for an agent to enquire further as to how those funds entered into their account. If, however, the funds come directly from, say, the parents to the solicitor, enquiry should be made as to whether or not these funds are a loan or a gift. If a gift, logically the matter stops there, and if a loan, that is then a matter requiring to be disclosed to the lender client. Certain parties think there is some dubiety as to that analysis, and it would be of benefit, therefore, if clarification could be provided as to exactly how this clause is to be interpreted.

6.6.3 I would assume that this clause will be updated in light of new legislation in this area?

6.7.1 It has been stated that if the property is a new conversion, it would be expected to see any new home warranty scheme made available. NHBC and the like rarely provide warranties for conversions as opposed to new builds. This clause should, therefore, be clarified.

6.7.7 We have, of course, been in recent discussion regarding the trigger for completion in respect of delivery of a local authority Habitation Certificate (particularly if verbal only) and again, this clause could be updated in light of this.

6.14 I have always thought this clause is unacceptable in both principle and in practice, in that as solicitors we cannot expect to be acting as insurance brokers. Whilst it is important for an agent to confirm that a property is prima facie covered under a policy for a required amount, it is not practical, particularly prior to settlement where no policy documentation may actually be issued, to check, for example, whether or not it covers all the various risks set out at length in this clause. It does seem appropriate that this clause is reviewed in some detail in order to reflect practicalities of insurance arrangements.

10.1 I would say it is illogical to require any certificate of title to be unqualified, when the whole tenor of the Handbook is to make disclosure to the lender client. In addition, I have already raised the concern about written authority to proceed once funds have already been released.

11.2 Whilst it would be appropriate for a general obligation to explain the primary purpose of the Standard Security to a borrower, it is not appropriate to explain this in detail, nor indeed to advise in any way on specific loan conditions. I would remind you that, under the Law Society Conflict of Interest rules that a party can only act for a borrower and lender where the terms of the loan have already been pre-agreed and are not subject to negotiation. It is illogical, therefore, to expect an agent to advise on loan conditions, as that would then be a prima facie conflict of interest in light of those practice rules.

> **16** I think it would be appropriate to make clear that whilst the Handbook sets out arrangements for transactions during the life of the mortgage, the actual duty of the solicitor under the Handbook for the purposes of the creation of the initial Security, terminates effectively on registration of the Security and delivery of the deeds to the lender client.
>
> **18** As you know the whole ARTL system has been subject to major criticism. This has been accepted by the Keeper, whom I believe to be trying to work up what will effectively be ARTL 2. I do think, therefore, that there should be dialogue with this email as to the benefits of offering under ARTL which, from the point of view of practitioners, is non existent. Although the Keeper makes a good sales pitch, in the context of risk management, I suspect the Society would be contradictory in its views in that regard.

At the Law Society SGM on 23 September 2013 Kennedy Foster repeated an offer made several times during the year to enter into negotiations on this topic, and has now met with the Law Society's Working Party. Future developments will be watched with keen interest.

Lenders' panels

That most lenders have moved away from an 'open panel' approach in the last four years is not exactly news. This followed pressure from the FSA, and was thought to be of assistance in reducing fraud. The working through of this change continues to cause problems for the legal profession.

Nationwide Building Society and confidential information

The Law Society has taken up with Nationwide concern voiced by its members as to the extent of disclosure required about their firm's financial arrangements, amongst other matters, in panel renewal letters. See bit.ly/14z5oe8. In reply, Nationwide gave assurances as to confidentiality and stressed that 'information is only used for assessment of firms, on a case by case basis, for the purpose of panel membership'. Puzzlingly, it adds that it does not use the data 'to select between firms'.

Lender Exchange

The following news release was issued by the Council of Mortgage Lenders on 25 November 2013:

> Three major lenders have confirmed that they will be adopting a new centralised panel management system to remove the need for conveyancing firms to repeatedly supply the same data to different lenders. 'Lender Exchange' is in the final stages of development, and is set to launch in the first quarter of 2014. Lender Exchange has been developed by Decision First, in collaboration with a working group of lenders. The scheme will cover Lloyds Banking Group, Santander and Royal Bank of Scotland Group and expressions of interest have also been made by Coventry Building Society,

Bank of Ireland, and Paragon Group. The system is open to all lenders who wish to participate.

The initiative has two main objectives – to minimise the costs and administrative burden on conveyancing firms responding to regular duplicate information requests from multiple lenders and to help lenders minimise fraud and negligence through robust due diligence.

It will give conveyancing firms throughout the UK an easy way to submit and update information to lenders about their conveyancing practice through a single, secure interface, saving them time and duplication of effort in meeting the terms of their panel membership. Lenders, in turn, can access information provided to enable them to assess the continued suitability of a firm to be on their panel, depending on their own individual criteria. Each participating lender will continue to have complete discretion over appointments and ongoing membership of its own conveyancing panel. The system will not allow lenders to know the composition of other lenders' panels.

If it saves time, as it may, Lender Exchange will also cost law firms money (as of course is currently the case for panel renewal with certain lenders). The annual fee will range from £285 + VAT for a sole practitioner to £995 + VAT for firms with more than 50 partners.

The Law Society (*Professional Practice Update*: November 2013) has expressed concern about the proposal, especially as the Society already holds much of the relevant information and would be prepared to provide it to the CML. See also (2013) 81 *Scottish Law Gazette* 89. In England and Wales the Law Society has come out strongly against Lender Exchange. In a letter to members on 3 December 2013 the Chief Executive explained that the Society had 'repeatedly offered to provide the data free to lenders but our offer has been refused without any explanation. As a result, a single commercial provider has been given a powerful position and the potential to control the dynamics of the conveyancing market and introduce needless cost to the detriment of consumers'. The letter went on to list nine specific areas of concern:

1 the lack of transparency in the assessment process or of any published objective criteria;
2 the selection of a commercial, for profit, organisation to act as a 'gatekeeper' to lender panel membership;
3 the lack of adequate consultation with the Law Society;
4 the continuing refusal of Decision First to provide their terms and conditions;
5 the fact that unsuccessful firms will be prohibited from reapplying for a period of time and the lack of information about how this time period is to be determined;
6 the lack of detail on any appeals process which will be a matter for individual lenders;
7 the security of the technical platform and the lack of evidence that it has been subjected to rigorous due diligence to ensure data protection of commercial and confidential data;
8 the potential commercial exploitation of your firm's data;

9 the basis on which the fee structure has been determined and the resulting 'secret profit' for the provider.

There, at the time of writing, matters rest.

Removal from panel without being informed

Meanwhile the August 2013 issue of the *Journal of the Law Society* (p 33) has reminded conveyancers of the risk that their firm may have been removed from a lender's panel without having been informed. In a letter to the Property Law Committee of the Law Society, Yorkshire Building Society confirmed that it carries out periodic reviews of its panel and removes firms without notice if they have not acted for the lender for at least 12 months. This is justified as ensuring that the lender does not retain firms that are no longer trading or have become dormant. A firm which has been excluded can apply for readmission.

Letters of obligation and s 75 agreements

The Law Society's *Professional Practice Update* for October 2013 records that new guidance (effective 1 November 2013) will be issued to clarify the view of the Property Law Committee that letters of obligation should not be granted in respect of s 75 Agreement transactions. The following wording is added to the existing guidance on letters of obligation, immediately below the paragraph entitled 'Should letters of obligation be given where there is no monetary consideration?'

> *Is the grant of a letter of obligation where my client grants a Section 75 Agreement to a Local Authority in the same category?*
>
> The answer to this is 'no'. The master policy insurers only regard such letters as classic where they relate to disposals such as a lease, disposition or security. A section 75 agreement is in the nature of a deed of real burdens or servitude. While there is insurance for a letter of obligation in such circumstances a 'double deductible' will be made, as the letter is not classic and outwith our control. The Property Law Committee therefore recommends that a letter of obligation should not be given in such circumstances.

Offers subject to survey/home report

Where an offer is made subject to a satisfactory survey (or home report), the Law Society suggests (in the *Professional Practice Update* for August 2013) that it should also be made subject to satisfactory valuation. This would allow solicitors to continue to act for a purchaser if, following a valuation which is lower than expected, the purchaser wants to negotiate a lower price. In the absence of such a provision, a solicitor would be bound, under current rules, to cease to act.

Submitting a suspicious activity report to SOCA

The Law Society's Alison Mackay provides the following guidance in the issue of the *Journal of the Law Society* for January 2013 (p 43):

Question

A client has instructed me to purchase a property in Edinburgh which is to be funded partly by a building society mortgage, with the balance being provided by his parents who live in China. The client's parents are insisting on sending the funds for the balance directly to me, but I have been unable to obtain a proper explanation for the source of the funds. I think this is suspicious and need to submit a suspicious activity report (SAR) to the Serious Organised Crime Agency (SOCA). Can you give me any practical tips on how to submit a SAR?

Answer

Section 328 of the Proceeds of Crime Act 2002 puts solicitors under a duty to report the activities of their client to the Serious Organised Crime Agency (SOCA) if the solicitor knows or suspects that the client is involved in an arrangement which facilitates the acquisition, retention, use or control of criminal property. Examples of 'arrangements' under s 328 would include the purchase of property funded with the proceeds of crime, and executries where there are reasonable grounds to suspect that part of the estate comprises money derived from tax evasion or benefit fraud.

The method of reporting is to submit a SAR to SOCA online via their website: www.ukciu.gov.uk/(zli0qn2ssfk5bni2k54ubsmf)/saronline.aspx

The Professional Practice team at the Society regularly receive calls in relation to SARs and are happy to discuss your concerns and queries.

Who should make the SAR?

It is the firm's money laundering reporting officer (MLRO) who should make the SAR – not the fee earner dealing with the transaction. The MLRO should obtain all relevant information from the fee earner and also review the file.

What should the SAR contain?

It is important when drafting the reason for the suspicion that all key information is given to SOCA. It is a good idea to prepare a written draft as it will help assess if you have enough information or if you need to ask more questions. The SAR should set out in non-legal language the background to the matter, who is involved, a concise explanation of the suspicion, the timescale/urgency, and whether you are requesting consent to proceed. If you require consent tick the consent box.

Don'ts

Do not send the file or privileged information to SOCA, or report everything 'just in case'. Do not ask SOCA to verify your client's ID, as this is your responsibility. Do not tell your client that you have made a SAR, as this constitutes tipping off which is a criminal offence.

Liaison with SOCA

The telephone number of SOCA's helpdesk is 0207 238 8282. SOCA can give guidance on what you can say to the client and the fee earners in cases of delay on the file. If you think the confidentiality of your SAR has been breached, you should phone the confidentiality breach line 0800 234 6657.

If new information comes to light you either need to update the SAR or submit a new SAR.

Signing of documents by unrepresented parties

The conflict of interest rules (rule B2.1) of the Law Society's Practice Rules were amended with effect from 1 June 2013 in relation to the signing of documents by unrepresented parties. The words 'another party or prospective' have been deleted and replaced with the words 'an unrepresented'. The new rule is as follows (replacement words in italics):

> B2.1.7 When you are acting on behalf of a party or prospective party to a transaction of any kind you shall not issue any deed, writ, missive or other document requiring the signature of *an unrepresented* party to that party without informing that party in writing that:
>
> (a) such signature may have certain legal consequences, and
> (b) he should seek independent legal advice before signature.

Quick-house-sale firms

The Office of Fair Trading has launched an investigation into quick-house-sale firms amid concerns that vulnerable homeowners are being pressurised into selling their property too cheaply. These firms offer to buy a house or find a third-party buyer very quickly, usually at a discount to the market value of the property. Home sellers typically sacrifice between 10 and 25% of their home's market value, but the OFT says it has seen reductions of up to 53%. The quick-house-sale sector represents around 1% of all UK property sales, with total sales between £0.5bn and £0.9bn. In many cases it is said to perform a useful service, but it is also open to abuse. The OFT is particularly concerned about 'gazundering' where companies reduce the price at the last minute after the seller is financially committed to the transaction, as well as firms that have made misleading claims about how much sellers will receive for their property. The OFT has written to around 120 firms telling them to check that their businesses practices are satisfactory and is actively investigating three. See www.oft.gov.uk.

Combined Standard Clauses: new edition

A new edition of the Combined Standard Clauses for residential conveyancing transactions came into force on 1 November 2013. The text can be found at bit.ly/Hz1U59. Only relatively minor changes have been made. For example all references to ARTL have been dropped; there is no longer any mention of what was the Edinburgh windows policy; and provision is made for properties subject to the Green Deal.

RICS style for small-business retail lease

In co-operation with the Property Standardisation Group, RICS has published a Scottish version of its small-business retail lease: see www.rics.org/UK/knowledge/more-services/professional-services/small-business-retail-lease.

For a (generally favourable) assessment by Hugh Angus, see p 32 of the *Journal of the Law Society* for March 2013.

Green Deal

The Green Deal was launched in January 2013, and has necessitated changes in the CML *Lenders' Handbook* and in styles of offer and acceptance. For further details, see **Commentary** p 150.

Help to Buy

In his Budget speech on 20 March 2013 the Chancellor of the Exchequer, George Osborne, said this:

> Today I can announce Help to Buy. The deposits demanded for a mortgage these days have put home ownership beyond the great majority who cannot turn to their parents for a contribution. That's not just a blow to the most human of aspirations – it's set back social mobility and it's been hard for the construction industry. This Budget proposes to put that right – and put it right in a dramatic way. Help to Buy has two components.
>
> First, we're going to commit £3.5 billion of capital spending over the next three years to shared equity loans. From the beginning of next month, we will offer an equity loan worth up to 20 per cent of the value of a new build home – to anyone looking to move up the housing ladder. You put down a five per cent deposit from your savings, and the government will loan you a further 20 per cent. The loan is interest free for the first five years. It is repaid when the home is sold … The only constraint will be that the home can't be worth more than £600,000 – but this covers well over 90 per cent of all homes. It's a great deal for homebuyers. It's a great support for home builders. And because it's a financial transaction, with the taxpayer making an investment and getting a return, it won't hit our deficit.
>
> The second part of Help to Buy is even bolder – and has not been seen before in this country. We're going to help families who want a mortgage for any home they're buying, old or new, but who cannot begin to afford the kind of deposits being demanded today. We will offer a new Mortgage Guarantee. This will be available to lenders to help them provide more mortgages to people who can't afford a big deposit. These guaranteed mortgages will be available to all homeowners, subject to the usual checks on responsible lending. Using the government's balance sheet to back these higher loan to value mortgages will dramatically increase their availability.
>
> We've worked with some of the biggest mortgage lenders to get this right. And we're offering guarantees sufficient to support £130 billion of mortgages. It will be available from start of 2014 – and run for three years. And a future Government would need the agreement of the Bank of England's Financial Policy Committee if they wanted to extend it.

'Help to Buy', the Chancellor concluded, 'is a dramatic intervention to get our housing market moving.' As it turns out, however, the market was beginning to move anyway, especially in the south of England, and the scheme has been strongly criticised for its inflationary potential.

As the Chancellor explained, Help to Buy comprises two different elements, neither of which appears to have required legislation. The first part – a 'shared equity' loan – is being administered separately for Scotland by the Scottish Government, and came on-stream only in September. Purchasers take out two loans, a conventional one from a bank which (together with a deposit) comprises 80% of the price, and a second loan from the Government which contributes the final 20%. Both are secured by standard securities. No interest is payable on the Government loan, but the size of the loan increases (or shrinks) with the rise (or fall) in the value of the house. When the house is resold, the Government is entitled to 20% of the price. Shared equity loans are available only for new-build houses – the idea being to stimulate the construction industry – and the purchase price must not exceed £400,000 (as opposed to the £600,000 announced by the Chancellor and applicable in England). Further details can be found at www.scotland.gov.uk/Topics/Built-Environment/Housing/BuyingSelling/help-to-buy.

Under the second part of Help to Buy, the Treasury sells mortgage protection to lenders for up to 15% of the value of the property. The technical details can be found at www.gov.uk/government/uploads/system/uploads/attachment_data/file/269135/Scheme_Rules_December_13th_v.42.pdf. The idea is that, thus protected, lenders will then be willing to make 95% loans. The scheme, which began in January 2014, is available for all properties, old and new, up to a maximum value of £600,000, but of course depends on the willingness of lenders to take part.

Help to Buy is not the only attempt to assist buyers. Over the years there have been a whole series of schemes, some still operational, to assist first-time buyers: see *Conveyancing 2011* pp 78–79. Help to Buy, however, is not confined to first-time buyers.

Residential property market: the last 10 years

Registers of Scotland has published an illuminating *10-Year Market Report 2003–2013* (available at www.ros.gov.uk/pdfs/RoS_10-Year_Report.pdf). The main findings are (p 5) that:

- Nationally, house prices grew steadily between 2003 and 2007, with fairly stable prices for the remainder of the 10-year period.
- Residential house-price averages increased by 52.9% over the decade. The average price in 2003–04 was £100,987 and the average price in 2012–13 was £154,387. But this conceals major differences across the country (p 18). For example the increase was 104.5% in Aberdeen (to £187,298), 56.9% in Dumfries and Galloway (to £135,949), 70.6% in Dundee (to £124,276), 44.7% in Edinburgh (to £217,329), 23.5% in Glasgow (to £126,930), 69.8% in Highland (to £153,594), 55.9% in Perth and Kinross (to £173,946), and 46.8% in the Borders (to £159,972). Today the lowest average price is in the Western Isles (£102,538) and the highest in Edinburgh (£217,329) – but whereas prices over the decade increased by 83.3% in the former they increased by a much more modest 44.7% in the latter.

- The highest average price of the decade was achieved in the second quarter of 2010–11. At this time, the average price for a property in Scotland was £163,360. The lowest average price of the decade was £91,089, which was achieved in the first quarter of 2003–04.
- The average prices of all property types have increased significantly since 2003, with flatted dwellings representing the largest share of the market at 40.2%.
- Between 2003 and 2013, the number of residential properties sold for over £1m has doubled and in Scotland's seven cities, average property prices have increased by 41.8%.
- The height of the market in terms of volume was in the second quarter of 2007–08, with 42,496 residential sales applications. The lowest volume of sales was 11,791 in the fourth quarter of 2008–09.
- Nationally, the number of sales dropped significantly between the third and fourth quarters of 2007–08. This fall coincided with the start of the economic downturn and radical changes in mortgage lending conditions.
- Over the decade, sales volumes decreased by 43.8%, from 130,319 in 2003–04 to 73,199 in 2012–13.
- The number of sales being registered with a mortgage has fallen by 64.1% from the height of the market in 2006–07.

The dramatic drop of 43.8% in sales volume from 2003–04 to 2012–13 will come as no surprise to conveyancers. Finally, however, the market may be showing modest signs of recovery. The most recent figures available, for the third quarter of 2013, show an increase of 22.5% on the same period in 2012. Total numbers were 24,274 – the highest recorded quarterly figure since 2008. At the same time average prices rose by 1.5%, making the average cost of a home £161,748. See http://ezine.ros.gov.uk/ezine/articles/Quarterly_Statistics_Release-July-September_2013.

Government consultation on home reports

On 5 December 2013 the Scottish Government launched the promised five-year review of home reports: www.scotland.gov.uk/Resource/0043/00439502.pdf. This consultation document will be followed by a research study. The closing date for responses to the consultation is 27 February 2014, and the whole review is expected to conclude by the end of the year. The consultation seeks views on matters such as whether the cost of home reports is delaying or preventing sellers putting houses on the market, whether home reports are 'a useful marketing tool' for sellers, and to what extent they are accepted by lenders. The emphasis is on making changes to what is there already. There is no suggestion that home reports might be scrapped.

Land Use Strategy for Scotland

In 2011 the Scottish Government set out the 'Vision', 'Three Objectives', and 'Ten Principles' for 'Sustainable Land Use' which comprise its 'Land Use Strategy

for Scotland'. Details of all three can be found in *Conveyancing 2011* pp 75–76. A *Land Use Strategy Progress Statement 2013* was published on 24 June 2013. The Executive Summary discloses that:

> Progress has been made in the delivery of all elements of the Land Use Strategy including establishing two regional land use pilots, evaluating progress with mainstreaming the Principles and developing a set of ten indicators to measure progress with the delivery of the Strategy's three Objectives.

Further details can be found at www.scotland.gov.uk/Publications/2013/06/1304.

A Strategy for the Private Rented Sector

Meanwhile, the Scottish Government's taste – we are tempted to call it a mania – for 'strategies' for everything continued unabated in 2013. Resisting the temptation to dwell on, for example, the new 'Play Strategy' (www.scotland.gov.uk/Publications/2013/06/5675 – 'We want Scotland to be the best place to grow up'), we confine ourselves to two which relate to housing and conveyancing. The first of these, *A Place to Stay, A Place to Call Home: A Strategy for the Private Rented Sector in Scotland* (www.scotland.gov.uk/Publications/2013/05/5877), was published by the Scottish Government on 30 May 2013. This followed on from an earlier document and a period of consultation (see *Conveyancing 2012* pp 91–93 and www.scotland.gov.uk/Publications/2013/09/1158). It contains an avalanche of words remarkable even by the standards of this type of document. The 'Strategy for the Private Rented Sector' comprises (i) a 'vision', (ii) three 'strategic aims', (iii) seven 'strategic challenges', and (iv) ten 'key actions'. The vision is: 'A private rented sector that provides good quality homes and high management standards, inspires consumer confidence, and encourages growth through attracting increased investment.' The three strategic aims are:

- to improve the quality of property management, condition and service;
- to deliver for tenants and landlords, meeting the needs of the people living in the sector; consumers seeking accommodation; and landlords committed to continuous improvement; and
- to enable growth, investment and help increase overall housing supply.

These lead seamlessly on to the seven strategic challenges:

1. tackling the minority of landlords and tenants who act unlawfully or antisocially, and have a disproportionate impact on vulnerable communities and the reputation of the sector overall;
2. creating a regulatory framework that works for both tenants and landlords – one that is effective, proportionate and sets standards to ensure quality but is also affordable and does not constrain growth;
3. ensuring that the sector meets the growing demand for private rented housing from a range of different household types;
4. encouraging tenants to think of themselves as consumers who can drive improvement within the sector; and supporting landlords to deliver improvements;

5. taking account of the needs of vulnerable tenants, particularly in light of the UK Government Welfare Reforms;
6. attracting more investment to increase the supply of private rented housing and to improve physical quality, against a backdrop of challenging economic times; and
7. responding to the need for improved energy efficiency in PRS [ie private rented sector] properties.

It is perhaps unnecessary to reproduce the ten key actions. As one might expect, they include refining the regime for registration of landlords, improving dispute-resolution, and the further regulation of letting agents.

It is not, of course, as if the private rented sector has been left alone in recent years. As *A Place to Stay, A Place to Call Home* reminds us (p 13), recent initiatives have included (i) HMO regulation (2000), (ii) landlord registration (2006), (iii) a new repairing standard, to be enforced in a new Private Rented Housing Panel (2007), (iv) tenancy deposit schemes (2012), and (v) tenant information packs (see p 59 above) (2013). To this list the Housing (Scotland) Bill, once enacted, will add (vi) a much-enhanced jurisdiction for the Private Rented Housing Panel, and (vii) a registration system for letting agents: see pp 69–70 above.

Chapter 2 of the paper has some useful background information on the private rented sector ('PRS'). Most tenancies in the PRS are let under the assured tenancy regime, which came into effect on 2 January 1989, the vast majority of lets being short assured tenancies. In 2011 there were an estimated 267,000 households in the PRS, accounting for 11% of households in Scotland – almost double the amount of a decade ago. In some parts of Scotland, the proportion of housing stock accounted for by the PRS is significantly higher. In Glasgow, the City Council estimates that private rented housing accounted for 19% of all dwellings in 2012. The majority of landlords own a small number of properties, 70% owning only one. They are mainly (84%) private individuals. It is estimated that there are around 500 letting-agents businesses in Scotland, accounting for around 50% of all annual lettings and involved in around 150,000 private lettings per year.

Sustainable Housing Strategy

The other 'strategy' which merits a mention concerns sustainable housing. Over the last year or two the Scottish Government has been consulting on the development of a Sustainable Housing Strategy: see *Conveyancing 2012* pp 93–94 and, for an analysis of the responses, www.scotland.gov.uk/Publications/2013/02/4438 and www.scotland.gov.uk/Publications/2013/02/5171. This led to the publication, on 21 June 2013, of *Scotland's Sustainable Housing Strategy* (www.scotland.gov.uk/Publications/2013/06/6324). The 'vision and objectives' for the strategy are to:

- deliver a step-change in provision of energy efficient homes to 2030 through retrofit and new build, as promised in the Infrastructure Investment Plan;
- ensure that no-one in Scotland has to live in fuel poverty, as far as is reasonably practicable, by 2016;

- make a full contribution to the Climate Change Act targets, as set out in the Report on Proposals and Policies; and
- enable the refurbishment and house-building sectors to contribute to and benefit from Scotland's low carbon economy and to drive Scotland's future economic prosperity.

The following 'outcomes' are sought:

- an end to fuel poverty, with lower fuel bills and increased comfort for all households, lower emissions and strong economic growth with Scotland the most attractive place in Great Britain for energy companies to invest in energy efficiency;
- people value and take responsibility for the condition and energy efficiency of their homes, with an appropriate role for standards;
- Scottish companies maximise the potential of innovative design and construction techniques to deliver more, greener homes as part of sustainable neighbourhoods, creating export and other economic opportunities;
- there is a market premium on warm, high quality, low carbon homes with lower running costs because these attributes are valued by lenders, consumers and surveyors.

To that end, three 'milestones' have been set:

1. every home to have loft and cavity wall insulation (where cost effective/technically feasible) and draught proofing measures such as pipe lagging;
2. every home heated with gas central heating to have a highly efficient boiler with appropriate controls;
3. at least 100,000 homes to have adopted some form of individual or community renewable heat technology for space and/or water heating.

As the paper records (p 3), some progress has already been made. For example, since 2008 free or subsidised cavity wall or loft insulation (or both) has been installed in more than 540,000 homes, while in the last year boilers were upgraded in 125,000 homes.

Scottish House Conditions Survey 2012

Key findings from this informative annual study are that:

- the proportion of dwellings with an EPC (ie energy-efficiency) rating of B or C continues to increase: 44% in 2012, up from 37% in 2011;
- 81% of dwellings had 'some' disrepair, down from 83% in 2011;
- 18% of dwellings had 'extensive' disrepair, down from 26% in 2011.

Further details can be found at www.scotland.gov.uk/Publications/2013/12/3017.

Housing Statistics 2012

House-building has continued to decline, according to *Housing Statistics for Scotland 2013: Key Trends Summary* (www.scotland.gov.uk/Publications/2013/08/2641). The headline news, on this and other matters, is as follows:

- **New housing supply**: New housing supply (new build, refurbishment and conversions) decreased by 14% between 2011–12 and 2012–13, from 16,922 to 14,629 units. This was mainly driven by a drop in both private and housing association house building. Local authority completions also fell slightly from the previous year from 1,114 to 965.
- **New house building**: In 2012–13, there were 13,803 completions in Scotland, a decrease of 13% on the previous year, when 15,940 had been completed. At the same time starts decreased by 9% from 13,791 in 2011–12 to 12,596 in 2012–13.
- **Affordable Housing**: In 2012–13 there were 6,009 units completed through all Affordable Housing Supply Programme (AHSP) activity – this figure is 13% down on the previous year and represents the 3rd consecutive decrease since the peak in 2009–10.
- **Public sector housing stock**: At 31 March 2013, there were 318,160 local authority dwellings in Scotland, a decrease of 1,224 from the previous year.
- **Sales of local authority dwellings**: Sales of local authority dwellings fell by 9% in 2012–13, from 1,125 to 1,020. This continues the declining trend in sales observed over recent years, following the introduction of the modernised Right to Buy, which came into effect on 30 September 2002.
- **Right to Buy**: The proportion of tenancies with some Right to Buy entitlement was 81% for 2012–13, unchanged from 2011–12.
- **Public sector vacant stock**: At 31 March 2013, local authorities reported 7,664 units of vacant stock, of which 42% consisted of normal letting stock. This represents 1% of all normal letting stock, and is down from 7,847 the previous year.
- **Lettings**: During 2012–13 there were 27,546 permanent lettings of local authority dwellings, an increase of 1% on the previous year (27,263). Lets to homeless households represented 41% of all lets made by local authorities in 2012–13.
- **Evictions**: Eviction actions against local authority tenants resulted in 965 evictions or abandoned dwellings in 2012–13 (550 evictions, 415 abandoned dwellings). Both of these are down slightly from the previous year.
- **Housing Lists**: Applications held on local authority lists decreased by 2% to 184,887 in 2012.
- **Scheme of Assistance**: In 2012–13, councils provided householders with 187,000 instances of help and spent almost £47 million. This compares to 163,000 instances of help and £52 million in 2011–12.
- **Houses in multiple occupation**: In 2012–13, 8,605 applications were received in respect of the mandatory licensing scheme for houses in multiple occupation. At 31 March 2013 there were 13,911 licences in force, representing an increase of 4% over the previous year.

Inquiry into the Title Conditions (Scotland) Act 2003

In the early months of 2013 the Justice Committee of the Scottish Parliament conducted a limited inquiry into a small number of provisions of the Title Conditions (Scotland) Act 2003. Having taken both written and oral evidence the Committee issued a Report on 5 June 2013 (www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/64203.aspx), to which the Scottish Government responded on 4 September 2013 (www.scottish.parliament.uk/S4_JusticeCommittee/Inquiries/20130904_SG_response_to_Title_Conditions_inquiry.pdf). There was a debate on the floor of the Parliament on 9 January 2014.

The Act is wide but, no doubt unavoidably, the focus of the inquiry was rather narrow: the difficulty of changing factors; the sometimes unsatisfactory nature of the service provided by 'land maintenance companies' (ie companies that own and maintain amenity and recreational areas in housing estates) and the uncertainty as to whether maintenance real burdens in such cases are enforceable (see *Conveyancing 2011* pp 116–18); the 30-year duration of manager burdens in housing estates containing former council houses (s 63); the effect on those opposing applications to the Lands Tribunal for variation or discharge of title conditions of the rule that expenses are generally to follow success (s 103); and the great uncertainty as to enforcement rights in respect of real burdens caused by the terms of s 53.

In responding, the Government emphasised that matters were being improved by the regulatory regime introduced by the Property Factors (Scotland) Act 2011. Further legislative action did not seem appropriate for most of the issues raised by the inquiry. The Government would work with land maintenance companies to produce a code of practice by the end of 2014 on dismissing and replacing such companies. (How this would fit in with the position where the companies own the amenity and recreational areas is not explained.) Similarly, when the code of practice for property factors next comes to be reviewed, the Government may include material on the need to disclose homeowners' details to other homeowners so as to allow discussion and, if need be, voting on whether to replace the factor. The Government undertook to consider further the issue of expenses before the Lands Tribunal: the Tribunal itself had suggested to the committee that, if a change was thought necessary, this could consist of capping expenses, or substituting a test of reasonableness for one of success. Finally, noting that s 53 had not been included in the draft of the legislation prepared by the Scottish Law Commission (indeed it was opposed by the Commission when it was added), the Government agreed with the Committee's suggestion that the provision should be referred to the Commission for review.

Homeowner Housing Panel

Set up under the Property Factors (Scotland) Act 2011 to deal with cases where factors allegedly failed to comply with contractual obligations or the Property Factor Code of Conduct, the Homeowner Housing Panel has so far received more than 300 applications (*Official Report of the Scottish Parliament* col 26396

(9 January 2014, Minister for Community Safety and Legal Affairs)). Its decisions are published on its website: http://hohp.scotland.gov.uk/prhp/2156.html.

Land reform (1): the Land Reform Review Group

In July 2012 the Scottish Government set up an independent Land Reform Review Group ('LRRG'), chaired by Dr Alison Elliot. For background, see *Conveyancing 2012* pp 94–96 as well as the LRRG's website: www.scotland.gov.uk/About/Review/land-reform. An initial call for evidence resulted in almost 500 responses (now available at www.scotland.gov.uk/Publications/2013/07/2790), ranging from a couple of paragraphs to 266 pages from Scottish Land and Estates. An analysis of the responses, published on 20 May 2013 (www.scotland.gov.uk/Publications/2013/05/4519), identified the following broad themes: land ownership and management; community land ownership; models other than ownership which would give communities and individuals a greater stake in land management; taxation; succession rights; tenant farmers and encouraging new entrants; crofting; access rights; forestry; water resources; and affordable housing. Unsurprisingly, the views expressed on these topics covered a wide spectrum of opinion from the very radical to the deeply conservative.

Also on 20 May 2013 the LRRG published its own Interim Report, as it was required to do: see www.scotland.gov.uk/Publications/2013/05/4519. The LRRG was at pains to emphasise (p 14) that the written responses were:

> only part of the material that will be relevant to the review. The respondents were self-selected, so do not cover all the views available. In this case, there was also an apparent cultural divide between those comfortable with making a submission to a Government consultation and those who were unused to this process or suspicious of it. One example of this was from some tenants who indicated that they were fearful of speaking at open meetings, or even of putting their concerns on paper, because of possible recriminations should their landlord hear they were expressing these views in public.

The LRRG has also been active in paying visits and seeking meetings.

The Interim Report is firm in excluding further work on two topics. Whilst grumbles were expressed about the exercise of the access rights conferred by part 1 of the Land Reform (Scotland) Act 2003 – complaints about blocked access, dog-fouling, tension between anglers and canoeists, damage by mountain bikes and horses, wild camping, and so on – these were seen by the LRRG as matters for the Access Code and the National Access Forum (pp 21–22). In this way some 25% of all responses could be set aside. The other rejected topic was tenant farmers, a topic perhaps too controversial even for a review which the LRRG has characterised as 'primarily social or political' (p 22). 'Agricultural tenancies', the Interim Report breathlessly concludes, 'are complex' and this whole 'aspect of rural Scotland is clearly problematic and requires sensitive and expert attention' (p 21). As 'the Tenant Farming Forum (TFF) already provides space for informed discussion and advocacy on tenancy matters … we urge the TFF to respond constructively to the tenants' concerns and proposals'.

On the other topics raised by consultees the Interim Report is either silent or rather undirected. More use, it suggests, should be made of the community right to buy (ie under part 2 of the Land Reform (Scotland) Act 2003). Its procedures should be simplified. It should perhaps be extended to urban areas. These, however, are hardly new thoughts, and they are quite likely to feature in the forthcoming Community Empowerment and Renewal Bill (see p 71). The only significant new idea in the Report is the establishment of a 'Land Agency', although its precise function – whether, for example, it is to promote dialogue in a neutral way or actively to negotiate community buy-outs – is left undecided (p 20).

The generally cautious nature of the Interim Report ensured a caustic reception from the land-reform lobby. One imagines that the Final Report, due in April 2014, will be at least a little more adventurous.

Land reform (2): the Commons Scottish Affairs Committee

Not to be outdone by their devolved colleagues, the members of the Scottish Affairs Committee of the House of Commons announced on 15 July 2013 that they would conduct their own inquiry into land reform – despite the fact that many of the legislative proposals that may result would in practice need to be passed by the Scottish Parliament. See www.parliament.uk/business/committees/committees-a-z/commons-select/scottish-affairs-committee/inquiries/parliament-2010/land-reform-in-scotland/. A briefing paper was commissioned from 'four notable land experts', James Hunter, Peter Peacock, Andy Wightman and Michael Foxley. Its eventual title, *432:50 – Towards a comprehensive land reform agenda for Scotland*, gives some idea as to the approach taken: 432 refers to the number of people believed to own 50% of privately-owned rural land in Scotland. The paper questions the level of public subsidy available to private landowners (eg by fiscal arrangements, agricultural support, and forestry grants), criticises the devices used by such owners to avoid tax, and calls for more community ownership (including ownership of land and foreshore currently in public ownership), for the introduction of an absolute right to buy for agricultural tenants, and for the replacing of council tax and rates by a land value tax.

On the basis of the paper, the Committee set out the following terms of reference:

- How does Scotland compare to other countries in terms of the pattern of land ownership?
- What are the benefits and disadvantages of the current pattern of land ownership, and to what extent is this pattern sustained and reinforced by subsidy and taxation arrangements?
- Is the current system of land tenure in Scotland the most efficient model for food security?
- In particular, is the current land ownership pattern contributing to, or inhibiting, economic and community development? Is it socially just?

- Given mounting political interest in, or commitment to, a programme of land reform in Scotland, what form should this programme take?
- What sort of subsidies and grants are available to landed estate owners in Scotland? What are the advantages and disadvantages of the subsidy regime? In particular, are support payments being capitalised into land values and making these higher than they otherwise would be?
- How does the tax regime affect the way in which land is owned in Scotland? For instance, does it offer landed estate owners the opportunity to minimise the tax they pay, thereby increasing the value of land, adding to speculative interest (on the part of those looking for ways to minimise or avoid tax) and making it less likely that it will be made available to others?
- How easy is it for communities in Scotland to take ownership of land and other assets? Should it be made easier in the light of the substantial achievements of existing community ownership groups?
- How easy is it for tenant farmers in Scotland to buy their farms? Should they be granted an absolute right to buy? Would such a right be compatible with human rights conventions and declarations?
- Is there a case for establishing a Land Agency to facilitate both the expansion of community ownership and the creation of new, especially 'starter', tenancies on land acquired for this purpose?
- How easy is it for land in public ownership to be transferred to communities and other private individuals, where that would be in the public interest? Should steps be taken to make it easier? For instance, should the UK and Scottish Governments compile a register showing land and assets for disposal? Should there be changes in the way in which such land and assets are valued? What UK Treasury rules are relevant to this area?
- Should a Land Value Tax of some sort be introduced in Scotland, as a replacement or addition to council tax and business rates?

The deadline for written evidence was 28 October 2013. Further developments are awaited.

Statutory repairs notices in Edinburgh

Edinburgh's much-vaunted regime of statutory notices has collapsed amidst allegations (now being investigated) of overcharging, bribery, poor materials, and substandard or unnecessary work. Since 2 April 2013, notices have only been served in emergencies. In all other cases, it is up to the owners to get together to carry out the repairs; if they fail to do so, that is seen as their problem and not one for the Council. However, in order to encourage repairs, the Council has established a Shared Repairs Service to provide advice and information on the process of organising repairs, from finding a contractor to arranging payment. It also alerts owners to other repair-support services such as property factoring, property management agencies and mediation, and the use of legislative powers like the tenement management scheme. See further www.edinburgh.gov.uk/info/1028/improvements_and_repairs.

The Council's website gives further details as to the circumstances in which the Council will still be willing to issue a statutory notice:

> The Shared Repairs Service only use statutory notices in emergency situations to alert owners there is a problem with their building and that immediate action is required. We will carry out 'make safe' work to reduce or remove the danger and protect the safety and health of passers-by.
>
> The most common problems which may require this kind of action are:
>
> - Roofs with major structural defects that are a danger to passers-by
> - Blocked/defective soil/waste pipework
> - Defective masonry to outside walls of the building
> - Defective and dangerous chimney stacks
> - Defective and dangerous boundary walls, railings and fencing
> - Defective and dangerous common stair treads/stair balustrading and glazed cupolas
> - Defective and dangerous plaster work within shared stairwell
> - Buildings damaged by fire

If the Council decides not to issue a notice there is no right of appeal.

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PART IV

COMMENTARY

COMMENTARY

COMMON AREAS

Three models

Of all the cases decided in 2013 the decision of the Lands Tribunal in *Lundin Homes Ltd v Keeper of the Registers of Scotland*[1] may turn out to be the most practically significant. It concerned a subject which has come before the courts in the recent past: the identification of common areas in housing and other developments.

First, the scene should be set. NewBuildCo Ltd buys some land and develops it as a residential estate, selling off the units as and when they are completed. Most of the development will be individual units to be conveyed to individual buyers, but some of it will be common areas. For example there may be landscaping, paths and roadways, a play park, a common parking area and so on. What, in terms of title, is to happen to these areas? There seem to be three possible models, although our impression is that the third is the most usual in practice.

(1) The developer retains the common areas. That involves some risk from the standpoint of the buyers. If they do not own the common areas, they have no right to use or even enter them;[2] and even if a servitude is granted, as it sometimes is, it is unlikely to be legally effective, for there is no such thing as a general servitude of use (although a servitude of parking is permitted).[3] In short, on this model the areas are the developer's, to do with as it pleases – and what pleases the developer may not please the individual buyers.

(2) At first the developer retains the common areas but on completion of the development conveys to an entity that will maintain these areas. This

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1 2013 SLT (Sh Ct) 73. The Tribunal comprised J N Wright QC and I M Darling FRICS. With the addition of Lord McGhie this was the same panel as sat in the leading case of *PMP Plus Ltd v Keeper of the Registers of Scotland* 2009 SLT (Lands Tr) 2.

2 Other than, perhaps, a contractual right, which in practice would benefit only the initial purchasers or, as discussed below, under part 1 of the Land Reform (Scotland) Act 2003.

3 D J Cusine and R R M Paisley, *Servitudes and Rights of Way* (1998) paras 3.71 and 3.77. It is thought that the position has not been altered by s 76 of the Title Conditions (Scotland) Act 2003. See further p 114 n 3 below. English law is more accommodating, at least in respect of common areas in housing estates: see *In Re Ellenborough* [1956] Ch 131. For servitudes of parking in Scotland, see *Moncrieff v Jamieson* 2008 SC (HL) 1.

possibility itself divides into three: (2a) the disponee is an association representing the individual buyers;[1] (2b) the disponee is a factoring company; (2c) the disponee is the local authority.

(3) The developer conveys the common areas to the owners of the individual units to be held as common property. So if there are 40 units, each is supposed to have a 1/40 share.[2]

Though we give the example of a residential development, much the same sort of thing can happen in commercial developments. In *Lundin Homes* model (3) was attempted – but the actual result was model (1), as will be seen. In what follows we deal mainly with model (3).

In practice the common areas are often described in a deed of conditions, with the split-off dispositions then containing words of conveyance by reference to that deed.[3] In other words, whilst the dispositive act itself is the disposition, the description of the common areas is in the deed of conditions. Describing the common areas, however, may not be easy, especially if the developer has yet to finalise the site layout, or wants to keep open the possibility of building additional units. The ideal, of course, is for the common areas to be shown on a plan, which can then be reproduced on the title plan in the Land Register. How far it is permissible to depart from that ideal was the subject of the landmark case of *PMP Plus Ltd v Keeper of the Registers of Scotland*, decided in 2008.[4] It is, equally, the subject of *Lundin Homes*.

PMP Plus

Before considering *Lundin Homes* it is necessary to say something about *PMP Plus*. In *PMP Plus* the split-off dispositions in a housing estate identified the common areas as being whatever was left once the individual units were sold off and the development completed. The actual wording was as follows:

> [A] *pro indiviso* share with all the proprietors of all other dwellinghouses and flatted dwellinghouses erected or to be erected on the Development known as Festival Park, Glasgow being the whole development of the subjects registered in the Land Register of Scotland under Title Number GLA 69039 (hereinafter referred to as 'the Greater Development') in and to those parts of the Greater Development which on completion thereof shall not have been exclusively alienated to purchasers of dwellinghouses or flatted dwellinghouses …

1 But only an association with juristic personality, such as the owners' association under the statutory Development Management Scheme, can hold title to land.

2 Of course, it can be more complicated. For example, it may be that one part of the common area will be exclusive to only some of the units. Such complications can be ignored for present purposes.

3 A deed of conditions cannot itself operate as a disposition. But a subsequent disposition can convey by means of express reference to the deed of conditions.

4 2009 SLT (Lands Tr) 2. See *Conveyancing 2008* pp 133–49; Scottish Law Commission, Report on *Land Registration* (Scot Law Com No 222, 2000) part 6.

That wording, said the Lands Tribunal, was wholly insufficient. To be conveyed, land must first be identified; and that identification must have occurred at the time of the conveyance, for the obvious reason that it is not possible to transfer the unknown. A description cannot, therefore, depend on some future event,[1] such as the completion of a development. With the possible exception of the final unit to be sold,[2] no one buying a house on the *PMP* wording could know, at the time of the purchase, the precise (or perhaps even the rough) extent of the common areas. That being the case the conveyance was a nullity in respect of the common areas (though not of course of the unit itself), with the inevitable consequence that the common areas remained the property of the developer.

In *Update 27*, issued in July 2009, the Keeper responded to *PMP Plus* with a new policy on common areas.[3] A description which, as in *PMP Plus*, was perilled on a future event would be treated as a nullity and so would not be reflected on the title sheet. But this policy would not be applied retrospectively, so that indulgence would continue to be shown to units in developments completed or in progress before 3 August 2009. An important distinction was thus being made between pre- and post-2009 developments.

Post-2009 developments: using the Development Management Scheme?

In all new developments there must now be a full description of the common areas. How this is to be achieved, however, is problematic. The boundaries of common areas are often uncertain until the development is completed; yet the effect of *PMP Plus* is to require those boundaries to be fixed long before that, at the time of the conveyance of the first house. One possible way forward is to sell the houses in a series of small and distinct phases, with a separate deed of conditions, and a separate common area, in respect of each phase. A much neater solution is to use the Development Management Scheme ('DMS').[4]

The DMS is an off-the-peg statutory management scheme which can be applied either in its enacted form,[5] or with such variations and adaptations (subject to certain limits) as the developer may wish. It is thus an alternative to proceeding by deed of conditions, and one which is often easier and more attractive. The DMS provides for an owners' association, a manager with delegated powers, annual budgeting, and much more. Crucially, for present purposes, the owners' association is a body corporate (though not a company) with power and capacity to hold title to heritable property.[6] In this lies a ready

1 The formulation tends to be 'future *uncertain* event', presumably because the time of completion of the development in *PMP Plus* was uncertain. But a description which is dependent on *any* future event, certain or uncertain, would be enough to prevent the common areas from being identified.

2 On the basis that by the sale of that unit, the development was complete and the extent of the common area was, finally, identified.

3 For an evaluation, see *Conveyancing 2009* pp 124–26.

4 For the DMS, see G L Gretton and K G C Reid, *Conveyancing* (4th edn, 2011) paras 15-08 ff.

5 Title Conditions (Scotland) Act 2003 (Development Management Scheme) Order 2009, SI 2009/729.

6 DMS rr 2.2 and 3.2(a).

solution to *PMP Plus*. Instead of disponing a share in the common areas to individual owners, the developer can undertake, in missives, to dispone the common areas to the owners' association when the development is completed. The house-owners thus receive the common areas, indirectly, through the owners' association of which they are the sole members; and the developer is able to describe the property in a manner which will satisfy the Keeper.

Pre-2009 developments: cure by later transmission?

For pre-2009 developments, the Keeper's undertaking in *Update 27* was to overlook infirmities in the description of common areas and to register with no questions asked. But that was not the same as saying that registration would be legally effective. On the contrary, it is clear from *PMP Plus* that no rights are conferred where the common areas were not fully identified at the time of the initial split-offs. Potentially that means that in housing estates up and down the land there are common areas which continue, unexpectedly, to belong to the developer. Since *PMP Plus* the question has been whether there is some way in which this might be put right.

In commenting on *PMP Plus* at the time it was decided we offered the following tentative solution.[1] If a description of common areas depended on a future event (typically the completion of the development), then that event was likely one day to come about,[2] and when it did come about, descriptive words which previously had no fixed meaning would finally acquire one. Of course this would come too late to help those who had acquired before that happy day. But for those acquiring thereafter, a disposition which employed the same words as before – typically by incorporation by reference from the title sheet – would be conveying a share in what was now an identified property.

Thus take a case where, as in *PMP Plus*, the common areas were described as whatever was left once the development was complete and all individual houses sold. And suppose that registration of the final house in the development occurred on, say, 30 June 2006. Up until that point no house, other than perhaps the last one, had acquired any rights in the common areas. But matters might be different when houses came to be resold thereafter. The dispositions, at any rate, would now be conveying a share in an area which, following completion of the development, was sufficiently identified. The fact that identification depended on evidence extrinsic to the deed would not be a fatal objection as far as the general law is concerned.[3] A different kind of problem is that the granter would not own the share being disponed (ownership having remained with the developer) so that the disposition would, to that extent, be *a non domino*. On the other hand, as already mentioned, the Keeper is committed to accepting such dispositions without exclusion of indemnity. Furthermore, due to the Keeper's

1 *Conveyancing 2008* pp 145–46.

2 Although, as in *PMP Plus* and *Lundin Homes* (below), there might be room for dispute as to whether the day had arrived (ie, in those cases, whether the development had been completed).

3 *Murray's Tr v Wood* (1887) 14 R 856; G L Gretton and K G C Reid, *Conveyancing* (4th edn, 2011) para 11-27.

'Midas touch', the effect of registration is to confer ownership on the disponee despite the absence of title in the disponer.[1] Admittedly, the Register would then be inaccurate in showing the disponee as owner (for in 'ordinary' property law no title can flow from an *a non domino* deed), and the developer might seek rectification. But if the disponee could show that he had (shared) possession of the common areas then he was likely to be protected against rectification as a proprietor in possession.[2]

If this argument is sound it would mean that, as more and more houses came to be resold, so more and more would be united with the share in the common areas which was originally intended, and the developer would be divested accordingly. Once all of the houses had been resold, the problem with the original conveyancing would have been cured. As it happens, this cure – if it is a cure – is about to be withdrawn, for under the new Land Registration Act the Midas touch is replaced by a rule of *bona fide* acquisition,[3] and no purchaser (being taken to know the law) could suppose that the seller had ownership of the common areas. But for those many units in many developments which changed hands between the completion of the development and the coming into force of the new Act, the problem, on this view, would have been solved.

A word of caution is, however, necessary. When we set out this solution, back in 2009, we warned that it might not work.[4] The difficulty lay, not in the description in the disposition, but in the manner in which that description was translated on to the Land Register. For if it is a principle of registration of title that the title sheet should be comprehensive and complete – as it may be – then that principle is defeated if the common areas can only be identified by use of extrinsic evidence. And even if that were not so, there is the specific difficulty posed by s 6(1)(a) of the 1979 Act, which requires a description of land in the Land Register to be 'based on the Ordnance Map'.[5] It is stretching language to say that this is satisfied when the only attempt at identification of the common areas is the red edging on the title plan of the development as a whole coupled with a vague verbal formula which is interpretable only with the aid of extrinsic evidence. Doubts along these lines were expressed by the Lands Tribunal in *PMP Plus* itself although the matter did not have to be decided.[6] If these doubts turned out to be well-founded, however, the registration of common areas would be a nullity.

Both our suggested solution and its possible infirmities were recorded in the Keeper's guidance in *Update 27* (July 2009). Whether the infirmities undermined the solution, however, was a matter that only further litigation could determine. *Lundin Homes* is that litigation.

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1 Land Registration (Scotland) Act 1979 s 3(1)(a).
2 LR(S)A 1979 s 9(3)(a).
3 Land Registration etc (Scotland) Act 2012 s 86.
4 *Conveyancing 2008* pp 144–46.
5 Similarly, the equivalent provision in the Land Registration etc (Scotland) Act 2012 (s 6(1)(a)(i)) requires land to be described 'by reference to the cadastral map'.
6 *PMP Plus* paras 95–100.

Lundin Homes

The facts

Lundin Homes[1] concerned a development of 54 houses on an estate at Seafield, Bathgate, West Lothian, known as Deanburn Gardens. The developers were Boyack Homes Ltd. Boyack sold the first house at the end of 2000 and the last in August 2003. Thereafter the Keeper closed the development title sheet on the basis that all the land had been conveyed away.

All of this took place before the change in practice occasioned by *PMP Plus*, and as in that case the common areas were described as being what was left after the individual units had been disponed:

> The Development with the exception of any parts thereof disponed to Proprietors and to any other disponees, is hereby declared to be common to the Proprietors and is hereinafter referred to as 'Common Ground' …

This provision was in the deed of conditions, and was incorporated by reference into the dispositive clause of the split-off dispositions in the usual way.[2] Although completion of the development was not expressly mentioned, as it had been in *PMP Plus*, it was implicit in the wording that the common areas could only be determined once completion had taken place. There could be no doubt, therefore, that the method of description employed fell under the decision in *PMP Plus*.[3]

At one time a plot at Deanburn Gardens had been earmarked for a detent pond for surface drainage but, much later, this was found not to be needed. As luck would have it, the plot was large enough for an additional house, and it appeared that planning permission would be granted. So in 2011, some eight years after the last house had been sold and the development apparently completed, Lundin Homes bought the plot from the receiver of Boyack Homes. Warrandice was excluded in the disposition and, when the deed came to be registered, the Keeper excluded indemnity.[4] The present litigation was an appeal against that refusal.

The arguments

It was accepted that the initial conveyancing was governed by *PMP Plus* so that no share in the common areas had been carried by the split-off dispositions. But, or so the Keeper argued, the position changed once the last house was sold and the development completed. The arguments and counter-arguments of the

1 2013 SLT (Lands Tr) 73.

2 Together with 'the whole rights, joint, common or mutual effeiring to the subjects herein disponed without prejudice of [*sic*] the foregoing generality being more particularly specified in a Deed of Conditions by us dated Seventh December, Two Thousand and registered on the Seventh day of December Two Thousand over the subjects in Title number WLN 19789'.

3 For another case from 2013 affected by error in relation to the common areas, see *Henderson v Wotherspoon* [2013] CSOH 113, [2013] PNLR 28, 2013 GWD 25-475. The common areas were defined as the whole of the development, thus including, inadvertently, the individual houses.

4 It may be that the 'accept the application but exclude indemnity' approach was wrong, because if the Keeper thought the disposition bad, the application should simply have been rejected. We will not enter into that issue here.

parties were as discussed above. Thus, according to the Keeper, a share in the common areas was carried with each post-completion resale; for by now the common areas had been identified and the Midas touch did the rest. Indeed, the split-off disposition of the final house could also be regarded as carrying the common areas because, with the granting of that deed, the development was complete and the common areas identified.[1] It followed, said the Keeper, that Boyack Homes had long since ceased to own 100% of the common areas; that its receiver could not grant a full title to Lundin Homes; and that exclusion of indemnity was appropriate. In response, Lundin Homes focused on the failure of the Land Register to show the common areas in the title sheets of the individual houses. Unmapped and barely described, the common areas were not properly registered; and in the absence of registration there could be no Midas touch and no divestiture of Boyack Homes. The disposition to Lundin Homes was thus granted by the person with title to do so (ie Boyack Homes), and there was no basis for excluding indemnity.

The decision

The Lands Tribunal found in favour of Lundin Homes. Whatever the merits of the Keeper's argument, it fell down, in the Tribunal's view, at the point of registration. No one could identify the common areas merely by inspecting the title sheets of individual houses. The title plans showed a red-edged outline of the unit and of the development but not of the common areas themselves; and the verbal description of those areas (quoted earlier) failed to make matters any clearer. The description of the common areas was therefore inadequate in two respects. It was a breach of the requirement in s 6(1)(a) of the 1979 Act that descriptions be based on the Ordnance Map. And it could not be understood without recourse to extrinsic evidence so extensive as to breach the principle that the Land Register should be full and complete as of itself.[2]

On the first point (s 6(1)(a)) the Tribunal accepted that 'it is going too far to say … that the extent of the land has to be actually depicted on the map. This may indeed be impossible for some types of property such as tenement property'. But in such cases the verbal description must 'be adequate to enable the area to be identified on the map'.[3]

On the second point (completeness of information on the Register) the Tribunal thought that extrinsic evidence might sometimes be permissible; but this would depend on the type of evidence:[4]

> We can see some justification in some situations for reference to other registered titles, at least in relation to other split offs from the same land and where the titles (unlike the inaccessible 'closed' development title) are in the public register. That

1 Oddly, and contrary to the wording of the deeds, the final house was argued to receive the common areas in their entirety rather than a mere *pro indiviso* share. See para 64.
2 The Tribunal's reasoning was set out mainly in relation to the last unit to be sold, but (para 65) it applied equally to the title sheets of the units which had been resold.
3 Paragraph 53.
4 Paragraph 60.

> may at least help to show, by exclusion, the extent of the title under consideration, bearing in mind the statutory effect of such registered titles. This may be thought not altogether dissimilar from the process of establishing what parts of a development remain in the ownership of the developer. We cannot, however, see the justification for reference to Sasine titles, even although that is also a public register – those titles would not have the same effect. Reference to other material, even publicly available material such as planning consents, appears to us simply wrong. It drives a coach and horses through the registration scheme.

In this case, however, the evidence needed to investigate whether the development was complete went far beyond what might be permitted. In words which will be closely studied, the Tribunal summarised the position thus:[1]

> In our opinion, reference to extraneous material, with the possible exception of other publicly accessible registered titles, in order to establish completion and identify common parts title to which, or a share of title, had been transferred to individual owners, is incompetent.

Implications

Effect

There is much to be said for the Tribunal's approach. Readily stateable as a matter of law, it seems sound also as a matter of policy. Indeed it anticipates the policy of the new Land Registration Act, which is for common areas to be properly mapped on title sheets of their own.[2] That it creates practical difficulties for existing titles, however, is undeniable. For not only does it close the escape route from *PMP Plus*; to some extent it spreads the fire. *PMP Plus* struck at cases where the common areas were unidentified at the time of the split-offs; *Lundin Homes* must be taken as extending this to cases where (unlike in *PMP Plus* and *Lundin Homes*) the common areas *were* identified in the split-offs but are not described in the Land Register with the precision which is now said to be required. With luck, however, such additional cases will be rare. After all, if common areas are identified in a split-off disposition, it is usually because they are shown on a deed plan; and if they are shown on a deed plan, they will also be shown on the title plan on the Register and so satisfy *Lundin Homes*. But it is possible to think of cases where this will not be so. In particular, if the common areas are described by words rather than by plan – for example, by descriptive words such as 'woodlands', 'parking areas', 'garden ground', 'paths' – then it may not be possible to identify them without recourse to the kind of extrinsic evidence which is forbidden by *Lundin Homes*.

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1 Paragraph 62.

2 Land Registration etc (Scotland) Act 2012 s 3(1), (6). The title sheet may or may not take the form of a 'shared plot title sheet' (ie one which shows the title numbers of the plots of which the shared plot is a pertinent rather than the names of the owners of those plots) under ss 17 and 18. See also Registers of Scotland, *Consultation on Implementation of the Land Registration etc (Scotland) Act 2012* (2013) paras 1.59 – 1.67.

The overall result of *Lundin Homes* is plain. A house carries a share in the common areas if and only if those areas are clearly described in the title sheet (or, for Sasine titles, in the original split-off deed). Otherwise, the common areas continue to belong to the developer.[1] There will be many such cases, giving developers a land bank which they did not expect, or intend, to have. In interim guidance on *Lundin Homes*, the Keeper indicates that, nonetheless, she will continue, for the moment at least, to include such common areas on the title sheets of individual houses in a manner which reflects the split-off deed, and without exclusion of indemnity.[2] Further guidance will be provided in due course and may turn out to be less accommodating.

The implications of *Lundin Homes* for conveyancing practice depend on whether one is acting for the buyer or the seller of an affected house.

Acting for the buyer

In acting in the purchase of a house in a modern estate it will now be necessary to pay close attention to how the common areas are described in the title sheet. If they are delineated in the title plan, all is in order. If they are not so delineated but are sufficiently identified by words, then that is also sufficient, provided the words can be understood without recourse to extrinsic evidence other than, perhaps, the title sheets of other registered properties. In all other cases, the description is inept, and the common areas are not included in the title. Clients will still receive the house (assuming the title to be otherwise in order), but they will be denied ownership of the common areas.

Does it matter if a title is found not to include the common areas? In the real world – the world in which clients actually live – the answer may often be: not very much. After all, the common areas are still there, whether the clients own them or not; and if they are there, they can be used even if there is no right to do so.[3] Few common areas are protected by razor wire and guard dogs. The attentions of the developer have moved on to other projects and are likely to stay there.[4] In any case, it is plausible that rights of some kind do in fact exist. For as long as missives remain in force, there are contractual rights against the developer. If the houses are otherwise landlocked, there is a right of access over any road forming part of the common areas.[5] Above all, there would appear to be (public) access rights under s 1 of the Land Reform (Scotland) Act 2003. It is true that private gardens are usually exempt from such rights owing to the privacy exception;[6] but that exception exists for the benefit of the owners or occupiers of

1 Or, if the developer-company has been dissolved, to the Crown: see Companies Act 2006 s 1012.
2 Additional Information Update 27: www.ros.gov.uk/pdfs/Lundin%20Homes%20update.pdf.
3 To which may be added that there would also be a question as to the validity of any maintenance burdens in respect of the common areas. In the absence of a right of use, these may not sufficiently relate to the burdened properties (ie the houses): see *Conveyancing 2008* p 144 and *Conveyancing 2010* p 126. Further, if the common areas are not properly described, the burden might fail due to lack of specification. See Title Conditions (Scotland) Act 2003 ss 3(1), 4(2)(a).
4 Of course, if a title raider were to acquire the common areas, matters might then be different.
5 *Bowers v Kennedy* 2000 SC 555.
6 Land Reform (Scotland) Act 2003 s 6(1)(b)(iv).

adjacent houses and can hardly apply in favour of a developer who has chosen to part with the houses. Assuming they exist, access rights are extensive and include the right to be on land as well as the right to cross land (other than by motorised vehicles).[1] They are likely to be sufficient for the purposes of most owners.

If there is a risk in all of this to purchasers, it is probably a different one. As developers continue to own, they can use the common areas for future development. It was this which prompted the litigation in both *PMP Plus* and *Lundin Homes*. Whether this is a serious prospect will depend on an assessment of the planning position. In most cases the risk is likely be small.

Clients must be told of the position; so (probably) must lenders; and a view will need to be taken. But matters should be kept in perspective. After all, there are plenty of housing estates where the reservation of ownership of common areas to the developer or a third-party maintenance company (such as Greenbelt) is a matter of deliberate policy and is accepted without question.[2] That in this case the arrangement has come about by accident may not make any difference.[3]

Acting for the seller

Agents for the seller, too, will have to be alert as to whether the common areas are included in the title, if only to ensure that the subjects are accurately described in the missives and disposition. If a right to common areas is included in the missives where no such right exists, the seller will be in breach of contract and vulnerable to rescission or a claim for damages. In the case of the disposition there is potential liability in warrandice.

Claims against the developer?

A kindly developer might, of course, be disposed to put matters right by corrective conveyancing. But there will not usually be any *obligation* to do so, for the original contract of sale is probably long since at an end, while warrandice in the disposition covers only the disponer's title (which was good) and not the subsequent failure to convey. It is only where the developer takes active steps to dispone part of the common areas to a third party – as in *Lundin Homes* itself – that a warrandice claim might arise. Such a disposition would be in breach of the undertaking, in absolute warrandice, that the title granted will not be affected by the granter's future acts.[4] A claim for damages would lie with the original

1 LR(S)A 2003 ss 1(2), 9(f).

2 This is model (1) of the three identified at the start of this section.

3 Where the common areas are owned by a land-maintenance company, the deed of conditions often gives the house-owners a right of use. But to be of enduring value, such a right would have to be constituted as a servitude and, at common law at least, a *ius spatiendi* has consistently been rejected as among the known servitudes: see D J Cusine and R R M Paisley, *Servitudes and Rights of Way* (1998) paras 3.54 and 3.71. For servitudes created by registration on or after 28 November 2004 the restriction to known servitudes ceases to apply, but a right of recreational use runs the risk of being excluded as 'repugnant with ownership': see Title Conditions (Scotland) Act 2003 s 76.

4 K G C Reid, *The Law of Property in Scotland* (1996) para 706.

purchasers of the houses or – since warrandice rights transmit to successors[1] – with their successors as owners.

Possible cures?

After *PMP Plus*, as already mentioned, it seemed that matters might be put right, gradually and effortlessly, by resales following completion of the development. We now know from *Lundin Homes* that this will not work. It is important, however, to be clear why. The Lands Tribunal did not challenge the use of the Midas touch where common areas had come to be identified. But it insisted that those areas be described on the Land Register by plan or in some other way which did not need extensive extrinsic evidence. What was wrong in *Lundin Homes*, in other words, was not that the common areas were unidentified, or that the Midas touch would not work, but that the entry on the Register was insufficient. It is conceivable that that objection can be met. Of course, the Keeper will not plot common areas unless a plan is produced at the time of registration. But where the common areas have come to be fixed,[2] a purchaser who is sufficiently concerned about the issue could draw up such a plan, annex it to the disposition, and present it for registration. In interim guidance on *Lundin Homes* the Keeper has announced that she will give consideration to any application for registration that identifies the common areas with the intention of creating rights to those areas, and suggests contacting pre-registration enquiries before submitting the application.[3] Even if the application is accepted, however, it is likely to be on the basis of exclusion of indemnity.

This 'cure', such as it is, is only available for as long as the 1979 Act and the Midas touch remain in place. That will cease to be so with the coming into force of the new Land Registration Act, probably towards the end of 2014. After that the only hope for cure rests with positive prescription. Here certain changes made by the new Act are of help. Prescription is no longer to be confined to cases where indemnity has been excluded. Furthermore, the title on which possession must proceed is no longer to be the entry on the Land Register but rather the deed which is presented for registration.[4] A disposition which can be read as including the common areas would be sufficient for this purpose.[5] But the difficulty, as always, is possession; and even if regular usage can be shown it may not extend to the whole area. Childless couples, for example, will avoid the play park; few people may step into the planted areas; other areas may also

1 Reid, *Property* para 712.
2 Eg by completion of the development.
3 www.ros.gov.uk/pdfs/Lundin%20Homes%20update.pdf.
4 As substituted by sch 5 para 18(2) of the Land Registration etc (Scotland) Act 2012, s 1(1)(b) of the Prescription and Limitation (Scotland) Act 1973 reads: 'the registration of a deed which is sufficient in respect of its terms to constitute in favour of that person a real right in (i) that land; or (ii) land of a description habile to include that land'.
5 That is also the Keeper's view: see www.ros.gov.uk/pdfs/Lundin%20Homes%20update.pdf. For dispositions registered after the new Act comes into force, the Keeper might classify the deed as being *a non domino* to the extent that it purports to convey a share in the common areas. That would trigger a requirement to notify the developer-owner (s 43(4)), which might in turn lead to an assertion of title by the developer.

go unpossessed. Further, even if there is possession, proving it to the Keeper's satisfaction may sometimes be difficult. The Keeper's interim guidance, however, suggests that she will be content to rely on the applicant's answer to the question relating to adverse possession.

LEASES

Turnover-rent leases

Leases with turnover rents have existed in the retail market for many years, but *Manchester Associated Mills Ltd v Mitchells & Butler Retail Ltd*[1] seems to be the first Scottish case. The lease had been entered into in 1980–81 for a period of 99 years, for a pub, the 'Three Lums', in Lewis Road in the Mastrick area of Aberdeen.[2] The lease said:

> The tenants bind and oblige themselves … to pay … in name of rent seven per centum of the gross annual turnover excluding value added tax of the business to be conducted from the public house to be erected on the ground leased subject to a minimum rental of seventeen thousand five hundred pounds sterling (£17,500) per annum and a maximum rental of thirty thousand pounds sterling (£30,000).

One can imagine the 7% figure as a fluctuating line on a graph. The £17,500 and £30,000 figures are then parallel lines across the graph, representing minimums and maximums. Between these two lines the 7% line can fluctuate without restraint. But when, going up, it hits the upper parallel line, the rent stops rising with the 7% figure, and instead flat-lines along the upper line. The result is that the rent payable is, for that period, below 7%. Conversely, if the 7% figure falls so far as to hit the lower line, the rent stops falling with the 7% figure, and instead flat-lines along the lower line. The result is that the rent payable is, for that period, above 7%.

Inevitably as time went on the cap and floor figures would become out of date, and accordingly the lease had a review clause, not for reviewing the 7% figure but for reviewing the cap and floor figures. It seems that the review period was every five years.

> The [landlord] or the tenants may … require that the minimum and maximum amounts of rental … being rent for the ground leased exclusive of any buildings and other structures erected thereon be re-negotiated or, failing agreement, be determined by an arbiter. … Declaring that the proportion of seven per centum per annum of the gross annual turnover … shall not fall to be re-negotiated.

Over the years changes were arrived at by agreement, but eventually a deadlock came about, and the matter was referred to an arbiter who, unsurprisingly, found himself in difficulties. The rent review clause said that the cap and floor

1 [2013] CSOH 2, 2013 SCLR 440.

2 www.sizzlingpubs.co.uk/thethreelumsmastrickaberdeen/. 'Here at The Three Lums you'll find everything you'd expect from a traditional local pub in Mastrick Aberdeen – but with a bit of added sizzle … we're the perfect place to watch the footy …'

figures were to be reviewed, though not the figure of 7%. But it gave no clue as to the basis on which the cap and floor figures were to be re-assessed. Both parties obtained legal opinions, though what those opinions said is not known. Eventually the arbiter came up with figures of £44,850 and £33,150 for the cap and floor. The way he reached these figures seems to have been as follows.[1] He looked at market rental levels for comparable properties, and came up with a figure of £39,000. He then calculated a margin in either direction of 15% as cap and floor figures. The basis for choosing 15% as the margin is unclear.[2] The arbiter commented that 'Clause 18 does not state that the minimum and maximum figures are to be above and below 7% of turnover'. On that view, the two parallel lines on the graph could be set so that the 7% line would be below both of them (in which case the rent payable would always be over 7%), or, conversely, the two parallel lines on the graph could be set so that the 7% would be above both of them (in which case the rent payable would always be under 7%).

The landlord applied to the Court of Session to quash the arbiter's decision. The Lord Ordinary agreed, quashing the decision and remitting the case back to the arbiter for a fresh determination. The arbiter was wrong, he held, to take comparable rental levels to establish the mid-point of the cap and floor. Such comparators would tend to give the landlord a return lower than 7%. The starting point should simply have been the current 7% figure. Although the Lord Ordinary does not put it in quite this way, we take it that on his view in each five-year review period the reviewed rent begins at *exactly* 7% of turnover, and then changes each year thereafter to keep tracking 7%, but with cap and floor; thus the cap and floor could never be relevant for the first year of each review period. If that is the approach taken, we would agree that it is probably the best interpretation of an obscure clause.

The Lord Ordinary did not himself fix the appropriate cap and floor. He merely said: 'It will be for him [the arbiter] to determine the appropriate minimum and maximum levels, though I hope that he will gain some assistance from the terms of this opinion.'[3]

This was a lease drafted in the early days of turnover-rent clauses, and no doubt drafting has evolved since then. Still, it does not require the eye of hindsight to see that the clause was not well drafted. Arguably the review clause was void because it was uninterpretable,[4] although this possibility was not discussed in the case. There now exists, on the two sides of the border, a huge body of case law on rent review clauses, and the lesson is in many cases the same: careful how you draft them. What makes this case distinctive is that it seems to be, surprisingly, the first case on turnover-rent leases in Scotland.

1 To some extent this is our reconstruction.
2 Paragraph 23: 'He did not explain the reasoning behind this but no doubt … this kind of decision would fall within the area of his reasonable discretion.' It is striking that the cap-and-floor range was narrower than the original range given in the lease itself.
3 Paragraph 27.
4 Cf *Beard v Beveridge, Herd & Sandilands* 1990 SLT 609.

Tenancy deposit schemes

Once upon a time if a client owned residential property and wished to let it out, the applicable law was simply the general law of leases. Then came legislation about security of tenure and rent control, beginning with what were intended to be temporary provisions: the Increase of Rent and Mortgage Interest (War Restrictions) Act 1915.[1] This area of law proved both permanent and unstable – unstable because the legislation was repeatedly changed according to the changing winds of politics. Eventually, in the 1980s, a certain stability emerged as to the law of security of tenure and rent control.

But more recently there has been another phase of change, about which conveyancers need to be able to advise their clients.[2] One was the system introduced in 2004 whereby private residential landlords must be approved and registered, contained in a statute so cunningly named that no one could reasonably be expected to discover the new rules: the Antisocial Behaviour etc (Scotland) Act 2004.[3] Another was a system for regulating tenancy deposits. Framework provisions were enacted in part 4 of the Housing (Scotland) Act 2006, and details were set out in the Tenancy Deposit Schemes (Scotland) Regulations 2011, SSI 2011/176.[4]

Hitherto landlords were simply paid the deposit, and sometimes, when the tenancy ended, took up an unreasonable position, exaggerating the deterioration of the property or even completing inventing it. (Of course, as well as the problem of bad landlords there is also the converse problem of bad tenants, who leave the property in a dreadful state.) The 2011 Regulations require residential landlords to pay deposits into an 'approved scheme'. At the end of the tenancy the money is paid out only against the signatures of both parties and, if they cannot agree, there is a dispute resolution system. Landlords are also under a duty to provide the tenant with information about the system.

What happens if landlords do not comply? *Fraser v Meehan*[5] is the first case. The pursuers took a tenancy of a flat in Edinburgh's Cumberland Street. They paid a deposit of £1,150. The tenancy ended on 12 January 2013. About five weeks later the pursuers were wondering about the deposit, and contacted the landlord asking for its return. He replied that he was keeping the whole deposit because of deterioration of the property. The pursuers said that they had left the property in good condition. Eventually there was a compromise: the landlord kept half the deposit and returned half. But the pursuers remained unhappy. They came to realise that the landlord had neither given them the required

1 Like so many temporary measures, it was not temporary. Those old enough to recall the 1798 budget will remember that the new tax announced in it, income tax, was a temporary measure. See Peter Harris, *Income Tax in Common Law Jurisdictions: Volume 1, From the Origins to 1820* (2006) pp 404 ff.

2 For further details see Scottish Government, *A Place to Stay, A Place to Call Home: A Strategy for the Private Rented Sector in Scotland* (2013), discussed at p 89 above.

3 On which see *Conveyancing 2004* pp 92–95, and also subsequent volumes for the various amendments. For further changes in the law of residential tenancies, see p 69 above.

4 On which see *Conveyancing 2011* pp 55–56.

5 2013 SLT (Sh Ct) 119.

information, nor paid their deposit into an approved scheme. Moreover he was not, they discovered, authorised to be a private landlord. They decided to take the matter further.

Regulation 9 says that 'a tenant who has paid a tenancy deposit may apply to the sheriff for an order under regulation 10 where the landlord did not comply with any duty … in respect of that tenancy deposit'. Regulation 10 says that 'If satisfied that the landlord did not comply with any duty in regulation 3 [which imposes duties in relation to tenancy deposits] the sheriff must order the landlord to pay the tenant an amount not exceeding three times the amount of the tenancy deposit'. No guidance is given in the legislation as to how the amount is to be calculated.

The sheriff[1] awarded the maximum sum, ie three times £1,150 (£3,450).[2] There were no extenuating circumstances. Not only had the landlord ignored the 2011 Regulations, but he had also failed to register under the 2004 Act. Moreover he had previously worked as an estate agent and so could be presumed to know the law in this area.

The rule in regulation 10 is curious. 'It may be analogous', comments the sheriff, 'to an award of punitive or exemplary damages which is a form of damages unknown today in the law of Scotland.'[3] But it may be noted that it is payable even if the tenant has suffered no loss whatsoever, so it should be distinguished from, for example, the 'treble' or 'triple' damages found in some countries whereby if, for instance, the actual loss to the plaintiff is $100,000, the award made by the court is $300,000.[4] Perhaps it is nearer to a fine. But the procedure is civil, not criminal, and moreover the money is not paid into the public purse but to the tenant, who thus obtains (as the sheriff notes)[5] a windfall gain. The question of whether the legislation is ECHR-compatible was not raised in the litigation.

The lesson for clients letting out residential property is clear: not only must they have due registration under the 2004 Act, but they must comply with the 2011 Regulations. If they do not, the consequences could be costly.

REAL BURDENS

Burdens in restraint of trade

Can real burdens be used to protect a trade or business exercised on the benefited property by restricting or prohibiting the exercise of the same trade or business on the burdened property? It is certainly the case that a real burden can be in restraint of trade, because the Title Conditions (Scotland) Act 2003 only prohibits

1 Sheriff Katherine E C Mackie.
2 This, it seems, was in addition to the 50% of the deposit already recovered. What if a tenant does in fact trash the property? Can that tenant still obtain an award if the landlord has not complied with the deposit rules?
3 Paragraph 13.
4 This system is particularly common in the USA, but it does not apply to all damages actions.
5 Paragraph 13.

burdens which, on grounds of public policy, are in '*unreasonable* restraint of trade'.[1] In fact, the obstacle, such as it is, comes less from this rule than from a different rule as to content, namely the rule that a real burden must be for the benefit of the benefited property.[2] A real burden, in other words, must confer praedial benefit and not – or not only – personal benefit, ie benefit on the person who happens to be owner at the time. This is neither a new rule – the common law was to the same effect – nor one which gives much trouble. But borderline cases are, as ever, difficult, and never more so than when the burden involves an element of restraint of trade.

Of course, it is easy to think of cases where a burden in restraint of trade does clearly confer some praedial benefit. A prohibition in the titles of housing estates on the exercise of a trade, business or profession is a well-known example, protecting the (praedial) interest of the community in maintaining a tranquil residential setting. But other examples are more marginal. In *Aberdeen Varieties Ltd v James F Donald (Aberdeen Cinemas) Ltd*,[3] the owners of two theatres in the same city disponed one of the theatres subject to a use restriction which prevented the performance of certain types of entertainment. The theatre thus burdened was half a mile away from the theatre which was intended to be benefited. In holding the burden invalid as lacking praedial benefit, the Second Division seems to have been influenced by the distance between the theatres,[4] so that if the theatres had been close – if, in other words, the restriction had done more than simply protect the commercial interests of the disponer – it is possible that the result would have been different. But the position is not clear, not least because of the statement by one of the judges that a perpetual restraint on trade can never be reasonable.[5]

More helpful is the decision of the Lands Tribunal in *Co-operative Wholesale Society v Ushers Brewery*[6] where burdens preventing each unit in a three-unit retail outlet from being used for the business of the other units were upheld on the basis that the viability of the outlet would otherwise be at risk. But, as the Scottish Law Commission has warned, 'whether the result would be the same in the absence of a community interest is less certain'.[7] The Scottish Law Commission continued:

> If property A is prevented from carrying out the business activity which is conducted on neighbouring property B, it may be difficult to show that anything more is being protected than the commercial interest of the owner of property B.[8] The strongest case is where property B is specially adapted for the activity in question, so that it is likely to be used for the same purpose even by future owners. The restraint

1 Title Conditions (Scotland) Act 2003 s 3(6).
2 TC(S)A 2003 s 3(3).
3 1939 SC 788, affd 1940 SC (HL) 52. See also *Phillips v Lavery* 1962 SLT (Sh Ct) 57 and *Giblin v Murdoch* 1979 SLT (Sh Ct) 5.
4 This is sometimes known, following Roman law, as the requirement of *vicinitas*.
5 At 797 per Lord Wark. Compare Lord Justice-Clerk Aitchison at 802.
6 1975 SLT (Lands Tr) 9.
7 Scottish Law Commission, Report on *Real Burdens* (Scot Law Com No 181, 2000) para 2.25.
8 Citing *Phillips v Lavery* 1962 SLT (Sh Ct) 57 and *Giblin v Murdoch* 1979 SLT (Sh Ct) 5.

> on property A would then be reflected in the value of property B. In the *Aberdeen Varieties* case it was argued, in favour of the burden, that its enforcement 'would be for the benefit of the dominant tenement as well as for the business carried on therein, in respect that it would tend to maintain or enhance the selling value of that tenement'.[1]

The strength of this argument, however, remained untested.[2] In a new case, *Hill of Rubislaw (Q Seven) Ltd v Rubislaw Quarry Aberdeen Ltd*[3] the moment for testing has finally arrived.

The case arose out of plans to develop the northern quarry subjects at Hill of Rubislaw in Aberdeen.[4] In order to engage the co-operation of the owners of nearby office blocks in respect of matters such as access, the developers entered into a minute of agreement with the owners. Among its terms was the following clause:

> The northern quarry proprietors undertake (to the relevant parties) that the maximum net lettable floor area of Office Space which may be provided within the northern quarry subjects at any given time shall not exceed 2,025.29 sq m (in total).

One of the issues in the case was whether the reference to 'net lettable floor area of Office Space' meant office space which was *capable* of being let – in effect, total office space in the development – or office space that was *actually* let. In finding for the former, the Lord Ordinary (Malcolm) noted that 'the aim was to protect the lettability and rental value of the neighbouring office blocks'.[5]

That finding, however, led to a further difficulty. As the dispute arose between successors of the original parties, the developer-owners of the quarry subjects were bound by the restriction only if it was a real burden. That in turn required a decision on whether a condition which was both in restraint of trade and for the commercial benefit of the office-owners could nonetheless be regarded as conferring praedial benefit. Lord Malcolm put it this way:[6]

> The dispute concerns the benefit flowing from the restriction. Is it purely personal, or does it concern the neighbouring office blocks? One might hypothesise that had the adjacent lots been vacant undeveloped sites, and the owners inserted a restriction designed to protect the potential commercial benefit of selling them on for office development at some future date, it might be difficult to identify the necessary praedial element. However, the adjacent subjects are substantial office blocks, with premises rented to oil companies and the like. Their value and occupancy rates could be affected by an unrestricted office development on the burdened subjects. Does this make a material difference?

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1 1939 SC 788 at 795.
2 As the Law Commission noted, it was accepted in one case in England: *Newton Abbot Co-operative Society Ltd v Williamson & Treadgold Ltd* [1952] Ch 286.
3 [2013] CSOH 131, 2013 GWD 27-545.
4 For the Rubislaw quarry, which provided so much of the building stone for Aberdeen, see http://en.wikipedia.org/wiki/Rubislaw_quarry.
5 Paragraph 11.
6 Paragraph 18.

Adopting the Scottish Law Commission's analysis, Lord Malcolm found that it did. In the same way that a building specially adapted for a particular trade would benefit from a condition restricting that trade in another property, so a building fitted for offices would benefit from a restriction on the amount of office space that could be built on an adjoining site. 'There is praedial benefit, not merely personal commercial benefit for the defenders.'[1]

A second hurdle remained. As already mentioned, although the Title Conditions Act allows conditions in restraint of trade, the restraint must not be 'unreasonable'. The very fact that praedial benefit is conferred, however, is a strong indication of reasonableness,[2] and Lord Malcolm was fully satisfied on the point:[3]

> I can identify no unreasonableness in the restraint on the use of the burdened subjects. The agreement unlocked the development potential of the vacant site. There is no restriction on its development for other purposes, for example housing, retail or leisure uses, and the owners of the burdened property are free to develop office premises elsewhere in the city. No monopoly is created.

This is an important decision. Hitherto it had been uncertain whether a restriction on trade could be imposed for a reason which was essentially commercial. Now it seems that such restrictions are permissible provided that they are praedial in the rather narrow sense of maintaining or enhancing the value of the benefited property. Of course, a condition in restraint of trade might fail for other reasons, such as a breach of competition law.[4] But the *Rubislaw* case opens the way for a far more extensive use of real burdens in a commercial context. We understand, however, that the decision has been appealed to the Inner House.

Interest to enforce

By s 8(3)(a)[5] of the Title Conditions Act a person has interest to enforce a real burden if and only if:

> in the circumstances of any case, failure to comply with the real burden is resulting in, or will result in, material detriment to the value or enjoyment of the person's ownership of, or right in, the benefited property.

The first decision on s 8, *Barker v Lewis*,[6] found that there was no interest to stop a close neighbour from using her property as a bed-and-breakfast business,

1 Paragraph 22.
2 Paragraph 21.
3 Paragraph 22.
4 The exemption from competition law for 'land agreements' was withdrawn with effect from 6 April 2011. See the Competition Act 1998 (Land Agreements Exclusion Revocation) Order 2010, SI 2010/1709 and, for a discussion of the implications, *Conveyancing 2011* pp 58–59. A provision which is illegal under competition law is necessarily incompetent as a real burden: see TC(S)A 2003 s 3(6).
5 Special provision is made in Title Conditions (Scotland) Act 2003 s 8(3)(b) for affirmative burdens to defray a cost.
6 2008 SLT (Sh Ct) 17; see *Conveyancing 2008* pp 92–95.

thus suggesting a threshold for enforcement which was unreasonably high. Since then, there has been some rowing-back from this approach. In *Kettlewell v Turning Point Scotland*,[1] a decision from 2011, neighbours in a housing estate were found to have interest to prevent use of one of the houses as care accommodation for adults with learning difficulties. Then in 2012 the Lands Tribunal in *Whitelaw v Acheson*[2] suggested that by 'material' detriment Parliament was simply pointing to a contrast with terms such as 'immaterial, insignificant, trivial'; on this view only the trivial would be too little to qualify as interest to enforce.[3] Now in an important new case, *Franklin v Lawson*,[4] the Lands Tribunal has backed up its earlier view with a careful analysis of s 8 in its legislative context:[5]

> [W]here there is an identifiable element of detriment which cannot be disregarded as insignificant or of no consequence, it seems to us that the test of materiality can be met. We think this is in accord with the substantive views expressed by the sheriff principal in *Barker v Lewis* at 2008 SLT (Sh Ct), p 20, para 27. We do note that at p 20, para 24 he described 'material' as an adjective of degree. However, this may be misleading. It can properly be seen to have a primary meaning as simply the opposite of 'immaterial'. Determination of what is 'material' does involve assessment of matters of degree but what is required is a decision as to whether or not the subject matter is 'material'. The term is not primarily an adjective expressing quantity. Where an adverse element of detriment can be identified as something more than fanciful or insignificant it can properly be described as material. We are not yet persuaded that Parliament intended a higher test. Section 8 must be construed in the context of the Act as a whole. The Act makes express provision for burdens to be varied when it is reasonable to do so. If a burdened proprietor considers that the interest of the benefited proprietor is of no great weight he can apply to the Tribunal under s 90(1)(a)(i). The Tribunal will then require to balance the interests of one against the other in terms of s 100, factors (b) and (c). When Parliament has provided for such a balancing exercise, there is no good reason to assume that it intended a preliminary test under which a real identifiable interest would have to be of some special weight before being allowed to be enforceable.

With this view we entirely concur. As applied to the facts of *Franklin v Lawson* it meant that the respondent had an interest to enforce a real burden preventing a neighbour on the other side of the road from building a two-storey extension which would have an impact on the respondent's view. And with this decision, the threshold for interest to enforce may perhaps be regarded as settled.

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1 2011 SLT (Sh Ct) 143; see *Conveyancing 2011* pp 87–90. In *Whitelaw v Acheson* 28 September 2012 the Lands Tribunal (at para 13) took issue with the sheriff's reference to a burden having been 'departed from' when all he really meant was that, in the particular circumstances of the case, there was no interest to enforce it. Only the Tribunal has the power to 'depart from' burdens, through its jurisdiction to vary or discharge.

2 28 September 2012, Lands Tribunal; see *Conveyancing 2012* pp 118–23. The Tribunal comprised Lord McGhie and I M Darling FRICS.

3 *Whitelaw* para 12.

4 2013 SLT (Lands Tr) 81. The Tribunal comprised Lord McGhie and I M Darling FRICS.

5 Paragraph 10.

MISSIVES: MAKING THE BUYER PAY

Remedies for non-payment

The normal practice

What if settlement date arrives but the buyer does not pay? That today is a relatively unusual occurrence because buyers tend not to commit to a purchase until the necessary funding is in place. Where it does occur, however, the normal practice is that the seller waits for a reasonable time, to see if the price will be paid (plus interest), and, if it is not paid, rescinds, and remarkets the property. The original, defaulting, buyer may then be liable for damages. Rescission is based on the clause to be found in almost all contracts whereby failure to pay the price for a stated period, such as 14 days, entitles the seller to rescind.[1] Even without such a clause, rescission is possible, though in that case special rules apply.

This 'three Rs' approach (rescind, remarket and resell) makes sense for both sides. Like a divorce, the parties regain their freedom. Buyers do not wish to remain locked into contracts that they cannot perform. Sellers wish to obtain the capital value of their property – that is why they marketed it in the first place – and if one buyer cannot pay, the obvious next step is to find another who can. To the extent that the seller suffers loss, the original defaulting buyer is liable in damages.

A theoretical alternative

So much for the normal practice. Is there an alternative? A contract for the sale of heritable property is – to state the obvious – a contract, and so general contract law is relevant. And general contract law says that where, in a contract between X and Y, there is material breach by Y, then X has a choice: (i) to rescind or (ii) to stay in the contract and insist on the promised performance, ie to demand implement.[2] Moreover, insistence on performance is often described as being the 'primary' remedy in Scots law. This is perhaps a misleading expression. It does not mean that it is the remedy that X *must* adopt. Nor does it mean that it is the remedy actually adopted in most cases. It means simply that X *is entitled to* insist on performance. Here Scots law differs from English. In England X cannot normally insist on performance; a court will grant an order for performance only in special cases. In Scotland the position is the other way round. In Scotland if X asks the court to order performance, the court must do so, apart from special cases. So on the basis of general contract law, where a buyer fails to come up with the money, it would seem that the seller, instead of rescinding, could stay with the contract and demand performance, ie demand that the buyer should pay in full (plus interest etc). So the seller could simply sue the buyer for the price.

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1 For instance clause 13 of the 2013 edition of the Combined Standard Clauses.
2 The terms 'performance' and 'implement' can be taken to be interchangeable.

Implement and specific implement

'You can't have specific implement for the payment of money.' This is a well-established rule. At first sight, it might seem to imply that a seller cannot seek implement of the contract by making the buyer pay the price. In fact the issue is merely terminological. The 'no specific implement for money' rule is about the law of remedies. Decree of specific implement (which can in principle lead to imprisonment or a fine) is not available to compel the payment of money. An obligation to pay money can, however, be enforced by decree for payment, followed, if necessary, by diligence (ie enforcement against the assets of the defaulting debtor). Where there is material breach, X has (in general) the choice between (i) rescission plus damages, and (ii) implement. If Y's obligation is one of payment, 'implement' cashes out as decree for payment, not what is called decree of specific implement.

What has AMA (New Town) Ltd been doing?

If this whole issue has never had much attention it is because the normal practice of sellers has been to adopt the 'three Rs' strategy: rescind, remarket and resell. A development company called AMA (New Town) Ltd, however, has sometimes opted for a different path. In cases where it did, it said to its defaulting buyers: 'we decline to rescind, we demand performance, ie payment of the whole price; we are suing you for that price, as a debt that is (in the time-honoured phrase) due and resting owing'.

Why the company departed from normal practice is a matter for speculation. But the cases that we know of have all been cases that arose following the crash of 2008.[1] For a time the property market was badly depressed. To rescind, remarket and resell could have been a very slow business, and the price achieved might have been poor. So one of the reasons why sellers normally adopt the 'three Rs' strategy, namely to obtain the capital value of the property within a reasonable time-frame, was not fully in operation. Another reason for the 'three Rs' strategy is that compelling a buyer to pay can be slow and uncertain. But not always. An action for payment of the whole price is like a pistol to the head. Decree could mean 'death' – liquidation or sequestration – for the buyer. It can happen that the buyer, faced with the choice of payment or death, pays, perhaps with the emergency help of friends or relatives or loan sharks.

Whatever the reasons, the 'sue for the price' approach was adopted by AMA (New Town) Ltd in a number of cases, two of which have appeared in the law reports. The first was *AMA (New Town) Ltd v McKenna*[2] in which it was held, by Sheriff Principal Bowen, that the missives could not be

1 The crash meant that many buyers could not pay, either because they could not sell their existing property, or because they could not find a financial institution willing to lend, or a combination of both.

2 2011 SLT (Sh Ct) 73, discussed in *Conveyancing 2011* pp 91–94.

enforced in this way. The second is the new case of *AMA (New Town) Ltd v Law*[1] where the Inner House has come to the opposite conclusion.[2]

AMA (New Town) Ltd v Law

A straightforward case?

In *AMA (New Town) Ltd v Law* the Inner House saw the case as a fairly straightforward one. The buyer had engaged to pay the price at the date of settlement. The buyer had failed to do so. The starting point of Scots law was, therefore, that the seller could insist on performance, ie payment of the price. The court agreed with the seller that there was no reason why this was a special case, where the innocent party did not have the right to require performance. Parties in breach cannot insist that innocent parties choose rescission rather than implement. The buyer had promised that he would pay on the due date. The decree merely ordered him to do as he had promised.

This may indeed be the right approach. But Sheriff Principal Bowen thought differently,[3] Professor McBryde thought differently,[4] and in our view the position adopted by the Inner House is not easy to defend. In what follows we do not attempt a complete coverage of the legal issues, but set out one particular argument.

Performance: sequential or simultaneous

In any contract, the performances of the parties are either (a) sequential or (b) simultaneous.[5] Sales of goods often involve simultaneous performance. This is the norm in high-street shopping, for instance. Some sales of goods involve the seller performing first and the buyer performing second: these are credit sales. Others, such as most internet sales, require the buyer to pre-pay, ie the buyer performs first, and the seller second.[6]

In sales of heritable property the norm has always been simultaneity. Traditionally the seller's agent and the buyer's agent met in person to effect settlement; the former handed over the deed + keys,[7] and the latter paid. Though

1 [2013] CSIH 61, 2013 SC 608, 2013 SLT 959.

2 *AMA (New Town) Ltd v McKenna* thus seems to have been overruled, though the Inner House does not say so expressly.

3 *AMA (New Town) Ltd v McKenna* 2011 SLT (Sh Ct) 73 (*Conveyancing 2011* Case (1)).

4 W W McBryde and G L Gretton, 'Sale of heritable property and failure to pay' 2012 SLT (News) 17. The coverage of that article is not coterminous with the coverage of the present text.

5 There may also be a combination. And in many contracts there is no single performance, but multiple performances, or continuous performance. These complications do not affect the basic logic, and may be ignored for present purposes.

6 This 'simultaneous or sequential?' issue has attracted little attention in either the case law or the literature, whether in Scotland or (as far as we know) in other legal systems. Discussions of contract law tend to ignore the special issues that arise where contracts call for simultaneous performance. A partial exception is Germany, but it may be doubted whether the German law in this area – *Leistung/Erfüllung Zug um Zug* is the striking expression – is wholly satisfactory. But this cannot be explored here. The comparative and historical literature on specific performance tends to be silent: see such works (in themselves highly valuable) as J Hallebeek and H Dondorp (eds), *The Right to Specific Performance: The Historical Development* (2010) and J Oosterhuis, *Specific Performance in German, French and Dutch Law in the Nineteenth Century* (2011).

7 'Keys' is shorthand for transfer of possession. For some types of property there will be no keys.

nowadays settlement is usually done remotely, the logic has not changed. Of course, the parties are free to agree sequential performance, but such arrangements are rare. Sequential performance involves risk – risk that the party who is to perform second fails to do so.[1]

Wording in sales contracts varies, but the following, from the Combined Standard Clauses,[2] can be taken as typical, and indeed the wording of such clauses has been broadly similar for generations: 'The Price will be payable on the Date of Entry, in exchange for (i) a good and marketable title;[3] (ii) a validly executed Disposition in favour of the Purchaser or his nominee(s); (iii) vacant possession of the Property …' So, the performances are to be simultaneous, and each is conditioned on simultaneous counter-performance. Did the wording of the contract in *AMA (New Town) Ltd v Law* depart from standard practice? We return to this question below, but for the time being we assume that it did not.

In cases of sequential performance, the innocent party's right to demand performance is generally straightforward. For example, a buyer of heritable property who has pre-paid can demand delivery of a valid deed, and also possession, and if these are not forthcoming will in principle be entitled to decree of implement or an interlocutor authorising the clerk of court to sign and deliver the deed on behalf of the defaulting granter.[4] Conversely, a seller who has already delivered the deed + keys can in general sue for payment of the price. The same is usually true of other types of contract. But where the contract contemplates simultaneous performance, matters are not so simple. For if the innocent party obtains decree,[5] that is an *unconditional* order to perform what the contract says is to be performed *conditionally*. Take the *AMA* cases. The seller obtains decree for payment. This decree does not say 'pay against simultaneous delivery of deed + keys'. It says 'pay'. Give that decree to an officer of court, and the decree will be enforced, whether or not the *seller* performs.[6] It is the unconditionality of such a decree that is the problem. To begin with, it departs from what the parties had agreed. Of course, it may be replied that a decree for damages is also contrary to what parties have agreed. So is a decree authorising rescission. But we are here dealing with a decree that purports to enforce the primary obligations of the parties.

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1 There are ways of alleviating the risks of sequential performance. And in countries within the English sphere of juristic influence 'equity' may help to protect the party who performs first. Some of the issues are discussed in G L Gretton 'Insolvency risk in sale' 2005 *Juridical Review* 335.

2 2013 edition, clause 16. The traditional wording is perhaps awkward (see eg next footnote), but works in practice.

3 Words that puzzle those not familiar with Scottish conveyancing practice. Of course they mean that the disposition, assuming that it is, as required a few words later, properly executed, will be, in point of substantive effect, valid and unchallengeable.

4 There are exceptions, for instance where the seller has been sequestrated.

5 Either (i) decree for payment, in favour of the seller against a defaulting buyer, or (ii) decree of specific implement, in favour of a buyer against a defaulting seller. We cannot here discuss the case where it is the seller who fails to perform. The issues there are in some respects the same, but not wholly so.

6 One cannot hand over a decree for payment to a sheriff officer or a messenger at arms and say 'enforce this at the moment when I deliver to the debtor the deed and the keys'. If one thinks this through carefully, the absurdity becomes evident. The decree orders the defender to pay, but does not order the pursuer to deliver. Even if it did, that would not solve the problem (see next section).

Perhaps one should shed no tears in such cases for buyers who, after all, have brought heaven's judgement down on their own heads by failing to do what they undertook to do. And perhaps the argument here outlined can be dismissed as merely academic and theoretical. But in fact the argument is the foundation for some hard and practical reasons why the approach taken by the Inner House is problematic, as will be seen below.

Of course, a seller could seek to circumvent the problem by delivering the deed and keys without first being paid. But that would be likely to be suicidal.[1]

Theoretical problems cash out as practical problems

Suppose that the seller obtains decree for payment of the price, which is, say, £300,000. The duly extracted decree is handed over to the sheriff officers or, as the case may be, the messengers at arms. The court officers contact the buyer. And suppose that the buyer then pays in full. By now a substantial amount of time has probably passed since the action was raised, and a further period since decree was pronounced. It is possible that the seller, although obliged to perform, is no longer able to do so. For example,[2] the seller's creditors may have attached the property, or the seller may have entered into some type of insolvency process, such as sequestration. The buyer's position is now awkward and perhaps disastrous: for instance he might have to pay the whole price to the seller's trustee in sequestration, and receive nothing in exchange.[3]

Of course, the buyer, when contacted by the court officers, might not pay – indeed, in most cases will not, for the reason for the breach in the first place was normally the lack of the means of payment. In that case the court officers will now begin the process of diligence.[4] They will look for assets to attach – the bank account, the car, and so on. Gradually these attachments are turned into money, which is paid over to the seller: £3,000 from auctioning the car, £2,000 from the bank account, and so on. Getting to the full £300,000 is likely to be difficult and slow.[5] It may never be achieved. As the months and perhaps years pass, the seller has an increasing amount of the buyer's money, while

1 This could raise the question of whether a buyer is *obliged to accept* deed + keys. Much of the Inner House case seems to have been devoted to that issue, which seems, with respect, of doubtful relevance to the dispute, a dispute that is, we suggest, not controlled by *White & Carter (Councils) Ltd v McGregor* 1962 SC (HL) 1; the pursuer's action should fail regardless of how the 'obliged to accept?' question is answered. And it may be added that a canny buyer might express willingness to accept delivery, knowing that no rational seller would go ahead and deliver, except against simultaneous payment.

2 Other examples include bolshiness, death, insanity, illness and, in the case of a company, change of management. In cases not involving insolvency, a defaulting seller (or executors, guardians etc) could, it is true, be made to perform – eventually.

3 In some legal systems (eg England) the buyer would be protected by already having 'equitable' ownership. Equitable property law brings with it certain benefits, but also certain drawbacks, and Scots law has not gone down that road.

4 Ie forced execution.

5 The general point is obvious enough. But it may be added that the big money (if any) is likely to come out of the debtor's immoveable property (if any), and diligence against immoveable property is slow.

still keeping the property – both ownership and possession. Indeed, it might occur to a cynical seller to say to the court officers: 'when you reach £299,999.99, stop!' In that way the seller would have all the price – minus one penny – and the property too. The seller's obligation to deliver deed and keys would never have been triggered.[1]

A variant is that the buyer enters an insolvency process, such as liquidation. Indeed, this would be likely enough, for the reason that the buyer has failed to pay is probably lack of means. In the liquidation the seller would, by virtue of the decree, rank as a creditor. Suppose that the liquidator is paying ordinary creditors at 10%. The seller would be paid £30,000 – and would have the property as well.

This general line of reasoning was briefly noted by the court but not considered decisive. Lady Dorrian, with whom the other judges[2] concurred, said:[3]

> I acknowledge that if the respondent is in truth so impecunious as to be unable to pay the price, complications can arise. However, there are ways in which such complications can be resolved. Moreover, it is not the case that no complications might follow were the appellants to accept repudiation and claim damages. They might not be able to re-sell the property; the impecuniosity of the respondents might mean that they would not be able to pay the award of damages. Many different situations could be envisaged. The mere fact that there might be awkward consequences, which require further legal steps to resolve, is not a reason for refusing the appellants their remedy.

The alternative view is that it is a reason for refusing sellers their remedy, ie that in cases of simultaneous performance, decree of implement should not normally be awarded. Of course it is true, as the court said in the passage just quoted, that complications might also arise were the sellers to accept repudiation and claim damages. Any breach of contract causes complications. The argument, however, is that in a case such as the present, whilst a decree of implement is possible in the sense that a court can pronounce it, its tendency is to give rise to unacceptable consequences.

Parallel problems in sequential performance?

Some of the problems here outlined could also arise in a case of sequential performance. Suppose that the contract says that the buyer is to pay first, not receiving deed + keys until full payment has been made. Then a decree for payment in favour of the seller might be problematic, for the reasons already given, and so perhaps in such a case decree for full payment should be refused.

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1 A possibility would be for the seller to convey shares of the property as and when blobs of money were paid. So on receiving the first £3,000, the seller would dispone a 1% share, and so on, each partial disposition being registered in the Land Register. Such a solution would be unworkable. (And would still encounter the objection that there would always be an element of pre-payment.)

2 Lord Menzies and Lord Philip.

3 Paragraph 58.

But it is not necessary to explore that issue here, for contracts of that sort are, it seems, unknown in practice. In the ordinary case, and we think that *AMA* was an ordinary case, the buyer has *not* agreed to pay first.

Enrichment law?

It might be argued that, if the seller succeeds in enforcing the decree for payment only incompletely, with the result that the time for delivering the deed and giving possession never arrives, there is a simple solution: the seller must return the money under the law of unjustified enrichment. But at what point is the money paid over by means of diligence 'undue'? It could hardly be undue from the start, otherwise each slice of money would have to be returned the moment it was received. But at what other time could it become *sine causa*, or *ob causam finitam*?[1] Enrichment law would have to be subject to much hammering, sawing, beating and welding to make it cope with this problem.

An unusual clause?

As mentioned above, the assumption so far is that this contract was in traditional terms, ie that the main performances – payment by the buyer, and delivery of deed + keys by the seller – were to be simultaneous. Was that in fact the case? If it was not – if the contract said that the buyer was to perform first – then the pursuer's case would become much stronger. The buyer would have been bound to pay the price on the due date, and it would have only been after that payment that the seller's obligation became prestable. We have not succeeded in obtaining sight of the missives, and they are not quoted at length in the case. But Lord Menzies says that the obligations to perform were not simultaneous: the buyer was to pay first:[2]

> The mechanism in clause 3 of the missives for determining the date of entry did not depend on anything done by the defenders … and clause 3.1 provided that the price shall be paid in full before 2 pm on that date. It was only once that had happened … that the pursuers … became obliged to give entry and vacant possession and release the keys. Although these obligations were co-relative, it was not a contractual requirement that they should be precisely simultaneous – the obligation on the sellers only arose once the obligation on the purchasers had been fulfilled.

Clause 3 is quoted, at least in part, in Lady Dorrian's Opinion:[3]

> Entry and vacant possession will be given and the keys released to the Purchaser only on payment of the full purchase price (including the price of any extra items not previously paid for) and any interest due on the purchase price. Consignation of the price will not be accepted.

1 The same issue arises if the story is not one of diligence, but of sequestration. If the trustee in sequestration pays £30,000, must that money instantly be returned?
2 Paragraph 2.
3 Paragraph 9.

Presumably this is a truncated quotation, for it does not cover the seller's most important obligation: to deliver a valid disposition.[1] But as far as it goes it does not support the theory that the buyer was to perform first. If there was something in the missives which bound the buyer to perform first, it is not identified in the case; and if there was such a provision, it would be highly unusual in terms of immemorial conveyancing practice. It would be something that the prudent conveyancer would assent to only with reluctance, given that it would put the buying client into the risky situation of prepayment.

A new clause in missives?

The decision has implications for conveyancing practice. No solicitor would wish his client to run the risk of being sued in the way that has happened in the *AMA (New Town) Ltd* cases. Such an action threatens to turn a nasty but survivable problem (liability for damages for breach of contract) into an outright disaster, because the effect of a decree for payment of the full price could very well be to force the client into sequestration or liquidation. So, when regional missives are next revised, conveyancers may wish to consider adding a rider to the existing clause on late payment to the effect of excluding an action for payment – or, which comes to the same thing, confining the seller to damages, interest on the price, and rescission.

PRESERVATION NOTICES FOR REAL BURDENS: NOW OR NEVER

Background

When real burdens are being created today, it is necessary to nominate and identify both the burdened and the benefited properties, and to register the disposition (or other constitutive deed) against both properties.[2] It was not always so. Under the law in force before the 'appointed day' for feudal abolition (28 November 2004), it was only the burdened property that had to be identified. Admittedly, deeds often did identify the benefited property or properties as well. But for cases where they did not, a series of rules was developed by the courts for inferring which properties were to benefit or, to put it another way, for identifying the person who was to have title to enforce. These rules for implied enforcement rights – or implied *jus quaesitum tertio* as they were often called – were complicated, illogical, and not altogether clear.[3] They were swept away by s 49 of the Title Conditions (Scotland) Act 2003 with effect from the appointed day. But something had to be put in their place, for otherwise many real burdens would have been lost. The solution adopted by the Title Conditions Act was to

1 The passage quoted above from Lord Menzies also passes over this issue in silence. The contractual right to possession, which is the focus of that passage, and of the clause of the missives quoted by Lady Dorrian, is not of central importance. Once the buyer has the disposition, the right to possession arises automatically, by force of the disposition itself.

2 Title Conditions (Scotland) Act 2003 s 4(2), (5).

3 For these rules, see K G C Reid, *The Law of Property in Scotland* (1996) paras 399–404.

recreate (and in some respects extend) the old rules but in a simplified and more logical form. So in place of the rules in cases such as *Hislop v MacRichie's Trs*[1] came the new rules in ss 52, 53 and 56 of the Act. The first two of those were for burdens imposed under a 'common scheme', the last for burdens concerned with 'facilities' (for example, roof maintenance) and services. All three, of course, were confined to burdens created before the appointed day; for burdens created on or after that day, as already mentioned, it was (and is) necessary to nominate the benefited property.

A great merit of this way of doing things was that it was effort-free. Until just before the appointed day, the common-law rules applied; as soon as midnight struck, their place was taken by ss 52, 53 and 56 without anyone having to do anything. Admittedly, one of these provisions, s 53, has proved difficult to understand and apply and is being referred to the Scottish Law Commission for repair.[2] But for the most part, the changeover worked smoothly enough; and in many cases those who had title to enforce burdens before the appointed day continued to have title after that day. The overwhelming impression, in other words, was one of continuity rather than of precipitous change.

In this bonfire of the common-law rules, however, there was one, albeit temporary, reprieve. This was in respect of a rule which could apply only to non-feudal burdens, that is, to burdens created by disposition: the rule in *J A Mactaggart & Co v Harrower*.[3] Unlike the other rules, the application or non-application of this rule could not be determined merely by reading the deed in which the burden was imposed; on the contrary, it was undetectable except by engaging in further research. This made it unsuitable for being carried forward, even in a modified form, into the new law; for the Title Conditions Act aimed at transparency, and such transparency could never be provided by the rule in *Mactaggart*.[4] The solution adopted by the legislation was thus to abolish the rule but to allow those who wished to preserve enforcement rights created under it to do so by service and registration of a notice of preservation – much in the same way as, before the appointed day, superiors had sometimes been able to preserve their enforcement rights. Recognising that notices of preservation could not be done overnight, the Act allowed ten years. For the first ten years after the appointed day, enforcement rights created before that day under the rule in *Mactaggart* would linger on, the sole survivor of what had once been an intricate series of common-law rules.[5] But once the ten years had passed – on 28 November 2014 – all such enforcement rights would perish unless their holder had acted to preserve them by registration of a notice of preservation under s 50 of the Act.[6]

1 (1881) 8 R (HL) 95.
2 See p 93 above.
3 (1906) 8 F 1101.
4 Scottish Law Commission, Report on *Real Burdens* (Scot Law Com No 181, 2000) paras 11.72 and 11.73.
5 Title Conditions (Scotland) Act 2003 s 49(2). But to reiterate: the rule in *Mactaggart* could not apply to create enforcement rights after the appointed day. For new real burdens, it is necessary to identify the benefited property in compliance with TC(S)A 2003 s 4(2)(c)(ii).
6 If a notice of converted servitude (discussed below) is needed, it can additionally be used to perform the function of a notice of preservation. See s TC(S)A 2003 s 80(5)(f).

Back in 2004, 2014 seemed a long time in the future, although in our 2004 volume we did urge the desirability of thinking about this issue right away.[1] Needless to say, no one paid much attention. The grand total of notices registered so far is 39.[2] Time is now running out. The final deadline for registration is 27 November 2014. In cases where no notice is registered, the right to enforce the burdens in question will be lost forever.

Notices of preservation[3]

The rule in *Mactaggart*

We will come to notices of preservation in a minute, but first it is necessary to say something about the rule in *Mactaggart*. This provided that where (i) the owner (A) of land transferred part of that land to B, (ii) the transfer was by disposition, (iii) the disposition was registered before 28 November 2004, and (iv) the disposition imposed real burdens without making provision as to enforcement, then (v) it was implied that the benefited property in the real burdens was such property as, at the time of registration of the disposition, was still retained by A.[4] In a case decided since the appointed day it was added that the rule did not apply to rights of pre-emption.[5]

Once land became a benefited property under the rule in *Mactaggart* it was subject to the same rules as any other benefited property. Thus the burdens were enforceable not merely by A, the original disponer, but by A's successors as owner, without the need for assignation of the right.[6] If the benefited property came to be divided, the effect depended on the date of the division. For divisions occurring before the appointed day, each divided part remained a benefited property; for divisions on or after that day, only the part retained remained the benefited property unless the disposition provided otherwise.[7]

Identifying s 50 cases

In order to preserve enforcement rights created under the rule in *Mactaggart*, a notice of preservation under s 50 must be registered before 28 November 2014. On one view the matter is self-sorting. If the enforcement rights are known about a notice will be registered; and if they are not known about there is little pain in

1 *Conveyancing 2004* p 96.
2 This was the figure as at 10 January 2014. We are grateful to Registers of Scotland for providing this information.
3 See also D A Brand, A J M Steven and S Wortley, *Professor McDonald's Conveyancing Manual* (7th edn, 2004) paras 17.10 – 17.14; R Rennie, *Land Tenure in Scotland* (2004) paras 8-13 – 8-15.
4 K G C Reid, *The Law of Property in Scotland* (1996) paras 403 and 404. See also the statutory statement of the rule, in the context of long leases, in s 13(3) of the Long Leases (Scotland) Act 2012. This was necessary to remove the uncertainty as to whether the rule in *Mactaggart* applied to leasehold conditions.
5 *Braes v Keeper of the Registers of Scotland* [2009] CSOH 176, 2010 SLT 689. See *Conveyancing 2009* pp 113–16.
6 For a contrary view, see *Marsden v Craighelen Lawn Tennis and Squash Club* 1999 GWD 37-1820, discussed in *Conveyancing 1999* pp 59–61.
7 Title Conditions (Scotland) Act 2003 s 12.

the prospective loss. The trouble is that eligible enforcement rights will seldom be known about, for the simple reason that the burden is to be found in the title to the burdened property, with the title to the benefited property usually being silent, so that whilst the burdened owner knows of the burden, the benefited owner commonly does not. Yet in some cases the loss will be serious. If only the cases can be identified now, before it is too late, there is an important long-term gain to the benefited owner. The question is how identification can be achieved.

The rule in *Mactaggart* only operates in respect of what may be termed *rump titles*, that is to say, titles to land left behind when one piece of land was sold off. Further, at least in the form meditated by the Title Conditions Act, it does not apply to common scheme cases.[1] Thus, in the typical case where land is divided into two, with one plot (plot A) sold and the other (plot B) retained to be sold later, there is a distinction between the situation where, when plot B comes to be sold, (i) plot B is sold subject to the same burdens as plot A, and (ii) plot B is sold without burdens or subject to different burdens. In the first case there is a common scheme of burdens affecting both plots, and the question of enforcement rights is regulated by ss 52 and 53. At any rate no notice need, or can, be registered under s 50. In the second case plot B is, by virtue of the rule in *Mactaggart*, the benefited property. A s 50 notice is therefore both competent and necessary.

In the few months that remain, solicitors need to be alert to rump-title cases, at least where they come up in the course of a conveyancing transaction.[2] The initial question is: is the property now being bought the rump (or part of the rump) of a formerly larger property? If so, a s 50 notice is needed if –

- the property or properties previously split off were conveyed by disposition (as opposed to feu disposition);
- the disposition was recorded before the appointed day;
- the disposition imposed real burdens without making provision as to their enforcement;
- the title to the property being acquired does not contain the same, or similar, burdens.

This is a daunting list. For properties on the Land Register the history of the title is particularly difficult to discover. And in all cases it will be necessary to look at titles of other properties, sometimes on a speculative basis. To assemble the necessary information will thus take time and trouble. If, as often, one of the conditions turns out not to have been satisfied, the work will have been for nothing. At the outset the clients must of course be asked whether they wish to incur the expense. No doubt the answer will often be no. Sometimes, however, the nature of the property itself may indicate that s 50 might apply. That will be true, for example, where a second house has been built on what was formerly part of the garden of the house now being acquired. A less conclusive case is where

1 TC(S)A 2003 s 50(6).

2 It is not suggested that solicitors should examine all the titles in their deeds safe. The same issue arose, of course, with the notices under the Abolition of Feudal Tenure etc (Scotland) Act 2000.

the property being acquired is a subdivided part of a formerly single house. In situations like this, at least, the case for further investigation is reasonably strong.

The notice itself

The form of notice is laid down in schedule 7 to the Title Conditions Act. It closely resembles notices under the Abolition of Feudal Tenure etc (Scotland) Act 2000. A completed notice might look like this:[1]

NOTICE OF PRESERVATION

Name and address of person sending notice: James Alexander Macfarlane 47 Church Lane Lanark ML11 6LH
Description of burdened property: 47A Church Lane, Lanark registered in the Land Register under title number LAN 57312.
Description of benefited property:[2] 47 Church Lane, Lanark, being the subjects described in Disposition by Andrew Rennie in favour of Catherine Anne Smith dated 9 September 1912 and recorded in the Division of the General Register of Sasines for the County of Lanark on 15 September 1912, under exception of the said subjects registered in the Land Register under title number LAN 57312.
Terms of real burdens: The real burdens set out in Disposition by Robert Campbell Wilson in favour of Norman Adams and Serena Joanna Knowles or Adams dated 12 February 1952 and registered in the said Division of the General Register of Sasines on 19 February 1952.
Explanation of why the property described as a benefited property is such a property: The property so described was the property still retained by Robert Campbell Wilson following the registration of the said Disposition in favour of Norman Adams and Serena Joanna Knowles or Adams. It is thus the benefited property by legal implication.
Service: A copy of this notice has been sent by recorded delivery on 8 April 2014 to the owner of the burdened property at 47A Church Lane, Lanark ML11 6LH.
I swear that the information contained in the notice is, to the best of my knowledge and belief, true.
Signature of person sending the notice: **Signature of notary public:** **Date:**

1 But it is always necessary to consult the statutory style and the notes for completion.

2 If the person sending the notice does not have a completed title to the benefited property, it is necessary to narrate the midcouples in a separate box. See sch 7 note 2.

The notice runs in the name of the owner of the benefited property or, if more than one, of any such owner.[1] It is not necessary that there is a title completed by registration provided that the necessary links in title are listed in an additional box.[2] The same notice can be used for more than one burden, and for more than one benefited or burdened property, so long as the burdens writ is the same.[3]

The only box likely to cause difficulty is the fifth. The Act requires that the notice 'set out the grounds, both factual and legal, for describing as a benefited property' the land so identified.[4] It is thought that there is only one 'legal' ground, namely the rule in *Mactaggart*. It is competent, but presumably unnecessary, to give the name and citation of the case;[5] the style given above simply describes the rule. The 'factual' ground is that the property in question was left behind after the burdened property was disponed and the burdens imposed.

Before the last two boxes are completed a copy of the notice must be served on the owner of the burdened property.[6] Service can be by post, by delivery, or by electronic means such as e-mail.[7] Unless the name of the owner is known it is sufficient to send the notice to the burdened property addressed to 'The Owner' or similar.[8] If the name *is* known and there is more than one owner (for example, a husband and wife owning in common), it is arguable, but not certain, that a separate copy must be served on each.[9] On service the notice must be accompanied by the explanatory note set out in schedule 7.[10] This may be reproduced at the end of the notice or, if preferred, on a separate piece of paper. The note is as follows:

Explanatory Note

This notice is sent by a person who asserts that the use of your property is affected by the real burdens whose terms are described in the notice and that that person is one of the people entitled to the benefit of the real burdens and can, if necessary, enforce them against you. In this notice your property (or some part of it) is referred to as the 'burdened property' and the property belonging to that person is referred to as the 'benefited property'.

The grounds for the assertion are given in the notice. By section 50 of the Title Conditions (Scotland) Act 2003 (asp 9) that person's rights will be lost unless this notice is registered in the Land Register or Register of Sasines by not later than 28 November 2014. Registration preserves the rights and means that the burdens can continue to be enforced by that person and by anyone succeeding as owner of that person's property.

1 TC(S)A 2003 s 50(1) ('an owner').
2 TC(S)A 2003 s 50(2)(c).
3 TC(S)A 2003 s 115(4).
4 TC(S)A 2003 s 50(2)(e).
5 D A Brand, A J M Steven and S Wortley, *Professor McDonald's Conveyancing Manual* (7th edn, 2004) para 17.12(4).
6 Unless 'not reasonably practicable to do so': see TC(S)A 2003 s 115(2).
7 TC(S)A 2003 s 124(2).
8 TC(S)A 2003 s 124(1)(b).
9 For the, perhaps comparable, position of notices under the 2000 Act, see K G C Reid, *The Abolition of Feudal Tenure in Scotland* (2003) paras 11.7 and 12.1 note 6.
10 TC(S)A 2003 s 115(2)(b).

> This notice does not require you to take any action; but if you think there is a mistake in it, or if you wish to challenge it, you are advised to contact your solicitor or other adviser. A notice can be challenged even after it has been registered.

The notice is completed by entering the details of service, and by signature before a notary public, the owner of the benefited property having sworn or affirmed that to the best of his knowledge or belief all the information contained in the notice is true.[1] The notary must also sign[2] and should also, as a matter of good practice, be named and designed.[3] Swearing or affirming a statement that is known to be false or is believed not to be true is an offence under ss 44 and 45 of the Criminal Law (Consolidation) (Scotland) Act 1995. Normally the oath must be given personally and not, for example, through a solicitor; but a company or other juristic person is represented by a person authorised to sign documents on its behalf,[4] and a person without legal capacity by an appropriate person.[5] An oath outside Scotland may be given before any person duly authorised by the country in question to administer oaths or receive affirmations.[6]

The final step is to register the notice in the Land Register or Register of Sasines. The Keeper has indicated that the land certificate need not accompany the application.[7] Section 50 requires registration against both the burdened property and the benefited property, in the usual way.[8]

Effect of notice

Registration of a notice of preservation does not create new rights, but it prevents the loss of existing rights. Even without notice, the property retains its status as a benefited property until 28 November 2014. Thereafter that status will survive only if it has been preserved by a notice registered before that day.[9]

Notices of converted servitude

There is also a second type of notice which requires brief mention.[10] One of the effects of the Title Conditions Act was the abandonment of the category of negative servitudes. Since the appointed day in 2004, all obligations in the form of restrictions have had to be created as real burdens and not as servitudes;[11] and

1 TC(S)A 2003 s 50(4).
2 TC(S)A 2003 sch 7 note 7.
3 See a note by the Keeper at (2004) 49 *Journal of the Law Society of Scotland* Nov/55. The notary is not, however, a witness, and a witness is not required: see Requirements of Writing (Scotland) Act 1995 s 6(3)(a).
4 See generally the Requirements of Writing (Scotland) Act 1995 sch 2.
5 TC(S)A 2003 s 50(5).
6 TC(S)A 2003 s 122(1) (definition of 'notary public').
7 See (2004) 49 *Journal of the Law Society of Scotland* Nov/55.
8 TC(S)A 2003 s 50(1), (3).
9 TC(S)A 2003 s 50(1).
10 See also D A Brand, A J M Steven and S Wortley, *Professor McDonald's Conveyancing Manual* (7th edn, 2004) paras 17.15 – 17.19; R Rennie, *Land Tenure in Scotland* (2004) para 11-09.
11 TC(S)A 2003 s 79.

all existing negative servitudes were automatically converted into real burdens on the appointed day.[1]

Unlike real burdens, negative servitudes were not always visible to an acquirer of the burdened property. They might be registered only against the benefited property or, in a few cases, they might not be registered at all. Section 80 of the Title Conditions Act sought to remedy the situation. Where a 'converted servitude' (ie a former servitude which was automatically converted into a real burden on the appointed day) is not currently registered or noted against the burdened property, the owner of the benefited property must register a notice of converted servitude. If this is not done by 28 November 2014 the servitude is extinguished. The form of notice is set out in schedule 9. The form and procedure are close to those already described for notices of preservation.

Happily, notices of converted servitude do not give rise to the problems of recognition which afflict notices of preservation. Either the title of a property will disclose the benefit of a (former) negative servitude or, as almost always, it will not. In the first case it is necessary to check whether the servitude is also noted in the title of the burdened property and to register a notice of converted servitude if it is not. In the second case no action is needed for, except where the servitude is not registered at all (which is so rare that it can be discounted in practice), the servitude will already be registered or noted in the title of the burdened property. Thus action is needed only in the case where one knows of the servitude from one's own title; unknown servitudes survive anyway.

A bonfire of real burdens

Ten years ago, the bonfire of real burdens that was expected on feudal abolition largely failed to materialise, mainly because neighbours tended to acquire – or, s 53 of the Title Conditions Act being fatally unclear, were thought possibly to have acquired – enforcement rights in place of feudal superiors. On 28 November 2014, however, the bonfire is likely to be for real. Thousands, or more probably tens of thousands, of burdens are today enforceable only by virtue of the rule in *Mactaggart*. Even if the rate of registration of s 50 notices increases, as surely it must, very few enforcement rights will be preserved between now and 28 November. In the sudden absence of a benefited property, the burdens will then become nullities, and the affected owners will be free to develop their properties unencumbered by real burdens.[2] It would be nice to suppose that the burdens will also disappear from the Land Register. That, however, would be unrealistic.[3] The Keeper will remove burdens on application where satisfied that they are spent and that their continued presence on the Register is an

1 TC(S)A 2003 s 80(1).
2 TC(S)A 2003 s 49(2).
3 See Title Conditions (Scotland) Act 2003 s 51, a provision which is prospectively repealed by the Land Registration etc (Scotland) Act 2012 sch 5 para 43(4).

inaccuracy.[1] Otherwise they will linger on, misleadingly and inappropriately, for the foreseeable future.

LEASEHOLD CONVERSION: ACTION NEEDED NOW

What is left for the (ex-)landlord?

Under the Long Leases (Scotland) Act 2012 the right of any tenant holding under a 'qualifying lease' will be upgraded on the 'appointed day' to the right of ownership.[2] A 'qualifying lease' is one which is granted for a period of more than 175 years (in practice, most will be much longer than this), is registered, and has an unexpired duration, immediately before the appointed day, of either 100 years (where the lease subjects are mainly a dwellinghouse) or 175 years (in other cases).[3] If more than one lease potentially qualifies in respect of any plot of land, the qualifying lease is the lowest such lease.[4] The 'appointed day' has now been fixed as Martinmas (28 November) 2015.[5]

Leasehold conversion works much like feudal abolition. The conversion itself happens automatically: on the appointed day the tenant becomes owner, and the rights of all landlords, immediate and remote (if any), are extinguished. In the discussion that follows we assume that the tenant under the qualifying lease holds directly from the owner of the land; but the same principles apply where there are intermediate landlords.

While the landlord ceases to be owner on the appointed day, he is not left bereft of all rights. Potentially the ex-landlord (as he now is) may be able to:

(i) claim a 'compensatory payment' for loss of rent;[6]
(ii) claim an 'additional payment' for loss of certain other rights such as development value;[7]
(iii) continue to act as a manager for that and other 'related' properties,[8] although only for five years after registration of the lease;[9]
(iv) continue to exercise mineral rights;[10]

1 By 28 November 2014 it may well be that the Land Registration etc (Scotland) Act 2012 has been brought into force, in which case the Keeper will be bound, under s 80 of that Act, to rectify any inaccuracy that is 'manifest'.
2 Long Leases (Scotland) Act 2012 s 4.
3 LL(S)A 2012 s 1. There are, however, some exceptions, the most important being where the annual rent is over £100.
4 LL(S)A 2012 s 3.
5 By s 70, the 'appointed day' is 'the first Martinmas occurring on or after the day 2 years after the day on which this section comes into force'. Section 70 was brought into force on 28 November 2013 by the Long Leases (Scotland) Act 2012 (Commencement No 1) Order 2013, SSI 2013/322.
6 LL(S)A 2012 ss 45–49.
7 LL(S)A 2012 ss 50–55.
8 The right to so act becomes a manager burden: see LL(S)A 2012 s 30. The equivalent provision at the time of feudal abolition was s 63(9) of the Title Conditions (Scotland) Act 2003. Where, as sometimes happens, the right to manage is held by a person other than the landlord, then it is that person who has the continuing power.
9 TC(S)A 2003 s 63(4).
10 LL(S)A 2003 s 6(5)(b). Except where they are part of the lease subjects, the minerals are excluded from leasehold conversion and will in future be held by the ex-landlord as a separate tenement.

(v) continue to exercise access rights and other rights which resemble servitudes;[1]

(vi) continue to be able to enforce such of the leasehold conditions as have been converted into real burdens;[2] and

(vii) continue to exercise sporting rights.[3]

Some of these rights come about by force of law. Others, however, require some action on the part of the landlord, typically the service of a notice on the tenant followed, in some cases, by registration. It is with the cases requiring action that this account is mainly concerned.

Of the seven items just listed, items (i) and (ii) (compensatory and additional payments) involve the service of a notice on the tenant, but as this can only be done after the appointed day there is no need to dwell on the details now. If the rent is a *cumulo* one (ie encompasses more than one lease),[4] the landlord will need to allocate it so that a fixed proportion is attached to each lease; whilst this can be done at any time before the appointed day, it can also be done after that day.[5] The one thing that does need to be done before the appointed day – indeed six months before that day – is to give notice to the tenant where the amount of compensation to be claimed is likely to exceed £500.[6] Failure to do so will cap any claim at £500.[7] Given the small amounts of rent typically due, however,[8] there will not be many cases where compensation of this amount is claimed.

Items (iii) (acting as manager), (iv) (minerals), and (v) (servitudes) occur automatically without the landlord having to do anything. Only the last of these requires further comment.[9] The subjects of the qualifying lease may be next-door or close to other property owned by the landlord – property that might be used by the landlord personally or also leased, perhaps on a qualifying lease. In cases such as this it is common for one of the landlord's properties to make use of the other for access, or pipes, and so forth, or indeed each may make use of the other. If the properties had been in separate ownership, such uses would usually have been underpinned by servitude; but with two properties owned by the same person no servitude can exist, for a person cannot be both the owner of property and also the holder of a subordinate real right in that property such as a servitude.[10] Following leasehold conversion, therefore, there would be no servitudes and hence no continuing rights to the access or the leading of pipes.[11]

1 LL(S)A 2012 s 7.
2 LL(S)A 2012 part 2.
3 LL(S)A 2012 s 8. The equivalent provision at the time of feudal abolition was s 65A of the Abolition of Feudal Tenure etc (Scotland) Act 2000.
4 LL(S)A 2012 s 38(1), (2).
5 LL(S)A 2012 s 40. Provision is also made for allocation of renewal premiums.
6 LL(S)A 2012 s 56.
7 LL(S)A 2012 s 56(4).
8 Not to mention the fact that a lease is not eligible for conversion where the rent is over £100.
9 For background, see Scottish Law Commission, Report on *Conversion of Long Leases* (Scot Law Com No 204, 2006) paras 3.34 – 3.41.
10 The principle is *res sua nemini servit*.
11 Of course there may be no such right even at the moment; the rules as to quasi-servitudes in leases are obscure.

The legislation responds to this difficulty as follows.[1] We are asked to imagine that the leases never were, that all leases and partial assignations were in fact conveyances, and that accordingly the properties were divided all along as to ownership. And having made that thought experiment, we are then to allocate to the properties such servitudes as they would have had in such a case, whether constituted expressly, by implication, or by prescription. These imagined servitudes will then spring into existence at the appointed day, once the properties in question really are held in separate ownership. So for example, if the tenant of property A took access for more than 20 years over property B (also belonging to the landlord) then, on the appointed day, a servitude by prescription would be deemed to have been constituted.

In respect of the final items – items (vi) (enforcement of leasehold conditions as real burdens) and (vii) (exercise of sporting rights) – the landlord must take certain steps before the appointed day. What these are, and the reasons for them, are considered below.

From leasehold conditions to real burdens

In the same way that ultra-long leases are quasi-feus, many of the conditions found in leases are quasi-real burdens, covering exactly the sorts of thing – maintenance, use restrictions, and so on – that one would expect to find in a feu. The policy of the legislation is that, once the lease is upgraded to ownership, the leasehold conditions should be capable of being upgraded to real burdens. But two constraints are put in place. First, the conditions must, by their nature, be the sort of thing that could be constituted as real burdens: in other words, they must conform to the rules for real burdens set out in ss 2 and 3 of the Title Conditions (Scotland) Act 2003.[2] Secondly, while the most important leasehold conditions will convert to real burdens automatically – conditions concerned with common maintenance would be an example – others will perish unless a notice is served and registered before the appointed day. There can, in other words, be both automatic conversion and conversion by notice.[3]

Automatic conversion

There are four cases of automatic conversion.[4] As no action is required by the landlord they can be dealt with quite briefly.

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1 LL(S)A 2012 s 7.

2 LL(S)A 2012 ss 10(3) (repeating the terms of TC(S)A 2003 s 2) and 11 (importing TC(S)A 2003 s 3). Section 10(5) also excludes certain conditions, such as an obligation to pay rent.

3 The most useful guide to the provisions is part 4 of the Scottish Law Commission's Report on *Conversion of Long Leases*. As the provisions are modelled on those which applied to feudal abolition, it is also of help to consult literature on that subject, such as: K G C Reid, *The Abolition of Feudal Tenure in Scotland* (2003) chs 2–6; R Rennie, *Land Tenure in Scotland* (2004) ch 3; D A Brand, A J M Steven and S Wortley, *Professor McDonald's Conveyancing Manual* (7th edn, 2004) ch 19.

4 Five if manager burdens (LL(S)A 2012 s 30), discussed above, are included.

In the first place, leasehold conditions which regulate the maintenance, management, reinstatement or use of facilities such as a private road or the roof or other common parts of a tenement are converted on the appointed day into facility burdens. Thereafter they are enforceable by the owners of those properties which the facility benefits (and is intended to benefit).[1]

Secondly, leasehold conditions which relate to the provision of services to other property – for example, for the supply of water or electricity – are converted on the appointed day into service burdens and are enforceable by the owners of the property in question.[2] Unlike facility burdens, service burdens are uncommon.

Thirdly, the Long Leases Act reproduces the controversial, and obscure, s 53 of the Title Conditions Act.[3] That means that leasehold conditions which were imposed on a group of 'related' properties under a common scheme become community burdens[4] which are mutually enforceable within the community of related properties.[5] The common scheme might have come about by a single lease followed by division of the subjects through partial assignation, or by a series of separate leases of separate subjects. As with s 53 it will not always be easy to know when properties are 'related'.

Finally, in those rare cases where a leasehold condition is expressly stated to be enforceable by the owner or tenant of some other property, the condition is converted into a real burden in favour of that property.[6]

Conversion by notice

Who can serve?

If automatic conversion is for the benefit of neighbours,[7] conversion by notice is aimed mainly at landlords (just as, in feudal abolition, it was aimed mainly at superiors). Under the legislation landlords can sometimes convert leasehold conditions into real burdens by serving and registering a notice of the appropriate kind. If there is a chain of landlords above the qualifying tenant, each landlord can serve a notice in respect of conditions in the lease for which he is the landlord.[8] It is not necessary that the landlord's title be completed by registration,[9] but if it is held as common property all of the *pro indiviso* owners must complete the notice.[10]

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1 LL(S)A 2012 s 29. The equivalent provision at the time of feudal abolition was TC(S)A 2003 s 56.
2 LL(S)A 2012 s 29(2). The equivalent provision at the time of feudal abolition was TC(S)A 2003 s 56.
3 For the difficulties with s 53 and proposals for its reform, see p 93 above.
4 For community burdens, see TC(S)A 2003 s 25.
5 LL(S)A 2012 s 31. There is no equivalent of s 52 of the TC(S)A 2003. It is in fact unclear whether tenants of different properties but holding under similar conditions have mutual rights of enforcement: see Scottish Law Commission, Report on *Conversion of Long Leases* para 4.52.
6 LL(S)A 2012 s 32.
7 Who may of course include the landlord if he owns other property.
8 Unless it is an interposed lease: see LL(S)A 2012 s 10(2)(b).
9 LL(S)A 2012 s 13(2).
10 LL(S)A 2012 s 13(5)(a).

As well as landlords, co-tenants may also be in a position to serve a notice. This occurs where (i) a lease has been assigned in part, so that there are now two (or more) tenants in place of one, each holding in respect of a distinct part of the leasehold subjects, and (ii) conditions were imposed, either in the assignation itself or in a deed of conditions granted in association with the assignation. Under current law such conditions can probably be enforced by the cedent and his successors as tenants of the land that was retained. We say 'probably' because there is no direct authority to that effect, although there is a clear analogy with the rule in *Mactaggart*[1] in the case of real burdens.[2] At any rate the position is put beyond doubt by the legislation. At least for the purposes of eligibility to serve a notice, the tenant[3] of the retained land is taken to have title to enforce any conditions in the assignation (or deed of conditions).[4] This means that preservation notices can be served, not only by landlords, but by a limited class of tenants as well. For ease of exposition, however, we will concentrate on the position of landlords, and mention tenants only where the rules are different.

Types of notice

On the appointed day the landlord's interest is extinguished. Hence if leasehold conditions are to be converted into real burdens, enforceable by the (ex-) landlord, only two solutions are possible. One is that a benefited property must be found, which in practice can only mean some other property in the neighbourhood owned by the landlord. The other is that the conversion must be into a personal real burden (ie a real burden without a benefited property).[5] The legislation allows for both possibilities, ie conversion into an ordinary or 'praedial' real burden and conversion into a 'personal' real burden, and provides different notices for each.

Conversion into a praedial real burden

To convert a leasehold condition into an ordinary (ie 'praedial') real burden, the landlord must serve and register a notice, under s 14 of the Act, nominating a benefited property.[6] This, of course, must be property which the landlord owns[7] (but not including property which he will soon lose because it is subject to a qualifying lease).[8] Furthermore, and following the rule which applied in feudal abolition, the property must have on it a permanent

1 *J A Mactaggart & Co v Harrower* (1906) 8 F 1101.
2 For the rule in *Mactaggart* see p 133 above.
3 And any subtenant.
4 LL(S)A 2012 s 13(3). Contrary to the rule for landlords, any of the *pro indiviso* tenants can serve a notice: see s 13(5)(b).
5 For personal real burdens, see TC(S)A 2003 s 1(3) and part 3.
6 The equivalent provision for feudal abolition was the Abolition of Feudal Tenure etc (Scotland) Act 2000 s 18.
7 Or, if the landlord is himself a tenant under a qualifying lease of the nominated property, will own on the appointed day.
8 LL(S)A 2012 s 14(5).

building lying within 100 metres of the 'qualifying land' (ie the subjects of the qualifying lease and which, after the appointed day, will be the burdened property) and which is used wholly or mainly as a place of human habitation or resort.[1]

If the experience with superiors is any guide, not many landlords will be able to satisfy the 100-metres requirement or, if they can, be willing to go to the trouble of registering the necessary notice. If, however, a notice is served and registered, the effect, on the appointed day, is that the conditions listed in the notice are converted into real burdens in which the burdened property is the qualifying land (now, of course, owned by the former tenant) and the benefited property is the land so nominated in the notice.[2] The end result is thus business as usual: the same enforcer (the former landlord) can enforce the same conditions (now recast as real burdens) against the same obligant (the former tenant and now owner of the leasehold subjects).

The requirement of a building within 100 metres is not an absolute one. There are four types of case where it does not apply. One is in respect of rights of pre-emption or redemption.[3] Another is where the nominated property comprises minerals, salmon fishings, or some other incorporeal property, and it is apparent that the condition was intended for the benefit of such property.[4] A third is where the landlord and tenant come to an agreement as to the continuation of leasehold conditions, the agreement being preceded by the service of a notice on the tenant under s 17.[5] Finally, the Lands Tribunal has power to override the 100-metres requirement where satisfied that the extinction of the condition would cause material detriment to the value or enjoyment of the nominated property.[6] The last date for applications to the Tribunal is 21 February 2015.[7]

Conversion into personal real burdens

Landlords, like superiors before them, have also the possibility of converting conditions into personal real burdens. But as such burdens are so narrowly defined both by scope and, in many cases, by eligible holder, it will not usually be possible to find a leasehold condition which matches the definition.

1 LL(S)A 2012 s 14(1)(a), (4)(a). For the meaning of a place of habitation and resort, see *SQ1 Ltd v Earl of Hopetoun* 2 Oct 2007, Lands Tribunal, discussed in *Conveyancing 2007* pp 147–48. If the notice is served by a tenant, the land which is nominated must be the land which was retained following the partial assignation, ie the land to which enforcement rights attach under s 13(3): see s 14(6). Such a tenant still has to comply with the 100-metres rule, unlike his counterpart in the rule in *Mactaggart*: see TC(S)A 2003 s 50, and p 133 above.

2 LL(S)A 2012 s 16.

3 LL(S)A 2012 s 14(4)(b).

4 LL(S)A 2012 s 14(4)(c).

5 See also ss 18–20. Why a notice should be necessary is unclear, as indeed was unclear in relation to the equivalent provision in the AFT(S)A 2000 (s 19).

6 LL(S)A 2012 s 21. If the Tribunal exercises its power, the landlord must still serve and register a notice under s 14.

7 LL(S)A 2012 s 21(4)(b).

Most but not quite all[1] of the existing types of personal real burdens are available to the landlord:[2] personal pre-emption burdens, personal redemption burdens, economic development burdens, health care burdens, climate change burdens, and conservation burdens. Only the first two can be held without restriction; in respect of the others, the holder – and therefore the landlord sending the notice[3] – is confined to, for example, local authorities, Scottish Ministers, or conservation bodies. The procedure is much as for conversion into praedial real burdens: after service on the tenant, the landlord registers the notice in the Land or Sasine Register. On the appointed day the condition is then converted into a personal real burden in favour of the former landlord.

Form of notice

Notices must be in the form prescribed by the Long Leases (Prescribed Form of Notices etc) (Scotland) Regulations 2014.[4] Each notice has its own form, although there is much common ground. We offer below a completed version of what is likely to be the commonest type of notice:[5] a s 14 notice to convert leasehold conditions into praedial real burdens by nomination of a benefited property.[6] We would stress, however, that what follows is based on our own interpretation of the rules, and that each form contains notes for completion which need to be consulted, partly as a guide to the wording to be used and partly because they cover a number of variants. Strict compliance with the statutory form is obviously desirable, although a modest amount of latitude may be allowed.[7]

1 The omissions are maritime burdens and rural housing burdens. As already mentioned, the conversion to manager burdens occurs automatically under s 30.

2 LL(S)A 2012 ss 23–28. The equivalent provisions in the AFT(S)A 2000 are ss 18A, 18B, 18C, 27 and 27A.

3 It is, however, possible under s 28 for an ordinary landlord to convert a condition into a conservation burden which is to be held by a third-party conservation body.

4 SSI 2014/9.

5 For others, assistance may be found in the completions for the feudal system notices given at pp 285–303 of K G C Reid, *The Abolition of Feudal Tenure in Scotland* (2003).

6 Long Leases (Prescribed Form of Notices etc) (Scotland) Regulations 2014 sch 1 form 2. In the case of feudal abolition almost 2,000 equivalent notices (under AFT(S)A 2000 s 18) were registered as compared to 642 in respect of personal pre-emption or redemption burdens, 268 in respect of conservation burdens, and small handfuls in respect of the other notices. The full figures can be found in *Conveyancing 2004* pp 95–96.

7 See *SQ1 Ltd v Earl of Hopetoun* 2 October 2007, Lands Tribunal, discussed in *Conveyancing 2007* pp 148–50. This was a decision on a notice based on s 18 of the AFT(S)A 2000. It may or may not be significant that, whereas the 2000 Act said that a notice should be 'in, or as nearly as may be' in the prescribed form, the 2012 Act says that a notice 'must be' in the prescribed form.

NOTICE FOR CONVERSION OF QUALIFYING CONDITION BY NOMINATION OF BENEFITED PROPERTY

Name and address of person sending notice:

James Alexander Macfarlane
47 Church Lane
Lanark ML11 6LH

Description of land nominated as burdened property:

47A Church Lane, Lanark registered in the Land Register under title number LAN 57312.

Description of land nominated as benefited property:

47 Church Lane, Lanark, being the subjects described in Disposition by Andrew Rennie in favour of Catherine Anne Smith dated 9 September 1912 and recorded in the Division of the General Register of Sasines for the County of Lanark on 15 September 1912, under exception of the said subjects registered in the Land Register under title number LAN 57312.

Links in title:

None

Specification of condition met:

The benefited property has on it a house at 47 Church Lane, Lanark which is within 100 metres of the burdened property.

Terms of qualifying conditions:

Condition 3-12 and 15-16 set out in Lease by James Macpherson in favour of Alexander Murray dated 12 February 1831 and recorded in the said Division of the General Register of Sasines on 19 June 1859.

Any counter-obligation:

None.

Title to enforce the qualifying conditions:
As the landlord of the person who is subject to the qualifying conditions, conform to Disposition by Robert Campbell Wilson in favour of James Alexander Macfarlane dated 4 September 1980 and recorded in the said Division of the General Register of Sasines on 30 September 1980.

Service:

A copy of this notice has been sent, in accordance with section 75(2) of the Long Leases (Scotland) Act 2012, by recorded delivery on 8 July 2014 to the tenant under the qualifying lease at 47A Church Lane, Lanark ML11 6LH.

I affirm that the information contained in this notice is, to the best of my knowledge and belief, true.

Signature of person sending notice:

Signature of notary public:

Date:

Procedure

By and large a common procedure applies for all types of notice, although of course it will always be prudent to check the legislative provision in question.

As can be seen, the last two boxes in the form cannot be completed until the notice has been served on the tenant. Service, which is mandatory except where not reasonably practicable, is by ordinary post, registered post, or recorded delivery.[1] Unless the name of the tenant is known it is sufficient to send the notice to the tenanted property addressed to 'The Tenant'.[2] If the name *is* known and there is more than one tenant, it is arguable, but not certain, that a separate copy must be served on each.[3] On service the notice must be accompanied by the explanatory note set out in prescribed form.[4] This may be reproduced at the end of the notice or, if preferred, on a separate piece of paper. The explanatory note for a s 14 notice reads:

Explanatory note for tenant under the qualifying lease

When it comes fully into force the Long Leases (Scotland) Act 2012 will convert certain very long leases into ownership. The conversion will occur automatically, and all tenants under such leases will then become owners of the property. This notice is being sent to you as a person who is believed to be such a tenant.

The notice is sent by your landlord or by someone else who claims to be able to enforce the burdens and conditions in the title to your property. That person is also a neighbour. In this notice your property (or some part of it) is referred to as the 'burdened property' and neighbouring property belonging to the person sending this notice is referred to as the 'benefited property'.

The person sending this notice asserts that the use of your property is subject to the 'qualifying conditions' listed in the notice. By this notice that person claims the right to continue to enforce these qualifying conditions even after conversion of the lease to ownership, but as owner (or tenant) of the benefited (ie neighbouring) property. In order to take effect the notice must be registered in the Land Register of Scotland or Register of Sasines under section 14(2) of the Long Leases (Scotland) Act 2012. Registration preserves the qualifying conditions and means that they can continue to be enforced by the person and by that person's successors as owner (or tenant) of the benefited property.

Normally, for the notice to be valid, there must, on the benefited property, be a permanent building which is within 100 metres of the burdened property. That building must be in use as a place of human habitation or of human resort. However, the presence of a building is not required if the burden gives a right of pre-emption or redemption, or if the benefited property comprises, minerals, salmon fishings or some other incorporated property (and the qualifying condition was created for the benefit of that land). Further, the Lands Tribunal for Scotland is able to dispense with these conditions if the extinction of the qualifying condition would cause material

1 LL(S)A 2012 s 75(2). The options for posting can be found in the notes for completion of the notice.
2 LL(S)A 2012 s 75(2).
3 For the, perhaps comparable, position of notices under the 2000 Act, see K G C Reid, *The Abolition of Feudal Tenure in Scotland* (2003) paras 11.7 and 12.1 note 6.
4 LL(S)A 2012 s 75(2)(b).

detriment to the value or enjoyment of the ownership of the land by the person sending the notice.

This notice does not require you to take any action; but if you think that there is a mistake in it, or if you wish to challenge it, you are advised to contact your solicitor or other adviser.

Service having been carried out, the details can be entered into the appropriate box and the notice signed. In the case of some notices – but not those concerned with personal real burdens (other than personal pre-emption or redemption rights)[1] – the signature must be in the presence of a notary public, the landlord having sworn or affirmed that to the best of his knowledge or belief all the information contained in the notice is true.[2] The notary must also then sign and should also, as a matter of good practice, be named and designed.[3] Swearing or affirming a statement that is known to be false or is believed not to be true is an offence under ss 44 and 45 of the Criminal Law (Consolidation) (Scotland) Act 1995. Normally the oath must be given personally and not, for example, through a solicitor;[4] but a company or other juristic person is represented by a person authorised to sign documents on its behalf,[5] and a person without legal capacity by an appropriate person.[6] An oath outside Scotland may be given before any person duly authorised by the country in question to administer oaths or receive affirmations.[7]

The final step is to register the notice, in the Land Register or Register of Sasines. Where conversion is to a praedial real burden, registration must be against the (nominated) benefited property as well as against the lease subjects which are to be burdened property.[8]

Other cases where notices are needed

The legislation makes provision for a small number of other notices which, if they are to be used at all, must be used before the appointed day (28 November 2015).

Reserved sporting rights

Reserved sporting rights are treated in much the same way as leasehold conditions. Thus, where a right of game or fishing[9] is reserved from a qualifying lease, the landlord will lose the right unless a notice in the prescribed form is

1 The exemption is presumably because the signatories are usually public bodies.
2 See eg LL(S)A 2012 s 15(3).
3 See a note by the Keeper at (2004) 49 *Journal of the Law Society of Scotland* Nov/55. The notary is not, however, a witness, and a witness is not required: see Requirements of Writing (Scotland) Act 1995 s 6(3)(a).
4 This is set out in the notes for completion of the notice.
5 See eg LL(S)A 2012 s 15(4)(b) and, more generally, the Requirements of Writing (Scotland) Act 1995 sch 2.
6 See eg LL(S) A 2012 s 15(4)(a).
7 This is set out in the notes for completion of the notice.
8 See eg LL(S)A 2012 s 15(1), (2).
9 Both are defined: see s LL(S)A 2012 s 8(7)(b), (c).

served and registered before the appointed day.[1] The effect of a notice is to convert the right into a separate tenement owned by the (former) landlord.[2]

Opting out of conversion

Tenants are able to opt out of conversion by registration of an exemption notice not later than two months before the appointed day (ie by 28 September 2015).[3] Why they might want to do so is not clear. At any rate they, or a successor, can change their minds by registration of a recall notice; conversion of the lease to ownership will then take place on the first term day occurring more than six months after the date of registration (assuming of course that the lease continues to fulfil the statutory requirements for conversion, including the requirement as to unexpired duration).[4]

There is a general exemption for leases where the annual rent is more than £100[5] and, to cover cases where the rent is uncertain or variable,[6] landlords can secure exemption by registering an agreement with their tenants that the rent is more than £100[7] or, failing agreement, apply to the Lands Tribunal for an order to that effect.[8] Tribunal applications must be made by 21 February 2015, and the Tribunal order registered by 28 September 2015. Similarly, any agreement with a tenant must also be registered by 28 September 2015.

What should be done now: in summary

The following is a list of notices which, if they are to be served (and in many cases registered) at all must be served (and registered) before the appointed day:[9]

- conversion of leasehold conditions to praedial real burdens by nomination of a benefited property;[10]
- conversion of leasehold conditions to praedial real burdens by agreement;[11]
- conversion of a leasehold pre-emption or redemption to a personal pre-emption or redemption burden;[12]
- conversion of leasehold conditions to economic development burdens;[13]
- conversion of leasehold conditions to health care burdens;[14]
- conversion of leasehold conditions to climate change burdens;[15]

1 LL(S)A 2012 s 8. The equivalent provision in respect of feudal abolition was AFT(S)A 2000 s 65A.
2 LL(S)A 2012 s 8(7)(a).
3 LL(S)A 2012 s 63.
4 LL(S)A 2012 s 67.
5 LL(S)A 2012 s 1(4)(a).
6 A variable rent is treated as a nil rent for the purposes of s 1(4)(a): see s 2(6).
7 Or, in the case of variable rents, that it was over £100 at any point during the five years prior to Royal Assent (7 August 2012).
8 LL(S)A 2012 ss 64, 69.
9 See also the time line on p 64.
10 LLS(S)A 2012 s 14.
11 LL(S)A 2012 s 17.
12 LL(S)A 2012 s 23.
13 LL(S)A 2012 s 24.
14 LL(S)A 2012 s 25.
15 LL(S)A 2012 s 26.

- conversion of leasehold conditions to conservation burdens;[1]
- conversion of reserved sporting rights to separate tenements;[2]
- advance notice of a claim for compensation in excess of £500 (not later than 28 May 2015);[3]
- exemption notice in respect of conversion (registration being required by 28 September 2015);[4]
- agreement or Lands Tribunal order to the effect that the annual rent exceeds £100 (registration being required by 28 September 2015).[5]

In addition a landlord[6] wishing to apply to the Lands Tribunal for exemption from the 100-metres rule or for an order that the annual rent is more than £100 must do so by not later than 21 February 2015.[7]

GREEN PROPERTY LAW

The Green Deal

Introduction

Green property law continued to evolve in 2013 with the arrival of the Green Deal. The idea is that energy-saving home improvements can be carried out without any initial capital cost to the owner, the improvements being paid for over the years, with (so the theory goes) the annual savings in energy bills being greater than the annual payments.[8] The annual payments are made by an increment to the electricity bill. Of course, owners can carry out energy-efficiency improvements anyway, and often do so, either from savings or from borrowings, but the scheme is targeted at those who are unwilling or unable to go down either of those conventional routes.

The scheme,[9] which went live in January 2013, must have absorbed a good deal of public money, of which one indication is the vast and complex body

1 LL(S)A 2012 ss 27, 28.
2 LL(S)A 2012 s 8.
3 LL(S)A 2012 s 56.
4 LL(S)A 2012 s 63.
5 LL(S)A 2012 s 64.
6 Or a tenant entitled to enforce a leasehold condition.
7 LL(S)A 2012 ss 21(4)(b), 69(4)(b).
8 In the jargon this is the 'golden rule'. Its status is that of a prediction. If it turns out to be incorrect – payment liability proving greater than savings – that is bad luck, but there is no comeback for the owner, unless there has been actionable default in carrying out the assessment, or in carrying out the work itself. While we have no technical knowledge of this area whatsoever, we note that there is currently widespread scepticism about the 'golden rule' – in other words, many people think that Green Deal plans will often end up costing more than they save.
9 See www.gov.uk/government/collections/green-deal-quick-guides for a collection of seventeen UK Government guides to various aspects of the Green Deal. These are, however, aimed at 'householders, owners, tenants and landlords' rather than conveyancers. A valuable, anonymous, guide aimed at Scottish conveyancers has been published online: *The Green Deal Loan for Scottish Property Lawyers* (2013) available at http://bigonit.com/index.php?option=com_content&view=article&id=50&Itemid=28. Another useful resource is the website of the Green Deal ombudsman: www.ombudsman-services.org/green-deal.html.

of legislation.[1] Despite the hype and fanfare, the take-up thus far has been minimal.[2]

Quasi-feuduty

The scheme is relevant to conveyancers because the payment liability on a Green Deal plan[3] transmits with the property, and because the payment liability is likely to take many years to discharge – as much as 20 years or even more. During that time it is likely that the property will change hands, perhaps more than once. The payment liability is rather like a temporary feuduty or ground annual. But to be precise, the liability follows not the owner of the property, but the electricity-bill payer. Usually these are the same, but not always, as where property is rented. For concision we refer simply to 'owners'.

Encumbrances affecting a property can normally be discovered from the registers or from property enquiry certificates. Neither is true for Green Deal liability. Instead there is a 'disclosure' system: the seller must tell the buyer. That sounds simple but is not: the statutory provisions are extensive and complex.

Disclosure and acknowledgement

The outline rules are set out ss 12–16 of the Energy Act 2011, and the details in a sequence of statutory instruments.[4] The Energy Performance Certificate must contain information about the Green Deal plan.[5] Not only must the seller (or other granter) disclose, but the buyer (or other grantee) must acknowledge. The focus in the following account is on sale, as opposed to other transactions such as leases or non-sale transfers.

The disclosure has to happen early in the sale process. Section 12 of the 2011 Act says that the disclosure must be made to any 'prospective buyer'. Furthermore:

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1 The legislation, both primary and secondary, is shared with England and Wales although, as we will see, there is one separate statutory instrument for Scotland. Moreover, the energy performance legislation, which now has a tie-in with the Green Deal, is separate in Scotland: see the Energy Performance of Buildings (Scotland) Regulations 2008, SSI 2008/309; for amendments see p 58 above. The technical quality of the Green Deal legislation is to be regretted: labyrinthine, prolix, and impenetrable.

2 For recent figures see *Green Deal and Energy Company Obligation (ECO): Monthly Statistics (December 2013)*, available at www.gov.uk/government/publications/green-deal-and-energy-company-obligation-eco-monthly-statistics-december-2013--2.

3 This term is defined in s 1 of the Energy Act 2011.

4 Green Deal (Disclosure) Regulations 2012, SI 2012/1660; Green Deal Framework (Disclosure, Acknowledgment, Redress etc) Regulations 2012, SI 2012/2079; Green Deal (Acknowledgment) (Scotland) Regulations 2012, SSI 2012/214. For the most part the provisions came into force on 28 January 2013. The second of these (which is by far the longest) is amended by the Green Deal Framework (Disclosure, Acknowledgment, Redress etc) (Amendment) Regulations 2012, SI 2012/3021, and the Green Deal Framework (Disclosure, Acknowledgment, Redress etc) (Amendment) Regulations 2013, SI 2013/139.

5 Energy Performance of Buildings (Scotland) Regulations, SSI 2008/309 reg 6 (1A), as inserted by the Energy Performance of Buildings (Scotland) Amendment Regulations 2013, SSI 2013/12: 'Where the building or building unit to which the energy performance certificate relates is a green deal property the energy performance certificate must (in addition to the information specified in paragraph (1)(a) to (d)) contain a statement that green deal information relating to that building or building unit is contained in the recommendations report.'

A person becomes a prospective buyer … when the person –

(a) requests any information about the property from the seller … for the purpose of deciding whether to buy … the property,
(b) makes a request to view the property for the purpose mentioned in paragraph (a), or
(c) makes an offer, whether oral or written, to buy … the property.

The disclosure takes the form of giving a copy of 'the document',[1] by which is meant 'a document containing … information in connection with the plan'.[2] The Green Deal (Disclosure) Regulations 2012 have bafflingly complex provisions which seem to mean that disclosure is to be made at the earliest of (i) when the buyer views the property or (ii) notes interest or (iii) offers.[3]

Disclosure by the seller is not enough. There must also be acknowledgement by the buyer, s 14 of the 2011 Act saying that 'the seller … must secure that the contract for sale … includes an acknowledgment by the buyer … that the bill payer at the property is liable to make payments under the green deal plan and that certain terms of that plan are binding on the bill payer'. So the acknowledgement must be made in the missives[4] (or, in non-sale transfers, in the disposition)[5] and, furthermore, must follow the form set out in the Green Deal (Acknowledgment) (Scotland) Regulations 2012. In fact there are two forms, one for the case where the Green Deal plan has early-repayment provisions, and one for where it does not. The two forms are as follows:

Form 1: Green Deal plan with early-repayment term

Acknowledgment of green deal plan

[I/We]*, [*Insert name and address of person[s]* giving acknowledgment*] acknowledge[s]* that:

(a) a green deal plan dated [*insert date*] with reference number [*insert reference number*] has been entered into for [*insert description of green deal property*] ('the property'); and
(b) for such time as [I am/we are]* the bill payer[s]* at the property, [I/we]* will be:
    (i) liable to make payments under the green deal plan; and
    (ii) bound by the terms of the green deal plan which bind [a]* bill payer[s]* at the property.

1 Energy Act 2011 s 12(2).
2 EA 2011 s 8(4). This should include what is formally called the 'Recommendations Report' – in practice more commonly referred to as the 'Green Deal Assessment' or 'Advice Report': see the Energy Performance of Buildings (Scotland) Amendment Regulations 2013 discussed at p 58 above.
3 See reg 4, though all those who have attempted to read it in full have died before reaching the end.
4 As concluded. It does not have to be in the offer. Indeed, usually it will not be in the offer, for the practice, as developed during 2013, has been that offers generally have a clause saying that the property is not subject to the Green Deal: see below.
5 Green Deal Framework (Disclosure, Acknowledgment, Redress etc) Regulations 2012 reg 46. If there is a prescribed form we are unaware of it.

[I/We]* further acknowledge that, when [I/we]* have ceased to be the bill payer[s]* at the property, [I/we]* will continue to be bound by the term[s]* in the green deal plan which enable[s]* the green deal provider to require early repayment of the amount outstanding under the green deal plan (see note 2).

(Note 1: A person will be a bill payer if they are:

(a) liable to pay the electricity bill at the property; or

(b) made the bill payer under regulation 6 of the Green Deal Framework (Disclosure, Acknowledgment, Redress etc) Regulations 2012. That regulation applies where there is no supply of electricity to the property and applies to those who are entitled to sell such a property or those who are tenants under a registrable lease at such a property.

Note 2: See regulation 38 of the Green Deal Framework (Disclosure, Acknowledgment, Redress etc) Regulations 2012 for the circumstances when a green deal plan may allow a green deal provider to require early repayment of credit, including from a person who used to be a bill payer at the property.)

[Signed……..…..[*Insert signature of person[s]* giving the acknowledgment*]

[Dated……..…..[*Insert date acknowledgment is given*].

* Delete as appropriate.

Form 2: Green Deal plan without early-repayment term

Acknowledgment of green deal plan

[I/we]*, [*Insert name and address of person[s]* giving acknowledgment*]
acknowledge[s]* that:

(a) a green deal plan dated [*insert date*] with reference number [*insert reference number*] has been entered into for [*insert description of green deal property*] ('the property'); and

(b) for such time as [I am/we are]* the bill payer[s]* at the property, [I/we]* will be:

(i) liable to make payments under the green deal plan; and

(ii) bound by the terms of the green deal plan which bind [a]* bill payer[s]* at the property.

(Note: A person will be a bill payer if they are:

(a) liable to pay the electricity bill at the property; or

(b) made the bill payer under regulation 6 of the Green Deal Framework (Disclosure, Acknowledgment, Redress etc) Regulations 2012. That regulation applies where there is no supply of electricity to the property and applies to those who are entitled to sell such a property or those who are tenants under a registrable lease at such a property.)

[Signed……..[*Insert signature of person[s]* giving the acknowledgment*]

[Dated……..[*Insert date acknowledgment is given*]

* Delete as appropriate.

Must the *whole* form, including notes, be in the missives? That seems to be what the Regulations require.[1] Must the signature be personally by the buyer, or could it be by the buyer's law agents? The Regulations are silent about this, and also about complex cases such as where property is being bought by someone acting under power of attorney, or by a guardian for an incapax. We interpret the silence on these issues as meaning that the general law applies, which is to say that the signature does not have to be personal but can be by a person who has lawful authority to act on behalf of the buyer. Given that the acknowledgement is to be part of the missives, it would be odd if the ordinary rules as to who can sign missives were to be changed.

Disclosure to heritable creditors?

Disclosure is made to the buyer. The legislation says nothing about disclosure by the buyer to heritable creditors. The CML *Handbook for Scotland* was revised in July 2013 to include a new para 5.1.1: 'Check part 2 to see whether we require you to disclose the details of any existing Green Deal Plan(s) on a property.'

Consequences of non-disclosure/acknowledgement

What happens if the disclosure/acknowledgement provisions are not complied with? This could occur by simple inadvertence. There will also be cases of sales by executors, trustees in sequestration, heritable creditors, guardians, and so on, where the seller has no personal knowledge. Concerns have also been voiced that some sellers may deliberately not disclose the existence of a Green Deal plan. The legislation has provisions dealing with non-disclosure on the part of the seller (whom the legislation calls the 'notifier' though perhaps a more accurate term in this context would have been the 'non-notifier'). In a nutshell, the buyer is absolved of Green Deal payment liability, and that liability falls on the seller.[2]

Acting for the seller

From the standpoint of the conveyancer acting for a seller, it will now presumably be necessary to check with the seller whether there is a Green Deal plan in force. If so, it should be in the sales particulars. Thereafter, as indicated above, it will be necessary to ensure that the formal acknowledgement enters the missives, which may happen at the stage of the qualified acceptance. The alternative approach would be to arrange to buy out the plan, on the basis that this would make the property more marketable. Indeed, it may be (see next paragraph) that buyers are simply not going to accept properties that are subject to the Green Deal, in

1 It is true that the acknowledgement only has to be 'substantially the same' as the prescribed form: see regs 3(2) and 4(2). But this latitude probably does not extend to omission of the notes.

2 EA s 16; Green Deal Framework (Disclosure, Acknowledgment, Redress etc) Regulations 2012 reg 66. The definition of 'breach' (reg 62) is, however, quite complex and perhaps open to differing interpretations. For the meanings of the terms used in reg 62 see reg 51.

which case buying out the plan is going to be the only course of action.[1] Finally there is the problem of the seller (executors etc – see the previous paragraph) who may not know whether there is a plan. Information can be obtained from the electricity supplier, but it would be a nuisance to have to seek that given that – at present at least – Green Deal plans are so rare.

Acting for the buyer

Not only is the Green Deal proving (so far) to be unpopular with house owners, but it is also looking as if it will prove unpopular with buyers, because although energy efficiency is usually an attraction to buyers, an obligation to pay quasi-feuduty for years into the future is definitely not.[2] The latest edition of the Combined Standard Clauses has this clause: 'The Property is not subject to a green deal plan as defined in s 1 of the Energy Act 2011.'[3] Perhaps this is merely a 'flushing out information' provision, but of course sellers are bound to provide this information anyway, at the earliest stage (see above), and this clause may reflect the actual wishes of buying clients.[4]

Solar panels

Solar panels may be part of Green Deal work, though usually they are not. Whether they are or not, they raise issues about title to the panels themselves, about the contracts involved and about the feed-in tariff. Thus far it seems that standard offers do not deal with solar panels.

Two useful information sources for the Scottish solicitor are (i) an article, written in large part by MacRoberts LLP and Brodies LLP, on the website of GreenEnergyNet,[5] and (ii) an article by Ken Swinton in the *Scottish Law Gazette*.[6] One point on which a consensus is perhaps emerging is that solar panels accede to the roof, and so become part of the heritable property, though it should be stressed that as yet the matter has not received judicial attention. Of course, the fact that panels have acceded does not prevent missives from providing that the seller can remove them, though such removal may not make financial sense for a seller.

One matter discussed in Ken Swinton's article is the 'rent-a-roof' system whereby a house-owner grants a long lease of the roof (and usually the airspace

1 At the level of pure economic theory this should not matter much: a buyer who is offering for a cheaper-to-heat property will in principle be willing to pay a higher price, and the extra slice of price should, in economic theory, be roughly equal to the cost of buying out the plan. But even if that is true, there will still be the hassle factor.

2 See eg a survey by *Which?*: www.which.co.uk/news/2013/05/home-buyers-wary-of-green-deal-319569/. This survey received wide publicity, and may itself prove to be a causative factor: if people look around them and see others wary of buying a property subject to a Green Deal plan, they are wary themselves.

3 Clause 27(a). The same has been done by the Property Standardisation Group: see eg clause 11.4 of the 'offer to sell – vacant possession' at www.psglegal.co.uk/offer_to_sell.php.

4 'Green Deal Plan? Nein Danke!'

5 www.greenenergynet.com/businesses/articles/independent-guide-selling-your-house-solar-pv.

6 K Swinton, 'Perils of solar panels' (2013) 81 *Scottish Law Gazette* 41.

too) to a company which installs solar panels (without charge to the owner) and pays a nominal rent plus other benefits to the owner. These leases are typically for 25 years.[1] In England and Wales such leases are accepted for registration by HM Land Registry. Swinton argues that leases of this kind are incompetent under Scots law, and that accordingly any such purported lease could not be registered in the Land or Sasine Register. The Keeper has recently set out her policy on such cases, and it appears that such leases will be accepted for registration.[2] Nevertheless in our view Swinton's conclusion is correct.

A 'rent-a-roof' agreement can be valid at a purely contractual level. But could it be a lease? A contract is not a lease solely because it uses the word 'lease': the requirements for the existence of a lease must be satisfied. A lease is a contract whereby the landlord gives possession of land to the tenant and in return the tenant pays rent to the landlord. The company does not have possession of the roof merely because there are panels on it.[3] Nor can mere words on paper constitute possession: possession is a *fact*. In fact, possession of the roof remains with the owner, and that is so regardless of whether the panels belong to the company or, by accession, to the owner. It is also doubtful whether the panels can be regarded as 'land'. Unless they accede to the roof, they remain moveable property; but even if they do accede, as seems likely, and so are heritable, they seem inseparable from the roof and not a separate tenement of the kind that could be made the subject of a lease.[4]

If this view is correct,[5] then (i) the Keeper is bound to reject applications for the registration of such 'leases' and (ii) any such 'leases' of roofs that may be accepted by the Keeper are nullities.[6]

DECISION-MAKING IN TENEMENTS

Some background

That every tenement should have a management scheme was one of the key purposes of the Tenements (Scotland) Act 2004. For those tenements whose titles were silent on such matters – typically those from the Victorian era or earlier – a new statutory scheme, the Tenement Management Scheme ('TMS'),

1 An example can be found at http://sunhive.com/the-contracts-to-rent-your-roof-for-free-solar/rent-your-solar-panel-roof-lease-agreement/. This is for 25 years plus one month. The rent is 'a peppercorn per annum (if demanded)'.

2 www.ros.gov.uk/public/about_us/foi/manuals/legal/text/ch19~1.htm.

3 The standard view is that possession must be *exclusive* for a contract to count as a lease. Whilst this view has occasionally been questioned (for discussion see A McAllister, *Scottish Law of Leases* (4th edn, 2013) ch 2), in a 'rent-a-roof' agreement, it is hard to see that the 'tenant' has possession of *any* kind.

4 K G C Reid, *The Law of Property in Scotland* (1996) para 212; *Compugraphics International Ltd v Nikolic* [2011] CSIH 34, 2011 SC 744 at para 44.

5 We mention here only the one argument, namely that a rent-a-roof contract is not a lease. For other arguments, see Swinton's article.

6 In such a case the Keeper's 'Midas touch' would not apply. See Land Registration (Scotland) Act 1979 s 3(1): 'insofar as the right … is capable, under any enactment or rule of law, of being vested as a real right …'

was supplied.[1] For tenements where the titles made at least some provision for management, however rudimentary, the title provisions were allowed to rule, but with the TMS filling in any gaps.[2] Today, therefore, the TMS applies to virtually all tenements. Sometimes it applies in its entirety; more often, it is a question of some only of the rules applying, so that the TMS has to be read together with the title deeds. The only cases where the TMS can be ignored altogether are those rare tenements in which the (much more sophisticated) Development Management Scheme has been adopted,[3] or where the titles are so comprehensive as to cover everything that is in the TMS.

Central to management is the manner in which decisions – what the TMS calls 'scheme decisions' – are made for the tenement.[4] The default procedure in TMS rule 2 is deliberately undemanding and flexible. Decisions are taken by simple majority. Everyone must be consulted, but the necessary votes can be assembled in any way the owners choose, for example by e-mail, or by knocking on individual doors. If a meeting is held – and there is no requirement that it should be – then 48 hours' notice is given. Once a decision is taken, it must be communicated to all of the owners.

Of course, being a default rule, rule 2 of the TMS applies only where there is no provision for decision-making in the titles.[5] Where, therefore, the titles lay down a procedure, that procedure must be followed, and rule 2 has no application. Typically, any procedure laid down in the titles will be more complex than the rule 2 procedure. So in the new case of *Garvie v Wallace*,[6] for example, decisions required a meeting of owners which itself required the giving of 14 days' notice. The relevant provision in the deed of conditions read:[7]

> Any one of the flat proprietors shall be entitled at any time to convene a meeting of all the flat proprietors after not less than 14 days notice in writing being given and it shall be competent at any such meeting by a majority of these present, …
>
> (a) to order to be executed any repairs, renewals, painting or redecoration of the common subjects; …

There is, of course, something to be said for the greater formality of procedure found in many title deeds. It promotes certainty, for example, as well as properly focusing the minds of those whose views are being canvassed. But it also runs the risk of not being complied with. That was the problem in *Garvie v Wallace*.

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1 Set out in sch 1 to the Tenements (Scotland) Act 2004.
2 T(S)A 2004 s 4.
3 T(S)A 2004 s 4(2). For the development management scheme, see G L Gretton and K G C Reid, *Conveyancing* (4th edn, 2011) paras 15-08 ff. The scheme itself is set out in the Title Conditions (Scotland) Act 2003 (Development Management Scheme) Order 2009, SI 2009/729.
4 TMS r 1.4. A decision is a 'scheme decision' whether made under TMS r 2 or under provisions in the titles.
5 T(S)A 2004 s 4(4).
6 2013 GWD 38-734.
7 This is quoted at para 160 of the decision. This is not the full provision and we do not know what else it may have contained.

Cracks in the wall

The tenement in *Garvie v Wallace* was a listed building, Carbeth House in Killearn, Stirlingshire, now divided into nine flats with names such as 'the Strathearn Suite', 'the Strathspey Suite', and 'the Strathaven Suite'. Alluring names, however, turned out to be no guarantee of effective governance; nor was a modern deed of conditions bristling with management provisions. When trouble with a gable wall was first detected, in 2003, no action was taken. That seems to have been unwise, because on 16 August 2007 the owners woke up to a large crack in the wall. A surveyor from Stirling Council inspected it on the same day and declared the wall to be in a dangerous condition. On 17 August the Council issued a formal letter to all of the owners requiring the immediate erection of a protective barrier; a dangerous building notice would follow on 24 September. By that time, however, the wall had already been inspected by a structural engineer sent in by one of the owners who was acting as manager. On the engineer's recommendation, a fence and scaffolding were erected on 20 August, though not before the agreement of a majority of owners had been obtained by e-mail. As luck would have it, a meeting of all of the owners was already scheduled to take place on 23 August, and this provided an opportunity to discuss the situation and to agree in principle that repairs should be carried out once estimates had been obtained. This initial flurry of activity, however, was not to be sustained. It was another year before a contractor was agreed upon and another nine months before he started work. Inevitably, further problems were then uncovered – a window lintel was rotten, another broke into pieces – and it was necessary to obtain the owners' approval for further expenditure. As before, all the key decisions were taken by e-mail, not least because by this time some of the owners were not on speaking terms and were thought unlikely to agree to attend a meeting.

The works were finally completed in March 2010 at the cost of £47,138.48. The long delays meant that scaffolding had had to be in place for almost three years, costing a further £36,543.75. These large bills led to more disagreement, and to the present action, which was one for payment by one of the owners against two other owners who refused to pay. In fact, the defenders accepted that they were liable for a share of repairs to the common parts of the building. But that liability, they said, was incurred only where the repairs had been authorised by a meeting or meetings of the owners in the manner prescribed by the deed of conditions. As this procedure had not been complied with in the present case, virtually all communication being by e-mail, it followed that there was no liability.

The procedural frailty to which the defenders drew attention was, of course, beyond dispute.[1] Nonetheless the sheriff[2] granted decree for payment. The reasons why repay closer study.

1 As the sheriff concluded: see paras 159 and 206.
2 Sheriff K J McGowan.

Grounds for decision

There were four main grounds for the decision. In order of ascending plausibility these were (a) that any co-owner can carry out a 'necessary' repair and recover the cost; (b) that procedural irregularities can be overlooked; (c) that the erection of the scaffolding was an emergency repair; and (d) that the defenders had either signified their agreement to the repairs or at any rate were personally barred from denying that they had. As we will see, the first of these grounds was wrong, the second doubtful, the third restricted to one part of the sum sued for, and the fourth difficult to make out. At the same time, a further ground, contained in the Tenements (Scotland) Act, was overlooked, which would have provided an easy route to success. As with some previous cases on tenements,[1] there is a lack of familiarity with the legislation which is both surprising and a source of concern.[2]

Ground (a): necessary repairs

'It is', said the sheriff, 'an established and well known principle of the common law of common property, that any one co-proprietor may instruct "necessary" repairs and then look to fellow proprietors for a contribution towards the cost: Bell's *Principles*, s 1075.'[3] In the present case the wall was common property, and its repair was clearly 'necessary'. 'Accordingly', continued the sheriff, 'I consider that quite apart from any rights and obligations arising under the Deed, one or more co-proprietors were entitled to instruct all of the repairs which were in fact executed on the grounds that these were necessary repairs and the first defender is obliged to meet a share of the cost thereof.' But there is a problem with this analysis. It is, of course, perfectly correct that, for 'normal' common property, a co-owner can instruct necessary repairs and recover the cost. But common property in tenements is different. Section 16 of the Tenements Act provides that:

> Any rule of law which enables an owner of common property to recover the cost of necessary maintenance from the other owners of the property shall not apply in relation to any common property in a tenement where the maintenance of that property is provided for in the management scheme which applies as respects the tenement.

In the present case the maintenance of the wall was indeed provided for in the management scheme which applies as respects Carbeth House – more precisely, in that part of the management scheme constituted by the deed of conditions.[4]

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1 For previous cases see: *Mehrabadi v Hough* 11 June 2010, Aberdeen Sheriff Court, discussed in *Conveyancing 2010* pp 93–96; *Hunter v Tindale* 2012 SLT (Sh Ct) 2, discussed in *Conveyancing 2011* pp 129–32. The only case to come before the Court of Session, *PS Properties (2) Ltd v Callaway Homes Ltd* [2007] CSOH 162, 2007 GWD 31-526 (discussed in *Conveyancing 2007* pp 139–41), was handled with much greater assurance.

2 Today, a decade after the Tenements Act came into force, there is plenty to read on it. See eg W M Gordon and S Wortley, *Scottish Land Law* vol I (3rd edn, 2009) pp 462–500; G L Gretton and K G C Reid, *Conveyancing* (4th edn, 2011) ch 14.

3 Paragraph 164.

4 See T(S)A 2004 s 27(c).

Hence the common-law right of recovery was disapplied. This first ground of decision, therefore, is without legal basis.

Ground (b): procedural irregularities

Accepting that owners will sometimes get things wrong, rule 6 of the TMS provides (subject to an exception which does not apply in the present case) that: 'Any procedural irregularity in the making of a scheme decision does not affect the validity of the decision.' In the absence of any equivalent provision in the deed of conditions, rule 6 applied in the present case.[1]

In this rule the sheriff saw a solution to the procedural infirmities described above:[2]

> The procedure adopted in making a scheme decision on whether the repairs should be instructed was not made in accordance with Clause SIXTH [of the deed of conditions] as there was no meeting. But … any procedural irregularity in the making of a scheme decision does not affect its validity. I am satisfied that the projected scheme costs were circulated to the first defender; that a vote was taken by email thereon; and that a majority approved the scheme.

The argument commands sympathy. Since the owners, including the defenders, were fully consulted, and the consent of a majority obtained, it may seem unfair to insist on compliance with the procedure set out in the deed of conditions. Yet it is improbable that rule 6 can be used to cure so fundamental a departure from the required procedure as this case discloses. In devising the tenements legislation, the Scottish Law Commission took the view that only 'minor' irregularities would be cured by rule 6:[3]

> Suppose for example that an owner wishes to carry out a repair to scheme property. He convenes a meeting which is well-attended and at which the repair is agreed. He instructs the repair and pays for it. He then asks his fellow owners for reimbursement. At this point it turns out that, due to an oversight, he forgot to give one of the owners the required notice of the meeting. In this situation it seems insupportable that the original decision should simply be considered invalid with the result that the repair costs cannot be reimbursed, except by means of a fresh decision.

But there are limits as to what can be cured. The passage continues:[4]

> It should be emphasised that we are dealing here with minor irregularities of procedure. The leniency would not extend to a failure to obtain a proper majority, even where that failure was accidental in the sense that one or more of the votes counted on turned out to be cast by a person who was not in fact the owner.[5]

1 T(S)A 2004 s 4(8).
2 Paragraphs 206-07.
3 Scottish Law Commission, Report on the *Law of the Tenement* (Scot Law Com No 162, 1998) para 5.37.
4 Paragraph 5.38.
5 Similarly, para 170 of the official *Explanatory Notes* says that rule 6 'will not, however, for example, excuse substantive failure such as a failure to achieve a majority as required by rule 2.5'.

Now, decision by e-mail – the method used in *Garvie v Wallace* – is not just an irregular version of decision by meeting; it is a different procedure altogether. It is in fact the procedure set out in rule 2 of the TMS and not the procedure set out in the deed of conditions. The implications of allowing rule 6 to operate here are startling. For if the substitution of one procedure for another can be excused as a procedural irregularity, then no procedure set out in a deed of conditions need ever be followed: it will be enough to comply with TMS rule 2. Not only is such a result wrong in principle but it is irreconcilable with the default status of rule 2, and its express disapplication by s 4(4) of the Act in cases where the title 'provided procedures for the making of decisions by the owners'.

Ground (c): emergency repairs

Normal procedures for decision-making can be by-passed in cases of emergency. Where 'emergency work' is required, TMS rule 7[1] allows any owner to carry out the work and to recover the costs from the others. 'Emergency work' means:[2]

> work which, before a scheme decision can be obtained, requires to be carried out to scheme property[3] –
>
> (a) to prevent damage to any part of the tenement, or
> (b) in the interests of health and safety.

Whether this provision is ever needed will depend largely on the speed, or otherwise, of the regular procedure for making decisions; for the work must be sufficiently urgent as to require to be carried out 'before a scheme decision can be obtained'. That would be rare in cases where the default procedure in TMS rule 2 applies, for under that procedure a scheme decision can usually be obtained within 24 hours.[4] But in *Garvie* the deed of conditions required 14 days' notice before the necessary meeting could take place. In the particular circumstances of the crack in the wall, that was far too long. Hence the sheriff was surely correct to say that the action taken in erecting scaffolding was 'emergency work' and hence that its cost was recoverable under rule 7.[5] To that limited extent, at least, the pursuer was entitled to decree.

Ground (d): personal obligation or personal bar

Like other owners, the defenders were kept fully informed as to the progress of the repairs over a period of almost three years. Yet far from objecting, they contributed to the impression of having positively assented to the expenditure. They were present at the meeting of 23 August 2007 at which there was agreement as to the need for repairs; and on 29 May 2009, just before the work started,

1 Which applied in the present case in the absence of a provision on this topic in the deed of conditions: see T(S)A 2004 s 4(9).
2 TMS r 7.3.
3 'Scheme property' includes property owned in common, such as the gable wall in the present case: see TMS r 1.2(a).
4 Scottish Law Commission, Report on the *Law of the Tenement* para 5.55.
5 Paragraph 199.

their solicitors indicated by letter that they were 'anxious for the repairs to be carried out' and would meet their share of the costs. That was enough, the sheriff concluded, to establish personal liability as a matter of contract or, alternatively, as a matter of personal bar.[1]

That may be so. Yet it is not self-evident that either basis of liability was made out. Contractual liability would require an intention to create legal obligations coupled with an agreement to pay the sums sued for.[2] Personal bar would require the facts to be accommodated within the framework – of 'inconsistent' conduct by one party resulting in unfairness to another party[3] – which is now accepted as being necessary for the doctrine to apply.[4] It may be that this could be done. The facts, certainly, are promising, particularly in relation to personal bar.[5] But the discussion in the case falls short of a developed argument on the point.

The ground that got away: the obligation of support

In fact, there was a much stronger ground than any of the four used to support the decision. Section 8 of the Tenements Act – re-enacting an obligation previously founded on the common-law doctrine of common interest – makes special provision for the repair of those parts of a tenement which are necessary for support or shelter within the building. A gable wall, needless to say, is necessary for support.[6] By s 8(1) the owner of such a part 'shall maintain the supporting or sheltering part so as to ensure that it provides support or shelter'. Where, as in the present case, the part is co-owned, the rule is that any co-owner 'may, without the need for the agreement of the others, do anything that is necessary' to repair the supporting part.[7] Once the repair is carried out, the repairing owner 'shall be entitled to recover from any other owner any share of the cost of the maintenance for which that other owner would have been liable had the maintenance been carried out by virtue of the management scheme in question'.[8]

It is not difficult to see how these provisions apply to the facts of *Garvie v Wallace*. The wall was in danger. The pursuer carried out the repairs. As a result, she was then entitled to recover a share of the cost from the defenders. There was no need to comply with the decision-making procedure in the titles: once the work was carried out there was an absolute right to recover the cost *as if* the procedure had been complied with. Not only was this a complete answer to the pursuer's dilemma, but the very simplicity of what has to be established might well have avoided the need for a proof.

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1 Paragraphs 175 ff.
2 In fact, a unilateral obligation, ie a promise, might be easier to establish.
3 E C Reid and J W G Blackie, *Personal Bar* (2006) paras 2.01 ff.
4 Eg *Patersons of Greenoakhill Ltd v Biffa Waste Services Ltd* [2013] CSOH 18, 2013 SLT 729 per Lord Hodge at para 98. In outline the argument would presumably be that by their conduct, both active and passive, the defenders were personally barred from founding on the failure to comply with the decision-making procedure.
5 Scottish Law Commission, Report on the *Law of the Tenement* para 5.37.
6 For an example under the former law, see *Fergusson v Marjoribanks* 12 Nov 1816 FC.
7 T(S)A 2004 s 8(4).
8 T(S)A 2004 s 10.

Post-repair authorisation

There is one other approach which the pursuer might usefully have adopted. Under the legislation it is not too late to authorise repairs even after they have been completed. All that is needed is a scheme decision, in terms of TMS rule 3.1(h), 'to authorise any maintenance of scheme property already carried out'. If, therefore, instead of raising a court action the pursuer had summoned a meeting of owners in the manner provided for in the deed of conditions, and obtained the necessary majority, the entire basis of the defence would have fallen away.

Implications

Two implications may be drawn from *Garvie v Wallace*, one for conveyancers and the other for their clients. The implication for clients is the importance of complying with the system of decision-making provided in the titles (if there is one). That, however, is easier said than done. Most flat-owners are not lawyers. Few read their title deeds or even have ready access to them. Many, today, are likely to communicate electronically rather than in person as their titles may require. So it was in *Garvie*. But if the behaviour in *Garvie* is typical, or at least not unusual, then – and this is the second point – there are obvious implications for conveyancers. In drafting a deed of conditions the decision-making procedure should be made as simple and informal as possible. It should attempt to replicate what the owners will do anyway, whether or not they have read the deed. That was the approach adopted by the Scottish Law Commission in framing TMS rule 2.[1] Conveyancers could do a lot worse than reproduce that rule.

DON'T LOOK NOW: THE SHADOW OF THE HIGH HEDGE

Introduction

High hedges have been springing up[2] in the statute books of six of the seven jurisdictions in the British Isles:

- England and Wales: Antisocial Behaviour Act 2003 (part 8)
- Isle of Man: Tree and High Hedges Act 2005
- Jersey: High Hedges (Jersey) Law 2008
- Northern Ireland: High Hedges Act (Northern Ireland) 2011
- Scotland: High Hedges (Scotland) Act 2013
- Guernsey: legislation expected in 2014.

All these enactments have a family likeness, the English/Welsh legislation of 2003 being the ancestor. But details vary, and the familiar tendency of

1 Scottish Law Commission, Report on the *Law of the Tenement* para 5.33.
2 The subject seems to lend itself to plays on words. See in particular Euan Sinclair, 'Good hedges make good neighbours' (2013) 58 *Journal of the Law Society of Scotland* April/32.

legislation, like tummies, to expand is evident, with the ancestor legislation running to 20 sections, and the 2013 Act in Scotland to almost double that: 39 sections.

The Scottish legislation has had a long gestation. An initial proposal was lodged by Scott Barrie MSP as long ago as May 2002. This was unsuccessful, as were two further proposals, in 2003 and 2006. A pressure group, Scothedge,[1] was formed, with a membership of more than 200. A public consultation by the Scottish Government in 2009,[2] following on from a much earlier consultation in 2000, showed strong support for legislation.[3] The new Act originated as a member's Bill, introduced by Mark McDonald MSP, with Government support. It came into force on 1 April 2014.[4]

Hedges are usually blameless and indeed welcome. They are eco-friendly, and if 'good fences make good neighbours' so too do good hedges. The catch is in the word 'good'. A bad hedge can block a neighbour's light and outlook and, in some cases, it can be an instrument of war.[5] In recent years the problem has been exacerbated by the planting of fast-growing species, notably the Leyland cypress,[6] which, like Jack's beanstalk, if not quite so dramatic, can grow a metre a year and reach heights of 30 metres.

The Act in outline

What is a 'high hedge'? The Act defines it as a hedge which:[7]

(a) is formed wholly or mainly by a row of 2 or more trees or shrubs,
(b) rises to a height of more than 2 metres above ground level, and
(c) forms a barrier to light.

This definition was debated as the Bill progressed. At the outset the Bill applied only to 'evergreen or semi-evergreen' trees or shrubs, but these words were later removed. In other respects the definition was not altered, but the Scottish Ministers have power, by statutory instrument, to make changes.[8]

The Bill confers protection only on owners or occupiers of a 'domestic property'.[9] Thus the legislation could not affect, for example, a hedge on the boundary between two farms. The test is whether the hedge 'adversely affects the enjoyment of the domestic property which an occupant of that property could reasonably expect to have'.[10] So it boils down to what is reasonable.

1 www.scothedge.colwat.com.
2 *Consultation on High Hedges and other Nuisance Vegetation* (www.scotland.gov.uk/Resource/Doc/281919/0085199.pdf).
3 See *Conveyancing 2009* pp 71–72.
4 High Hedges (Scotland) Act 2013 (Commencement) Order 2014, SSI 2014/54.
5 The same can be true of fences and walls. There can be 'spite' walls, fences and hedges.
6 *Cupressocyparis leylandii.*
7 High Hedges (Scotland) Act 2013 s 1.
8 HH(S)A 2013 s 35.
9 HH(S)A 2013 s 2(1). There is a definition in s 34 but this contains nothing worth commenting on.
10 HH(S)A 2013 s 2(2).

The aggrieved owner applies to the local authority.[1] There will be a fee.[2] Its level was not known at the time of writing, but may be between £325 and £500.[3] The complainer must first have taken 'all reasonable steps to resolve the matters'.[4] If English experience is any guide, this may mean an attempt at mediation, and also that the complainer should compile and have available a dossier of attempts at resolution.[5] After consultation the local authority can, if it agrees with the complaint, issue a 'high hedge notice'[6] which sets out 'the initial action that is to be taken by the owner' and 'any preventative action that is to be taken by the owner'. There is a right of appeal,[7] to the Scottish Ministers. The courts are not mentioned. If the notified owner does not comply with the notice, the local authority can take the necessary action itself[8] and bill the notified owner.[9]

How long do high hedge notices last? Seemingly forever,[10] though they can be withdrawn, or varied.[11] Are the notified owner's singular successors affected? Seemingly yes, for the Act says that 'a high hedge notice is binding on every person who is for the time being an owner of the neighbouring land specified in the notice'.[12] Can future successors discover the existence of the notice? There is no registration system, but it is to be assumed that notices will be picked up in PECs. In any event the existence of a notice is unlikely to be a serious issue for an incoming owner: after all, a potential high hedge would be subject to the Act anyway, even had there been no subsisting high hedge notice.

As mentioned above, if the notified owner does not comply with the notice, the local authority can take the necessary action itself[13] and bill the defaulting owner.[14] If the money is not paid, might an incoming owner be liable? Here the legislation adopts a solution pioneered by the Tenements (Scotland) Act 2004. The local authority can register in the Land or Sasine Register a 'notice of liability for expenses'[15] (the equivalent of the notice of potential liability for costs in tenements) and if that happens then 'the new owner is severally liable with any former owner' for the unpaid bill.[16] As and when the debt is recovered, a notice of discharge is registered.[17]

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1 HH(S)A 2013 s 2.
2 HH(S)A 2013 s 4.
3 E A Comerford, 'High hedges and neighbours' (2013) 17 *Edinburgh Law Review* 415.
4 HH(S)A 2013 s 3(1).
5 E A Comerford, 'High hedges and neighbours' (2013) 17 *Edinburgh Law Review* 415.
6 HH(S)A 2013 s 8.
7 HH(S)A 2013 s 12.
8 HH(S)A 2013 ss 22 ff.
9 HH(S)A 2013 s 25.
10 The notice may cause an initial bout of vigorous trimming, but that may not be the end of the story. Hedges have a proclivity to grow, and some species have lifespans running to several human generations.
11 HH(S)A 2013 s 10.
12 HH(S)A 2013 s 9. A small point: the person who is bound by a high hedge notice is the owner, but the complainer is the owner *or occupier*: see s 2. There is thus an asymmetry: owner, on one side, and owner or occupier, on the other; cf the Title Conditions (Scotland) Act 2003 ss 8(2) and 9(1).
13 HH(S)A 2013 ss 22 ff.
14 HH(S)A 2013 s 25.
15 HH(S)A 2013 s 26.
16 HH(S)A 2013 s 27.
17 HH(S)A 2013 s 28.

Should missives be adjusted in future to take account of the possible existence of (i) high hedge notices and (ii) notices of liability for expenses? Existing standard form offers probably suffice. Thus the Combined Standard Clauses, clause 5, places liability for pre-missives statutory notices with the seller and allows the buyer to make an appropriate retention from the price.[1]

Some reflections

Clearly the previous law did not offer neighbours much protection. It is true (though this point seems largely to have escaped notice) that a 'spite' hedge, like a spite wall or fence, has always been unlawful, under the doctrine of *aemulatio vicini*.[2] But some problem hedges are not a result of spite, and anyway spite, being a matter of motive, is very difficult to prove.

As for planning law, this regulates 'any … gate, fence, wall or other means of enclosure [which] would exceed 2 metres in height … [which] would be within or would bound the curtilage of a dwellinghouse'.[3] Here one sees a two-metre rule. Was the view taken that a hedge is not a 'means of enclosure'? (If so, that would be rather surprising). Or was the view taken that light-blocking shrubs and trees can be a problem even if they do not amount to an 'enclosure'?[4] We have not tracked down any discussion of the relevance of existing planning law.[5]

If existing planning law was inadequate to deal with the issue, one might have expected it to be modified accordingly. That could have been done by a one-page statutory instrument, and not by a 17-page Act of Parliament. So why was planning law not the chosen route? The issue is discussed in the 2009 consultation document.[6] One reason given was cost. Under the 2013 Act the complainer must pay a fee.

The consultation document also notes, as a reason for not including the issue within planning law, that 'a high hedge is a nuisance issue rather than a land use planning issue' and that 'Scottish Planning Policy states that the planning system operates in the long term public interest. It does not exist to protect the interest of one person against the activities of another'.[7] In other words, nuisance hedges are issues for private law, not for public law. If the law needs to be fixed, it is private law that needs the fixing, not public law. There is much to be said for this point of view. Yet the 2013 Act goes down the route of public law, not private law, and confers no *rights* on owners (other than the right to complain to the local authority). Aggrieved owners are not enabled by

1 At the next revisal of the Combined Standard Clauses, however, it would seem worth adding HH(S)A 2013 s 27(2) to the provisions listed in clause 5(f).
2 Unlike the law in England and Wales or Northern Ireland.
3 Town and Country Planning (General Permitted Development) (Scotland) Order 1992, SI 1992/223 (as amended) sch 1 para 3E.
4 HH(S)A 2013 s 1.
5 The only discussion seems to have been about the much less specific s 179 of the Town and Country Planning (Scotland) Act 1997: E A Comerford, 'High hedges and neighbours' (2013) 17 *Edinburgh Law Review* 415.
6 Scottish Government, *Consultation on High Hedges and other Nuisance Vegetation* (2009).
7 *Consultation on High Hedges* 48.

the Act to go to court to protect their interests. Some will question the wisdom of this approach.

It may be added that, in some countries, such issues are indeed dealt with squarely within private law.[1] Under French law, for instance, the default rule[2] is what might be called a 'double two-metre' rule. Within two metres of the boundary it is not permitted to have trees or shrubs that are higher than two metres, or, to put it in other words, if you want trees or shrubs higher than two metres, you must plant them at least two metres from the boundary line. In such countries, all this is a matter of private law, and thus enforcement is a matter for the parties affected, and is settled, as with other neighbour disputes,[3] through the ordinary courts.

SERVITUDES

Servitude or real burden (or neither)?

At issue in *Garden v Arrowsmith*[4] was the following provision in a split-off disposition from 1992:

> And the subjects hereby disponed are so disponed ALWAYS WITH AND UNDER the following additional burden, namely there is reserved to me and my successors as proprietors of Two Woodstock Road, Aberdeen a right of access over the said area of ground to any garage to be erected for Two Woodstock Road, aforesaid; which burden is declared to be a real and preferable burden affecting the subjects hereby disponed and is appointed to be set forth at full length in any Instrument of Sasine or Notice of Title to follow hereon and to be inserted or validly referred to in terms of law in all future writs, transmissions and investitures thereof or any part thereof, otherwise the same shall be null and void, subject always to Section 9 of the Conveyancing (Scotland) Act 1924.

The right reserved – an ordinary right of access – looks very much like a servitude. But the word 'servitude' is absent; worse, the right is actually declared to be something different, namely a real burden. What, then, was the legal status of the reservation? Had a servitude been created, or a real burden – or was the confusion of categories so great as to deny it the status of any kind of real right?

The most obvious response is to take the words at face value. If the right is declared to be a real burden, then a real burden it is. And as the deed was granted comfortably before the coming into force of the Title Conditions (Scotland) Act 2003, on 28 November 2004, there is no particular difficulty with a real burden that confers a right to enter and cross the burdened property.[5]

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1 As far as we can see, no consideration was given to legal systems outwith the British Isles.
2 See Article 671 of the French Civil Code. Whilst this is the basic rule, a variety of qualifications and exceptions exist.
3 Boundary disputes, servitude issues, nuisance etc.
4 2013 GWD 4-120.
5 K G C Reid, *The Law of Property in Scotland* (1996) para 391; D J Cusine and R R M Paisley, *Servitudes and Rights of Way* (1998) para 1.06.

The position in this respect, however, changed with the 2003 Act. Today real burdens are confined to obligations to do something ('affirmative burdens') or to refrain from doing something ('negative burdens').[1] Except in an ancillary manner, they cannot confer a right to enter or make use of property.[2] Coupled with the abolition of the category of negative servitudes, the effect is to eliminate the former overlap between servitudes and real burdens: an obligation to allow another to enter or make use of property is a servitude; an obligation to do or not do something is a real burden. One incidental consequence is that on 28 November 2004 all real burdens consisting of a right to enter or make use of property were automatically converted into servitudes by s 81 of the Title Conditions Act. Accordingly, on the analysis put forward here, the right in *Garden v Arrowsmith* started life as a real burden and is now, by statutory fiat, a servitude.

That was not, however, the analysis adopted by the sheriff principal.[3] Although his end conclusion was the same, he arrived at it by a different route. It was clear, said the sheriff principal, that the right was intended to bind, and transmit to, successors. That could be inferred from the reference to successors in title, the obligation to insert in future transmissions, and from the evidently permanent nature of the right. That suggested the creation of a servitude. It is true that the term used was 'real burden' and not 'servitude', but it is well-established that a servitude can be created without the use of the actual term.[4] Accordingly, there was a servitude from the very start.

For the reason already given, it was not necessary for the sheriff principal to engage in such strained reasoning in order to reach the result which the circumstances seemed to demand. But that reasoning will be of service to any right of access created as a real burden in a post-2004 deed. For in the modern law such a right could not be a real burden, and if it is not a servitude it would not bind successors at all.

Postponed start, postponed real right?

Garden v Arrowsmith[5] raised a second issue. As the right reserved was one of access 'to any garage to be erected' on the dominant tenement, it could not be exercised unless or until such a garage was actually built. In other words, it was a right with a postponed start, albeit one whose commencement was within the power of the dominant proprietor. As it happened, no garage was built until 2010, some eighteen years after the right was first reserved. By this time both properties had changed hands, and the owners of the putative servient tenement challenged the existence of the servitude. A postponed start, they argued, meant a postponed real right. Until the garage was built, the right could be no more than personal. But long before that could happen the 'servient' tenement had

1 Title Conditions (Scotland) Act 2003 s 2(1), (2).
2 TC(S)A 2003 s 2(3), (4).
3 Sheriff Principal Derek C W Pyle.
4 Citing *Ferguson v Tennant* 1978 SC (HL) 19.
5 2013 GWD 4-120, discussed above.

changed hands. Its acquirer could not be affected by a mere personal right; and now it was too late for the right to become real.

Unsurprisingly, the sheriff principal rejected this argument. He found in *North British Railway Co v Park Yard Co Ltd*[1] 'authority for the proposition that a servitude right can be created notwithstanding that at the date of its creation the purpose of the right could not be immediately exercised by the proprietor of the dominant tenement either because he had not acquired the land or had not carried out the construction to which the right referred'.[2] And indeed there will be many cases where something needs to be done – the building of a road, for example, or the removal of a wall or other obstruction – before a servitude can be exercised. That should not of itself delay the creation of the real right.

Shut that gate

'This case', noted the sheriff in *Smith v McLaren*,[3] 'involves a dispute between neighbours and sadly the dispute has many of the characteristics associated with such disputes: animosity, allegations, insults and instances of obsessive or irrational behaviour.'[4] The pursuer (Mr Smith) owned East Cottage, Pressock Farm, Guthrie, by Forfar. The defenders (Mr and Mrs McLaren) owned West Cottage. Access to West Cottage was by a road owned by the pursuer and in respect of which the defenders had a servitude of vehicular access. In March 2010, and without consulting the defenders, the pursuer erected a swing gate across the road. It was this gate that was to be the source of all future trouble.

The defenders' initial response to the new gate was to leave it open after use. The pursuer complained to Mr McLaren's employer, the Red Cross. Thereafter, Mr McLaren closed the gate if he was driving a Red Cross vehicle, but otherwise he left it open. In July 2011 the pursuer fitted a spring to the gate so that it would close by itself, and in February 2013 replaced this meek-and-mild spring with a much stronger version. The new spring caused significant difficulty to the defenders. Access to their house became a two-person job: one person to drive the car, the other to hold open the gate against the powerful force of the spring. The postman could no longer gain vehicular access; nor could the van delivering oil, unless one of the defenders was at home to assist. Relations between the parties got worse. Eventually litigation ensued, though curiously it was Mr Smith, and not the McLarens, who sued.

In this action the pursuer sought to interdict the defenders from (i) holding the gate in the open position and so damaging the spring by putting it under tension, and (ii) allowing the gate to close under the power of the spring (as opposed to leading it by hand), resulting in damage to the gate and gate post.

1 (1898) 25 R (HL) 47.
2 Paragraph 5. In fact the proposition is stated too broadly. Where, as in *North British Railway Co*, the dominant tenement has been neither identified nor acquired at the time of the deed, there can be no servitude until acquisition (or at least identification) takes place. See Cusine and Paisley, *Servitudes and Rights of Way* para 2.43.
3 18 October 2013, Arbroath Sheriff Court. The sheriff was Sheriff P Paterson.
4 Paragraph 2.

In support of his case the pursuer had installed four video cameras and also kept a detailed diary of events. The case turned largely on the credibility of the witnesses, with the sheriff preferring the evidence of the defenders to that of the pursuer, although even the former was 'not free of rancour'.[1] The defenders were assoilzied.

The pleadings raised only obliquely what the sheriff took to be the main issues in the litigation, namely (i) whether there was an obligation on the defenders to shut the gate, and (ii) whether the spring was an unlawful interference with the exercise of the servitude. Although these matters were not fully argued before him, the sheriff was willing to offer some tentative views. As there is no Scottish authority on either issue, this is very much to be welcomed.

On (i), Cusine and Paisley acknowledge a duty to shut gates, based on the *civiliter* principle, but would limit it to cases where this is required by the nature of the servient tenement, for example in order to keep cattle in or for reasons of security.[2] This is based on English and Irish authority and in particular on the English case of *Lister v Rickard*.[3] The sheriff in *Smith v McLaren*, however, was prepared to go further:[4]

> [M]y view is that in Scots Law the obligation to close a gate does exist. Essentially the servient proprietor is entitled to make full use of his own property, provided it does not materially interfere with the dominant tenements rights.[5] In Scots Law the dominant proprietor is obliged to exercise their right *civiliter* ie in the least burdensome fashion. *Lister* appears to qualify the right to have the gate closed by suggesting the right only occurs if the need for the gate to be closed is required for the reasonable enjoyment of the servient tenement. In my view this qualification does not recognise that the servient tenement[6] is the owner of the ground in question and subject to the obligation not to materially interfere with dominant tenement's rights, the servient tenement can do as he wishes on his own land. If he chooses to erect a gate and have the gate closed, that is his right. The requirement to close the gate is, in my view, consistent with the obligation to exercise the right *civiliter.* A refusal on the part of the dominant tenement to close the gate would require the servient tenement to close the gate, which would place a burden on the servient tenement. It is the exercising of the access right that causes the gate to be opened and it is the exercising of the right that gives rise to the obligation to exercise it *civiliter.* By failing to close the gate the gate is left in the open position which is not how the servient tenement wishes his property to be. By failing to restore the gate to the closed position, in my view the dominant tenement cannot be said to be exercising the right *civiliter.*

That seems a reasonable approach.

On (ii) (the lawfulness of the spring), the sheriff's starting point was the view of Lord President Hope, in *Drury v McGarvie*,[7] that a dominant proprietor can

1 Paragraph 18.
2 D J Cusine and R R M Paisley, *Servitudes and Rights of Way* (1998) para 12.106.
3 (1970) 21 P & C R 49.
4 Paragraph 32. The punctuation is as it appears in the Opinion.
5 Citing *Ferguson v Tennant No 2* 1978 SC (HL) 19.
6 Here and elsewhere in this extract, 'tenement' evidently means 'proprietor of the tenement'.
7 1993 SC 95 at 100.

erect a gate provided it 'can be opened without material inconvenience'. The sheriff continued:[1]

> A swing gate that could be opened and remain in the open position, unaided would not in normal circumstances be a material inconvenience. A swing gate of this type could be operated by one person without assistance either of a third party or a weighted device. The fact that the gate in its current form requires a user either, to seek assistance or carry a device means that the defenders are subject to a material inconvenience. It requires something beyond the normal opening and shutting of the gate on the part of the dominant tenement. Even if I am wrong on this point, the fact that either the first or second defender require to remain at home to allow access for the oil tanker delivering their central heating oil in my opinion, clearly constitutes a material inconvenience.

Far, therefore, from the defenders being in the wrong, in allegedly damaging the spring, it was the pursuer who was in the wrong, in installing the spring at all.

Extinction by abandonment

It is well understood that servitudes are lost by 20 years' non-use, by virtue of the long negative prescription.[2] But can non-use for a period shorter than this result in the extinction of a servitude? Cusine and Paisley draw attention to the doctrine of abandonment.[3] On one view this can come about by non-use alone, but Cusine and Paisley argue that more is needed and in particular that there must be an intention to abandon, whether express or evidenced by acts or omissions. Indeed if this were not so, abandonment would be merely a way of reducing the period of negative prescription. Cases on abandonment, however, are few and far between. Nor is the plea of abandonment usually successful. In what was until now the most recent case, *Pullar v Gauldie*,[4] decided in 2004, the sheriff[5] noted that 'it is clear from the various cases to which I was referred that abandonment is relatively rarely established'. In that case too the plea failed. 2013, however, has brought a new case, and one in which the plea of abandonment met with success.

The pursuers in *Thomas v Stephenson's Exr*[6] had been the owners of property at Cairndow, Argyll known as Kilkatrine (and previously as Burnside) since 2003. Much earlier, in 1990, the then owner of Kilkatrine had disponed a part of the property (now known as Holly Robin Lodge), reserving a servitude right of access. Holly Robin Lodge was acquired by the defenders in 1996. Although the route of the servitude was plotted on the disposition plan, it was imperceptible on the ground apart from a primitive and dilapidated bridge which crossed a burn separating the two properties. In practice it seems to have been little used,

1 Paragraph 28.
2 Prescription and Limitation (Scotland) Act 1973 s 8.
3 D J Cusine and R R M Paisley, *Servitudes and Rights of Way* (1998) para 17.15.
4 25 August 2004, Arbroath Sheriff Court. For discussion, see *Conveyancing 2010* pp 179–80.
5 Sheriff Ian G Inglis.
6 4 October 2013, Dunoon Sheriff Court.

particularly after 1992 when the then owners of Kilkatrine built a wholly new access by a different route. Certainly the access had not been used by the pursuers.

Recently, however, the pursuers had come to have safety concerns about the 1992 access because the access point to the main road was near a bend. They sought to assert the original 1990 access and, when the defenders declined to co-operate, raised the present action for declarator and interdict. The defenders' response was to apply to the Lands Tribunal for discharge of the servitude on the ground that the 1992 access was an adequate replacement.[1] That application failed, by a narrow margin, and the present action, which had been sisted, sprang back into life.

The action was defended on the basis of abandonment. According to Cusine and Paisley, an intention to abandon 'is to be inferred from additional acts on the part of the dominant proprietor which are consonant with no servitude existing or, possibly also, his inaction in the face of acts by the servient proprietor to similar effect'.[2] The defence turned on a mixture of action and inaction. After the split-off of 1990, the disponees – the defenders' predecessors – had constructed a house. The water supply and septic tank were placed on land which was subject to the servitude. The garden was planted out without regard to the servitude, and a beech hedge and other shrubbery lay directly across the route. Not only did the pursuers' predecessor observe this activity without objecting, he gave his active assistance in the whole project. He assisted in carrying out ground-preparation and construction works, and he allowed the defenders' predecessors to park their caravan on his property while the work was proceeding.

Following a proof, the sheriff[3] held that the servitude had indeed been abandoned by the pursuers' predecessor, and that this had occurred some years before the pursuers became owners. In addition to the events just described, two other factors were found to support this conclusion. One was the fact – evidently essential in such cases – that there was an alternative access. The other was the failure by the pursuers' predecessors to include the servitude in the disposition when they came to sell the property. We would not be inclined to place much weight on the latter point: having been constituted by reservation and not by grant, the servitude had never formed part of the title to Kilkatrine and it is easy to see how it might have been overlooked in drafting the disposition. Nonetheless, it is hard to fault the sheriff's overall finding in favour of abandonment.

REGISTRATION OF COMPANY CHARGES

An outline history: 1961 to 2006

In 1961 the floating charge was introduced, by the Companies (Floating Charges) (Scotland) Act 1961. The legislation aimed to reproduce English law, including

1 *Stephenson v Thomas* 21 November 2012, Lands Tribunal. See *Conveyancing 2012* pp 23–24.
2 Cusine and Paisley, *Servitudes and Rights of Way* para 17.15.
3 Sheriff Thomas Ward.

the English registration rules.[1] A floating charge had to be registered in the Companies Register.[2] But registration was not a prerequisite for creation, as it is, for example, for a standard security. A floating charge came into force without any publicity. It was supposed to be registered within 21 days of creation, but that meant a 'blind' or 'invisibility' period of up to 21 days in which third parties were to be kept in the dark. The rationality of this policy – a policy which remains in force to this day – is not one that we would care to have to explain. If the floating charge was not registered within that three-week period, registration thereafter was not allowed. But the court was given an equitable jurisdiction to permit registration later than this – even years later. An unregistered floating charge was (after the 21 days) semi-void.[3]

The 1961 Act, as well as introducing the floating charge, and a registration system for the floating charge, did something else as well. It required certain *other* types of security right, if they were granted by companies, to be registered in the Companies Register. The main category in practice was heritable securities. This registration regime was not in substitution for, but in parallel with, the general law about the creation of security rights. So since 1961, if a company grants a heritable security, the security must be doubly registered, once in the Land Register or Register of Sasines as the case may be, and once in the Companies Register. The same rules operated, so that a heritable security by a company in 1962 would become semi-void 21 days after its recording in the Register of Sasines (its date of creation) unless within that period it had also been registered in the Companies Register.

Although the general aim of the legislation was to copy English law, there were separate statutory rules for registration by Scottish companies. Over the years subsequent statutes made some changes, but all were minor and the basic scheme remained in place. The most recent set of statutory rules, until 2013, was part 25 of the Companies Act 2006. While there were some changes from the provisions previously in force (part XII of the Companies Act 1985), the changes were, as usual, minor – with two exceptions (ss 893 and 894) to which we must return.

In the years leading up to the 2006 Act there had been extensive discussion about the possibility of major changes to the system of company charges registration. The two chief complaints[4] were about double registration (for most charges, other than floating charges)[5] and about the 21-day invisibility period (for

1 The English floating charge developed on the basis of case law in the 19th century. The system of registration of company charges began in England with the Companies Act 1900.

2 Strictly speaking there is no such register. The legislation merely speaks of the registrar and of the requirement to deliver documents to the registrar etc. There is something called the 'register of charges' but this is not what in Scotland is thought of as a register: it is merely a subdivision of a company file. There are thus as many 'registers of charges' as there are registered companies.

3 One of the many odd features of the registration regime was that an unregistered charge did not become wholly void after the 21 days, but only void in certain respects: void against creditors and void against a liquidator. Later, void against an administrator was added. A certain very limited degree of validity thus continued. This approach has generated much complexity for no benefit.

4 See further G L Gretton, 'Registration of company charges' (2002) 6 *Edinburgh Law Review* 146.

5 Floating charges being registered only in the Companies Register.

floating charges).[1] Some proposals were radical. The Scottish Law Commission, with general support, recommended that the system be wholly abolished.[2] No security would have to be doubly registered, and floating charges were to have a new home made for them: a Register of Floating Charges. (Of this, more later.) The Law Commission of England and Wales was also unhappy with the system.[3] But by the time that what is now the 2006 Act was entering Parliament, no consensus had been reached. So in the Act the existing rules were re-enacted, with some minor changes, and two new sections (893 and 894) were added which would allow major changes to happen in future without the need for primary legislation.

Section 893 makes it possible to solve the double registration problem by the following system. The security right is registered in its normal register[4] (eg a standard security is registered in the Land Register), and the registrar[5] concerned (eg the Keeper) writes[6] to the Companies Registrar saying (for instance) 'ABC Ltd has granted a standard security to DEF over property GHI'. The Companies Registrar can then make the appropriate entry in the Companies Register. The benefits of double registration, if such benefits exist,[7] are thereby achieved without the need for actual double registration. Section 893 was a response to the criticisms made of the double registration system. But thus far the number of 'special registers' brought into the s 893 system is … zero. Thus the problems and inconveniences of double registration continue unabated.

By contrast, the other enabling provision, s 894, has been activated. This section allows the whole of part 25 of the 2006 Act – ie the company charges registration regime – to be reformed by statutory instrument. This has now, eventually,[8] been done by the Companies Act 2006 (Amendment of Part 25) Regulations 2013,[9] which came into force on 6 April 2013.[10] As a technical point, the way the statutory instrument works is that it amends the 2006 Act. Hence the

1 Subject to certain qualifications, this was a problem that existed only for floating charges. For instance, a standard security is visible to third parties from the moment of its registration in the Land or Sasine Register.

2 Scottish Law Commission, Report on *Registration of Rights in Security by Companies* (Scot Law Com No 197, 2004) para 3.25.

3 For some of the history, see Scottish Law Commission, Discussion Paper on *Moveable Transactions* (Scot Law Com DP No 151, 2010) ch 10.

4 In s 893 called the 'special register'.

5 In s 893 called 'the responsible person'. Had Parliamentary Counsel drafted the Bible, the opening words would have been: 'On the appointed day, the responsible person created. …' Actually, the *very* first words would have been: 'Subject to …'

6 We speak of substance rather than form. Obviously communication will not be by paper and ink.

7 Few countries in the world have the English system whereby security rights granted by companies are doubly registered. Even countries that have been subject to English influence have generally rejected double registration (eg Australia, Canada, New Zealand and the USA). The net benefits of double registration, though often asserted in London, are not self-evident.

8 The process took a long time, the initial consultation document having been issued in 2010. For some of the background, see H Patrick, 'Charge registration reform – further BIS consultation' 2011 SLT (News) 81. The initial slow pace finally ended in an unseemly scramble, the statutory instrument being made on 12 March 2013, less than four weeks before it came into force. This sort of thing is unacceptable: the SI was not emergency legislation.

9 SI 2013/600.

10 Almost nothing seems to have been written on the new regime. The only article worth noting of which we are aware is 'Revised system of registration of company charges comes into force – at last' [2013] *Company Law Newsletter* 1.

company charges registration regime continues to be set out in part 25 of the 2006 Act. What has happened is that part 25 has mutated into a new form.[1] Since the system applies also to LLPs, a parallel statutory instrument was made for those.[2]

The new rules

The new rules bring about numerous changes in detail, which collectively represent the largest change in the company charges registration regime that has been seen since that regime was set up in 1961. Yet the reforms, though substantial, are not radical, and make no attempt to deal with the real problems. The double registration problem remains. The 21-day invisibility problem remains. The 'semi-void' problem remains. The following items are some of the highlights; we do not seek to give an exhaustive account.

Unitary set of rules

The provisions for England and Wales and those for Scotland are, for the first time, integrated into a single set of provisions.

Which types of security right are registrable?

Under the previous regime, specified types of security right had to be registered.[3] If a security right was not on the list, it did not have to be registered. Under the new regime, it is the other way round: all types of 'charge' must be registered,[4] except for types that are specifically exempted from registration, namely: '(a) a charge in favour of a landlord on a cash deposit given as a security in connection with the lease of land; (b) a charge created by a member of Lloyd's (within the meaning of the Lloyd's Act 1982) to secure its obligations in connection with its underwriting business at Lloyd's; (c) a charge excluded from the application of this section by or under any other Act.'[5]

There is a provision saying: '"Charge" includes (a) a mortgage; (b) a standard security, assignation in security, and any other right in security constituted under the law of Scotland, including any heritable security, but not including a pledge.' This contains two puzzles that we cannot explain. The first is that the word 'charge' merely *includes* 'any … right in security'. So there can be other 'charges' in addition to rights in security. We do not know what such charges might be. The implications are alarming. However, that alarm may perhaps be allayed by the reflection that the word 'charge' in this sense is purely a modern statutory one, and so if statute does not explain it, no appeal can be made to some background common-law meaning. That would lead to the conclusion

1 The new sections are distinguishable from the repealed sections because of the way that they are numbered: 859A to 859Q. Two sections of the original part 25 (ss 893 and 894) remain in force, for obvious reasons.
2 Limited Liability Partnerships (Application of Companies Act 2006) (Amendment) Regulations, SI 2013/618.
3 Companies Act 2006 s 878.
4 CA 2006 s 859A(1).
5 CA 2006 s 859A(6).

that the word 'includes' is an error for 'means'. At any rate, one must hope that that is the answer. Another puzzle is that 'charge' means (or includes) not only a standard security but also any 'heritable security'. Since a standard security is a type of heritable security, what other type of heritable security is contemplated?

No mention is made of securities arising by operation of law, such as lien, or securities created by diligence. The previous legislation was also silent on these points. The consensus under the old regime was that, since it applied only to security rights 'created' by a company, security rights arising by operation of law or by diligence were excluded from the registration regime. The new legislation also uses the word 'created', so presumably the law in this respect remains unchanged.

When does the 21-day clock begin to tick?

There is now a whole section devoted to the question of when a security right is 'created' (thus beginning the ticking of the 21-day clock).[1] The rule for standard securities remains what it was under the previous regime, namely the date of registration in the Land or Sasine Register.

The 21-day invisibility period for floating charges

In English law the publicity principle is not a strong one, and the idea of security rights existing without any public notice does not disturb the mind of the English lawyer. Thus the 21-day invisibility period for floating charges has always tended to be more of an irritant in Scotland than in England.[2] The issue arises only for floating charges, for other security rights have to be fully constituted (eg by registration in the Land Register) before the 21-day period begins to run. We return to floating charges below.

Failure to register timeously

Failure to register timeously has essentially the same consequences as under the previous law. The security right becomes semi-void.[3] But, as before, there is the cumbersome and expensive system whereby a creditor can seek the permission of the court to register late.[4] The consequence is that the invisibility period may last much longer than 21 days. It can even last years.

Forms, particulars documents etc

There are new registration forms, the most important being the MR01.[5] The applicant must not only state the 'particulars'[6] but must also deliver a certified

1 CA 2006 s 859E.
2 Complaints have been numerous over the years. The earliest we know is D Bennett, 'A judicial wet blanket upon the Register of Charges' 1967 SLT (News) 153.
3 CA 2006 s 859H.
4 CA 2006 s 859F.
5 The Companies House website has a useful page: 'Company Charges and Mortgages FAQs' at www.companieshouse.gov.uk/infoAndGuide/faq/companyCM.shtml. See also www.companieshouse.gov.uk/infoAndGuide/faq/MR01Checklist.shtml.
6 CA 2006 s 859D.

copy of the 'instrument'.[1] The provisions do not say what is meant by 'certified' or who can be the certifier. It might be thought that the new system is closer to the Scottish tradition of registering or recording deeds, and that one result would be that the form would be simpler. In fact the form does not seem any simpler. The Registrar allocates a 'unique reference code' to each charge and also, as before, issues a certificate.[2]

The Keeper has issued a note about the implications of the new rules for standard securities granted by companies or LLPs.[3] As before, the Keeper should be requested to confirm the date of registration in the Land or Sasine Register. 'Solicitors who wish the Keeper to confirm the date of registration should ensure that the request for confirmation is clearly marked in block capitals at the top of the front page of the application form for the standard security and any accompanying transfer of title.' The note continues:

> Under the new [company charges registration] scheme, the Companies House certificate will contain only the name and number of the company or LLP that granted the security, together with the unique reference code allocated by Companies House to the charge. The Keeper will still require production of the Companies House certificate, but this should be supported by an assurance from the solicitor that the certificate relates to the standard security deed that was submitted to RoS.

International private law

Does the registration regime apply extraterritorially? This is rather a complex subject, but the basic answer has hitherto been yes. Thus if a Scottish-registered company owned land in Japan, and granted to a Japanese bank a security over the land, and the security complied with all requirements of Japanese law but there was no registration in the Companies Register in Edinburgh, then the security was semi-void. Whether this remarkable rule ever cut much ice with the courts of Japan or elsewhere may be doubted, but this is what the legislation said, albeit rather by implication than expressly.[4] On this question the new provisions are even less forthcoming than their predecessors.[5]

Two abolitions

Two rules in the old regime that were never enforced in practice have been abolished. One was the rule that failure to register a charge was a criminal offence. This was dotty in itself, indicative of the muddled thinking that has always permeated this area of law. It was doubly dotty because the fine increased for each day of failure to register even though, once the 21-day deadline had passed, registration could not be effected. This was possibly the daftest rule in the entire statute book, and so it is sad to see it disappear. The other provision that

1 CA 2006 s 859A(3). To a limited degree sensitive information may be redacted: CA 2006 s 859G.
2 CA 2006 s 859I.
3 www.ros.gov.uk/pdfs/update38.pdf. In what follows we quote the note only selectively.
4 See eg CA 2006 s 884.
5 CA 2006 s 859B(8)(b) perhaps may imply that foreign security rights are covered, but it may be that that provision is actually only about Scots law.

was never enforced, and which has now been scrapped, was for each company to maintain its own 'internal' register of charges.

The floating charge: the future?

Part 25 of the Companies Act 2006 has a dual role. It calls for double registration of security rights, such as standard securities, where the granter is a company. It also provides the sole registration system for floating charges. As mentioned earlier, in 2004 the Scottish Law Commission recommended (i) that double registration should be scrapped (so that, for instance, standard securities etc would have to be registered just once, in the Land or Sasine Register) and (ii) that a new Register of Floating Charges should be set up.[1] One aspect of the new system was that the registration of floating charges would work in a rational way: there would be no time limit for registration (a creditor could register after a month or a year) but the floating charge would not come into existence until registered. This of course is the way that the registration of standard securities works. The first part of the recommendations would have needed Westminster legislation,[2] and Westminster was not willing to make that change. But the second part of the recommendations – reform of the law of floating charges, including the establishment of a new register – was a devolved matter, had broad support within Scotland, and was enacted as part 2 of the Bankruptcy and Diligence etc (Scotland) Act 2007. This, however, has yet to come into force. After it was passed the Scottish banks, which critics say have now become essentially London-based institutions, decided that they did not like it and lobbied against it. What seems to be happening is that the Scottish Government is preferring the banks' views to the decision of the Scottish Parliament.[3]

MORTGAGE FRAUD AND THE LAND REGISTER

Another year, another case on mortgage fraud. In *Santander UK plc v Keeper of the Registers of Scotland*,[4] the fraud was both simple and effective. In March 2007 Samia Anjum bought a flat at 145 Albion Street, Glasgow. This was at the height of the market, and the price was £235,000. The purchase was financed by a substantial loan from the Alliance and Leicester Building Society which was secured over the flat by a standard security. After only six months Miss Anjum visited the offices of Registers of Scotland and presented a discharge of

1 Scottish Law Commission, Report on *Registration of Rights in Security by Companies* (Scot Law Com No 197, 2004).

2 That, at least, is the conventional reading of the Scotland Act 1998. That Act devolves the law of rights in security but reserves company law. The registration of company charges in the Companies Register lies on the cusp. The predominant view is that this area falls on the 'reserved' side of the boundary, though the issue has never been tested in the courts.

3 Another part of the 2007 Act also remains uncommenced, namely the provisions about replacing adjudication by land attachment. The banking lobby is not involved. It may be added that what many saw as the major unfairness of the diligence of adjudication was taken away by *Hull v Campbell* 2011 SLT 881, 2011 SCLR 598, discussed in *Conveyancing 2011* pp 145–46.

4 [2013] CSOH 24, 2013 SLT 362.

the security for registration. Mindful of identity theft, the Registers carried out an identity check, as was their practice.[1] But there was no identity theft in this case. Miss Anjum was indeed who she said she was.[2] But the signature on the discharge was forged.[3]

Freed of the Alliance and Leicester security, Miss Anjum proceeded to obtain a further loan from the Bank of Scotland, again secured over the flat. But her repayments of the first loan became so sporadic that, in February 2008, Alliance and Leicester decided to call up the security. The fraud was uncovered, and Miss Anjum disappeared, with the police in pursuit.

Alliance and Leicester's first move was to raise an action for reduction of the discharge coupled with rectification of the Land Register. By the beginning of 2010 decree had been granted, as one might expect, and the standard security restored to the Register. But there was a problem. There are limits even to the power of the Keeper: while she can rectify the Register she cannot re-write history. Rectification, in other words, is not retrospective in effect.[4] So the security burdened the flat for six months in 2007, ceased to burden it for all of 2008 and 2009, and burdened it once more following rectification in 2010. But during the period when the security was 'off' and not 'on', the Bank of Scotland had obtained a standard security of its own, and that security now ranked ahead of the Alliance and Leicester's security.

What happened next may readily be imagined. The Bank of Scotland called up its loan and sold the flat. The sale price, a mere £125,000, was not enough to satisfy even this loan. Alliance and Leicester, which by now was owed around £250,000, received nothing at all. Its loss was of course due to the fraud of its client. But the conduct of Registers of Scotland in accepting a forged discharge might also not be beyond reproach. Santander, which by now had absorbed Alliance and Leicester, resolved to make a claim against the Keeper. The normal basis of such a claim would, of course, be the indemnity provision in s 12 of the Land Registration (Scotland) Act 1979. But indemnity under s 12 is presented as an alternative to rectification. If the Keeper refuses or omits to rectify, indemnity is due.[5] If, on the other hand, she agrees to rectify, nothing is due:[6] the applicant is assumed to be completely satisfied by rectification. In the present case the Keeper had indeed rectified. Santander's security was restored. But Santander

1 Identity theft is a common instrument of fraud. For an example involving standard securities, see *Cheshire Mortgage Corporation Ltd v Grandison* [2012] CSIH 66, 2013 SC 160, discussed in *Conveyancing 2012* pp 150–51.

2 At least as far as we know.

3 This is not the only case involving a forged discharge to be decided in 2013, although in *Frank Houlgate Investment Co Ltd v Biggart Baillie LLP* [2013] CSOH 80, 2013 SLT 993, [2013] PNLR 25 the discharge was presented for registration by the fraudster's solicitor.

4 *Stevenson-Hamilton's Exrs v McStay* 1999 SLT 1175; *Keeper of the Registers of Scotland v MRS Hamilton* 2000 SC 271.

5 Land Registration (Scotland) Act 1979 s 12(1)(b). However, as this too is tied to rectification (ie the amount payable is judged by the position in which the claimant would have found itself had rectification, after all, been granted), nothing would have been due in the present case (because, as events showed, rectification brought no advantage). *Braes v Keeper of the Registers of Scotland* [2009] CSOH 176, 2010 SLT 689 is an example of this kind of difficulty.

6 Other than, under s 12(1)(a), to a person who suffers loss as a result of the rectification.

was far from satisfied because, in the event, a second-ranking security turned out to be worthless.

There was, however, an alternative route. In *Braes v Keeper of the Registers of Scotland*,[1] another case in which the statutory indemnity provisions proved inadequate, the court was willing to entertain the possibility of a claim against the Keeper based on common-law negligence although, in the event, the matter did not fall to be decided. Taking the hint, Santander raised an action against the Keeper for negligence.

The Lord Ordinary, Lord Boyd of Duncansby, was prepared to accept, on the averments, that the loss arising from registration of the discharge might have been foreseeable.[2] A number of factors pointed in this direction:[3]

> the nature of the register conferring a real right and the concomitant responsibility thus imposed on the defender [ie the Keeper]; her general awareness of the risk of fraud; her knowledge of practice elsewhere, albeit in Ireland;[4] the pursuers' averments of industry practice in respect of retention of title deeds while the loan is outstanding and the release of discharges of standard securities only to solicitors; the fact that personal presentation of discharge is rare; the likelihood that if fraud is to be perpetrated it will be by an individual rather than a solicitor.

Particularly telling was the fact of personal presentation, an occurrence which was sufficiently rare to invite suspicion. Of the 251,003 applications for registration of discharges in 2007, only 56 were personally presented.[5]

But with pure economic loss, as in other 'novel' cases, foreseeability is not enough by itself to give rise to a duty of care. It is also necessary to establish the other two parts of the tripartite test set out in *Caparo Industries plc v Dickman*.[6] One of those – that there was a relationship of proximity or neighbourhood between the parties – was conceded by the Keeper.[7] On the final part of the *Caparo* test, however – that it would be fair, just and reasonable to impose a duty of care – the action foundered.

This was primarily because the loss was 'caused by the criminal acts of the pursuers' customer',[8] particularly as the risk of such criminality was one assessed, and therefore assumed, by Alliance and Leicester:[9]

> Miss Anjum was the Alliance & Leicester's customer. It was they who decided to lend money to Miss Anjum. It was they who required her to execute a standard security

1 [2009] CSOH 176, 2010 SLT 689 at paras 84–89 per Temporary Judge M G Thomson QC. See *Conveyancing 2009* pp 128–30.
2 Lord Boyd also accepted, surely correctly, that the case concerned a decision which was 'operational' and not a 'policy' decision of the kind which would have been non-justiciable: see paras 67–76.
3 Paragraph 87.
4 Rather oddly, the Keeper met the pursuer's averments about registration practice in *England and Wales* with a 'not known and not admitted': see para 82.
5 Paragraph 15.
6 [1990] 2 AC 605.
7 In *Braes* the proximity limb had been said to cause the pursuer 'no difficulty' (para 88).
8 Paragraph 109, founding on *Mitchell v Glasgow City Council* [2009] UKHL 11, 2009 SC (HL) 21.
9 Paragraphs 101 and 102.

> and it was their solicitors who presented it to the defender along with the title for registration.
>
> In deciding to lend money to Miss Anjum the pursuers accepted certain risks. The first one was that Miss Anjum would be able to repay the loan in such instalments and within such a period of time as the pursuers had specified in their offer of loan. It must, I think, have been implicit in the building society's dealings with Miss Anjum that they accepted, or were satisfied, as to her honesty.

If a duty of care were to exist, Lord Boyd continued,[1] 'then it is the public purse[2] that will bear the loss and not the commercial enterprise that initially assumed the risk'. That was not fair, just and reasonable.

Commenting on the decision from the vantage-point of delict law, Professor Douglas Brodie is broadly supportive although he finds a stronger ground in an argument which was not put to the court, namely the principle established in *Gorringe v Calderdale MBC*[3] that an inability to recover under a statutory provision cannot usually be circumvented by a claim in common-law negligence.[4] 'It would be surprising', Professor Brodie writes, 'if the legislature had intended that those not covered by s 12 [ie the indemnity provision in the 1979 Act] could also recover from the Keeper'.[5]

It is possible, however, to question this view and indeed the Lord Ordinary's decision as a whole. It is no doubt a sound principle that, where a compensation scheme is provided by Parliament, the scheme should usually be regarded as complete in itself and not capable of augmentation by recourse to the common law. But that argument loses force where, as here, the failure to provide compensation flows from what the Scottish Law Commission has identified as a structural flaw in the 1979 Act provisions (ie the tying of indemnity to refusal of rectification so that a person who is *granted* rectification is unable to claim for loss);[6] or, to say the same thing in another way, it is arguable that this is a case where the statutory scheme is not, after all, complete.[7] The Lord Ordinary's emphasis on the criminality of Miss Anjum's behaviour might also be questioned. Is the suggestion that the Keeper's duty to carry out her statutory functions vanishes where someone acts fraudulently? On the contrary, it might be thought that it is in such cases that the Keeper's duty is particularly engaged.

Whether or not the decision is good in delict law, however, it is bad on land registration policy. That, however, is the fault of the 1979 Act and not of the court

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1 Paragraph 107.

2 In fact the loss falls on the land registration system (which is self-funding) and not on the public purse, in the sense of the taxpayer.

3 [2004] UKHL 15, [2004] 1 WLR 1057, [2004] 2 All ER 326.

4 Douglas Brodie, 'Searching for *Gorringe*' (2013) 111 *Greens Reparation Bulletin* 5.

5 At p 7.

6 Scottish Law Commission, Discussion Paper on *Land Registration: Registration, Rectification and Indemnity* (Scot Law Com DP No 128, 2005) paras 7.7 – 7.18.

7 To which might be added that *Gorringe* is not a particularly good guide as to how the present case should be disposed of. The question at issue was whether a local authority might be liable for loss allegedly caused by inadequate road signage. The claimant was not (as in the present case) a paying customer, and a successful claim (unlike in the present case) would indeed have been a burden on the public purse.

in *Santander*. The binding of indemnity to rectification restricts recovery in a manner which is both artificial and unprincipled; and matters are made worse by the 'on-off' status of rights which are subjected first to registration (with its Midas touch) and then to rectification. Happily, these shortcomings are avoided by the Land Registration etc (Scotland) Act 2012. If the facts of *Santander* had played out after the new Act came into force, the forged discharge would have had no effect, and the Alliance and Leicester would have lost neither the standard security nor its first ranking. The Bank of Scotland, deceived by the absence of the Alliance and Leicester security from the Register, would have had a claim for its loss on the basis of the Keeper's warranty of title.[1]

In any event, this particular fraud will be much harder to bring off in the future due to a change of practice at Register House. Before registering a discharge which is personally presented by the borrower, the Keeper now contacts the lender to ascertain that all sums due under the security have been repaid.[2] That change of practice is the long-term legacy of *Santander*.

CRIMINAL PROPERTY LAW

There exists a cluster of statutory provisions aimed at depriving criminals of their ill-gotten gains, of which the most important are in the Proceeds of Crime Act 2002 (POCA). This area of legislation, which originated in the 1980s, was at first aimed only at drug dealers, but it has over the years been extended and now applies to any criminal activity. The extension has been twofold: extension of the legislation itself, and extension of Crown practice. The Crown not only can now target all criminal conduct (and not only drug dealing) but is increasingly doing just that, and as it does so the results for property lawyers are becoming significant.

In part, this is because the rules bring with them a new form of compulsory transfer of property. But it is also because the rules are increasingly being applied to mortgage fraud, so that the interest from a property-law standpoint is at both ends: the criminal acquisition as well as the later compulsory divestiture. 'Mortgage fraud' comes in a variety of different forms, with differing degrees of culpability. At the lighter end one finds applicants bending the truth about their income or credit history and so on: that too is 'mortgage fraud' because it uses deception to bring about a gain. Perhaps because it is at the less serious end of the culpability spectrum, it often happens.

It took the Crown some time to realise that cases of this sort are a rich resource to be fracked. The fracking began south of the border, but, as we foretold last year,[3] it has now arrived here, in the shape of *Scottish Ministers v K*.[4] K was a tenant in social housing. She wanted to buy the property that she lived in under

1 Land Registration etc (Scotland) Act 2012 s 73(1)(b).
2 *Santander* para 17.
3 See *Conveyancing 2012* pp 142–45.
4 [2013] CSOH 129, 2013 GWD 26-524. The case took away the defender's money, but not her anonymity. Perhaps she would have preferred it the other way round.

the right-to-buy legislation. Taking into account the discount to which she was entitled, the price would be £54,000. She had no financial resources of her own, so to buy the property she needed to borrow the price. But since she had no income, other than state benefits, she had a problem. She went to a mortgage broker and said that she was in employment, earning £17,000 *per annum*. The broker applied to a lender on her behalf and included in the application the false information about employment, with the result that K obtained a loan of £62,925 – well over 100% of the price. Neither the broker nor the lender took any steps to verify what she said about her income. With this loan she bought the property, in 2006. What she did with the balance of £8,925 is not known. In 2010 K resold the property, the price being £122,500. At that stage the outstanding amount on the loan had increased to £65,124.75.[1] The loan was paid off, leaving £57,375.25.[2]

How did the Crown learn about the misstatement in the 2006 loan application? That is always the mystery in such cases. Misstatements in loan applications tend to come to light only where there is default on the loan and the lender seeks to enforce. But the cases where the Crown takes action under POCA tend to be cases where the lender does not enforce.

Since the property itself had been sold, the 'recovery' against K was monetary. The Lord Ordinary (Bannatyne) does not attempt to quantify the actual amount but says that: 'On the sale of the subject property, the sale price under deduction of the sum of the outstanding mortgage becomes the recoverable property.'[3] We take that to mean that the Crown obtained decree for £122,500 minus £65,124.75. While this may be correct, we note[4] that it means that for those in K's position, the more they borrow the less they are liable. Had K not initially received a 100% mortgage loan, she would have ended up paying more to the Crown. If she spent that extra money on wine, men and song (we merely speculate) then her pleasures came free and her mistake was not to have borrowed even more. Indeed, with planning she might have borrowed so much that her POCA liability would have been zero. The same point can be made in relation to the fact that during the lifetime of the loan (2006 to 2010) the negative balance increased. With hindsight, she should have made sure it increased even more.

One of the many puzzles about POCA is that the Crown often has the option (i) of taking cases under part 3 ('Confiscation') or (ii) taking cases under part 5 ('Civil recovery of the proceeds etc of unlawful conduct').[5] For instance last year's English case that went to the Supreme Court, *R v Waya*,[6] which involved facts that were in some respects similar, was not taken as a 'confiscation' case, and for

1 The reason for this is not known. Perhaps she borrowed more, or perhaps interest payments were missed, and added to capital. Possibly the lender, being well secured, was not particularly concerned about an increasing negative balance. But all this is mere speculation.

2 It is stated, however, that 'the net free proceeds of sale were £51,289.33' (para 30). Even after meeting fees and outlays, there is a puzzle as to this figure for 'net free proceeds', but that issue cannot be explored here.

3 Paragraph 105.

4 As we did last year: *Conveyancing 2012* p 145.

5 Part 5 applies across the UK. But the 'confiscation' system is enacted in three separate forms, one for England and Wales (part 2), one for Scotland (part 3) and one for Northern Ireland (part 4).

6 [2012] UKSC 51, [2013] 1 AC 294.

that reason was regarded in the present case as being of limited relevance. Thus this vast and incomprehensible statute[1] generates two separate bodies of case law. As well as its technical deficiencies, the equity of the statute seems doubtful, because of the lack of proportion between a minor offence, which in the event caused no one any harm, and the consequences that the statute imposes. By contrast, those who actually cause criminal harm to others may suffer sanctions that are, in comparison, trivial.

A final thought. The consequences of a misstatement on a loan application form are now so horrendous that there might be a case for routinely warning clients about the risks.

LAND REGISTRATION

Overlapping titles

In *Rivendale v Keeper of the Registers of Scotland*[2] a muddle over Sasine titles developed into a full-scale disaster in the Land Register. The muddle began in 1950 when the owner of an estate at Baluachrach, Tarbert, Argyll disponed a cottage and garden ('plot A'). By error, a later disposition out of the same estate in 1958, of what may be called 'plot B', included an area of garden which had been disponed as part of plot A in 1950.[3] At the time, this error was no more than a minor inconvenience. As the area had left the estate in 1950, it could not be conveyed in 1958. After the 1958 disposition, therefore, as before it, the area remained part of plot A.

But matters become more complex once the Land Registration (Scotland) Act 1979 comes to be involved. And the way in which rights are then allocated depends on the order of first registration. This is the Land Register lottery.[4] All is well if the property which was first to be broken off (plot A) happens also to be first to be registered. For the disputed area will then be shown on the title plan for plot A; and when, later, an application is made for first registration of plot B, the Keeper will decline to include the disputed area. That, of course, is as it should be: the disputed area does not belong to the later property and so should not be included within its title plan.

But things go badly wrong if the lottery balls spin the other way and it is the later property (plot B) which is first to enter the Land Register. That, unhappily, was the situation in *Rivendale*. When plot B was sold in 2007, this prompted first registration. And in making up the title plan the Keeper, naturally enough, followed the plan in the 1958 disposition and included the disputed area. The problem only came to light in 2010 when plot A changed hands and the disponee applied for (first) registration. But by this stage the

1 The intellectual incoherence and impenetrability of the legislation cannot be overstated.
2 30 October 2013, Lands Tribunal. The Tribunal comprised J N Wright QC and K M Barclay FRICS.
3 The precise extent of the overlap area was itself the subject of strenuous dispute in the case: see below.
4 References are to the 1979 Act. Things work differently under the Land Registration etc (Scotland) Act 2012: see below.

Keeper's hands were tied. By including the disputed area within plot B, the Keeper had conferred a good title on the owner of that property; for the very act of registration – the Keeper's 'Midas touch' – turns bad titles into good.[1] And having made this (innocent) error, the Keeper was not then in a position to undo it. It is true that the Register was inaccurate in showing the area as part of plot B when it should have been part of plot A. But an inaccuracy cannot normally be rectified to the prejudice of a proprietor in possession;[2] and unless the owner of the first plot to be registered gives up the windfall gain by conceding he is not in possession – which, for obvious reasons, rarely occurs – the Keeper, not being in a position to test the matter for herself, will refuse the application for rectification. The disappointed party is then left with the hard decision as to whether to litigate – with no guarantee of success – in order to try to get his land back.

Thus matters stood in *Rivendale*. The disputed area, as already mentioned, was included within plot B. The owner of plot A sought to have the area reallocated to that plot by an application for rectification.[3] The owner of plot B having pled possession, the Keeper refused the application. The owner of plot A then appealed the Keeper's decision to the Lands Tribunal.[4] The Keeper lodged written answers but played no further part in the proceedings, and the real defence was mounted by the owner of plot B.

For the appellant to recover her rightful property, by rectification, she would have to be able to show that it was not in the possession of her competitor. In the event, she had only partial success. That the part closest to the appellant's cottage was in the appellant's possession was something that the owner of plot B was willing to concede. The Lands Tribunal found that there was also possession of an additional strip. The rest of the area, however, was held to be possessed by the owner of plot B and so was irrecoverable. The appellant was left to seek such solace as she could find in a claim for indemnity against the Keeper.[5]

It is worth reflecting on how matters would have worked out if the two first registrations had occurred once the Land Registration etc (Scotland) Act 2012 had come into force.[6] Under the new Act there is no Midas touch and no protection for 'proprietors in possession' as such. Instead the Land Register will operate much the same rules of priority as under the Sasine system or, to put it more correctly, as under the ordinary rules of the law of property. So when the disputed area was included by mistake within the title of plot B, its ownership

1 Land Registration (Scotland) Act 1979 s 3(1)(a).
2 LR(S)A 1979 s 9(3)(a). In *Rivendale* the Tribunal (at paras 63–64) thought it necessary to consider whether the registered proprietor would be prejudiced if rectification went ahead. In fact it is self-evident that the loss of ownership is prejudicial, except perhaps in a case where the ownership carries significant liabilities.
3 Oddly, the appellant sought rectification of her own title sheet (which had yet to be issued) and not that in respect of plot B, but, by agreement between the parties, this mistake was overlooked in the appeal: see para 4.
4 LR(S)A 1979 s 25(1).
5 LR(S)A 1979 s 12(1)(b).
6 For transitional arrangements, see below.

as part of plot A would have been undisturbed. And on the subsequent first registration of plot A the Keeper – provided she was satisfied as to the error[1] – could have cured the inaccuracy on the Register by detaching the area from plot B and reuniting it with plot A. In place of the topsy-turvy world of the 1979 Act, each party would receive that to which they were properly entitled; and it would be the owner of plot B, and not of plot A, who would have to make do with compensation from the Keeper.[2]

The position might, however, be different if the owner of plot B had sold the property on to a third party before the first registration of plot A. For, in order for a system of registration of title to work as it should, an acquirer must be able, by and large, to rely on what he sees on the Register; and if the third party had consulted the Register in this case he would naturally have supposed that the disputed area was part of the property he was buying. Section 86 of the 2012 Act therefore confers on a *bona fide* acquirer a good title even where, as here, the area in question was not owned by the disponer. But there is a further requirement. Under s 86 there must have been possession of the area for a year, either by the disponer alone, or by the disponer followed by the disponee. Thus, much as under the 1979 Act, entitlement to the disputed area, in this case at least, would depend on the state of possession.

When is a proprietor 'in possession'?

An enduring mystery of the 1979 Act has been the meaning of 'proprietor in possession', a concept which, despite being of central importance to the operation of the Register, is left undefined in the legislation. It is only now, on the threshold of the Act's demise, that there is sufficient case law to make some attempt at finding a meaning.

An important first step was the discussion of the issue by the Lands Tribunal[3] and then the Inner House in *Safeway Stores plc v Tesco Stores Ltd*.[4] The fullest analysis was by Lord Hamilton:[5]

> In my view it is necessary, in the circumstances of this case, to make some attempt to divine what the legislature had in mind by a proprietor 'in possession' who *ex hypothesi* does not 'truly' have the right accorded to him on the register but whose possession (and registered proprietorship) is nonetheless, as a matter of policy, not to be disturbed. In my view the term 'in possession' in this statutory context imports some significant element of physical control, combined with the relevant intent; it suggests actual use or enjoyment, to a more than minimal extent, of the subjects in question as one's own.

1 For rectification to take place, the inaccuracy must be 'manifest': see Land Registration etc (Scotland) Act 2012 s 80(1), (2). If not at first manifest, it can be made manifest by a successful declaratory action.

2 Rather than the indemnity system of the 1979 Act this is a claim under the Keeper's warranty of title: see LR(S)A 2012 ss 73 and 77.

3 2001 SLT (Lands Tr) 23, under the name of *Tesco Stores Ltd v Keeper of the Registers of Scotland*.

4 2004 SC 29.

5 2004 SC 29 at para 77.

Much more recently a second case, *Burr v Keeper of the Registers of Scotland*,[1] offered views on the important question of the time at which possession is to be measured. Finally, these two cases have now, in 2013, been supplemented by a further two: *Rivendale v Keeper of the Registers of Scotland*,[2] referred to above, and *Nicol v Keeper of the Registers of Scotland*.[3] Both are decisions of the Lands Tribunal[4] on appeal from a refusal by the Keeper, in the face of competing claims as to possession, to rectify an inaccuracy in the Register. In *Rivendale* the Tribunal concluded that the person registered as proprietor was in possession of only part of the disputed area and allowed the appeal in respect of the other part; in *Nicol*, which concerned a garden shed, the registered proprietor was found not to have been in possession at all.

On the basis of all of these cases it is possible to offer a number of thoughts on the topic of proprietors in possession. First, although the factual question to be determined, strictly, is whether the registered proprietor[5] is in possession, it is not usually possible to do this without considering the possessory status of the 'true' owner, ie of the person who would be owner if the inaccuracy on the Register were to be rectified.[6] So to ask whether the registered proprietor is in possession is really to ask which of the two parties – the registered proprietor or the 'true' owner – is in possession.

Secondly, the relevant date for determining possession is 'the date of the application to rectify … or perhaps the [Keeper's] decision'.[7] Nonetheless – and this is the third point – it will usually be necessary to look at the state of possession *before* this time.[8] This is because, in order to be in possession, one has to acquire it, and the main acquisitive action may have taken place some time ago.

Fourthly, once possession has been acquired, a person is taken to remain in possession without further possessory acts.[9] So in *Rivendale* the Lands Tribunal found that some earlier possessory acts, neither repeated nor challenged in the period that followed, were sufficient to constitute possession.[10]

Fifthly, it may often be difficult for the registered proprietor to demonstrate acquisition of possession. As Lord Hamilton said in the passage already quoted from *Safeway*, there must be 'some significant element of physical control'.[11]

Sixthly, where it is only a *part* of the property in the title plan which is in dispute, it is possible that possession of *other* parts of the same property may be regarded as possession of the disputed part – even if few or no acts have

1 12 November 2010, Lands Tribunal. See *Conveyancing 2010* pp 159–62.
2 30 October 2013, Lands Tribunal.
3 2013 SLT (Lands Tr) 56.
4 The Tribunal comprised, respectively, J N Wright QC and K M Barclay FRICS (*Rivendale*) and J N Wright QC and I M Darling FRICS (*Nicol*).
5 This is because 'proprietor' in this context means, not the person who ought to be owner (the 'true' or 'should-be' owner) but rather the person who, because he is registered as owner, *is* the owner, because of the 1979 Act's gift to the Keeper of the Midas Touch. See eg *Nicol* para 25.
6 *Burr* para 24; *Nicol* para 28.
7 *Burr* para 27.
8 *Safeway* para 80; *Rivendale* para 60.
9 *Tesco Stores Ltd v Keeper of the Registers of Scotland* 2001 SLT (Lands Tr) 23 at 36F.
10 *Rivendale* para 60.
11 *Safeway* para 77.

taken place on the disputed part. But this rule applies only where the disputed part is 'an integral element of the registered subjects viewed as a whole',[1] and whether that is so depends on the layout and use of the subjects.[2] In *Rivendale*, for example, the area in dispute comprised two distinct elements – garden ground and a track – so that possession of one element could not be regarded as possession of the other.[3]

Seventhly, actings of one or both parties once the possessory dispute becomes live are often disregarded as being merely part of a 'tennis match' of claim and counter-claim; but that would not be so if these were the first significant actings in respect of property which had previously been unpossessed.[4]

Eighthly, civil possession – in other words indirect possession, through family members or tenants or the like – is probably the equal of ordinary (ie natural) possession,[5] although the issue has not been definitively determined. In *Rivendale*[6] the Lands Tribunal was perhaps being unduly cautious when it expressed doubt as to whether an owner could possess a track through those to whom she had granted servitude rights of access.

Finally, each case turns on its own facts and circumstances. As the Lands Tribunal emphasised in *Nicol*[7]

> There has in fact been some authoritative guidance from court cases, as well as one or two cases before this Tribunal, on what is meant by 'possession' in this context, although it is fair to say that the situations in which the issue has to be considered will be particular to every case.

Transitional: from the 1979 Act to the 2012 Act

Although the 1979 Act will be replaced by the 2012 Act on a day yet to be designated (known as 'the designated day'),[8] probably sometime towards the end of 2014, the issues just described will be with us for many years to come. For the 2012 Act is not retrospective in effect, and all registrations which took place while the 1979 Act was in force will continue to be governed by that Act. But this statement is subject to some qualifications. Under transitional provisions contained in the 2012 Act, the state of possession for the purposes of the proprietor-in-possession exception in the 1979 Act is to be judged, not as at the date on which the application for rectification is made but on the day immediately before the designated day.[9] And this will be true

1 *Safeway* para 77.
2 *Burr* para 26.
3 *Rivendale* paras 54 and 55.
4 *Burr* para 26; *Nicol* para 26. The expression 'tennis match' was first used in *Safeway* para 81.
5 *Kaur v Singh* 1999 SC 180 at 191G per Lord President Rodger: 'We did not indeed understand it to be disputed that a proprietor in natural possession of the subjects falls within the terms of the subsection. It may well be that the same applies to a proprietor who possesses in other ways, say, through a student daughter.'
6 Paragraph 58.
7 Paragraph 26.
8 Land Registration etc (Scotland) Act 2012 s 122.
9 LR(S)A 2012 sch 4 paras 17, 22.

in all cases, even if the rectification application is not made until many years after the designated day. Furthermore, in the future 'the person registered as proprietor of the land is to be presumed to be in possession unless the contrary is shown'.[1] Designed to assist with proof where a long period has elapsed since the designated day, this presumption will apply in all cases after that day and will have the effect of favouring the registered proprietor at the expense of the 'true' owner.

In another important respect, the designated day will mark a cut-off point. Where, immediately before that day, the Keeper would have had power to rectify an inaccuracy on the Register – typically because there was no proprietor in possession – the legal position of the parties is determined from that point on as if the power had in fact been exercised.[2] Conversely, if there was no power to rectify immediately before the designated day, the error on the Register is disregarded for the future and the Register is treated as accurate.[3] An example makes this clearer.[4] Suppose that when Angus applies for first registration in 2013, the Keeper includes in the title plan land to which he was not entitled and which is held by Betty on a Sasine title.[5] Angus will then become owner, because of the Keeper's Midas touch, but the Register will be inaccurate and Betty will be able to have it rectified if, but only if, Angus is not in possession. Now suppose that no steps are taken to apply for rectification before the designated day. The position is then governed by the state of possession immediately before that day. If Angus was in possession – as will be presumed in the absence of contrary evidence – his title becomes unchallengeable and Betty must make do with compensation from the Keeper.[6] But if it was Betty who was in possession and not Angus, ownership reverts to Betty on the designated day – without any action on her part and regardless of what the Register says – and it is Angus who is, or may be, entitled to compensation.[7] Betty can then have the Register rectified at her leisure.[8]

INSOLVENCY

Delay in realisation by trustee in sequestration

When someone is sequestrated, the trustee in sequestration should realise the estate with reasonable speed. But that does not always happen. What are the consequences if it does not?

1 LR(S)A 2012 sch 4 para 18.
2 LR(S)A 2012 sch 4 para 17.
3 LR(S)A 2012 sch 4 para 22.
4 For further examples, see Scottish Law Commission, Report on *Land Registration* (Scot Law Com No 222) para 36.13.
5 As occurred in *Rivendale v Keeper of the Registers of Scotland* 30 October 2013, Lands Tribunal, discussed above.
6 For compensation, see LR(S)A 2012 sch 4 paras 23 and 24.
7 For compensation, see LR(S)A 2012 sch 4 paras 19–21.
8 Under the 2012 Act, rectification does not change ownership: it merely brings the Land Register into line with the actual rights of the relevant parties.

Does the discharge of the debtor re-vest unrealised assets?

It is sometimes supposed that when the debtor is discharged (which under current law is usually after just one year) any unrealised assets revert to the debtor. That is not the case. The discharge of the debtor has no effect on the bankrupt estate, which remains at the disposal of the trustee just as much after, as before, that discharge. Suppose that Jack acquired Blackmains four years ago, and was sequestrated two years ago. The Land Register still has his name in the B section. He now seeks to sell Blackmains, arguing that since he has been discharged from his sequestration, and since the trustee did not sell the property, the property is now his (Jack's) to sell. This argument is unsound. Blackmains remains part of the sequestrated estate and Jack cannot sell it. No disposition of Blackmains will be valid without the trustee's signature on it. But to this general principle there are certain qualifications and exceptions. Here we look at one or two of these.

The family home and the three-year rule

In the case of the 'family home' the legislation has a specific provision: the three-year rule set out in s 39A of the Bankruptcy (Scotland) Act 1985. This says:

> (1) This section applies where a debtor's sequestrated estate includes any right or interest in the debtor's family home.
> (2) At the end of the period of 3 years beginning with the date of sequestration the right or interest mentioned in subsection (1) above shall –
> (a) cease to form part of the debtor's sequestrated estate; and
> (b) be reinvested in the debtor (without disposition, conveyance, assignation or other transfer).

There are some exceptions to this, to be mentioned below, but first a few words about the nature of the re-vesting. The words 'without disposition, conveyance, assignation or other transfer' could be read as suggesting that ownership has passed to the trustee, and that it then passes back again, but does so without any actual disposition. If that is what the provision presupposes,[1] then it is in error, for sequestration does not of itself transfer ownership of heritable property to the trustee.[2] Ownership remains with the debtor until either (i) the trustee has sold the property and the buyer has completed title or (ii) the trustee has completed title in his own name.[3] Now, neither (i) nor (ii) is relevant here, because if either of them happens re-vesting is blocked anyway.[4] So re-vesting is not and

1 It might be argued that the trustee is an uninfeft proprietor (unregistered holder) and that under general law such a person can only be divested by disposition. We will not enter into these complexities here.

2 For some types of property sequestration operates as a completed transfer, but not for heritable property. It may be added that the provision was copied, perhaps not wholly wisely, from the (English-law) rule in s 283A of the Insolvency Act 1986.

3 This has been settled law ever since the process of bankruptcy sequestration was created in the 18th century and has recently been confirmed in *Joint Liquidators of the Scottish Coal Co Ltd* [2013] CSIH 108, 2014 SLT 259 (discussed below): see in particular paras 111, 113 and 117.

4 See below.

could not be a transfer of *ownership* from the trustee to the debtor.[1] Be that as it may, however, the effect of s 39A is that the property ceases to be part of the bankruptcy estate, and that accordingly the trustee's powers in relation to it come to an end and the debtor's powers revive.

The three-year rule: exceptions

The three year re-vesting rule is subject to a number of exceptions, these being set out in the same section, s 39A. One, fairly obviously, is where the trustee has already sold the property, and this includes sale on missives even if settlement has not yet taken place. Another is where the trustee has completed title in his own name in the Land Register or Register of Sasines.[2] Another is where the trustee has registered a notice in the Register of Inhibitions. When sequestration proceedings begin, a notice enters the Register of Inhibitions. But that lasts for only three years. The trustee can, however, through a new notice, extend this for a further three years.[3]

Since registration in the Land or Sasine Register is not difficult, and since registration of a notice in the Register of Inhibitions is even easier, and given that three years is usually plenty of time to sell heritable property, one might suppose that cases of re-vesting of the family home would be vanishingly rare. We have no statistics, but such cases do crop up. *Rose's Tr, Applicant*[4] was one such case.

The sequestration happened in May 2008. None of the exceptions applied, and so re-vesting took place in May 2011. The trustee, faced with the loss of the property from the bankruptcy estate, decided to invoke another provision, subsection (7) of s 39A:

> The sheriff may, on the application of the trustee, substitute for the period of 3 years mentioned in subsection (2) above a longer period –
>
> (a) in prescribed circumstances; and
>
> (b) in such other circumstances as the sheriff thinks appropriate.

The application was, however, rejected. The logic of the sheriff[5] is convincing:[6]

> The Trustee's argument suggests that there is no time limit at all within which an application under s 39A(7) can be made. That simply cannot be the case … In combination, sections 39A(2) and (3) provide that reinvestment of the family

1 The section was inserted into the 1985 Act by the Bankruptcy and Diligence etc (Scotland) Act 2007. The explanatory notes to the latter say (para 75): 'Section 39A provides for the ownership or other right in a debtor's family home, which is part of the sequestrated estate, to be returned to the debtor if the trustee has not taken any action in relation to that property within 3 years of the date of sequestration.' This confirms the mistake that the drafters were labouring under.

2 A minor drafting error here is that s 39A(3)(d) speaks of registering a 'notice of title' though in fact under the Land Registration (Scotland) Act 1979 no notice of title is used. However, the drafting error will cease to be such when the Land Registration etc (Scotland) Act 2012 comes into force, for under that Act notices of title reappear for Land Register transactions: see s 53.

3 Bankruptcy (Scotland) Act 1985 s 14(4).

4 2013 GWD 22-424.

5 Sheriff Philip Mann.

6 Paragraphs 5.3 and 5.4. But with respect the language of re-vesting of 'ownership' is inexact: see above.

> home in the debtor happens automatically on the expiry of the 3 year period unless the Trustee has taken a relevant step in terms of s 39A(3). At that point the debtor may do as he pleases with the property since he is, once again, the owner of it. It seems to me that the possibility that ownership of the property could revert to the Trustee at any time in the future would act as an effective barrier to the debtor being able to do as he pleases with his property. For example, I could well imagine that a lender would be unwilling to lend on the security of the property in such circumstances. The prejudice to the debtor is obvious when one considers that if the Trustee's submissions are correct then the possibility of reversion of ownership might never be removed should the Trustee choose never to apply to the court under s 39A(7). The plain fact of the matter is that, on the Trustee's averments, the property has already reverted to the ownership of the debtor and it is now too late to prevent that from happening. The Trustee is not trying to prevent that from happening. He is, in effect, trying to reverse that which has already happened in consequence of s 39A(2). Section 39A(7) says nothing about reversing the effect of s 39A(2).

The other three-year rule

Section 44(4) of the Conveyancing (Scotland) Act 1924 says:

> No deed … by a person whose estates have been sequestrated under … the Bankruptcy (Scotland) Act 1985 … relative to any land … belonging to such person at the date of such sequestration … shall be challengeable … on the ground of such sequestration if such deed … shall have been granted … at a date when the effect of recording … under subsection (1)(a) of section 14 of the Bankruptcy (Scotland) Act 1985 the certified copy of an order shall have expired by virtue of subsection (3) of that section, unless the trustee … shall before the recording of such deed … in the appropriate Register of Sasines have completed his title to such land …

Though this refers only to the Register of Sasines, the provision is extended to the Land Register by s 29 of the Land Registration (Scotland) Act 1979.[1] What it says is that if the trustee fails to record in the Register of Inhibitions a renewal notice within three years of the sequestration, the debtor recovers power to deal with any heritable property in the sequestrated estate.[2]

This provision of the 1924 Act (which seems to be less well-known than it should be) evidently has much in common with section 39A of the 1985 Act (just discussed). But it is both wider and narrower. It is wider in that it is not limited to the family home. It is narrower, because it does not remove the property from the sequestrated estate. For instance, s 44(4) of the 1924 Act would not prevent the trustee, after the expiry of the three years, from completing title in his own name, *qua* trustee, assuming of course that the property had not already been

1 The Land Registration etc (Scotland) Act 2012 does not repeal this. In other words, the rule saying 'statutory references to the Register of Sasines are deemed to include references to the Land Register, subject to certain exceptions' will remain based on the 1979 Act, and is not repeated in the 2012 Act.

2 If the debtor does sell, the question arises as to whether he or she has a duty to account for the money to the trustee. That is a question that will not be discussed here.

sold by the debtor. The reason behind these differences lies in the differing policy objectives of the two provisions. Section 44(4) of the 1924 Act is a measure in favour of third parties, who could otherwise be at risk, because if the trustee has not, during the three years, recorded a renewal notice, nor completed title, nor sold the property, a buyer might not be aware that the property is subject to the sequestration.[1] Section 44(4) is thus a lubricant in the conveyancing system. By contrast, s 39A is a substantive rule of 'internal' insolvency law. We might add that both provisions seem less than perfect and accordingly would benefit from a review.

The conveyancer's point of view

If the trustee in sequestration seeks to sell, then the first point to check is whether the sequestration took place within the past three years. If so, neither s 39A of the 1985 Act nor s 44(4) of the 1924 Act is relevant. But if more than three years have passed it is necessary to check that the trustee has timeously either (a) recorded a renewal notice in the Register of Inhibitions or (b) completed title in the Land or Sasine Register. If neither (a) nor (b) has occurred, there is a real possibility that re-vesting may have happened, and the burden will fall on the trustee to satisfy the buyer that it has not happened.

But re-vesting is not the only risk. For the 1985 Act has another provision about the family home, contained in s 40, which says that the trustee can sell the family home only if certain requirements are satisfied. So if the property is or might be a family home, it is for the trustee to satisfy the buyer either (i) that the s 40 requirements have been satisfied or (ii) that the property is not a family home within the meaning of the provision.[2] It should be noted that s 40 is not about whether the property does or does not fall within the sequestrated estate. The section is about when the trustee's power of sale arises in respect of property that *does* fall within the sequestrated estate.

What if the sale (or other transaction) is not by the trustee, but by the debtor? Here the starting-point is that the debtor cannot sell such property unless either (a) s 39A of the 1985 Act or (b) s 44(4) of the 1924 Act applies.[3] From a practical point of view, if the trustee has not made any timeous entry in either the Register of Inhibitions or the Land (or Sasine) Register then the buyer may not know that there had ever been any sequestration. Leaving that point on one side, and assuming that the buyer does know about the sequestration, if no timeous entry has been made by the trustee in either Register then the debtor has power to sell (or grant security etc) under s 44(4), regardless of whether re-vesting has taken place.

1 One might have expected s 44(4) to add a good faith requirement, but it does not do so. It may be added that if the sequestration took place between three and five years before the sale, the fact of sequestration should be picked up by a standard five-year search of the Register of Inhibitions.

2 If a sale takes place even though the s 40 requirements have not been satisfied, the buyer could plead for the sheriff's mercy under s 63 of the 1985 Act.

3 This is a slight over-generalisation. For instance, there is the possibility that the doctrine of abandonment might apply.

Notices of litigiosity/caveats

Notices of litigiosity are not as well-known as they should be. There have been two cases this year in which they appear, or rather do *not* appear where one might have expected them to appear. The question of whether to use them is a matter for court practitioners, but the latter may seek advice from their colleagues, the conveyancers, and in any event, conveyancers need to know about these notices because they can turn up as unwelcome guests in conveyancing transactions. The Land Registration etc (Scotland) Act 2012 will, as far as properties in the Land Register are concerned, replace notices of litigiosity with 'caveats', which will have comparable effects. So this is a topic worth some comment.

A notice of litigiosity can be recorded in the Register of Inhibitions on the dependence of two types of action: an action of adjudication and an action of reduction. The reason for the existence of this procedure is to protect pursuers against the possibility that defenders might alienate the property, or grant other rights over it, while the action is still ongoing. The effect of a notice is comparable to the effect of an inhibition on the dependence of an action. If the debtor does grant a disposition (or standard security etc), the transaction is voidable. And of course if the pursuer's action eventually proves unsuccessful, then the notice of litigiosity itself becomes void. The law in this area is primarily common law, supplemented by s 159 (as amended) of the Titles to Land Consolidation (Scotland) Act 1868.

It may be mentioned that notices of litigiosity do not need to be relied on as against a bad-faith grantee. If Adam's trustee in sequestration raises an action to reduce a disposition by Adam to Boris on the ground that the disposition is voidable as a gratuitous alienation,[1] and while the action is ongoing Boris dispones[2] to Carla, Carla has no protection if she knows that Boris's title was voidable, regardless of whether there was a notice of litigiosity.[3] But of course most grantees are in good faith, so notices of litigiosity offer essential protection to pursuers in depending causes.

In *Brown v Stonegale Ltd*[4] certain companies in a single group had granted gratuitous dispositions. The granting companies later went into administration, and the administrators raised actions to reduce the dispositions as being gratuitous alienations. The actions were resisted, and the administrators were worried that, while the actions dragged on, the defenders might sell the properties. They sought, and were granted, interim interdicts against sale. Whether they also used notices of litigiosity is not known. If they did not, then we would suggest that they should have. In the first place, the interim interdicts

1 Two notes. (i) There are other possible reasons why a deed might be voidable. (ii) If the disposition is void, the law is not quite the same. Subject to certain qualifications relating to the land registration system, the rule is that if Boris's title is void, Carla has no defence against Adam, even if she is in good faith.

2 Or grants some other real right.

3 This is a slight over-simplification, but we cannot go into all the nuances here.

4 [2013] CSOH 189, 2014 GWD 2-47.

were, it seems, only against 'sale',[1] whereas a notice of litigiosity takes effect against any prejudicial transaction.[2] In the second place, a notice of litigiosity is, on the whole, likelier to prove an effective remedy than is interim interdict. Interim interdict operates against the person, whereas litigiosity operates against the thing. In some cases defenders can defy interdicts (for instance, companies cannot be imprisoned, and insolvent persons cannot be made to pay fines). But litigiosity cannot be defied. If P raises an action of reduction against D, and on the dependence of that action registers a notice of litigiosity, P is automatically protected. If D dispones to X, X takes the property subject to P's rights.

The second case this year raising the issue was *Accountant in Bankruptcy v Balfour and Manson LLP*.[3] Ms Phillip disponed heritable property gratuitously to her husband.[4] Thereafter she was sequestrated. Her trustee in sequestration raised an action to reduce the disposition. While the action was ongoing, the defender, Mr Phillip, granted a standard security to a finance company. The amount secured, £212,500, was greater than the value of the property itself. The action of reduction thereby became pointless.[5] The trustee in sequestration (who was in this case the Accountant in Bankruptcy) now sued her law agents for damages for negligence. The law agents, should, she pointed out, have registered a notice of litigiosity. Had they done so, the voidability of the disposition would have extended to the standard security, and thus the interests of the trustee, and hence the creditors, would have been protected.

The defence, as so often in professional negligence claims, was that the trustee's claim came too late, and so was barred by prescription. This defence was upheld.[6] But the moral of the case is plain: actions of reduction should be backed up by notices of litigiosity as a matter of course.

Lastly, caveats. These are introduced by the Land Registration etc (Scotland) Act 2012, and will arrive when that statute comes fully into force. For properties in the Land Register, caveats replace notices of litigiosity.[7] Though the procedural side is very different, their substantive effects are comparable.[8] Thus in future when an action is raised to reduce a gratuitous alienation, and the property in question is in the Land Register, a caveat should be registered as a matter of course.

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1 See para 9.

2 As will be seen in the next case, *Accountant in Bankruptcy v Balfour and Manson LLP*, where the prejudicial transaction was a standard security.

3 2013 GWD 31-632.

4 We presume that it was recorded/registered, but oddly nothing is said about this rather central issue.

5 Had the finance company acted in bad faith, matters would have been different.

6 Where there is a gratuitous alienation, and the property itself cannot be recovered, the grantee of the alienation can normally be required to pay the trustee the value of the property. Presumably that had been tried but without success, for otherwise the action for damages against the law agents would hardly have made sense. But the case says nothing about this issue.

7 Land Registration etc (Scotland) Act 2012 part 6.

8 See generally part 32 of Scottish Law Commission, Report on *Land Registration* (Scot Law Com No 222, 2010).

Can a liquidator throw overboard assets with a negative value?

What happened?

In *Joint Liquidators of the Scottish Coal Co Ltd, Ptrs*,[1] Scottish Coal Co Ltd was in the business of open-cast coal mining, with sites in Ayrshire, Fife and Lanarkshire. For a variety of reasons, most importantly the global fall in coal prices, the company suffered increasing financial problems, and in April 2013 the Court of Session placed the company in liquidation. The liquidators were able to find a buyer for some sites, but the others were unsellable.

Open-cast mining requires several different permissions, which the company duly held, among them licences under the Water Environment (Controlled Activities) Regulations 2005 and 2011 (the 'CARs'),[2] the licences being issued by the Scottish Environmental Protection Agency (SEPA). The CAR licences imposed certain stringent, and expensive, obligations in relation to environmental protection. Moreover, the CARs stated that these obligations were binding also on the liquidators of licence holders. While the company was making money, that was no problem. But it became a problem when insolvency struck. The cessation of mining operations did not bring with it an end to the need for expenditure on environmental protection. Even after that cessation, the total monthly environmental protection costs at the various sites is said to be over £400,000. The capitalised cost is estimated at over £70 million.[3] If the joint liquidators had to make full provision for these costs, the effect on the general body of creditors would be dramatic.

In these circumstances, the liquidators decided that, if they could, they would abandon the land, and abandon/disclaim the CAR licences. But since this was an uncertain area of law, they sought the authority of the court. Various public-sector bodies opposed the petition, including SEPA, the Scottish Government, and the relevant local authorities. In the Outer House the decision was in favour of the liquidators.[4] The respondents reclaimed, and the Inner House has reversed the Outer House decision.[5]

The case is complex, raising issues of property law, insolvency law, environmental law and constitutional law.[6] Not all of these themes can be explored here.

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1 [2013] CSOH 124, 2013 SLT 1055 *rev* [2013] CSIH 108, 2014 SLT 259.

2 Respectively SSI 2005/348 and SSI 2011/209. The 2011 Regulations replaced the 2005 Regulations, but nothing turned on this issue.

3 2013 SLT 1055 at paras 5 and 6.

4 *Joint Liquidators of the Scottish Coal Co Ltd, Ptrs* [2013] CSOH 124, 2013 SLT 1055.

5 *Joint Liquidators of the Scottish Coal Co Ltd, Ptrs* [2013] CSIH 108, 2014 SLT 259. The Opinion of the Court was delivered by Lord Justice Clerk Carloway, the other judges being Lords Menzies and Brodie.

6 The constitutional question was whether the CARs could impose obligations on the liquidators of insolvency licence-holders. Insolvency law is reserved to Westminster, and hence there is an argument that the CARs, in imposing those obligations, were *ultra vires*. This argument was accepted by the Lord Ordinary but rejected on appeal. The Inner House's careful exploration of this issue is of some significance from the standpoint of constitutional law.

Can ownership of land be abandoned?

It is a familiar rule of property law that corporeal moveable property can be abandoned, in the sense that the owner ceases to be owner. Can heritable property also be abandoned, in the sense of abandoning ownership? The issue does not normally arise, because whereas moveables often become more or less worthless,[1] the same is not true for land. The present case is the first in which the issue has been squarely addressed. Can the ownership of land be abandoned?[2] The Lord Ordinary took one view (that it could) and the Inner House took the other (that it could not). The issues are difficult, and we offer here no view, though it may be noted that in general in private law rights may be given up, so that if ownership of land cannot be abandoned, the result is asymmetrical.

Can a CAR licence be abandoned/disclaimed?

The liquidators' gambit involved not only giving up the sites but giving up the CAR licences as well. Was that possible, given that SEPA was opposed? The Lord Ordinary held that a CAR licence can be abandoned or disclaimed, but the Inner House disagreed. Though such a licence is in some respects an asset it is also in some respects a liability, and a licence holder should not be able to walk away from liabilities. The Inner House noted that '[i]t would be a curious construction of an explicit provision that a liquidator is a responsible person and, therefore, responsible for ensuring compliance with the statutory licence, only for as long as he chooses'.[3]

English law and cross-border issues

In England the statutory position is different. Whatever may be the general law in England about abandonment, there is a statutory provision empowering liquidators to abandon any 'onerous property'.[4] This power includes both real estate and onerous licences.[5] There is no equivalent provision for Scotland.

One notable point is that the English provision is not based on the *situs* of the property, but on the *situs* of the company. Scottish Coal Co Ltd was a Scottish company, and so the English provision did not apply, and that would have been the case even if the company had had open-cast operations in England. Conversely, if the company had been English-registered, the English rule would have applied, so that the liquidators could have abandoned the sites. If this is the result, it seems rather arbitrary. Since the *general* law of abandonment is based on the *situs* of the property, not on the domicile of the owner, it is odd that the same approach should not apply where the owner has become insolvent. Abandonment of onerous property throws burdens on to the public authorities of the place where the property lies, so if it is not a matter for the law of the *situs*, it ought to

1 Were that not so, we would live in a world without wheelie bins.
2 K G C Reid, *The Law of Property in Scotland* (1996) para 9(4): while corporeal moveables can be abandoned, 'it is unclear whether ownership of land can also be lost by abandonment'.
3 Paragraph 138.
4 Insolvency Act 1986 s 178.
5 For the latter see *In Re Celtic Extraction Ltd (In Liquidation)* [2001] Ch 475.

be. This general issue is discussed briefly in the case, but we are uncertain as to what conclusion was reached.[1]

The analogy with sequestration

The central argument made for the liquidators was that a liquidator has the same powers as a trustee in sequestration,[2] and that since a trustee in sequestration can abandon property, so can a liquidator. The Inner House disagreed. Since it considered (see above) that ownership of land cannot be abandoned, it followed that ownership of land could not be abandoned by a trustee in sequestration. It was true, noted the Inner House, that a trustee in sequestration could decline to take up an asset. But that was not the same as abandonment of ownership. Anything so 'abandoned' simply remained the debtor's.

The relevance of the first strand to the second

The first strand of the case was whether ownership of land can be abandoned, and the second strand was whether a CAR licence can be abandoned or disclaimed. Whilst the Inner House held that neither can be abandoned, it added that even if ownership of land could be abandoned that would not help the liquidators anyway. Discussing the point in relation to a sequestration, the Inner House said:[3]

> A trustee may be able to avoid certain liabilities involved in an onerous contract by not adopting it. He may also be able to avoid liability in respect of obligations which run purely with the ownership of land by declining to take title from the bankrupt. He cannot, however, rid himself of liabilities owed to creditors, not by the owner of the land as such, but by the bankrupt, who may also happen to be the owner, just because these liabilities relate to land to which he (the trustee) has declined to take title … The trustee cannot elect not to rank a competent claim by 'disclaiming' the relevant liability as relating to an asset which he does not wish to realise. If the liability is personal to the bankrupt, it requires to be ranked whether or not the trustee chooses to deal with the asset to which it relates in a general, rather than real, sense.

Further comments

In conclusion, two further comments may be made. First, *Scottish Coal Co* is about deliberate abandonment of ownership at a particular point in time. But there are other possibilities. What if those entitled to possess heritable property do not do so for decades, even generations, perhaps to the point where even identifying such persons becomes difficult or impossible? This does happen in practice, with land of low value. Might this eventually become abandonment of ownership with the result that the land passes to the Crown? It is hard to know: the abandonment of ownership of heritable property is a subject on which the authorities are minimal.

1 We are not sure how the first and second halves of para 126 fit in with each other.
2 Insolvency Act 1986 s 169.
3 Paragraphs 118 and 119.

Secondly, the Inner House in *Scottish Coal Co* offered the following thought in relation to transfer:[1]

> It may be worth observing *en passant* that, strictly, it is not 'ownership' that is transferred. It is the land which may be transferred and thereby result in the termination of one person's ownership and its creation in another (Reid: *The Law of Property in Scotland*, para 652; Hohfeld: *Fundamental Legal Conceptions*, p 12).

We will not discuss that view here, but merely note that it is controversial and perhaps not borne out by the authorities cited.

PROPERTY TAXES IN SCOTLAND[2]

In previous years, this section has been limited to dealing with stamp duty land tax and its predecessor, stamp duty. It is a mark of the growing complexity faced by Scottish property lawyers that a more generic heading is now appropriate, even if dealing only with the successor to stamp duty land tax. Thus SDLT will shortly be replaced by LBTT (land and buildings transaction tax), but will itself remain relevant for the next couple of years; while further new initialised abbreviations such as ATED (annual tax on enveloped dwellings) are added to old favourites such as CGT and VAT.

Land and buildings transaction tax

Introduction

In a sense, consideration of the most important development in property taxes in purely Scottish terms is premature, for LBTT will not come into force until April 2015.[3] But the Land and Buildings Transaction Tax (Scotland) Act 2013 received the Royal Assent on 31 July 2013 and seems certain to come into effect regardless of the result of this year's referendum on independence. Furthermore, transactions for which contracts are concluded on or after 1 May 2012 (when the Scotland Act 2012 received the Royal Assent), but which do not settle before April 2015, will be liable to the new tax.[4] The effect on leases currently liable to SDLT but which continue after the new tax comes into force is still under consideration, but it seems likely that, at the very least, variations and extensions of leases now in operation will be affected by the new tax. However, it is fair to say that there is something of a lacuna in relation to such transactions in the new legislation and transitional arrangements in general require further clarification before the new tax comes into force.

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1 Paragraph 98.

2 This part is contributed by Alan Barr of the University of Edinburgh and Brodies LLP.

3 The April 2015 date has been widely announced; technically, land transactions in Scotland will continue to be liable to stamp duty land tax until a date appointed by Treasury Order, expected to be 1 April 2015: see Scotland Act 2012 s 29(4).

4 See Scotland Act 2012 s 29(5).

There has been much criticism of the largest apparent gap of all – any indication of the rates of the new tax. The Scottish Government has said that such indications will not be given before the autumn of 2014. Criticism on this aspect seems a little unfair, as tax rates (including those of SDLT) are often increased, decreased or otherwise varied at very short notice indeed – often from midnight of the day of or even before the announcement of such changes. An understandable desire for certainty must be balanced against a fear that early announcement of proposed rates would lead to avoidance or forestalling tactics; or delaying transactions until more favourable rates come into force.

Apart from rates, there is a great deal else which remains to be clarified. For instance, it seems likely that there will be changes to the rules on leases; there may be legislation to introduce a limited sub-sale relief to facilitate forward funding for developments; and much remains to be done to prepare for the administration of the new tax, including sight of the returns to be made. Much of the administration will be in the hands of Registers of Scotland, where of course preparations are also in hand for the implementation of the Land Registration etc (Scotland) Act 2012. It is to be hoped that guidance will be available on the operation of the new tax, as significant uncertainties remain.

With all that remains to be done, we do nevertheless have the first piece of purely Scottish tax legislation in more than 300 years. (The last tax legislation of the old Scottish Parliament dealt, with perhaps stereotypical inevitability, with duties on ale and beer in Glasgow). The Scottish Government has made much of taking a distinctively Scottish approach, calling in support the principles on a tax system put forward by Adam Smith to the effect that taxation should be proportionate, taxpayers should have certainty about what they need pay, and the system should be convenient and efficient. It has to be said that the jury is out on the extent to which the new tax will meet those criteria. A strong move is made towards proportionality (see below); but in other than basic situations there remains a significant degree of uncertainty; the basic administration by Registers of Scotland may assist convenience; and the overall effectiveness of the administration system will dictate the extent to which the system is efficient.

Ambit and reliefs

Perhaps inevitably, but disappointingly nonetheless, the new Act draws substantially on existing SDLT legislation. No-one would claim that this was a model meeting the Adam Smith principles, but time did not allow for a completely new, principle-based tax. As with SDLT, LBTT is to apply to land transactions whether or not there is an instrument effecting the transaction, regardless of the place of execution of any such instrument, and whether or not any party to the transaction is present, or resident, in Scotland.[1] There is some attempt to replace English terminology with terms used in Scotland ('seller' replaces 'vendor', for example).[2] But much is preserved that

1 Land and Buildings Transaction Tax (Scotland) Act 2013 s 1(2).
2 LBTT(S)A 2013 s 7.

might profitably have been changed. For example, chargeable interests are defined as:[1]

(a) a real right or other interest in or over land in Scotland, or
(b) the benefit of an obligation, restriction or condition affecting the value of any such right or interest.

This terminology, after the introductory words, is not particularly clear, but it does indicate an attempt to cover a very wide range of rights with a connection to land.

Under LBTT, residential leases are to be exempt – a welcome move towards certainty and simplicity as very few such leases are currently liable to SDLT due, primarily, to the 20-year limit in duration.[2] Initially, the exemption which applies to licences under SDLT was to be dropped but it was included in the final version of the legislation, with the exception of 'prescribed non-residential licences' (yet to be defined).[3] This is intended to catch things like concessions at airports and the like (although not hotel management agreements).

Most other exemptions and reliefs which apply to SDLT are also to apply to LBTT. But omitted are relief for relocation packages, relief on insurance company demutualisations, and the time-limited SDLT relief for new zero-carbon homes.

A more serious omission relates to sub-sales. No relief at all is included in the current legislation, although the Scottish Government is continuing consultations on introducing a targeted relief specifically to facilitate development. However, the absence of a general sub-sale relief is a significant difference from the SDLT legislation (even as that has been restricted in Finance Act 2013 – see further below). The effect on contracts with nominee provisions remains to be seen, but it seems that where a nominee provides consideration to take over the position of an original contractual party, there will be two chargeable transactions and not one, even where there is only a single settlement of the original contract.

How much?

Although the actual rates of tax have not yet been announced, the structure of the rate system for purchases has been laid out. LBTT will abandon the 'cliff-edge' approach of SDLT and instead be charged at the lower rates (including a zero rate) on consideration up to particular thresholds and at the higher rates only on the amounts above those thresholds.[4] This progressive system (which might be thought to meet the principled demand for proportionality) will apply both to residential and non-residential transactions. This approach should eliminate the distortions in property prices around the current SDLT thresholds and perhaps remove the dangerous (for taxpayers and their solicitors) temptation

1 LBTT(S)A 2013 s 2.
2 See LBTT(S)A 2013 s 16, sch 1 para 3(1)(a).
3 LBTT(S)A 2013 s 16, sch 1 para 3(1)(b), (4).
4 LBTT(S)A 2013 s 25.

to apportion rather more than might be justified to items in a sale unaffected by the tax – such as carpets and curtains in domestic sales.

The inevitable effect of such a progressive approach, if overall revenue is to remain constant, is that lower-value transactions will suffer less tax and higher-value ones will suffer more tax. Consultation documents issued in the run-up to the new tax have used rates as high as 7.5% and 10% for the two projected positive rates.[1] With thresholds of £180,000 and £1.5 million, this would produce tax of £31,500 on a £600,000 purchase (as against £24,000 of SDLT); and £109,000 on a £1.6 million purchase (as against £80,000 of SDLT).

Of course, consideration tends to be much higher in commercial transactions – the same consultation gave illustrative rates rising only to a maximum of 4.4%. But even that marginal increase on the current top rate for non-residential property would be sufficient to produce significant increases of LBTT over SDLT. Higher rates would lead to concomitantly greater increases in the tax chargeable on higher-value transactions.

The intention of the Scottish Government has been stated to be neutral in terms of the overall revenue to be raised from LBTT – the Scottish block grant will be reduced by an amount based on the SDLT collected in Scotland and it is this reduction that the take from LBTT will require to replace.

Leases

Under LBTT, leases will be taxed, as under SDLT, on the net present value of the rent payable over the term of the lease.[2] The calculation of net present value is on the same basis as applies to SDLT.[3] Under the legislation there is no obligation to have more than one tax band other than the zero rate band.[4]

While the principles of the tax on lease transactions remain the same, a significant attempt is made to make the amount on which the tax is collected a much more accurate reflection of the rent actually charged over the term of the lease. This comes from the requirement to review and recalculate the tax due on a lease every three years following the effective date of a lease transaction (or, in some cases, every three years from another significant event).[5] Such reviews will lead to the need for new tax returns to be submitted (and tax adjusted) on each review. While this will undoubtedly involve an increased administrative burden, it will also increase certainty in respect of the 'correct' tax to be charged. It will also facilitate the repayment of tax where leases do not run for their full intended term, although it may also increase the tax which would be due in situations where, currently, SDLT is estimated, such as on turnover leases and wind farms. These provisions are also thought to be sufficient to cover the increased tax that will be due on an extension of a lease.

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1 By LBTT(S)A 2013 s 24(2) there must be a zero rate and at least two tax bands with positive rates of tax.
2 LBTT(S)A 2013 s 52, sch 29 para 4.
3 LBTT(S)A 2013 sch 29 paras 4–7.
4 LBTT(S)A 2013 sch 29 para 3.
5 LBTT(S)A 2013 sch 29 paras 10–12.

Administration and tax avoidance

Although the Land and Buildings Transaction Tax Act makes provision for additional returns in relation to leases, administrative provisions will generally be contained in the Revenue Scotland and Tax Powers Act, the Bill for which was introduced to the Scottish Parliament on 12 December 2013. As well as basic administrative provisions, the Bill contains general anti-avoidance provisions (see further below). Thus, while the Land and Buildings Transaction Act does contain some anti-avoidance provisions, there is no equivalent of the SDLT anti-avoidance provisions contained in s 75A of the Finance Act 2003. However, the groundwork is laid in relation to one of the fundamentals of SDLT avoidance: there is provision for regulations to be made to treat transfers of interests in residential-property holding companies as chargeable land transactions in their own right.[1]

Change still to come? – trusts and partnerships

Apart from the provisions set out above, most of the legislation on LBTT replicates that on SDLT. While there is still scope (and indeed the necessity) for some changes to be made, it seems clear that the basic framework and much of the detail will not differ markedly from SDLT. However, the LBTT Act gives considerable power to the Scottish Ministers to extend and amend the Act by subordinate legislation in relation to a very broad range of matters, some of them fundamental.[2] These matters include two areas where the current provisions simply replicate the SDLT rules and where change would be welcome.

The first of these is the application of LBTT to trusts.[3] This currently includes provisions which now look very strange in Scottish legislation. They provide that:[4]

> 2. Paragraphs 3 and 4 apply where property is held in trust –
>
> (a) under the law of Scotland, or
>
> (b) under the law of a country or territory outwith the United Kingdom,
>
> on terms such that, if the trust had effect under the law of England and Wales, a beneficiary would be regarded as having an equitable interest in the trust property.
>
> 3. The beneficiary is to be treated for the purpose of this Act as having a beneficial interest in the trust property despite the fact that no such interest is recognised by the law of Scotland or of the country or territory outwith the United Kingdom.
>
> 4. An acquisition of the interest of a beneficiary under the trust is to be treated as involving the acquisition of an interest in the trust property.

Thus Scottish lawyers are required to decide whether Scottish trusts involve interests akin to those which exist under trusts in similar terms in England and Wales, and whether in that case a beneficiary would have an equitable

1 LBTT(S)A 2013 s 47.
2 LBTT(S)A 2013 s 68.
3 LBTT(S)A 2013 s 50, sch 18.
4 LBTT(S)A 2013 sch 18 paras 2–4.

interest in the trust in English law.[1] If so, an acquisition of that beneficiary's interest is to be treated as an acquisition of the property held in trust. Such a convoluted thought process is, at the very least, difficult – and seems a very odd one to be required under a Scottish tax law, promoted by an SNP government. It is to be hoped that this provision will soon be replaced by something more acceptable.

The second area where change would be welcome is in relation to the application of LBTT to partnerships. Here, the complex and often illogical SDLT scheme is reproduced unamended.[2] It is to be hoped that serious consideration will be given to a root-and-branch revision of these rules, perhaps to a system under which transfers of the economic value of what would be chargeable interests if transferred directly becomes chargeable if transferred in the form of an interest in a partnership.

While the basics of the new tax are now tolerably clear, the scope for amendment of some of the more technical areas (including transitional provisions), as well as the absence of administrative detail, mean that there is still a great deal to be done both by the tax authorities and by advisors in the run up to April 2015. It is safe to say that dealing with tax on property transactions will not yet be a simple matter.

Landfill tax

The Landfill Tax (Scotland) Act 2014 received Royal Assent on 21 January 2014. It too will come into force in April 2015 and the Scottish version will replace UK landfill tax from then.

The Scottish version of this tax is even more closely wedded to the UK original than is the case with the other devolved and partially devolved taxes. As with the outsourcing of the collection of LBTT to Registers of Scotland, the collection and basic administration of landfill tax will be carried out by the Scottish Environment Protection Agency. However, the Scottish legislation provides for the imposition of both fines and taxes on unauthorised operators of landfill sites, which is seen as preferable to the imposition of fines through the court process.

The same list of qualifying materials will be used as applies elsewhere in the UK and the intention is to set tax rates in subordinate legislation (and power has been taken to do this). It has been confirmed that the rates will be the same as the UK rates for 2015–16, although no confirmation has been given beyond that. However, there are powers to establish more than two tax rates, and to vary the list of qualifying materials, by subordinate legislation. Further work will be done on the Landfill Communities Fund, in particular the existing eligibility test which demands that the benefit is used within a ten-mile radius of the relevant landfill site.

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1 It seems hardly necessary to add, as Lord Drummond Young emphasised recently, that 'Scots law does not recognise anything akin to the English concept of an equitable interest': see *Ted Jacob Engineering Group Inc v Matthew* [2014] CSIH 18 at para 100.

2 LBTT(S)A 2013 s 49, sch 17.

Tax administration: a big hello to Revenue Scotland

The last of the trio of Scottish tax statutes is the Revenue Scotland and Tax Powers (Scotland) Bill which was introduced to the Scottish Parliament on 12 December 2013. This is a substantial piece of legislation, attempting to strike a balance between establishing an administrative framework for the taxes which have already been devolved and a desire to set up a system which could be used for any future tax devolution – or indeed independence. Thus the Bill commences with provisions to establish the primary administrative body for the collection and management of devolved taxes, 'Revenue Scotland', and to set out its structure and functions as a body corporate independent of the Scottish Government.[1] Provisions follow on taxpayer information.[2] There are then provisions setting up Scottish Tax Tribunals (First-tier and Upper).[3] The structure of those bodies will be on an interim basis pending the establishment of a new unified system for all Scottish tribunals dealing with devolved matters.[4] Thus the structure of Scottish tax appeals will depend firstly on whether one is dealing with a devolved tax (as non-devolved taxes will continue to be dealt with by the UK tax tribunals); and then on whether the new overall structure of Scottish tribunals has been established.

Perhaps the most contentious part of the new legislation will be the General Anti-Avoidance Rule.[5] This has deliberately been set out in different terms from its UK equivalent, as indicated by its description as an anti-*avoidance* rather than an anti-*abuse* rule. The rule is intended to be wider than the UK version.[6] The basic provision is to the effect that it will be possible to counteract tax advantages from 'tax avoidance arrangements' that are 'artificial'.[7] A tax avoidance arrangement is defined as follows:[8]

> An arrangement (or series of arrangements) is a tax avoidance arrangement if, having regard to all the circumstances, it would be reasonable to conclude that obtaining a tax advantage is the main purpose, or one of the main purposes of the arrangement.

A tax avoidance arrangement is 'artificial' if either of two conditions is met.[9] The first is met if the entering into or carrying out of the arrangement is not a reasonable course of action in relation to the tax provisions in question having regard to all the circumstances.[10] Those circumstances include consistency with the principles and policy objectives of the relevant tax provisions; and whether the arrangement is intended to exploit any shortcomings in those

1 Revenue Scotland and Tax Powers (Scotland) Bill part 2.
2 RSTPB part 3.
3 RSTPB part 4.
4 Legislation to achieve this – the Tribunals (Scotland) Bill – is currently before the Scottish Parliament: see p 70 above.
5 See RSTPB Part 5.
6 Which is now contained in Finance Act 2013 part 5 and sch 43 – see further below.
7 RSTPB s 57(1).
8 RSTPB s 58(1).
9 RSTPB s 59(1).
10 RSTPB s 59(2).

provisions.[1] The second condition is met if the arrangement lacks commercial substance.[2] The fact that the two conditions are alternatives (their near-equivalents are cumulative in the UK legislation), and the very general nature of both, may leave these rules open to wide possibilities for the tax authorities. A great deal will depend on their interpretation of what is reasonable, and further guidance is awaited with interest.

Much of the rest of the Bill is taken up with the more standard fare of tax administration, often with provision for subordinate legislation. Thus the Bill deals with tax returns, enquiries and assessments,[3] investigatory powers,[4] penalties[5] (an area which may require some careful consideration), interest due to or by Revenue Scotland,[6] enforcement of payment,[7] and reviews and appeals.[8] While this legislation again draws on UK provisions, it also draws from elsewhere – and may be subject to substantial revision as it goes through the Parliamentary process.

High-value residential property

The final two measures in the UK Government's 2012 strategy, *Ensuring the fair taxation of residential property transactions*,[9] were enacted in Finance Act 2013. What was originally called the annual residential property tax has been enacted as 'ATED', the annual tax on enveloped dwellings.[10] As originally announced, it affects dwellings valued at more than £2 million. Tax is be charged in a series of broad bands, rising from £15,000 for properties valued between £2 million and £5 million up to £140,000 for properties valued at more than £20 million. The affected owners will be companies and partnerships including company and collective investment schemes. There is a range of reliefs including, importantly, property rental businesses. There is an anomaly here in that this tax (and the related measures on this type of property) was originally put forward at least partially to counter SDLT avoidance. ATED will continue to be due to the UK tax authorities even when SDLT has been replaced by land and buildings transaction tax for transactions in Scotland. It remains to be seen if and how this will be adjusted.

The final part of this package is the introduction of new capital gains tax rules for what are now termed 'ATED-related gains'.[11] The rules introduced are significantly different from those originally announced. In the first place, the non-natural persons affected now exclude trustees and executors. In the second place, the charge to capital gains tax will extend to UK companies, meaning

1 RSTPB s 59(2).
2 RSTPB s 59(3).
3 RSTPB part 6.
4 RSTPB part 7.
5 RSTPB part 8.
6 RSTPB part 9.
7 RSTPB part 10.
8 RSTPB part 11.
9 See *Conveyancing 2012* pp 178–80. Earlier measures included a new 7% rate of SDLT for purchases of residential properties for over £2m.
10 Finance Act 2013 part 3, schs 33–35.
11 Finance Act 2013 s 65, sch 25, amending the Taxation of Chargeable Gains Act 1992.

that they will be charged to that tax rather than corporation tax on part of their profits (when the corporation tax rate itself is subject to significant scheduled reductions) . In the third place, the definitions and (importantly) the reliefs for this tax charge are now virtually uniform with the properties affected by ATED. But the general principle of this new rule remains, and UK capital gains tax will now be charged on non-resident companies previously exempt on disposals of UK property falling within the rules.

The substantial body of legislation now affecting high-value residential property held by non-natural persons is thought to affect a very limited number of properties in Scotland; the properties affected (both by value and in terms of the entities in which they are held) are heavily concentrated in the south-east of England.

Stamp duty land tax

Residential properties over £2m: some reliefs and exclusions

Finance Act 2012 introduced a penal rate of SDLT of 15% where residential properties valued at more than £2 million (referred to as a 'higher threshold interest') were purchased by certain non-natural persons.[1] These rules have now been brought into line with those applying to the annual tax on enveloped dwellings and its related capital gains tax charges (just discussed).[2] Essentially, this means that substantial reliefs and exclusions are now available from this penal rate. The 15% rate will no longer apply where the property is acquired for letting in the course of a property-rental business, for development and resale or exchange in a property-development trade, or for resale of properties held as stock. Relief will also be available where the property is used by employees, is used as a farmhouse, or is used in a trade where the public have access to the property. There are also provisions for the clawback of all of these reliefs if the qualifying use ceases.

Sub-sale relief

As noted above, the land and buildings transaction tax legislation currently has no provisions allowing so-called sub-sale relief. For SDLT this relief derived from provisions headed 'Contract and conveyance: effect of transfer of rights',[3] and the provisions were used for some of the most aggressive SDLT-avoidance schemes. They have been re-written in Finance Act 2013 with effect from 17 July 2013.[4] In addition, there is a retrospective change made to s 45 taking effect from 21 March 2012 (Budget day that year), which is aimed at stopping a particular perceived abuse under which the sub-purchaser could effectively occupy a property for a considerable period without payment of SDLT.[5]

1 Finance Act 2012 s 214, sch 35, inserting Finance Act 2003 sch 4A.
2 Finance Act 2013 s 196, sch 40.
3 Finance Act 2003 s 45.
4 Finance Act 2013 s 195, sch 39, inserting Finance Act 2003 sch 2A.
5 Finance Act 2013 s 194.

The more general change involves a new schedule[1] with a new heading – 'Transactions entered into before completion of contract' – and the replacement of a single section with nine pages of new legislation. This does not remove the relief, but instead sets out the conditions under which it applies in rather more detail – and so restricts apparent scope for avoidance. There are a number of new definitions. A distinction is drawn between an assignment (assignation) of rights under a contract (as where B, the original purchaser under a contract, assigns the benefit of that contract to C with intimation to A, the original seller), and a 'free-standing transfer of rights', which is any other pre-completion transaction, such as an actual sub-sale of all or part of the subject of the original contract (as where B contracts to sell the subjects to C without involving A in that contract). In either case, a minimum consideration is set out to be charged to SDLT, regardless of the amount paid on the final transaction. Special rules apply where any of the parties are connected with each other or dealing otherwise than at arm's length.

If the conditions are met, there is still a relief available to prevent transactions subsequent to the original contract, but before completion, necessarily being charged to a second round of SDLT. Very importantly, intermediate purchasers in a chain of such pre-completion transactions are required to report and claim the necessary relief; and it will not be available where there are tax-avoidance arrangements as part of the chain. Under SDLT, this relief will continue to be important and valuable where further transactions take place after an original contract for purchase has been concluded.

Leases

In addition, some further changes were made to the SDLT rules on leases.[2] These are in three areas. The first is in relation to what are termed 'growing leases' (which will include leases continuing by tacit relocation). The effect of the new rules is to simplify matters in various ways where a lease which has extended by operation of law is then replaced by a new lease. As well as avoiding the need to claim relief for overlaps in some cases, the need to make new returns is delayed.[3] (The rules on reporting every three years in relation to leases under LBTT should preclude the need for such changes in relation to that tax.)

The second area of change is to reduce administrative requirements where (i) there is an agreement for lease, (ii) that agreement is substantially performed, and (iii) an actual lease is then granted.[4] It is thought that the unamended provisions were often ignored in practice.

Finally, the abnormal rent-increase provisions (dealing with such increases after the first five years of a lease, on which the amount of SDLT on a lease is generally based) are repealed.[5]

1 Finance Act 2013 sch 39.
2 Finance Act 2013 s 197, sch 41.
3 Finance Act 2013 sch 41 paras 2 and 3, amending Finance Act 2003 sch 17A.
4 Finance Act 2013 sch 41 para 6, amending Finance Act 2003 sch 17A paras 12A and 19, the latter dealing specifically with missives of let.
5 Finance Act 2013 sch 41 para 7, repealing Finance Act 2003 sch 17A paras 14 and 15.

General Anti-Abuse Rule

As noted above, Finance Act 2013 also brought into effect (from the date of Royal Assent, 17 July 2013) the UK General Anti-Abuse Rule.[1] This has an import far wider than property transactions, although it would be fair to say that aggressive SDLT avoidance is at least as much of a target as any other area of tax. The rules apply 'for the purpose of counteracting tax advantages arising from tax arrangements that are abusive'.[2] Consideration of this important new legislation (and the detailed GAAR guidance already issued by HMRC) is beyond the scope of this note, but the potential hurdle posed by the new rules is a factor which should always be taken into account when considering any form of tax planning. The flavour of the new rules is evident from the use of the word 'abuse'. Much tax planning will still be possible and 'reasonableness' is a key concept in the new rules. But artificial and convoluted schemes with no other purpose than the avoidance of tax will come under a whole new regime of scrutiny before or instead of being challenged in court.

It is not as if HMRC have been unsuccessful in challenging such schemes under existing legislation. They have had some notable successes in 2013, including in *DV3 RS Limited Partnership v RCC*[3] (a scheme involving sub-sales and the rules on partnerships), and in *Project Blue Ltd v RCC*,[4] where the SDLT anti-avoidance provisions in Finance Act 2003, s 75A were considered and held to operate to defeat a scheme in relation to the sale of Chelsea Barracks. The latter evidently gave particular pleasure to HMRC, in that some £11 million more in SDLT was held to be payable than would have been the case without the attempted planning (another attempt to use sub-sale relief). HMRC have also had successes in relation to avoidance in matters other than SDLT; and the combination of court success, new legislation and political will means that the climate for tax avoidance is as stormy as it has been for many years.

1 Finance Act 2013 part 5, sch 43.
2 Finance Act 2013 s 206(1).
3 [2013] EWCA Civ 907, [2013] STC 2150, [2013] BTC 661.
4 [2013] UKFTT 378 (TC), [2013] STI 3058.

PART V

TABLES

TABLES

CUMULATIVE TABLE OF DECISIONS ON VARIATION OR DISCHARGE OF TITLE CONDITIONS

This table lists all opposed applications under the Title Conditions (Scotland) Act 2003 for variation or discharge of title conditions. Decisions on expenses are omitted. Note that the full opinions in Lands Tribunal cases are usually available at http://www.lands-tribunal-scotland.org.uk/records.html.

Restriction on building

Name of case	*Burden*	*Applicant's project in breach of burden*	*Application granted or refused*
Ord v Mashford 2006 SLT (Lands Tr) 15; *Lawrie v Mashford*, 21 December 2007	1938. No building.	Erection of single-storey house and garage.	Granted. Claim for compensation refused.
Daly v Bryce 2006 GWD 25-565	1961 feu charter. No further building.	Replace existing house with two houses.	Granted.
J & L Leisure Ltd v Shaw 2007 GWD 28-489	1958 disposition. No new buildings higher than 15 feet 6 inches.	Replace derelict building with two-storey housing.	Granted subject to compensation of £5,600.
West Coast Property Developments Ltd v Clarke 2007 GWD 29-511	1875 feu contract. Terraced houses. No further building.	Erection of second, two-storey house.	Granted. Claim for compensation refused.
Smith v Prior 2007 GWD 30-523	1934 feu charter. No building.	Erection of modest rear extension.	Granted.
Anderson v McKinnon 2007 GWD 29-513	1993 deed of conditions in modern housing estate.	Erection of rear extension.	Granted.
Smith v Elrick 2007 GWD 29-515	1996 feu disposition. No new house. The feu had been subdivided.	Conversion of barn into a house.	Granted.

Name of case	*Burden*	*Applicant's project in breach of burden*	*Application granted or refused*
Brown v Richardson 2007 GWD 28-490	1888 feu charter. No alterations/new buildings	Erection of rear extension.	Granted. This was an application for renewal, following service of a notice of termination.
Gallacher v Wood 2008 SLT (Lands Tr) 31	1933 feu contract. No alterations/new buildings.	Erection of rear extension, including extension at roof level which went beyond bungalow's footprint.	Granted. Claim for compensation refused.
Jarron v Stuart 23 March and 5 May 2011	1992 deed of conditions. No external alteration and additions.	Erection of rear extension.	Granted. Claim for compensation refused.
Blackman v Best 2008 GWD 11-214	1934 disposition. No building other than a greenhouse.	Erection of a double garage.	Granted.
McClumpha v Bradie 2009 GWD 31-519	1984 disposition allowing the erection of only one house.	Erection of four further houses.	Granted but restricted to four houses.
McGregor v Collins-Taylor 14 May 2009	1988 disposition prohibiting the erection of dwellinghouses without consent.	Erection of four further houses.	Granted but restricted to four houses.
Faeley v Clark 2006 GWD 28-626	1967 disposition. No further building.	Erection of second house.	Refused.
Cattanach v Vine-Hall	1996 deed of conditions in favour of neighbouring property. No building within seven metres of that property.	Erection of substantial house within two metres.	Refused, subject to the possibility of the applicants bringing a revised proposal.
Hamilton v Robertson 10 January 2008	1984 deed of conditions affecting five-house development. No further building.	Erection of second house on site, but no firm plans.	Refused, although possibility of later success once plans firmed up was not excluded.
Cocozza v Rutherford 2008 SLT (Lands Tr) 6	1977 deed of conditions. No alterations.	Substantial alterations which would more than double the footprint of the house.	Refused.
Scott v Teasdale 22 December 2009	1962 feu disposition. No building.	New house in garden.	Refused.

Name of case	*Burden*	*Applicant's project in breach of burden*	*Application granted or refused*
Rennie v Cullen House Gardens Ltd 29 June 2012	2005 deed of conditions. No new building or external extension.	Extension of building forming part of historic house.	Refused.
Hollinshead v Gilchrist 7 December 2009	1990 Disposition and 1997 feu disposition. No building or alterations.	Internal alterations.	Granted.
Tower Hotel (Troon) Ltd v McCann 4 March 2010	1965 feu disposition. No building. Existing building to be used as a hotel or dwellinghouse.	No firm plan though one possibility was the building of flats.	Granted.
Corstorphine v Fleming 2 July 2010	1965 feu disposition. No alterations, one house only.	A substantial extension plus a new house.	Granted.
Corry v MacLachlan 9 July 2010	1984 disposition of part of garden. Obligation to build a single-storey house.	Addition of an extra storey.	Refused.
Watt v Garden 4 November 2011	1995 disposition. Use as garden only.	Additional two-bedroom bungalow.	Granted but with compensation.
Fyfe v Benson 26 July 2011	1966 deed of conditions. No building or subdivision.	Additional three-bedroom house.	Refused.
MacDonald v Murdoch 7 August 2012	1997 disposition. No building in garden.	Erection of 1½-storey house.	Refused.
Trigstone Ltd v Mackenzie 16 February 2012	1949 charter of novodamus. No building in garden.	Erection of four-storey block of flats.	Refused.
McCulloch v Reid 3 April 2012	2011 disposition. No parking in rear courtyard.	Parking of two cars.	Refused.

Other restriction on use

Name of case	*Burden*	*Applicant's project in breach of burden*	*Application granted or refused*
Church of Scotland General Trs v McLaren 2006 SLT (Lands Tr) 27	Use as a church.	Possible development for flats.	Granted.
Wilson v McNamee 16 September 2007	Use for religious purposes.	Use for a children's nursery.	Granted

Name of case	*Burden*	*Applicant's project in breach of burden*	*Application granted or refused*
Verrico v Tomlinson 2008 SLT (Lands Tr) 2	1950 disposition. Use as a private residence for the occupation of one family.	Separation of mews cottage from ground floor flat.	Granted.
Whitelaw v Acheson 29 February and 29 September 2012	1883 feu charter. Use as a single dwelling; no further building.	Change of use to therapy and wellbeing centre; erection of extension.	Granted subject to some restrictions.
Matnic Ltd v Armstrong 2010 SLT (Lands Tr) 7	2004 deed of conditions. Use for the sale of alcohol.	Use of units in a largely residential estate for retail purposes.	Granted but restricted to small units and no sale of alcohol after 8 pm.
Clarke v Grantham 2009 GWD 38-645	2004 disposition. No parking on an area of courtyard.	A desire to park (though other areas were available).	Granted.
Hollinshead v Gilchrist 7 December 2009	1990 disposition and 1997 feu disposition. No caravans, commercial or other vehicles to be parked in front of the building line.	Parking of cars.	Granted and claim for compensation refused.
Perth & Kinross Council v Chapman 13 August 2009	1945 disposition. Plot to be used only for outdoor recreational purposes.	Sale for redevelopment.	Granted.
Davenport v Julian Hodge Bank Ltd 23 June 2011	2010 deed of conditions. No external painting without permission.	Paint the external walls sky blue.	Refused.

Flatted property

Name of case	*Burden*	*Applicant's project in breach of burden*	*Application granted or refused*
Regan v Mullen 2006 GWD 25-564	1989. No subdivision of flat.	Subdivision of flat.	Granted.
Kennedy v Abbey Lane Properties 29 March 2010	2004. Main-door flat liable for a share of maintenance of common passages and stairs.	None.	Refused.
Patterson v Drouet 20 January 2011	Liability for maintenance in accordance with gross annual value.	None, but, since the freezing of valuations in 1989, ground floor flats had reverted to residential use.	Variation of liability of ground floor flats granted in principle subject to issues of competency.

Name of case	*Burden*	*Applicant's project in breach of burden*	*Application granted or refused*
Melville v Crabbe 19 January 2009	1880 feu disposition. No additional flat.	Creation of a flat in the basement.	Refused.

Sheltered and retirement housing

Name of case	*Burden*	*Applicant's project in breach of burden*	*Application granted or refused*
At.Home Nationwide Ltd v Morris 2007 GWD 31-535	1993 deed of conditions. On sale, must satisfy superior that flat will continue to be used for the elderly.	No project: just removal of an inconvenient restriction.	Burden held to be void. Otherwise application would have been refused.

Miscellaneous

Name of case	*Burden*	*Applicant's project in breach of burden*	*Application granted or refused*
McPherson v Mackie 2006 GWD 27-606 rev [2007] CSIH 7, 2007 SCLR 351	1990. Housing estate: maintenance of house.	Demolition of house to allow the building of a road for access to proposed new development.	Discharged by agreement on 25 April 2007.

Applications for renewal of real burdens following service of a notice of termination

Name of case	*Burden*	*Applicant's project in breach of burden*	*Application granted or refused*
Brown v Richardson 2007 GWD 28-490	1888 feu charter. No buildings.	Substantial rear extension	Refused.
Council for Music in Hospitals v Trustees for Richard Gerald Associates 2008 SLT (Lands Tr) 17	1838 instrument of sasine. No building in garden.	None.	Refused.
Gibson v Anderson 3 May 2012	1898 disposition. No building other than one-storey outbuildings.	Two-storey house.	Refused; burden varied to allow limited building.
Macneil v Bradonwood Ltd 2013 SLT (Lands Tr) 41	Mid-Victorian feus limited building at foot of garden to one storey.	1.5-storey houses.	Refused; burden varied to allow the proposed houses.
Cook v Cadman 2014 GWD 3-66	1876 feu prevented building.	Four additional houses.	Refused; burden varied to allow the proposed houses.

Applications for preservation of community burdens following deeds of variation or discharge under s 33 or s 35

Name of case	*Burden*	*Applicant's project in breach of burden*	*Application granted or refused*
Fleeman v Lyon 2009 GWD 32-539	1982 deed of conditions. No building, trade, livestock etc.	Erection of a second house.	Granted.

Applications for variation of community burdens (s 91)

Name of case	*Burden*	*Applicant's project in breach of burden*	*Application granted or refused*
Fenwick v National Trust for Scotland 2009 GWD 32-538	1989 deed of conditions.	None. The application was for the complete discharge of the deed with the idea that a new deed would eventually be drawn up.	Refused.
Patterson v Drouet 2013 GWD 3-99	1948 deed of conditions apportioned liability for maintenance in a tenement on the basis of annual value.	Substitution of floor area for annual value.	Granted; compensation refused.
Gilfin Property Holdings Ltd v Beech 2013 SLT (Lands Tr) 17	1986 deed of conditions apportioned liability for maintenance in a tenement on a percentage basis rooted in rateable value.	Substitution of a more equitable apportionment.	Granted.
Stewart v Sherwood 7 June 2013	1986 deed of conditions.	Addition of a prohibition on letting.	Refused.
Scott v Applin 16 May 2013	2005 deed of conditions.	Removal of requirement that the full-time manager should be resident.	Granted.
McCabe v Killcross 2013 SLT (Lands Tr) 48	Feu dispositions from 1976.	Altering apportionment of liability for maintenance following division of one of the flats.	Granted except in one respect.

Servitudes

Name of case	*Burden*	*Applicant's project in breach of burden*	*Application granted or refused*
George Wimpey East Scotland Ltd v Fleming 2006 SLT (Lands Tr) 2 and 59	1988 disposition. Right of way.	Diversion of right of way to allow major development for residential houses.	Granted (opposed). Claim for compensation for temporary disturbance refused.
Ventureline Ltd 2 August 2006	1972 disposition. 'Right to use' certain ground.	Possible redevelopment.	Granted (unopposed).
Graham v Parker 2007 GWD 30-524	1990 feu disposition. Right of way from mid-terraced house over garden of end-terraced house to the street.	Small re-routing of right of way, away from the burdened owner's rear wall, so as to allow an extension to be built.	Granted (opposed).
MacNab v McDowall 24 October 2007	1994 feu disposition reserved a servitude of way from the back garden to the front street in favour of two neighbouring houses.	Small re-rerouting, on to the land of one of the neighbours, to allow a rear extension to be built.	Granted (opposed).
Jensen v Tyler 2008 SLT (Lands Tr) 39	1985 feu disposition granted a servitude of way.	Re-routing of part of the road in order to allow (unspecified) development of steading.	Granted (opposed).
Gibb v Kerr 2009 GWD 38-646	1981 feu disposition granted a servitude of way.	Re-routing to homologate what had already taken place as a result of the building of a conservatory.	Granted (opposed).
Parkin v Kennedy 23 March 2010	1934 feu charter. Right of way from mid-terraced house over garden of end-terraced house.	Re-routing to allow extension to be built, which would require a restriction to pedestrian access.	Refused (opposed).
Adams v Trs for the Linton Village Hall 24 October 2011	Dispositions of 1968 and 1970 reserved a servitude of access.	Re-routing to a route more convenient for the applicant.	Granted (opposed).

Name of case	*Burden*	*Applicant's project in breach of burden*	*Application granted or refused*
Brown v Kitchen 28 October 2011	1976 feu disposition reserved a servitude of pedestrian access.	Re-routing to the edge of the garden.	Granted in principle (opposed) subject to agreement as to the widening of the substitute route.
Hossack v Robertson 29 June 2012	1944 disposition reserved a servitude of pedestrian access.	Re-routing to end of garden to allow building of conservatory.	Granted (opposed).
Cope v X 2013 SLT (Lands Tr) 20	Servitude of access.	Substitute road.	Granted (opposed).
ATD Developments Ltd v Weir 14 September 2010	2002 disposition granted a servitude right of way.	Narrowing the servitude so as to allow gardens for proposed new houses.	Granted (unopposed).
Stirling v Thorley 12 October 2012	1994 and 1995 dispositions granted a servitude of vehicular access.	Building a house on half of an area set aside for turning vehicles.	Refused (opposed).
Colecliffe v Thompson 2010 SLT (Lands Tr) 15	1997 disposition granted a servitude of way.	None. But the owners of the benefited property had since acquired a more convenient access, secured by a new servitude.	Granted (opposed).
G v A 26 November 2009	1974 disposition granted a servitude of way.	None. But the owners of the benefited property had since acquired a more convenient access (although not to his garage).	Granted (opposed) but on the basis that the respondent should apply for compensation.
Graham v Lee 18 June 2009	2001 disposition granted (a) a servitude of way and (b) of drainage.	None.	(a) was granted provided the applicants discharged a reciprocal servitude of their own, and compensation was considered. (b) was refused.

Name of case	*Burden*	*Applicant's project in breach of burden*	*Application granted or refused*
McNab v Smith 15 June 2012	1981 disposition granted a servitude of vehicular access for agricultural purposes.	None. But the owner of the benefited property could access the property in a different way.	Granted (opposed) but, because works would be needed to improve the alternative access, on the basis of payment of compensation.
Stephenson v Thomas 21 November 2012	1990 disposition granted a servitude of vehicular access.	None. But the owner of the benefited property could access the property in a different way.	Refused (opposed) on the basis that there were safety concerns about the alternative route and the benefited proprietors were proposing to revert to the original route.
McKenzie v Scott 19 May 2009	Dispositions from 1944 and 1957 granted a servitude of bleaching and drying clothes.	None. But the servitude had not in practice been exercised for many years.	Granted (opposed).
Chisholm v Crawford 17 June 2010	A driveway divided two properties. A 1996 feu disposition of one of the properties granted a servitude of access over the driveway.	None. But the applicant was aggrieved that no matching servitude appeared in the neighbour's title.	Refused.
Branziet Investments v Anderson 2013 GWD 31-629	1968 disposition granted a servitude of vehicular access.	Narrowing the servitude to five metres so as to allow rear gardens for new houses.	Granted (opposed) except that at either end the width was to be larger.
Mackay v Bain 2013 SLT (Lands Tr) 37	Servitude of pedestrian access over the front garden of applicant's property (1989).	None.	Refused (opposed). The servitude was the only means of access to the respondents' front door.

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. This table is a continuation of the earlier table, beginning with appeals heard during 2009.

Aberdeen City Council v Stewart Milne Group Ltd
[2009] CSOH 80, 2009 GWD 26-417, 2009 Case (6) *affd* [2010] CSIH 81, 2010 GWD 37-755, 2010 Case (9) *affd* [2011] UKSC 56, 2011 Case (13)

AMA (New Town) Ltd v Finlay
2010 GWD 32-658, Sh Ct, 2010 Case (8) *rev* 2011 SLT (Sh Ct) 73, 2011 Case (1)

Blemain Finance Ltd v Balfour & Manson LLP
[2011] CSOH 157, 2012 SLT 672, 2011 Case (69) *affd* [2012] CSIH 66, [2013] PNLR 3, 2012 GWD 30-609, 2012 Case (70)

Cheshire Mortgage Corporation Ltd v Grandison; Blemain Finance Ltd v Balfour & Manson LLP
[2011] CSOH 157, 2012 SLT 672, 2011 Case (69) *affd* [2012] CSIH 66, [2013] PNLR 3, 2012 GWD 30-609, 2012 Case (69)

Christie Owen & Davies plc v Campbell
2007 GWD 24-397, Sh Ct, 2007 Case (53) *affd* 18 Dec 2007, Glasgow Sheriff Court, 2007 Case (53) *rev* [2009] CSIH 26, 2009 SLT 518, 2009 Case (82)

Compugraphics International Ltd v Nikolic
[2009] CSOH 54, 2009 GWD 19-311, 2009 Cases (22) and (90) *rev* [2011] CSIH 34, 2011 SLT 955, 2011 Cases (21) and (74)

Co-operative Group Ltd v Propinvest Paisley LP
17 September 2010, Lands Tribunal, 2010 Case (36) *rev* [2011] CSIH 41, 2011 SLT 987, 2011 Case (38)

Cramaso LLP v Viscount Reidhaven's Trs
[2010] CSOH 62, 2010 GWD 20-403, 2010 Case (58) *affd* [2011] CSIH 81, 2011 Case (57)

EDI Central Ltd v National Car Parks Ltd
[2010] CSOH 141, 2011 SLT 75, 2010 Case (5) *affd* [2012] CSIH 6, 2012 SLT 421, 2012 Case (4)

Euring David Ayre of Kilmarnock, Baron of Kilmarnock Ptr
[2008] CSOH 35, 2008 Case (82) *rev* [2009] CSIH 61, 2009 SLT 759, 2009 Case (93)

Martin Stephen James Goldstraw of Whitecairns Ptr
[2008] CSOH 34, 2008 Case (81) *rev* [2009] CSIH 61, 2009 SLT 759, 2009 Case (93)

Hamilton v Dumfries & Galloway Council
[2008] CSOH 65, 2008 SLT 531, 2008 Case (37) *rev* [2009] CSIH 13, 2009 SC 277, 2009 SLT 337, 2009 SCLR 392, 2009 Case (50)

Hamilton v Nairn
[2009] CSOH 163, 2010 SLT 399, 2009 Case (51) *affd* [2010] CSIH 77, 2010 SLT 1155, 2010 Case (44)

Holms v Ashford Estates Ltd
2006 SLT (Sh Ct) 70, 2006 Case (40) *affd* 2006 SLT (Sh Ct) 161, 2006 Case (40) *rev* [2009] CSIH 28, 2009 SLT 389, 2009 SCLR 428, 2009 Cases (19) and (52)

Hunter v Tindale
2011 SLT (Sh Ct) 11, 2010 Case (16) *rev* 2011 GWD 25-570, Sh Ct, 2011 Case (19)

K2 Restaurants Ltd v Glasgow City Council
[2011] CSOH 171, 2011 Hous LR 171, 2011 Case (20) *affd* [2013] CSIH 49, 2013 GWD 21-420, 2013 Case (5)

Kerr of Ardgowan, Ptr
[2008] CSOH 36, 2008 SLT 251, 2008 Case (80) *rev* [2009] CSIH 61, 2009 SLT 759, 2009 Case (93)

L Batley Pet Products Ltd v North Lanarkshire Council
[2011] CSOH 209, 2012 GWD 4-73, 2011 Case (62) *rev* [2012] CSIH 83, 2012 GWD 37-745, 2012 Case (43)

Liquidator of Letham Grange Development Co Ltd v Foxworth Investments Ltd
[2011] CSOH 66, 2011 SLT 1152, 2011 Case (64), *rev* [2013] CSIH 13, 2013 SLT 445, 2013 Case (70)

Livingstone of Bachuil v Paine
[2012] CSOH 161, 2012 GWD 35-707, 2012 Case (12) *rev* [2013] CSIH 110, 2013 Case (9)

Luminar Lava Ignite Ltd v Mama Group plc
[2009] CSOH 68, 2009 GWD 19-305, 2009 Case (91) *rev* [2010] CSIH 1, 2010 SC 310, 2010 SLT 147, 2010 Case (77)

McGraddie v McGraddie
[2009] CSOH 142, 2009 GWD 38-633, 2009 Case (60), [2010] CSOH 60, 2010 GWD 21-404, 2000 Case (48) *rev* [2012] CSIH 23, 2012 GWD 15-310, 2012 Case (38) *rev* [2013] UKSC 58, 2013 SLT 1212, 2013 Case (32)

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