CONVEYANCING 2014

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CONTENTS

PREFACE

This is the sixteenth 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 website (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 2013*. The next two parts summarise, respectively, statutory developments during 2014 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. Next 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 2014. 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, John King, Sarah Meanley, Roddy Paisley, Graeme Reid, Andrew Steven, Neil Tainsh and Scott Wortley.

Kenneth G C Reid
George L Gretton
20 March 2015

TABLE OF STATUTES

TABLE OF ORDERS

TABLE OF CASES

PART I

CASES

CASES

MISSIVES OF SALE

(1) Trs for S & A Kilcoyne v Sadiq's Judicial Factor [2014] CSIH 34, 2014 GWD 17-310

Missives were concluded for the sale of commercial premises at 71 Nuneaton Street, Glasgow, at a price of £2 million, with entry on 26 June 2009. The date of entry came and went without payment being made. Once it became apparent that the buyer was not in a position to pay, the seller rescinded (as it was entitled to do if payment was more than 14 days late) and raised an action for damages. The missives contained a provision that, in the event of rescission for non-payment, the seller was entitled to damages in respect of all losses including wasted expenditure and the cost of a bridging loan. It had not proved possible to re-sell the premises, and the seller had leased it instead on a short-term lease.

The seller was successful before the sheriff, being awarded damages of £319,683.97 in respect of the drop in market value of the premises and the costs consequential on having to retain them. In respect of the second of those, it appears from the sheriff's findings-in-fact that the heads of damage included: legal expenses; remarketing costs; costs for insurance, rates, energy, and security in respect of the premises for the period after the date of entry; and interest on an additional loan needed to purchase other premises.

The buyer's judicial factor appealed, first to the sheriff principal and then to the Inner House. Both appeals were unsuccessful. Before the Inner House, the appeal was confined to disputing two heads of damage, one on the ground that it had not been sufficiently pled and was in any event too remote, the other on the ground that insufficient account had been taken of the rental income for the premises. Neither ground was found to have been established.

(2) MacQueen v MacPherson 3 October 2014, Oban Sheriff Court

The defenders concluded missives to buy property from the pursuers after which, so far as we know, the transaction proceeded to settlement without incident. The present litigation concerned clause 7 of the contract, by which the defenders agreed in turn to convey a strip of land (which they already owned)

to the pursuers and to grant a servitude in respect of another area. Clause 7 was in the following terms:

> Subject to the approval of our clients' [ie the defenders'] mortgage lenders they will convey to your clients the strip of ground coloured yellow on the title plan and grant a servitude right of access in favour of your clients [ie the pursuers] over the strip shown coloured green on the plan which two strips of ground form part of the subjects owned by our clients at 35 Lora View, North Connell, by Oban however this is a separate matter and it is not a condition of the Missives that it be completed prior to the date of entry.

The action was for declarator and specific implement, which failing for damages of £200,000. The defence was (i) that the two years provided for in the supersession clause having passed, clause 7 had ceased to be enforceable, and (ii) that, in any event, clause 7 was introduced by a suspensive condition, namely that the lenders should give their consent, which had not so far been purified. Both points were rejected by the court.

On (i), the contract was subject to the Combined Standard Clauses, clause 22 of which provided that:

> The Missives shall cease to be enforceable after a period of 2 years from the Date of Settlement except insofar as (i) they are founded upon in any court proceedings which have commenced within the said period or (ii) this provision is excluded in terms of any other condition of the Missives.

The 'Missives' were defined as '… the contract of purchase and sale concluded between the Purchaser and the Seller of which the Offer incorporating reference to these clauses forms part'.

The question to be determined was whether clause 7 was a (collateral) term of the 'missives' (as so defined) or a completely separate contract which just happened to be included in the same contract letters as the missives proper. If the former, the supersession clause applied and the obligation was at an end; if the latter, the supersession clause did not apply and clause 7 remained in force.

In finding for a separate contract, the sheriff (W Douglas Small) explained his reasoning as follows (para 35):

> In my opinion if the parties had intended the defenders' obligations in respect of the two strips of ground to be 'collateral' to their principal obligation to purchase 'Aisling Chailein' then precise words, or words from which that intention might be inferred would require to have been used. There are no such words in clause 7 or indeed anywhere within the contract letters passing between the parties' agents. In fact, the opposite is provided for when the words 'this is a separate matter and not a condition of the missives' are used.

Why so strict a rule of construction should have been employed is unclear; the cases which the sheriff goes on to mention seem of only marginal relevance (as well as being English: they were *Heilbut Symons & Co v Buckleton* [1913] AC 30 and *Suisse Atlantique Société d'Armement SA v NV Rotterdamsche Kolen Centrale* [1967]

1 AC 361). Further, the rider at the end of clause 7 seems conclusive only in the version quoted by the sheriff which, by omitting the crucial final words ('that it be completed prior to the date of entry'), is made to appear to say that clause 7 is 'not a condition of the missives'. None of this is to say that the decision itself is wrong. The facts are such that a finding for either party would be defensible. But the sheriff's reasoning does not convince.

One other matter seems worth mentioning. Clauses like clause 22 of the Combined Standard Clauses are generally called 'supersession clauses', a term which traces their ancestry to the old '*non*-supersession clauses' which were in use prior to s 2 of the Contract (Scotland) Act 1997: see G L Gretton and K G C Reid, *Conveyancing* (4th edn, 2011) pp 319–21. But as the sheriff points out (adopting an argument made by senior counsel for the pursuers), 'strictly speaking clause 22 is *not* a supersession clause in that it does not supersede anything in the missives but simply acts as a "contractual time-bar" regulating the period after which proceedings in relation to the "missives" become time-barred'.

(3) Kippax Ltd v Glasgow Harbour Development Ltd [2014] CSOH 29, 2014 GWD 8-157

In terms of a contract, dated 17 February 2007, for the purchase by the defender from the pursuer of 95 car-parking spaces 'located as indicated on the base drawings and specifications', the (very detailed) drawings and specifications could themselves be altered if the pursuer submitted full details in writing and the defender either gave its acceptance or failed to respond within five days. The pursuer sought declarator that this mechanism had been successfully employed to alter the location of the car-parking spaces in respect that, on 11 March 2009, the pursuer had sent the defender the following letter:

> Further to our meeting yesterday, please find enclosed a copy of the revised basement car park layout, as per the development and sale agreement dated 17 February 2007. I forgot to give you the drawing before you left. If you have any queries regarding the above, please give me a call to discuss.

It was **held** by the Lord Ordinary (Lord Malcolm) (i) that the mechanism could not be used for a change in location as this was in reality 'a change to the subjects to be purchased' (para 5), and (ii) that in any event a letter as informal and uninformative as that of 11 March 2009 was not a proper exercise of the mechanism.

COMMON PROPERTY

(4) Collins v Sweeney 2014 GWD 12-214, Sh Ct

Ever since Lord McCluskey, in *Scrimgeour v Scrimgeour* 1988 SLT 590, allowed one co-owner of a house to buy out the share of the other rather than have the

house sold on the open market, 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. The defender's right to do so was rejected at first instance (see 2013 GWD 11-230, *Conveyancing 2013* Case (3)) and has now been rejected on appeal to the sheriff principal (C A L Scott QC).

The continuing disagreement turns to some extent on the scope of the decision of the First Division in *Upper Crathes Fishings Ltd v Bailey's Exrs* 1991 SLT 747. The actual decision in that case was that a *pro indiviso* owner was (with a few exceptions) always entitled to division or sale of the property, and that it was no ground for refusing this right that the owner was acting in bad faith or that its share was perfectly marketable on its own (the subjects being salmon fishings). But does that mean that (except where an exception applies) a *pro indiviso* owner is always entitled to either physical division of the property or, where that is impractical, to its sale and division of the price? Or does it mean rather that, while a co-owner is always entitled to division or sale in the broad sense of bringing the co-ownership arrangement to an end, a court has a discretion as to how this should be achieved?

In *Collins v Sweeney* the sheriff principal was emphatic in his adoption of the first of these positions. The choice, in his view, was one between division and (ordinary) sale. What was not available was the remedy sought by the defender, namely the forced sale by the pursuer to the defender of the pursuer's half share. In the sheriff principal's view (para 36):

> Such a conclusion is justified not merely by the absence of authority supporting the defender's argument and contrary authority, particularly in the form of the *Upper Crathes* case. It can be securely arrived at by an analysis of the fundamental principles involved here. When it comes to division and sale, a co-proprietor's right to raise such an action is absolute. It cannot be qualified by consideration of equity. The remedy itself is straightforward. Where as in this case division does not come into play, it follows that a sale of the subjects must take place and the proceeds of that sale require to be divided.

A forced sale of the pursuer's *half* share, as the defender requested, would not, the sheriff principal added (para 37), 'equate to a sale of the subjects'. *Gray v Kerner* 1996 SCLR 331, a decision of a temporary sheriff which allowed the remedy of a forced sale, was 'wrongly decided' (para 34).

Interestingly, a different sheriff (Philip Mann) in a different case, noted below (*Fraser v Fraser*), seems to have adopted the opposite interpretation of *Upper Crathes Fishings Ltd v Bailey's Exrs*. Commenting on that case, and on similar remarks which appeared in *Morrison v Kirk* 1912 SC 44, Sheriff Mann thought (para 5.1) that the court

> clearly acknowledges that it is open to the parties to contract as to how the common property is to be dealt with. When the Lord President said [in *Morrison v Kirk*] that 'the law of Scotland has always held that the state of joint property may be brought to an end at the instance of any one of the joint proprietors pursuing a division or a division and sale' he was simply saying that no proprietor could be compelled to remain as a common owner. He was not referring to the method by which the bonds of common ownership could be broken. The word 'pursuing' was not an exclusive reference to an action of division or division and sale. One method of pursuing a division or a division and sale would be by contract. Another method, where the parties are unable to agree, would be by way of court action.

Similarly (para 5.2):

> The Lord President (Hope) did not introduce any conflict in the *Upper Crathes Fishings* case when he said that he could find no authority 'to suggest that the right to resort to a division or sale is anything other than an absolute right'. Here, too, Lord Hope was not referring exclusively to an action of division or sale and division.

The decision in *Collins v Sweeney* has attracted a certain amount of comment; see: Alan Eccles, 'Division and sale: smash in case of emergency' 2014 SLT (News) 87; Frank Burr, 'Division and sale: prevention is better than cure' 2014 SLT (News) 147. For our part we regard it as unfortunate that the courts are denying themselves the flexibility of pronouncing an order which, in circumstances such as those in *Collins v Sweeney*, would produce a much more satisfactory solution than a sale in the open market. (See further K G C Reid, *Law of Property in Scotland* (1996) para 33.)

(5) Fraser v Fraser
2014 Hous LR 66, Sh Ct

An action for division of one property and division and sale of another was dismissed on the ground that the parties had previously entered into an agreement providing how the properties were to be disposed of. This included the outright sale of the property in respect of which the pursuer was seeking division.

This decision applies the principle established in *Morrison v Kirk* 1912 SC 44 and *Upper Crathes Fishings Ltd v Bailey's Exrs* 1991 SLT 747 that the right to division and sale can be excluded by contract.

(6) Rezac's Exrs v Rezac's Exx
2014 GWD 15-281, Sh Ct

Mr and Mrs Rezac bought a house together in 1999, the title containing a survivorship destination. On 2 September 2007 they executed a deed evacuating the destination. This was registered in the Books of Council and Session, and it was a matter of agreement between the parties to the present action that the deed was effective. On the same day, 2 September 2007, they both executed wills. Mr

Rezac's will appointed his daughter as his executrix. Mrs Rezac's will left her half share in the house to Mr Rezac in (trust) liferent and to her nephew in fee. Mrs Rezac died a few days later. Her executors were confirmed, and completed title as such. Mr Rezac died in 2011. His daughter was his primary beneficiary (though details here are sketchy) as well as being his executrix. She was confirmed. She was the sole occupier of the house.

Mrs Rezac's executors raised the present action for division or sale: since the house was not capable of division, only sale was sought. The defence was that, since Mrs Rezac's will directed the executors to transfer the fee in Mrs Rezac's original half share to her nephew, the action should fail. The answer for the pursuers was that they had power of sale. The sheriff (P A Arthurson) agreed with the defender and granted decree of absolvitor.

One might have thought that Mrs Rezac's executors would have disponed her half share to the nephew, and left him to deal with the matter. Why this was not done we do not know. Indeed, what his attitude was is unclear. He was not brought in as a joint pursuer, and if he concurred in the action that fact does not emerge. Finally, and more fundamentally, even if the action for division or sale was in breach of the trust and hence of the rights of the nephew, that was a matter internal to the trust. Whether this could be used by the present defender, a stranger to the trust, as a ground for resisting the action is far from clear.

(7) Edgar v Edgar
[2014] CSOH 60, 2014 GWD 13-236

In this action the pursuer obtained reduction of a disposition which she had granted to herself and her son, and survivor, on the ground of essential error and facility and circumvention: see Case (21) below. As a precaution she sought as an alternative remedy division and sale of the property, with the proceeds of sale being divided 99% in her favour and 1% in favour of her son. The main authority relied on was *Ralston v Ralston* 1994 SLT 771, a case in which the Second Division allowed a division of the price which reflected the fact that one of the parties had repaid the whole secured loan.

In the event that the alternative remedy had been at issue, the Lord Ordinary (Lord Burns) would not have allowed the division of the proceeds requested by the pursuer. Rather, he would have made a deduction from the defender's 50% share of the proceeds of a sum equal to the amount paid by the pursuer in mortgage repayments (para 61).

SERVITUDES

(8) Sidebottom v Green
2014 GWD 19-367, Sh Ct

In this action of declarator of servitude of pedestrian and vehicular access in respect of land near Inverurie, it was **held**, after proof and in the face of conflicting evidence, that a servitude had been established by positive prescription. The

pursuers, farmers living at Crannabog Farm, Rothienorman, Aberdeenshire, had a property nearby called Croft of Cowhill. They sought to establish, in favour of that property, access rights over two other properties, Backhill of Smiddyburn, Folla Rule, Rothienorman, and the adjacent Tifty House.

One matter to emerge at proof was that, although a fence blocked the access route at the boundary between Backhill of Smiddyburn and Tifty House, a makeshift 'bodge' or 'yankie gate' had been created which allowed the access to continue. Our north-eastern agricultural correspondent, Professor Roderick Paisley, tells us that a 'yankie' (or 'yankee') gate

> is really no more than a continuation of a fence which has a post at one end. This is linked into the continuation of a fence by loops attached to a post at the end of the fence that does not move. It is known in Bavaria as a 'Prussian' gate. It is a lazy and cheap way to make an entrance into a field but it has the difficulty that it is not rigid and the wires in the gate tend to snarl up and become fanked together when the gate is opened.

Nonetheless the gate seems to have been effective, at least when 'yanked' open. It was described by one witness as 'cute' and a 'very common way of making a gate in Aberdeenshire'.

It was argued for the first defender that, even if possession for 20 years could be established, it was the 'wrong' type of possession, not being as of right. That argument was rejected by the sheriff (Philip Mann) (para 4.4):

> I am equally satisfied that the pursuers used the access as of right. The nature, frequency and regularity of the pursuers' use points firmly to that conclusion. Additionally, Mrs Sidebottom's evidence was that the pursuers had been told when they bought Croft of Cowhill that they had a right of access through Backhill of Smiddyburn. They had commenced their use of the access, initially on foot, immediately upon the purchase. Even though it may have turned out that there was no such right within the pursuers' title to the property the pursuers were clearly asserting a right when they commenced to use the access. Mrs Sidebottom's letter to Strutt and Parker is further evidence that the pursuers were asserting their right to use the access. In short, I am satisfied that Mrs Sidebottom's evidence establishes the necessary ingredients for the acquisition of a servitude right of access by prescriptive use.

(9) Wall v Kerr
March 2014, Airdrie Sheriff Court

When James Gardner split Blackton House from the rest of his farm (Blacktongue Farm, Greengairs, Airdrie) in 1978 by disponing it to his son and daughter-in-law, he granted 'a right to use the access road insofar as I have right thereto leading from the Greengairs Road to Blacktongue Farm Steading'. Even if effective, however (and that depended on Mr Gardner having been in a position to make a grant, which was now in question), this servitude only took the owners of Blackton House as far as the farm. What was still required was a servitude *through* the farm to Blackton House. No provision for such a servitude was made in the 1978 disposition.

Both Blackton House and the farm had changed hands and the new owners were now in dispute as to the existence of a servitude of access over the farm. In this action the owners of Blackton House sought to establish that a servitude had been created either (i) by implication, in the 1978 disposition or (ii) subsequently, by positive prescription. In relation to (i), their case, as averred, looked (as they said) like a 'text-book example' of an implied grant of servitude. In particular (a) the case was one of grant and not reservation; (b) in 1978 the road was the only means of access to Blackton House; and (c) the servitude sought was a continuation of the servitude actually granted in the disposition. So strong was the case, indeed, that the pursuers advanced the bold argument that a proof was not needed and that decree should simply be granted in their favour. Unsurprisingly, this suggestion was rejected by the sheriff and a proof before answer allowed.

REAL BURDENS

(10) Hill of Rubislaw (Q Seven) Ltd v Rubislaw Quarry Aberdeen Ltd [2014] CSIH 105, 2014 GWD 40-723

By a minute of agreement registered in 2005 between the owner of development property 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 property later challenged the status of the restriction as a real burden, principally on the basis that it conferred no praedial benefit and was an unreasonable restraint of trade. Neither ground of challenge succeeded before the Lord Ordinary: see [2013] CSOH 131, 2013 GWD 27-545, *Conveyancing 2013* Case (11). Equally, they have both now failed in the Inner House. See **Commentary** p 117.

VARIATION ETC OF TITLE CONDITIONS BY LANDS TRIBUNAL

(11) Trustees of John W Raeside & Son v Chalmers 2015 SLT (Lands Tr) 13

When, in 1989, Mr and Mrs Raeside sold 0.3428 hectares of land at the edge of their farm (Brownhills Farm, near St Andrews, Fife) for residential development, the disposition included the following provision:

> in respect that [on] a part of the adjoining subjects being retained by us there is erected an agricultural shed which lies along the north boundary of the subjects hereby disponed we hereby undertake that the said shed shall be used in all time coming for agricultural purposes only and in a manner that shall not be a nuisance to our said disponees or their successors as proprietors of the subjects hereby disponed and we hereby undertake that in the event of a sale of the said agricultural shed we shall bind our successors in title in like manner.

Ten houses were subsequently built on the land disponed, which became known as 'Brownhills Steadings'.

Although the point was not taken, it is unlikely that the condition just quoted was a valid real burden, for it is contained in a conveyance of the *benefited* and not (as was required under the pre-2004 law) in a conveyance of the *burdened* property. That, perhaps, is the explanation for the undertaking at the end to take successors bound. For the purposes of the application, however, it was taken that the condition amounted to a real burden and that the owners of the 10 houses had title to enforce it (see para 13).

The (now) owners of Brownhills applied for discharge of the condition. They had obtained planning permission to build two houses on the site of the shed. The application was opposed by the owners of two of the houses in Brownhills Steadings, each of which backed on to the shed. Neither was opposed to a development of some kind, but they were anxious that the boundary wall which would replace the wall of the shed should be of a sufficient height to provide protection against wind and road noise. The shed wall (now apparently demolished) had been 15 feet in height; they proposed in its place a stone wall of 10 feet.

The application was granted to the extent needed to allow residential development. Far from the preservation of the shed being a benefit to the objectors (factor (b)), it was in reality an eyesore whereas the proposed new houses 'would mark an improvement in the general amenity of Brownhill Steadings and the objectors' property in particular' (para 26). As, therefore, the burden on the applicants (factor (c)) outweighed any benefit to the objectors, the application fell to be granted. Nor was the wall suggested by the objectors either necessary or appropriate for a development of this kind.

On factor (f), the Tribunal was unpersuaded by the purpose of the condition suggested by the applicants. 'These considerations', thought the Tribunal (para 18), 'suggest that there are instances where unsupported speculation as to purpose is of little assistance and that we ought in this case to focus on the terms of the condition.'

(12) MacKay v McGowan
2014 GWD 37-687, Lands Tr

When the school at Heylipol, Isle of Tiree, closed in 1975, Argyll and Bute Council converted the building into two houses (the school and the schoolhouse). In due course each was sold to its tenant under the right-to-buy legislation. The feu dispositions contained identical burdens which, among other things, prohibited new building work without the superior's consent. The houses are in an isolated part of the island. Apart from a church, in weekly use, they are the only buildings for some distance. Both houses are let.

The applicant was owner of the former school, and also of rough ground extending to around half an acre which at one time had been the playground. Having obtained outline planning permission to build a house on this ground, the applicant entered into negotiations to sell the whole property. The potential

buyer, unsurprisingly, insisted on removal of those burdens which would prevent the building of the house. The Council, which retained contractual enforcement rights by virtue of s 75 of the Abolition of Feudal Tenure etc (Scotland) Act 2000 (the applicant being the original purchaser), was happy to oblige. The owners of the schoolhouse, however – originally without enforcement rights but who had now acquired them by virtue of s 53 of the Title Conditions (Scotland) Act 2003 (see para 31) – refused their consent. The sale fell through. The present application sought to vary the burdens to the extent needed (i) to build the new house and (ii) to add an extension to the existing house. No firm plans existed in respect of (ii). The application was opposed by the owners of the schoolhouse.

The application was granted in respect of the new house (provided that it was no more than one and a half storeys and built on the footprint shown in the planning permission) but refused in respect of the extension. In relation to the proposed house, the Tribunal was satisfied that, given its position, any visual or other impact on the schoolhouse would be minimal (factor (b)) while its denial would be a significant impediment to the enjoyment of the former school (factor (c)). Whether that would also be true of the extension was, by contrast, impossible to say in the absence of precise plans.

Two other matters merit comment. One is the Tribunal's treatment of factor (f) (the purpose of the condition). Other factors in s 100 contain an implied question, the answer to which points either in favour or against discharge. Factor (f), however, does not, with the result that it has usually been used in conjunction with some other factor, most often factors (a) or (b). See G L Gretton and K G C Reid, *Conveyancing* (4th edn, 2011) para 16–08. But on this occasion the Tribunal, with a new legal member (R A Smith QC), chose to consider factor (f) in isolation (paras 30 and 31). As only the superior had title to enforce prior to the abolition of the feudal system, it was not possible, the Tribunal said, to 'discern a purpose such as the protection of any specific view or aspect of amenity from the perspective of any particular neighbour'. This led on to the conclusion that 'we do not think factor (f) adds much to the respondents' position'. If this approach is used in future cases, it will be interesting to see where it leads.

The other matter concerns interest to enforce. In *Franklin v Lawson* 2013 SLT (Lands Tr) 81, a differently constituted Lands Tribunal had taken an appropriately indulgent view of the threshold requirement of 'material detriment', finding that it meant merely 'something more than fanciful or insignificant': see *Conveyancing 2013* pp 122–23. In *MacKay v McGowan* the Tribunal noted that 'we were given no reason not to apply the Tribunal's approach in *Franklin v Lawson*' and added that 'the reasons we have given for not agreeing to a complete discharge or wider variation seem to us to recognise the potential for more than insignificant material detriment in the sense used above' (para 37).

(13) Duffus v McWhirter 2015 SLT (Lands Tr) 2

When Burnockstone Farm in Ayrshire was sold in 2005, the seller reserved two cottages and six acres of ground. This reserved area was reached by a narrow

private road which then continued to the farm. The title of the farm (ie the farm minus the six acres) included part of this road, and a servitude of access in respect of the rest.

In terms of the disposition, the six acres were subject to a real burden preventing 'commercial use'. The applicants, the current owners of the six acres, sought to have the burden varied to the extent of allowing commercial equestrian use. They already had planning permission for seven stables and an all-weather outdoor exercise area, but (so far) for private use only. The application was opposed by the owner of Burnockstone Farm. He would have been content with the proposed development if the applicants had been willing to widen the private road at its entrance to the public road and to install passing places. As it was, he considered that the quite extensive public use which might be anticipated was beyond the road's capacity.

The application was refused. On the one hand (para 18)

> we accept that the title restriction preventing commercial use and therefore an intensification of traffic on the access road is a significant benefit to the benefited property [factor (b)]. The access road is not, we conclude, generally busy, but the amount of its use is still significant. The farm operation would be impeded by having to wait or reverse for other vehicles, and there could be particular delays should two lorries meet or should one of the drivers be unfamiliar with the situation.

The access road 'is simply not fit for public use in its present state' (para 27). On the other hand, 'the extent of the burden upon the burdened property [factor (c)] has to be seen in the context that the site as it stands has inherent limited capacity' for development (para 26). As compared to factor (c), factor (b) must be given 'decisive weight' (para 26).

(14) Grant v National Trust for Scotland
8 August 2014, Lands Tr

An application for the variation of conditions imposed under a conservation agreement with the National Trust for Scotland was granted in part on the basis that the new houses which were likely to result would have a minimal impact on the nearby property owned by the NTS and made available to the public. See **Commentary** p 206.

(15) Pollacchi v Campbell
2014 SLT (Lands Tr) 55

The applicants owned a building in Largs, Ayrshire, which, formerly in commercial use, had now been converted into a house. It was reached from the main road by a pend. Beyond the applicants' property lay a second property owned by the respondent. This comprised a windowless building and a yard. Its current use, by the respondent's tenant, was for storage of various vehicles including two caravans, cars, and a van. In order to reach the yard, access was taken through the pend and then, by virtue of a servitude, in a straight line

through the applicants' property. The purpose of the application was to have the route of this servitude changed so that it would run on one side of the applicants' property rather than through the middle. This would allow the applicants to have a proper garden, with appropriate fencing.

The Tribunal accepted (factor (c)) that the current route of the servitude was a significant impediment to the applicants, and that the proposed new garden would be attractive in itself as well as improving both privacy and security. But, at least in its current form, the proposed new route was unsatisfactory from the point of view of the benefited property (factor (b)). A particular problem was caused by an S-bend which would make it impractical or impossible to handle larger vehicles. A further problem was that, as the benefited property would now be reached at a different place, this would lead to the loss of some usable space as well as forcing vehicles to be parked hard against the building, making access to the building more difficult. The Tribunal accepted that the current access was not perfect either and that it was made more workable in practice by drivers encroaching on parts of the applicants' property which were not subject to the servitude. Nonetheless, after a site visit and a private study of the plans using scale cut-out vehicles – one of the treats of being a Lands Tribunal member – the Tribunal concluded that it would be possible for the larger vehicles to take access at present without any encroachment.

While, however, the Tribunal was not willing to approve the variation sought by the applicants, it was willing to allow a revised version which ameliorated the problem of the S-bend. The parties were urged to settle a new route by negotiation; and, in order to assist the negotiations, the Tribunal set out its own suggestions which, it indicated, it would be willing to approve.

(16) Young v Markey
2014 SLT (Lands Tr) 61

In 1993 part of the grounds of a substantial detached villa at 3 Eastmains Road, Giffnock, Renfrewshire, was sold off. The purchaser built a house, which became number 3A. Access to both properties, for vehicles and pedestrians alike, was by means of a driveway in number 3 in respect of which number 3A had a servitude. Both properties changed hands. Eventually, the owners of number 3A acquired additional land and built a separate car entrance, whereupon the owner of number 3 made this application to have the servitude discharged. After initially promising vigorous resistance, the owners of number 3A eventually consented to the discharge but sought compensation under s 90(7)(a). This allows the Lands Tribunal to award 'a sum to compensate for any substantial loss or disadvantage suffered by … the owner of the benefited property … in consequence of the discharge'.

The normal measure of compensation is the diminution in capital value, of which in the present case there was none, but it was also open to the Tribunal to base the award on the cost of making available a reasonable alternative: see *McNab v Smith* 7 December 2012, Lands Tribunal (*Conveyancing 2013* Case (27)). In the event, an award on this basis was not controversial and the only

point of disagreement was quantum. As the new entrance to number 3A was not suitable for pedestrians, the owners had devised a further and elaborate new pedestrian entrance, complete with a video-entry system, which would cost £15,975.06. A further £7,675.32 was claimed in respect of the recent cost of installing monoblocking which would now have to be removed. The owner of number 3, in turn, had costed a much simpler pedestrian entry at £2,730.

The Tribunal awarded compensation of £2,730. The rival sum suggested by the owners of number 3A 'far exceeds the reasonable cost of replacement of the pedestrian access' (para 26) and involved a substantial element of betterment. Nor would recovery be allowed for the historic spending on the monoblocking.

As the applicant had been wholly successful on the merits, the Tribunal awarded her expenses up to the point at which the owners of number 3A had conceded the claim. But this would be on the usual 'party and party' basis and not, as the applicant requested, on the higher 'agent and client, client paying basis'. The latter was only appropriate where 'one of the parties has conducted the litigation incompetently or unreasonably' (*McKie v Scottish Ministers* [2006] CSOH 54, 2006 SC 528 at para 3 per Lord Hodge), which had not been shown to be the case here.

EXECUTION OF DEEDS

(17) Khosprowpour v Mackay [2014] CSOH 175, 2015 GWD 1-8

The pursuer's case was that, in 1989, he had lent his mother-in-law, Ann Bowden Mackay, £8,000 to buy her council house at 7 Partick Bridge Street, Glasgow, on the basis that she would bequeath the house to him in her will. Such a will, the pursuer averred, had indeed been drawn up and signed; but when Mrs Mackay died in 2012 it was found that she had made a will in 2003 leaving the sale proceeds of the house to her children. By that time the pursuer was no longer married to Mrs Mackay's daughter. The present action, one of damages, was raised against Mrs Mackay's executor.

An initial obstacle was that the alleged agreement had not been reduced to writing. For, the Lord Ordinary (Lord Turnbull) held, the arrangement was properly classified as a contract relating to heritage and not merely as a contract of an innominate kind, so that, under the law in force in 1989 (ie prior to the Requirements of Writing (Scotland) Act 1995), it needed writing for its constitution. Cases vouching for this proposition were *Fisher v Fisher* 1952 SC 437 and *McEleveen v McQuillan's Exr* 1997 SLT (Sh Ct) 46. The pursuer, however, pled *rei interventus* and in particular the fact that Mrs Mackay had made a will in the pursuer's favour. In allowing the pursuer a proof on this point, Lord Turnbull accepted (at para 25) that 'there is no apparent or stated explanation for the terms of the first will which Mrs Mackay is said to have executed, beyond that contended for by the pursuer'. It was true that there was some inconsistency between the pursuer's case and the terms of a standard security granted to the

pursuer by Mrs Mackay in 1991, which bore to be in security, not of an obligation *ad factum praestandum*, but of all sums due and to become due. 'The proper impact of his document', however, was a matter for proof (para 25).

STATUTORY NOTICES

(18) Scott v Scottish Borders Council April 2014, Jedburgh Sheriff Court

Last year the perils of buying a house with a retaining wall were demonstrated in *Sinclair v Fife Council* 2013 GWD 17-364 (*Conveyancing 2013* Case (30)). Now another case provides a further warning that buying such a house may turn out to be, as Sheriff Peter Paterson says (para 40), 'an ill advised purchase'.

When a 150-year-old retaining wall separating 'Airenlea' from Oxnam Road in Jedburgh, Roxburghshire, was in danger of collapse, Scottish Borders Council served a notice on the owners under s 91(2) of the Roads (Scotland) Act 1984 requiring that it be repaired. The cost would be at least £40,000 and might turn out to be much more. The owners of 'Airenlea' appealed.

After concluding that the wall did indeed belong to the pursuers – a point of contention – the sheriff turned to the question of his powers to reverse the Council's decision. In *Sinclair* the sheriff had reviewed the decision on grounds of overall reasonableness and concluded that the notice was unfair and unreasonable. But that, Sheriff Paterson said, was the wrong approach. The appeal process in a case such as the present was akin to judicial review, meaning that the appropriate test was that identified by Lord Greene MR in *Associated Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 233, namely 'that the task of the court is not to decide what it thinks is reasonable, but to decide whether what is *prima facie* within the power of the local authority is a condition which no reasonable authority, acting within the four corners of their jurisdiction, could have decided to impose'. Applying that test (para 40):

> the actions of the defender could not be said to be such that no other local authority acting reasonably would have done. While it is undoubtedly true that in requiring the pursuers to carry out remedial work the defender is imposing a very significant economic burden that, of itself, is not unreasonable. It may be said to be unfair in a general sense that the pursuers have to bear the cost of maintaining a wall which has as one of its main purposes, supporting a public road. However, as I have said that is not the test.

The notice, therefore, must stand.

Helpfully, the sheriff offered (*obiter*) views on some other matters. First, he referred to the Council's power, under s 91(5) of the 1984 Act, to 'make such contribution as they think fit' towards the pursuers' expenses. That was a matter in respect of which the parties should be in discussion, having regard in particular to the pursuers' financial position. '[T]he defender should balance their rights under the Act with [the] greater good, in keeping the road open'

(para 50). In the absence of a statutory appeal procedure, any challenge to the Council's decision on that point would have to be by judicial review.

The sheriff also commented on the meaning of 'occupier of land' in the context of the statutory power, under s 91(2), to serve a notice on the owner of the wall or 'the occupier of the land on which it is situated'. In the sheriff's view (para 23):

> For the legislation to be workable, occupation must mean more than mere use. If a party simply used a field on a casual basis, for example grazing a horse, that party would have no right to carry out any of the work that would be required. At the very least, the concept of occupation in the context of section 91(2) brings with it some legal right to occupy, for example, an agricultural tenancy or commercial lease.

(19) McWatters v Inverclyde Council 2014 SLT (Sh Ct) 155

Following an earlier closure order (ie an order prohibiting the use of a flat which does not meet the tolerable standard in circumstances where other flats in the building do meet this standard: see s 114 of the Housing (Scotland) Act 1987) in respect of the pursuer's flat at 3 Bruce Street, Port Glasgow, Inverclyde Council made a demolition order in respect of the whole building. This was because, by then, none of the flats met the tolerable standard. This was a summary application to quash the demolition order or to order Inverclyde Council to issue a suspension order on the basis of undertakings by the owners to bring the building up to the tolerable standard. The application was refused on the basis that (i) the pursuer failed to show that he had the authority of the owners of the other flats to proceed with a renovation; (ii) the renovation plan put forward on the pursuer's behalf was wholly lacking in specification and credibility; and (iii) the pursuer having failed to carry out any work on his flat so far, there was nothing to persuade the court to exercise its discretion in his favour. Instead the Council should be allowed to proceed with its plan to regenerate the area, which was full of dilapidated and vacant properties.

COMPETITION OF TITLE

(20) Wheeldon's Exr v Spence's Exx [2014] CSOH 69, 2014 GWD 15-267

The dispute concerned a property known as Powfoot Hall (in, we think, Dumfriesshire). James Wheeldon lived there for 43 years until his death in 2007. In 1987, however, he conveyed the property to a business associate, Doris Spence. Subsequently, in 1994, the parties entered into an informal written agreement which contained the following provision:

> As affairs between … Doris Spence and … James Wheeldon are now agreed by both parties concerned and fully settled, and the title deeds to the Powfoot Hall are hereby returned to … James Wheeldon who now assumes full legal title to Powfoot Hall on 20/12/1993 and becomes owner of said property …

No conveyancing, however, was carried out, so Ms Spence in fact continued to hold 'full legal title'. When she died in 2003 she left a will bequeathing the property to her son. This was an action by Mr Wheeldon's executor to have the will and confirmation reduced on the basis of the offside goals rule, or at least on the basis of *Paterson v Paterson* (1893) 20 R 484. *Paterson* was a case in which the creditor in an obligation to bequeath all of a person's property was held entitled to reduce a will by the obligant which left the property to others; the legal basis was not entirely clear but none of the offside goals cases was cited.

Although the wording of the 1994 agreement was rather unclear, it was common ground that its effect was to place Ms Spence under an obligation to convey to Mr Wheeldon, and that the bequest in the will was in breach of this obligation. The action was defended on the basis (i) that there was no authority for extending the offside goals rule to a bequest; nor should it be extended: 'The beneficiary in a will should not be equated to a subsequent buyer. He merely took his bequest in a passive way and was not trying "to score a goal"' (para 7), and (ii) that Ms Spence's son was not averred to be in bad faith, and bad faith was a requirement for the offside goals rule.

A proof was allowed. The Lord Ordinary (Lord McEwan) concluded that he was bound by *Paterson*, and seems to have thought that the same result might also be reached by a version of the offside goals rule. In respect of the second ground the case provides (weak) authority for the proposition that the offside goals rule applies to cases where, rather than being in bad faith, the second acquirer was a donee. See K G C Reid, *The Law of Property in Scotland* (1996) para 699.

Counsel seem to have enjoyed developing the offside goals metaphor. Not to be outdone, Lord McEwan said (para 21), in relation to bad-faith cases, that:

> If I can continue in the same vein, I think the 'offside goal rule' was intended to strike at bad faith; the player knowing he is out of position yet trying to secure a benefit from the offside place on the field of play. This is what *Rodger* is about. It does not deal with the player who takes an advantage gratuitously and who may not be offside. The problem is that the player (Doris) who passes the ball to him (George) has broken the rules and the pass is invalid.

In addition, Lord McEwan expressed his approval (at para 16) of Lord Emslie's reasoning in *Gibson v Royal Bank of Scotland plc* [2009] CSOH 14, 2009 SLT 444 (*Conveyancing 2009* pp 34–37) ('a decision by a strong judge': 'Lord Emslie would well understand how the "offside rule" would apply (as would have his father before him)'). He also offered comments (at para 12) on the facts of the leading case of *Rodger (Builders) Ltd v Fawdry* 1950 SC 483.

(21) Edgar v Edgar
[2014] CSOH 60, 2014 GWD 13-236

After her husband died in 2006 Mrs Edgar suffered from depression and vertigo. Two years' later, by which time she was 74, she signed a disposition conveying

her flat in Greenock to herself and her son, William, and to the survivor. They both then signed a standard security in favour of HBOS in respect of a loan of £26,000, which was used by William to repay his debts. The parties were not separately represented in the transactions.

Following a proof, the Lord Ordinary (Lord Burns) summarised the key facts as follows (para 45):

> I have found that, on 11 December 2008 [the date of the disposition], the pursuer [Mrs Edgar] was suffering from the effects of an attack of vertigo which, although in its early stages, substantially affected her ability to take in and understand what was being said to her. In addition, she was distracted by the loss of her husband. I find that the defender [the pursuer's son, William] had pestered her in the weeks preceding that meeting to agree to take out a loan and that she finally acceded to course. She was not aware, however, prior to the meeting that this would involve a transfer of the title to the property. Although I accept that Mr Armstrong [a solicitor acting for both parties] did go through the terms of the disposition with her, I conclude that the pursuer was not in a condition to be able properly to appreciate the meaning and consequences of what she was being asked to sign. I find that she was under the misapprehension that the document she was signing related only to a loan, due to the repeated pestering by the defender about that matter and did not appreciate that it disponed one half of the property to the defender or that it contained the survivorship clause. The information given to her by Mr Armstrong did not dislodge the pursuer's understanding from her mind. Such an error is a substantial and material one and can properly be classified as 'essential'. She thought that she was signing a document very different in nature to that she was actually signing and which had significant consequences on her ownership of the property which she was not in a position to consider.

Mrs Edgar's action was for reduction of the disposition (but not the standard security, perhaps because she may have understood the security's effect). The legal grounds were (i) error and (ii) facility and circumvention. Both were **held** to have been established. In respect of (i) it was said, under reference to W W McBryde, *The Law of Contract in Scotland* (3rd edn, 2007) para 15–39 and to *Hunter v Bradford Property Trust Ltd* 1970 SLT 173, that the fact that no consideration was given meant that even uninduced error was a sufficient ground for reduction. But in any event there was ample evidence that the error had been induced. In respect of (ii), Lord Burns found both that Mrs Edgar was facile at the relevant time and that her son had taken advantage of that facility.

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

(22) Chalmers v Chalmers
[2014] CSOH 161, 2014 GWD 38-699

An action of reduction of a forged disposition was refused, after proof, on the ground of personal bar. See **Commentary** p 196.

(23) McVicar v D
[2014] CSOH 61, 2014 GWD 13-227

The pursuer owned a house in Fernieside, Edinburgh. According to her pleadings, a former boyfriend arranged for her to be impersonated by another woman for the purposes of selling the house. The sale price was £110,000. The pursuer's signature on the disposition was forged by the impersonator. The buyer borrowed £80,500 from the Nationwide, of which £45,411.90 was used to repay the pursuer's loan and procure the discharge of the security. The buyer was registered as owner and the Nationwide security entered on the charges section. At all times the pursuer remained in possession.

Some points in the story as averred by the pursuer are unclear. Whilst she averred that the boyfriend was prosecuted and convicted for the fraud, nothing was said about any prosecution of the impersonator. The role of the buyer is unclear and the question of his good faith is not discussed.

On the fraud being uncovered, the pursuer raised this action for reduction of the disposition and standard security and rectification of the Register. The action was unopposed, but the Nationwide made a counterclaim for payment of the £45,111.90 (with interest) that had been used to repay the pursuer's loan. The legal ground was unjustified enrichment. At Procedure Roll the pursuer defended the counterclaim on the basis, among others, that (i) the Nationwide could recover from the purchaser under the loan contract, (ii) as recompense was a subsidiary remedy, it could not be used where a contractual remedy was available, and (iii) the pursuer's enrichment was indirect and for that reason not recoverable. The Lord Ordinary (Lord Doherty) allowed a proof before answer without offering any comments on the merits.

We would observe that it would be odd if the pursuer could, as a result of the fraud, receive the windfall benefit of having her mortgage wholly paid off. As against that, it would also be odd if her previous liability to pay off the loan at a comfortable monthly rhythm over, say, 20 years, were to be replaced by an obligation to pay that whole sum overnight. Finally, the question of whether the Keeper had been asked, or should have been asked, to pay indemnity to the Nationwide is not raised in the case as reported.

LAND REGISTRATION

(24) Burton v Keeper of the Registers of Scotland
2014 SLT (Lands Tr) 69

'This case', noted the Lands Tribunal (para 29), 'illustrates the difficulty in applying the decisive test of possession under the 1979 Act in the case of overlapping titles where the area in dispute is of such a character that minimal physical possessory acts are to be expected.' It is one of four cases – there were also two in 2013 – in which the Tribunal had to decide whether the person entered on the Land Register as proprietor was in possession so as to have the defence against rectification provided by s 9(3)(a) of the Land Registration

(Scotland) Act 1979. Although the 1979 Act has now been replaced by the Land Registration etc (Scotland) Act 2012 (where there is no protection for a proprietor in possession *as such*), it would not be surprising if there are other cases still to come.

As the present case acknowledges, the leading discussion of the meaning of 'possession' in this context is that of the Inner House in *Safeway Stores plc v Tesco Stores Ltd* 2004 SC 29. Based on that and on later cases, it is possible to reduce the relevant law to the 10 principles which are set out elsewhere in this volume: see pp 163–65. Some of these principles will be referred to in the discussion which follows.

The appellants in the present case had owned Glasnick Smithy Croft, Kirkcowan, Newton Stewart, since 1990. Their property, amounting to 4.31 hectares in all, comprised (i) a house, (ii) a triangular field, and (iii) an adjoining field to the east and, separated from the field by a fence, (iv) a small 'wild' area. The appellants' immediate neighbour to the north – who, by contesting the application, became so-called 'interested parties' – acquired their property only in 2012, their title being registered under title number WGN 7533. This was a substantial holding extending to 82.4 hectares. By mistake the title plan included – and had presumably included for some years, for this was not a first registration – an area of land which formed the eastmost strip of the appellants' wild area. Initially, however, the error does not seem to have been known to either party and only emerged when the appellants noticed contractors for the interested parties carrying out work on the disputed strip. After some investigations and discussions, the appellants applied for the rectification of WGN 7533 to the effect of removing the disputed strip. The interested parties, for their part, accepted that the Register was inaccurate; but they opposed the application because they had long-term plans to use the strip for access.

The only issue in dispute was possession. If the interested parties were in possession of the strip, then they were exempt from rectification; if they were not, rectification could proceed and the strip would be restored to the appellants. As the question of possession was in dispute, the issue could not be adjudicated by the Keeper and she refused the application for rectification, as she was bound to do. That this was harsh on those in the position of the appellants was one of the structural flaws in the 1979 Act. Through no fault of their own, part of their property had been included in the title of their neighbours. Yet the only way of getting the part back was to litigate before the Lands Tribunal. At this point many people are likely to give up and accept indemnity from the Keeper. The appellants, however, chose to litigate.

Although the appellants made only occasional use of the wild area (including the strip now in dispute) it was plain that, at least until the acquisition by the interested parties in 2012, they were in possession of it. The question then became whether that possession had been lost to the interested parties. And, as so often in such cases, the question of whether the registered proprietor was in possession was inseparable from the possessory status of the 'true' owner (para 35): this is the first of the principles identified later on in the volume.

In the first months after becoming owners, the interested parties employed contractors to carry out minor works on the disputed strip. In the same period, no possessory acts appear to have been carried out by the appellants. But were the activities of the interested parties sufficient to amount to the taking of possession, bearing in mind that this involves some significant element of physical control, to a more than minimal extent (para 2; this is the fifth principle)? The evidence led on both sides was said to be 'unsatisfactory' (para 42). Nonetheless, interpreting it as best it could, the Tribunal concluded that the activities by the interested parties amounted to the 'interested parties coming into the disputed area on, probably, three occasions when, after removing some stones from the dyke, they strung up some tape to delineate the boundary, cut down one small willow tree and branches of others, and some shrubs, and once or twice sprayed the bracken' (para 53). In all this was 'something around one day's work' (para 61). Much, but not all, of this work occurred before the interested parties' title was challenged.

In the Tribunal's view, this was not enough to establish possession (para 61):

> It might not take much to take control of wild ground possessed by no-one, but that was not the position here, as the appellants had been in control of this ground. The appellants made their objection and claim of ownership when they became aware of this activity and, in our view, made their application to rectify in reasonable time. Although the appellants have not been able to show continuing use of the disputed area after the interested parties commenced their activities, the interested parties' attempt to establish control over the area was in our view incomplete. They had not actually obtained any meaningful use or enjoyment of it.

Two additional factors which might have helped the interested parties were (properly) dismissed by the Tribunal. First, it was said to be irrelevant that the interested parties had been in undisputed possession of the adjacent ground because, while possession of one part of property can sometimes be regarded as possession of other parts, this did not apply where, as here, the disputed strip was an integral part, not of the property of the interested parties, but of the property of the appellants (para 50; this is the seventh principle). That was clear both from the character of the disputed strip and from the fact that it was physically separated from the former (but not from the latter) by a stone dyke. Secondly, nothing could be taken from the fact of a fence being erected by the interested parties between the disputed strip and the property of the appellants. This was done only once the title error had become known, and the fence was in any case taken down several times by the appellants and then re-erected. This 'seems to us to be the sort of tit-for-tat activity which has been characterised as a "tennis match"' (para 61).

While the Tribunal states its conclusions with confidence, this is a case which seems to us to lie at the margin. With rough ground of the type in question, not much is needed to establish possession. Although such a result might have seemed unfair, it would not have been difficult to hold that the interested parties

had done enough to secure their position. That indeed was the decision in the next case, and there is some tension between the two decisions.

(25) Gray v Keeper of the Registers of Scotland 2014 SLT (Lands Tr) 117

This is the second of the cases about 'proprietors in possession' for the purposes of the Land Registration (Scotland) Act 1979. On first registration of a title, the Keeper inadvertently included more than half an acre from the neighbouring property (which was held on a Sasine title). When, the mistake having been discovered, the neighbour sought rectification of the Register, the application was resisted by the registered proprietors on the basis that they were in possession. Although the possessory acts were not so much more significant than those in the immediately previous case, the Tribunal **held** that the registered proprietors were indeed in possession and that accordingly rectification could not proceed. See **Commentary** p 166.

(26) Mathers v Keeper of the Registers of Scotland 2015 GWD 3-68, Lands Tr

In this third case about proprietors in possession, the Keeper, in registering the interested parties' title in 1997, mistakenly included in the title plan an area forming part of the neighbouring farm, the 200-acre Tillymair Farm in Tough, Aberdeenshire, which was (and still is) held on a Sasine title. The mistake did not emerge for almost a decade. Eventually, in 2007, the owners of the farm applied for rectification so as to have the area in question removed from the interested parties' title. The latter conceded some of the area but for the rest claimed to be in possession. Accordingly, the Keeper refused the rectification application in respect of such land. This was the appeal against the Keeper's decision.

Generally speaking, the property ('Tonley') that belonged to the interested parties lay to the west and the farm lay to the east of a burn known as Bents Burn. The disputed area comprised (i) the east bank of the burn, generally only a few feet wide, and (ii) part of a field lying to the east of the burn. Having taken account of the possession of both parties (see the first of the principles identified at pp 163–65 below), the Tribunal concluded that, while the interested parties were in possession of (ii), they did not possess (i). Admittedly, in relation to (i), the narrowness of the bank was such as to make possessory acts hard to detect; but, while the appellants' fence lay a short distance to the east of the burn, the evidence taken as a whole suggested that the boundary between the two properties was the burn. That being so, it was the appellants and not the interested parties who could take advantage of the rule (the seventh of the principles) that possession of part of the subjects can be treated as possession of the whole. As a result, the appellants were entitled to rectification in respect of (i).

A novel feature of the case was the Tribunal's willingness to consider evidence of possession by the parties' predecessors. This was because 'we are dealing here

with agricultural fields in a rural area where changes no doubt occur slowly and over a period of time' (para 40).

(27) Van Eck v Keeper of the Registers of Scotland 2014 SLT (Lands Tr) 92

This is the final case about proprietors in possession. As in the others, the problem arose out of a mapping error by the Keeper at first registration which gave the proprietor part of a neighbouring property (the neighbours still holding on a Sasine title). The properties in question were adjacent houses in a Cala Homes housing estate in Murieston, Livingston, West Lothian, built in the 1990s: the registered house was number 27 Albyn Drive, the neighbours' house number 28. When the owners of number 28 discovered what had happened – in this case only some five or six years after the event – they sought rectification. This is an appeal against the Keeper's refusal to rectify.

Unlike in the other cases, there was no concession that the Register was inaccurate. The Keeper's position, indeed, was that it was not. And the description of each property in the split-off deeds was certainly far from straightforward, with a not fully intelligible verbal description supported by an estate plan on so small a scale that the size of each plot was less than that of a fingernail. Nonetheless, as (i) the verbal description of number 27 gave the relevant boundary as 'the centre line of a fence', (ii) the accompanying deed plan showed the boundary as encompassing a strip of land on number 28's side of the fence, and (iii) the Keeper's title plan followed the deed plan even though it was declared to be demonstrative, it was evident that the title plan could not be accurate.

After considering the evidence the Tribunal was able to form a view on the extent of the inaccuracy. And as the disputed strip lay entirely on number 28's side of the fence there could, with one qualification, be no argument that it had been possessed by the registered proprietor (ie the owner of number 27). The qualification was that in the summer of 2013 the registered proprietor proceeded to insert some gravel on part of the strip. But by that time the parties had long since been in dispute (litigation in the sheriff court had begun in 2010), and so the Tribunal dismissed the possessory act on the basis of the 'tennis-match' principle (para 23). In the absence of possession, the owners of number 28 were therefore found entitled to rectification.

In a subsequent hearing, the appellants were awarded expenses against the Keeper: see Note of 11 August 2014. The whole dispute had been caused by the Keeper's initial error, and the Keeper had continued to maintain that the Register was accurate during the appeal (in which, however, she had taken no part).

(28) Pattie v Keeper of the Registers of Scotland 2014 SLT (Lands Tr) 28

Like the previous cases, this too was an appeal against the Keeper's refusal of rectification in circumstances where the owners of one farm, held on a Sasine title, sought to have removed from the title sheet of the neighbouring farm a small

strip of ground in the region of 0.015 hectares. This time, however, the interested parties consented to the rectification shortly before the hearing, and the only question remaining to be resolved was expenses. The consent was said to have been given for 'pragmatic' reasons, as the interested parties did not accept that there was an inaccuracy; the appellants lacked an express title to the strip and were relying on positive prescription.

The Tribunal awarded expenses against the interested parties. The appellants had been wholly successful. They had repeatedly offered to settle the dispute on the basis of no expenses due. Surprisingly, in view of the small value of the strip, the concession by the interested parties had come 'far too late' (para 2).

(29) Miller Homes Ltd v Keeper of the Registers of Scotland 2014 SLT (Lands Tr) 79

This is the latest in the cases about common areas in housing estates which began with *PMP Plus v Keeper of the Registers of Scotland* 2009 SLT (Lands Tr) 2 and continued, last year, with *Lundin Homes Ltd v Keeper of the Registers of Scotland* 2013 SLT (Lands Tr) 73. In the present case the Lands Tribunal offered its thoughts on the extent to which deeds in which the description of common areas referred to a future event might be capable of founding positive prescription. See **Commentary** p 135.

RIGHT-TO-BUY LEGISLATION

(30) Maclennan v Dunedin Canmore Housing Association Ltd 2014 SLT (Lands Tr) 25

The applicant applied to buy his rented house. The landlord failed to respond within the statutory period, and the applicant then applied to the Lands Tribunal to require the landlord to sell. The applicant accepted that the property was one in which no right to buy existed, but argued that the landlord's failure to respond timeously meant that an order should nevertheless be made in his favour. The Lands Tribunal rejected that argument.

LEASES

(31) Cramaso LLP v Viscount Reidhaven's Trs [2014] UKSC 9, 2014 SC (UKSC) 121, 2014 SLT 521, 2014 SCLR 484

This Supreme Court decision may well come to be seen as a leading case in the law of misrepresentation. Alastair Erskine decided to take on the lease of a grouse moor at Castle Grant from the defenders. Though he invested several hundred thousand pounds, the shooting proved disappointing. He claimed that he had been induced to enter into the lease as a result of fraudulent or negligent misrepresentations by an employee of the defenders. He sought reduction of the lease, and damages.

After proof, the Lord Ordinary (Hodge) held that there had indeed been a negligent misrepresentation, which had led Mr Erskine to take on the lease. But the lease had not been taken on by Mr Erskine himself. He had formed an LLP, Cramaso LLP, and it was this LLP that had taken on the lease. The representation had been made to Mr Erskine, and not to the LLP. Moreover, at the time, Cramaso LLP had not yet come into existence. On this ground the Lord Ordinary granted absolvitor: see [2010] CSOH 62, 2010 GWD 20-403 (*Conveyancing 2010* Case (58)). The pursuer appealed, but the Inner House agreed with Lord Hodge: see [2011] CSIH 81, 2012 SC 240 (*Conveyancing 2011* Case (57)). The pursuer appealed to the Supreme Court, which has allowed the appeal. (Lord Hodge, who is now in the Supreme Court, did not sit.)

Giving the leading opinion, Lord Reed said (para 22):

> The continuing effect of a pre-contractual representation is reflected in a continuing responsibility of the representor for its accuracy. Thus a person who subsequently discovers the falsity of facts which he has innocently misrepresented may be liable in damages if he fails to disclose the inaccuracy of his earlier representation. … The same continuing responsibility can be seen in the treatment of representations which are true when made, but which become false by the time the contract is entered into.

At this point it may be observed that the continuing nature of a representation is also significant in two other 2014 cases: *Royal Bank of Scotland v O'Donnell* (Case (54) below) and *Frank Houlgate Investment Co Ltd v Biggart Baillie LLP* [2014] CSIH 79, 2014 SLT 1001 (Case (65) below). Lord Reed continued (para 31):

> In continuing and concluding the contractual negotiations with the appellant [the LLP], through its agent Mr Erskine, without having withdrawn the representation earlier made to Mr Erskine as an individual, the respondents by their conduct implicitly asserted to the appellant the accuracy of that representation; and they did so in a situation where it continued to be foreseeable that the representation would induce the other party to the negotiations to enter into a contract. They therefore assumed a responsibility towards the appellant for the accuracy of the representation. They therefore owed the appellant a duty of care, which they failed to fulfil.

(32) Burgerking Ltd v Castlebrook Holdings Ltd [2014] CSOH 36, 2014 GWD 9-178

This case is about that perennial issue, whether a landlord's refusal to consent to an assignation or sublease is or is not reasonable. Burgerking Ltd held a lease of a fast-food outlet at Queens Drive Leisure Park, Kilmarnock. It wished to sublet to Caspian Food Retailers Ltd. The principal lease said that the tenant was:

> 16.1 Not to assign charge (by way of a fixed charge) sub-let or in any way for any purpose deal with the Tenant's interest in this Lease in whole or in part or share or part with possession of the Premises in whole or in part except as herein permitted.
>
> 16.2 Notwithstanding the foregoing generality, not to assign this Lease without the prior written consent of the Landlord which consent shall not be unreasonably

> withheld or a decision thereon unreasonably delayed in the case of an assignation of the whole to a party demonstrably capable of implementing the obligations hereunder of the Tenant.
>
> 16.3 Notwithstanding the foregoing generality, not to sub-let the whole of the Premises without the prior written consent of the landlord whose consent shall not be unreasonably withheld or a decision thereon unreasonably delayed to a sub-tenant who is respectable and responsible. . . .

At para 2 of his opinion the Lord Ordinary (Lord Tyre) notes the 'economy of punctuation' of these provisions.

The proposed subtenant, Caspian Food Retailers Ltd, had not hitherto traded. It was, however, part of a successful group. The landlord refused consent to the sublease. The tenant raised this action to have it held that the refusal of consent was unreasonable and for the landlord to be ordained to consent – in other words, it sought specific implement. The case did not go to proof, but was decided at debate on the basis of the written pleadings. The defender's case was that it was for the tenant to satisfy the landlord, and that the question of whether the proposed tenant was 'respectable and responsible' fell to be determined by reference to that tenant itself, as a separate juristic person, not by reference to the group to which it belonged. The Lord Ordinary agreed, and dismissed the action.

The alienation clause in the lease had different criteria for (i) assignation and (ii) subletting. For the former the proposed assignee was to be 'demonstrably capable of implementing the obligations hereunder of the Tenant'; for the latter the proposed subtenant was to be 'respectable and responsible'. One of the pursuer's arguments was that the defender was applying the first test when it should have been applying the second. The Lord Ordinary, basing his approach on earlier authority, said that 'by using the word "responsible" in sub-paragraph 16(3), the parties agreed . . . that the landlord would be entitled to be satisfied as to the financial solidity of any proposed sub-tenant' (para 11). He further noted (at para 12):

> The landlord has, or at least may have, an indirect interest in the financial soundness of the sub-tenant. The ability of the latter to meet its financial obligations to the tenant may, for example, affect the ability of the tenant in turn to meet its obligations to the landlord. A failure by the sub-tenant to carry on its business in a respectable manner could, in some circumstances, affect the return obtainable by the landlord from future letting.

(33) Aviva Investors Pensions Ltd v McDonald's Restaurants Ltd [2014] CSOH 9A, 2014 GWD 7-146

The pursuer was the owner of Corstorphine Road Retail Park in Edinburgh. One of the tenants was the defender. The lease held by the defender said that its consent would be needed to certain types of development, 'such consent not to be unreasonably withheld'. Usually, of course, the 'such consent not to

be unreasonably withheld' clause in a lease refers to the landlord's consent in favour of the tenant: here it was the other way round.

The owner wished to develop a new retail outlet, to be leased to Costa Ltd. This development was of a type that needed the defender's consent. The defender sought expert advice, which was that the increased pressure on parking would be likely to have an adverse commercial effect. Accordingly, it refused consent. The owner then raised this action, arguing that the refusal of consent had been unreasonable. There was a proof, at which expert evidence was heard about the likely effects of the proposed development.

'To a large extent', noted the Lord Ordinary (Lord Malcolm) at para 5, 'the proof was taken up with the pursuer attempting to establish that the advice given to it was correct, and that the advice tendered to the defender was wrong. By contrast, though without making any concessions, counsel for the defender focused on the question whether it was reasonable for the defender to rely upon the advice from its expert.' The Lord Ordinary held that the latter approach was correct: 'The only question is – did the tenant act in a reasonable manner? To a substantial extent the pursuer conducted the proof on the basis that the court should review the experts' evidence and reach a view on the merits of the issues between them. However this is neither necessary nor appropriate for the proper determination of the case' (para 19).

'The onus is on the landlord to demonstrate that the refusal was unreasonable, not on the tenant to prove the opposite' noted the Lord Ordinary (para 17). He had no difficulty in concluding that the pursuer had not discharged that onus (para 21):

> The defender did not 'expert shop', nor tailor matters to obtain the advice it wanted. There was no need for the defender to seek another view, nor to place the ADL report [the report from the defender's experts] before DBA [the pursuer's experts] before reaching a decision on what to do. There was no obligation upon the defender to come to its own independent view on the traffic impact of the DBA proposals. It was entitled to rely on the advice received from ADL. There was nothing unreasonable about the conclusions on which the refusal of consent was based. They had a foundation in the expert advice. … In the whole circumstances there was no requirement on the defender to weigh in the balance the landlord's interests. This was not a clear case of disproportionality.

Curiously, this year there were two cases in which the landlord of a shopping centre sought the consent of a tenant to the development of a new retail outlet. The other case is considered next. Though the underlying legal details were different, in both cases the ultimate result was the same: the landlord was unsuccessful.

(34) Gyle Shopping Centre General Partners Ltd v Marks and Spencer plc [2014] CSOH 59, 2014 GWD 18-352 and [2014] CSOH 122, 2014 GWD 26-527

The long leases at a major shopping centre included a *pro indiviso* right to the unbuilt parts of the development including, in particular, the car parking areas.

The current landlord claimed that this was merely a contractual right against the original landlord, and accordingly that it (the current landlord) was not bound, but was free to do what it liked with the unbuilt areas. See **Commentary** p 126.

(35) Dem-Master Demolition Ltd v Alba Plastics Ltd [2014] CSOH 84, 2014 Hous LR 32 rev [2014] CSIH 58, 2014 GWD 24-446

Centrelink 5, Shotts, Lanarkshire, is 'a huge A-listed building, considered to be one of Britain's most significant and important large industrial buildings of the later twentieth century. It is the work of Ahrends, Burton & Koralek, Ove Arup & Partners and Landesign Group, and is ABK's principal work of the 1970s in the UK' (see www.geograph.org.uk/snippet/7096, where photographs can be found.) This edifice, which for reasons that we are at a loss to explain is not being promoted by VisitScotland as a major tourist magnet, has been the centre of a battle between landlord and tenant, reminding us of some of the bitterer matrimonial disputes. The landlord, Dem-Master Demolition Ltd, claiming that the tenant was in default in both the rent and the electricity payments, cut off the electricity. The tenant hired a generator. The landlord raised an action for payment of the (alleged) outstanding rent and electricity charges. As well as defending the action, the tenant claimed that the landlord was blocking access, and sought interdict against the pursuer, and interim interdict. The request for interim interdict was dropped when the pursuer gave a formal undertaking to the court to allow access of a certain type and subject to certain conditions.

The tenant then went back to court saying that the landlord, despite the undertaking, was still blocking access. The tenant sought an order under ss 6 and 7 of the Court of Session Act 1988 compelling the landlord to allow access. The Lord Ordinary granted the order (see [2014] CSOH 84) but the landlord reclaimed. In the Inner House it was **held** that the Lord Ordinary had given too broad an interpretation to the terms of the lease, and a more restricted definition of access rights was substituted.

(36) Drimsynie Estate Ltd v Ramsay [2014] CSOH 93, 2014 GWD 19-361

The defenders bought a mobile home (a 'chalet') at Corrow Farm, Lochgoilhead, Argyll, and at the same time took a lease of the plot. The lease had provisions for the purchase of the mobile home by the site owner when the lease expired. The parties were in dispute as to how the mobile home should be valued for this purpose. In the words of the Lord Ordinary (Lord Malcolm) (para 3): 'Is the chalet to be valued on the assumption of a continuing right to occupy it on plot 18 on the terms of the lease? Alternatively, as Drimsynie suggest, should the arbiter consider only the market value of the chalet itself, which, on this hypothesis, is to be removed from the plot?' The first approach, favoured by the defenders, would give a much higher value than the second approach. The Lord Ordinary **held** that the first approach was the more reasonable interpretation of the lease.

For an earlier litigation between the same parties, see *Drimsynie Estate Ltd v Ramsay* [2006] CSOH 46, 2006 SLT 528 (*Conveyancing 2006* Case (58)).

(37) Arlington Business Parks GP Ltd v Scottish & Newcastle Ltd [2014] CSOH 77, 2014 GWD 14-261

Nowadays break options in favour of tenants are common in commercial leases, and accordingly there is sometimes litigation as to the exercise of such options. This is one such case. There were two connected leases of offices. The ish for both was 2023, but in each case there was a break option for May 2013, the notice exercising the option to be served 12 months in advance. The tenant served notice timeously, in May 2012. But the landlord refused to accept. The lease said that the break option would not be effective if the tenant was 'in breach of any of their obligations … at the date of service of such notice and/or the termination date'. The landlord raised an action of declarator that, because of breach, the option had not been validly exercised. The defender admitted that it had been in breach of its repairing obligations at the time of the notice (May 2012), but it averred that between May 2012 and May 2013 it had spent £1.3 million on repairs, and that by May 2013 it was no longer in breach. It argued that the reference to breach meant only material and irremediable breach. It also argued (para 2) that the 'and/or' wording 'allows the break option to be exercised so long as there is no breach at the termination date, which is the operative date for these purposes'. The Lord Ordinary (Lord Malcolm) gave the wording of the lease its natural interpretation and accordingly found in favour of the landlord.

(38) ELB Securities Ltd v Alan Love & Prestwick Hotels Ltd 2014 GWD 28-562, Sh Ct

When a company is struck off the Companies Register, it ceases to exist. It dies. Its juristic personality is extinguished. And usually, that's that. But the Companies Act 2006 ss 1024–1034 says that a dead company can, by legal magic, be brought back to life, and when this is done 'the general effect of an order by the court for restoration to the register is that the company is deemed to have continued in existence as if it had not been dissolved or struck off the register' (s 1032(1), and see also s 1028). Retrospectivity, however, is never free from problems, because it seeks to change the past: a company ceased to exist, but also did not cease to exist.

Prestwick Hotels Ltd held a lease of the fifth floor at 166 Buchanan Street, Glasgow. The company was dissolved on 13 June 2013. On 3 October 2013 it was revived. So what happened to the lease?

In the normal case, by the time that a company is dissolved it no longer has any assets. But if for any reason a company is dissolved still holding assets, those assets pass to the Crown. This is the general rule of common law for any dissolved juristic person, but for companies there is an express statutory rule: Companies Act 2006 s 1012. Section 1013 then says that the Crown (represented by the Queen's and Lord Treasurer's Remembrancer) can disclaim such property. Section 1014 then says that 'where notice of disclaimer is executed … as respects

any property, that property is deemed not to have vested in the Crown under section 1012'. (More retrospectivity.) In the present case, on 15 July 2013 the Crown, acting through the QLTR, disclaimed the lease.

So the sequence of events was: (i) dissolution on 13 June, with the lease immediately vesting in the Crown; (ii) Crown disclaimer on 15 July, with the lease immediately un-vesting in the Crown, or, rather, being deemed never to have vested in the first place; (iii) company restored to existence on 3 October, or, rather, being deemed never to have ceased to exist.

The landlord, ELB Securities Ltd, did not wish the revived company to continue as tenant, and the issue for the court was whether the revived company could or could not insist on doing so. At first instance it was held that the revived company could indeed carry on as tenant. The sheriff principal (C A L Scott), however, has now reversed, holding that the effect of the Crown's disclaimer was that the lease had ceased to exist as at 15 July, and did not revive, and accordingly the landlord was entitled to resume natural possession. He invoked in particular s 1020 of the 2006 Act: 'The Crown's disclaimer operates to determine, as from the date of the disclaimer, the rights, interests and liabilities of the company, and the property of the company, in or in respect of the property disclaimed.' So although the company was deemed never to have ceased to exist (s 1032), that fact did not rescue the lease, which since 15 July had been dead beyond rescue.

The sheriff principal was also influenced by an argument from policy. Under the 2006 Act, the period during which a dissolved company can be revived is (subject to certain qualifications) six years: s 1030. If the position advanced by the defender had been correct, argued the sheriff principal, the property could be blighted for many years, because nobody could know whether the company might pop back out of non-existence and claim the lease. 'It would be absurd to contemplate that, for a 6 year period, subjects such as those in the present case could be blighted by an indeterminate factor' (para 28).

This case, which contains more discussion than can be summarised here, is a valuable contribution to this area of law. But it is feared – as suggested above – that the statutory provisions may not, ultimately, make sense.

(39) L Batley Pet Products Ltd v North Lanarkshire Council [2014] UKSC 27, 2014 SC (UKSC) 174, 2014 SLT 593

The pursuer was the mid-landlord and the defender was the occupational subtenant of commercial premises at Wardpark South Industrial Estate, Cumbernauld. The subtenancy ended on 18 January 2009. The defender's liabilities in terms of repair and restoration were governed in part by the terms of the sublease, in part by the terms of the head-lease which had been incorporated into the sublease, and in part by a separate minute of agreement that had been entered into between the parties. How these all fitted together was less than clear. The mid-landlord sued for £253,766.44 for reinstatement costs, founding on the terms of the minute of agreement, or, in the alternative, for £189,692.30 for repair costs in terms of the sublease.

The defence was that the terms of the minute of agreement superseded (in respect of reinstatement) the terms of the sublease, and that under the minute of agreement the landlord had to send written notice, and do so before the ish. There had been written notice, but it had been sent two days after the ish. The landlord argued that written notice was not needed, and averred that oral notice had been given prior to the ish. The landlord further argued that even if it was wrong on this, the repairing obligation in terms of the sublease was enforceable.

At first instance the mid-landlord was successful: [2011] CSOH 209, 2011 GWD 4-73 (Conveyancing 2011 Case (62)). That decision was reversed by the Inner House: [2012] CSIH 83, 2012 GWD 37-745 (*Conveyancing 2012* Case (43)). The mid-landlord then appealed to the Supreme Court.

The appeal was successful. Lord Hodge, who gave the Opinion of the Court, took the view that the repairing obligation under the sublease was not superseded by the terms of the minute of agreement. He further held, though he admitted the point was a fine one, that the reinstatement obligation under the minute of agreement could be triggered by oral notice.

Lord Hodge's opinion has some valuable comments on the right approach to the interpretation of commercial contracts. The Supreme Court's decision does not bring the dispute to an end: the case was remitted to the Court of Session for a proof before answer.

(40) Fordell Estates Ltd v Deloitte LLP [2014] CSOH 55, 2014 GWD 12-212

At the end of a lease of property in Charlotte Square, Edinburgh, each side instructed firms of chartered surveyors to negotiate about dilapidations liability. A figure of £338,000 was arrived at. The landlord considered that figure to be final and binding. The tenant disagreed. The landlord sued for the negotiated figure. It was **held** that the figure was no more than a proposed figure, and final consensus had never happened, and that accordingly the figure did not bind the parties.

(41) Grove Investments Ltd v Cape Building Products Ltd [2014] CSIH 43, 2014 Hous LR 35

A 25-year lease of a unit at Germiston Industrial Estate, Glasgow, ended in May 2011. The landlord sought payment in respect of dilapidations, the sum sued for being £10,229,912, which was the grand total brought out by the schedule of dilapidations prepared for the landlord. The issue for the court was how the landlord's claim should be quantified. The case began in the sheriff court, where the landlord's approach was held to be correct. The defender appealed to the sheriff principal, who adhered to the sheriff's decision. (These stages of the case are unreported.) The defender then appealed to the Inner House.

At the heart of the dispute was clause ('article') 12 of the lease:

> The tenants bind themselves to flit and remove from the premises at the expiry or sooner termination of this lease …, to repair any damage done by the removal of fittings belonging to them and to pay to the landlords the total value of the Schedule of Dilapidations prepared by the landlords in respect of the tenants' obligations under Articles Fifth and Sixth hereof declaring that the landlords shall be free to expend all moneys recovered as dilapidations as they think fit and the tenants may, with the prior written agreement of the landlords, elect to carry out the whole or any part of the said Schedule of Dilapidations but that provided such work is completed to the landlords' reasonable satisfaction.

In its pleadings (quoted at para 3), the landlord argued that 'the clause obliges the [tenant] to pay the total value of a schedule of dilapidations duly prepared in accordance with the terms of the lease. The [tenant] would be entitled to challenge that total value if they believe that it had not been so duly prepared'. The tenant's argument was summarised by Lord Drummond Young, giving the Opinion of the Court, as follows (para 4):

> Article Twelfth meant that the tenants were only obliged to make payment to the landlords of the loss actually suffered by them in consequence of the tenants' failure to implement their repair and maintenance obligations under article Sixth and their obligation to make good the removal of any alterations and additions under article Fifth. To construe the clause in the manner contended for by the landlords might result in a recovery that bore no relation to any loss in fact suffered by the landlords as a result of the failure of the tenants to comply with their repairing and redding-up obligations under the lease. Consequently the tenants were not obliged to make payment to the landlords of whatever sum happened to be the total of the various cost estimates contained in the schedule of dilapidations produced on behalf of the landlords. Instead, the clause was intended to reflect and reinforce the common law, under which the landlords would be entitled to the actual loss sustained by them, which might be calculated using a number of different methods.

Lord Drummond Young further elaborated the argument (para 5):

> The landlords' claim is accordingly based exclusively on an estimate of the cost that would be incurred if the landlords wished to reinstate the premises to the condition required by the terms of the parties' lease. It is obvious that this might not represent the landlords' actual loss. For example, if they were to let the premises to another tenant who required very substantial alterations, most of the reinstatement work might not be carried out, thus reducing the landlords' loss. Alternatively, the landlords might decide that the best course was to demolish the existing premises and to dispose of the site, or to construct a new building and let it. In such a case the loss would again be reduced. The landlords' position is accordingly that the sums due under article Twelfth are debts that are due regardless of what happens to the premises, whereas the tenants contend that liability under article Twelfth should be treated as akin to damages, designed to compensate the landlords for the loss that they have actually suffered as a result of the tenants' breaches of clauses Fifth and Sixth.

Lord Drummond Young thought that 'both of these constructions are possible constructions of the clause; when article Twelfth is read in context, neither can

be described as unreasonable, or manifestly contrary to the wording that is used in the clause' (para 16). He continued:

> In favour of the tenants' construction it can be said that, if it had been intended that the schedule of dilapidations should include binding estimates of the costs of repair, it would have been more natural to use the expression 'costs of repair' rather than 'value'; that would have made it clear that the schedule was intended to include estimates of cost and that those estimates were to be used to determine how the breach of the tenants' obligations in articles Fifth and Sixth was to be quantified, subject to a right to challenge individual items. 'Value', however, is a word of more general signification than 'cost'. Moreover, the purpose of the relevant part of article Twelfth is to deal with breaches of other clauses by the tenants. In that context, we are of opinion that the use of the word 'value' can be taken to indicate that the schedule of dilapidations is not an end in itself but a means to an end, namely the ascertainment of what is required to put the landlords in the position that they would have been in if the tenants had fulfilled their obligations under articles Fifth and Sixth.

He added (para 20):

> Counsel for the landlords argued that, if all that the relevant part of article Twelfth did was to restate the common law rule, it would not serve any useful purpose. This argument found favour with both the sheriff and the sheriff principal. Nevertheless, it is not uncommon for leases and other contracts to repeat common law rules, usually in order that the document may provide a reasonably comprehensive written statement of the parties' respective rights and obligations.

The approach developed in this case was followed in the next. Taken together, the two cases seem to constitute a significant development in the way that the courts will approach the interpretation of repairing obligations at the termination of leases.

(42) @Sipp (Pension Trustees) Ltd v Insight Travel Services Ltd [2014] CSOH 137, 2014 Hous LR 54

A lease of Gareloch House, Port Glasgow, came to an end in 2012. The landlord raised the present action as to the tenant's repairing obligations, concluding for the sum of £1,051,086.25 in terms of a schedule of dilapidations. The issues are summarised by the Lord Ordinary (Lord Tyre) thus (paras 2 and 3):

> The first issue is whether, on a proper construction of the lease, the defender's obligation at termination is limited to putting the premises into the condition in which they were accepted by it at the commencement of the lease. The second issue is whether, on a proper construction of the lease, the pursuer is entitled to payment of a sum equal to the cost of putting the premises into the relevant state of repair, regardless of whether it actually intends to carry out any such work.

The Lord Ordinary notes that the lease 'is lengthy and tends towards comprehensiveness rather than comprehensibility'. As so often one finds oneself in thickets of words which offer cover for almost any interpretation. Lord Tyre

noted that the tenant was bound to maintain the property 'in at least as good condition as they are accepted by the tenant' and concluded that 'the inclusion of these words excludes any obligation to leave the premises in a state of improvement from their condition at commencement of the lease' (para 19). In short, he took the view that 'keep' does not imply 'put'. In taking that view, he considered *dicta* in *L Batley Pet Products Ltd v North Lanarkshire Council* (Case (39) above) which could be read as meaning that 'keep' does imply 'put' (para 17):

> Lord Hodge's judgment … was not, and was not intended to be, anything more than a commentary on the terms of the clause with which the Supreme Court was concerned in that case. If the court had intended to overrule the long-standing distinction made at common law in Scotland between ordinary and extraordinary repairs, one would have expected it to say so.

That disposed of the first issue. As for the second, the Lord Ordinary noted, at para 24, on lines that echo the comments in *Grove Investments Ltd v Cape Building Products Ltd* (Case (41) above):

> The landlord will ordinarily assert that the proper measure of its loss is the cost of the works required to put the subjects into the specified condition. That, however, is not the only possible measure: in certain circumstances, the proper measure could be the diminution in capital value of the subjects as a consequence of the tenant's breach of the terms of the lease. Where, for example, the landlord has no intention of carrying out repairs to the building because it is to be extensively renovated, the cost of repairs may not provide a satisfactory measure of loss. Indeed, where the subjects are to be demolished to make way for a new building, for reasons unconnected with the tenant's breach, the landlord may be unable to prove any loss at all. … The issue is whether, on the terms of the lease in the present case, the defender is entitled to contend that the proper measure of loss is something other than the cost of repairs.

He held that it could. The lease here, like the lease in *Grove*, could be interpreted in more than one way in relation to quantification of loss, and, as in *Grove*, it was held that it was preferable to interpret it as having intended to refer to actual loss. As the Lord Ordinary put it (para 28):

> It would … require very clear wording in order to conclude that a tenant had entered into an agreement which might have the consequence of it having to pay a sum which bore no relation to what was required to compensate the landlord for loss (if any) actually sustained as a result of the tenant's breach of its repairing obligation.

(43) Lormor Ltd v Glasgow City Council [2014] CSIH 80, 2014 SLT 1055

When and how does a lease come to an end? It's a simple question, but there are few simple answers. Two primary divisions can be made. The first is the distinction between termination at the ish, and termination before the ish, ie termination by irritancy (or rescission for breach, if the view is taken that that

can be distinguished from irritancy). The second is between the general law (itself a mix of common law and statute) and the mass of sector-specific legislation, such as the residential tenancy legislation (itself divided into private-sector and public-sector tenancies, and with further sub-divisions), agricultural tenancy legislation (itself with many sub-divisions), and so on. Even for commercial leases there is to some extent sector-specific legislation, such as the Tenancy of Shops (Scotland) Act 1949.

Keeping just to the general law, and keeping just to termination at the ish, what are the rules? In part they are common law rules, and in part are to be found in ss 34 ff of the Sheriff Courts (Scotland) Act 1907. Section 34 says (and it's all a single sentence so take a deep breath before beginning):

> Where lands exceeding two acres in extent are held under a probative lease specifying a term of endurance, and whether such lease contains an obligation upon the tenant to remove without warning or not, such lease, or an extract thereof from the books of any court of record, shall have the same force and effect as an extract decree of removing obtained in an ordinary action at the instance of the lessor, or any one in his right, against the lessee or any party in possession, and such lease or extract shall, along with authority in writing signed by the lessor or any one in his right or by his factor or law agent, be sufficient warrant to any sheriff officer or messenger-at-arms of the sheriffdom within which such lands or heritages are situated to eject such party in possession, his family, sub-tenants, cottars, and dependants, with their goods, gear and effects, at the expiry of the term or terms of endurance of the lease: Provided that previous notice in writing to remove shall have been given (A) When the lease is for three years and upwards not less than one year and not more than two years before the termination of the lease; and (B) In the case of leases from year to year (including lands occupied by tacit relocation) or for any other period less than three years, not less than six months before the termination of the lease (or where there is a separate ish as regards land and houses or otherwise before that ish which is first in date): Provided that if such written notice as aforesaid shall not be given the lease shall be held to be renewed by tacit relocation for another year, and thereafter from year to year: Provided further that nothing contained in this section shall affect the right of the landlord to remove a tenant who has been sequestrated under the Bankruptcy (Scotland) Act 1856, or against whom a decree of cessio has been pronounced under the Debtors (Scotland) Act 1880, or who by failure to pay rent has incurred any irritancy of his lease or other liability to removal: Provided further that removal or ejectment in virtue of this section shall not be competent after six weeks from the date of the ish last in date: Provided further that nothing herein contained shall be construed to prevent proceedings under any lease in common form; and that the foregoing provisions as to notice shall not apply to any stipulations in a lease entitling the landlord to resume land for building, planting, feuing, or other purposes or to subjects let for any period less than a year.

Countless examples could be given of the poor condition of the statute book, but this is as good an example as any. One of the problems is that the section has not been updated. But even in 1907 it was a disgrace. Why is a provision about the law of leases to be found in a statute about the sheriff courts? More fundamentally, what does the section mean? To what extent is it about warrants

to remove (which is how it starts off) and to what extent is it about length of notice and tacit relocation? We could carry on in this vein for some time.

One question is this: if there is a lease for land of more than two acres, and it is a lease that is running on annually by way of tacit relocation, and the tenant wishes to flit and remove at the coming ish, how much notice must the tenant give? For just as failure to give timeous warning by the landlord to the tenant will result in tacit relocation, the same is true the other way round. Section 34 says that the period of notice by the landlord to the tenant is to be not less than six months. Is that equally true of a tenant's notice to the landlord? The section, for all its verbosity, is silent on this basic issue. There are two possible responses to that silence. The first is that the period must be the same – ie six months in either case. The general law concerning leases is that notice periods are the same, so that if the intention had been to make a distinction, ie to have two different periods, s 34 would have said so. Its silence was no doubt unfortunate, and characteristic of its poor drafting, but there could be no other inference. And that is what the landlord argued in this case. The alternative approach would be to argue thus. The common law notice period is 40 days; there exist numerous exceptions, but that is the default period. If s 34 had been intended to fix a different period for tenant-to-landlord notices, it would have said so. It did not, and so the inevitable consequence is that the default period – 40 days – applies. And that is what the tenant argued in this case.

The case was impressively argued by both sides. In the end the Extra Division decided in favour of the tenant: 40 days' notice was sufficient for a tenant-to-landlord notice. Like us, the court had some harsh words to say about the legislation.

(44) Krajciova v Feroz
2014 GWD 27-536, Sh Ct

The pursuer owned a property at Kirk Brae, Cults, Aberdeenshire. The defender was in occupation, and in this action the pursuer sought payment of arrears of rent, and also removing. The defence was that the defender was not a tenant, but was in occupation under a contract of sale. This defence was unsuccessful, as was the appeal to the sheriff principal.

(45) Shetland Leasing and Property Developments Ltd v Younger
2014 Hous LR 9, Sh Ct

Section 4 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 says that a landlord, before irritating for non-payment of rent, must serve a notice, sometimes called a 'warning notice, or 'ultimatum notice' or 'pre-irritancy notice'. Over the years there has been a good deal of litigation about such notices, in which the tenant has argued that the notice was for one reason or another invalid. See, for a general review, *Conveyancing 2011* pp 103–09. This is another such case. The notice was as follows:

> We act on behalf of Shetland Leasing and Property Developments Ltd, your Landlord … in terms of a lease dated 26th and 29th April 2005.
>
> You have failed to pay:- 1. Rent as undernoted. 2. Interest at the rate of 3% per annum over the base rate charged by Clydesdale Bank Public Limited Company from time to time in relation to the arrears of rent in terms of the lease.
>
> On behalf of our client, we hereby give you notice in terms of the lease that you are required to pay the sum of £10,167.64 within fourteen days following service of this notice. If you fail to comply with the terms of this notice, served under section 4 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, the said lease may be terminated at the instance of our client.
>
> Please arrange to pay the said sum of £10,167.64 directly into our client's bank account, details as undernoted, within fourteen days. Once payment has been received we shall notify you of the interest then due.
>
> Yours faithfully. …
>
> Note referred to:- Rent outstanding and due for October 2012 – February 2013 (inclusive) £10,167.64.

The tenant did not flit, and the landlord raised an action of declarator that the lease had been validly irritated, and requiring the defender to flit and remove. The defence was (para 2.2) that:

> [The] notice did not adequately convey to the defender what it was that he had to do in order to comply with it. This was because there was no adequate specification of the rent that was said to be in arrears. The rent was said to relate to a period of five months but the actual figure did not equate to five months' rent, although it was more than four months' rent.

This argument was rejected. The sheriff (Philip Mann) said (para 3.6):

> Part of the defence in this case involves an assertion that the arrears of rent are overstated in the … notice. That is not a defence that is open to a tenant who has received such a notice and has done nothing in response to it. It may well be the case that the sum claimed in such a notice is inaccurate. That could be so for a variety of reasons. But in this case we are dealing with a commercial lease. The defender is a man of business. In running his business he must maintain records. He ought to know whether or not he is actually in arrears with his rent. He ought to be able to calculate from his records the extent to which he is in arrears with his rent. But all that the defender avers is that he was aware that he was in arrears of rent to some extent but was unaware of the exact amount. If it is truly the defender's position that the … notice overstated the arrears he could, and should, have responded to the notice by asserting a lower amount of arrears than was claimed and by paying that lower amount. Had he done so then I would have been of the view that for the pursuers to obtain the remedy that they seek they would have been under obligation to establish by proof that the actual arrears exceeded the sum admitted and paid by the defender. But the defender does not seek to defend the action on that basis.

(46) Eastmoor LLP v Bulman
2014 GWD 26-529, Sh Ct

A landlord of a private-sector residential tenancy sought to bring it to an end before the ish on the ground of non-payment of rent. Section 18(6) of the Housing (Scotland) Act 1988 says:

> The sheriff shall not make an order for possession of a house which is for the time being let on an assured tenancy, not being a statutory assured tenancy, unless –
>
> (a) the ground for possession is Ground 2 or Ground 8 in Part I of Schedule 5 to this Act or any of the grounds in Part II of that Schedule, other than Ground 9, Ground 10, Ground 15 or Ground 17; and
> (b) the terms of the tenancy make provision for it to be brought to an end on the ground in question.

In the present case the lease had the following irritancy clause:

> If any of the events referred to in Grounds 8, 11, 12, 13, 14, 15 or 16 of Schedule 5 of the Housing (Scotland) Act 1988 occur, the Landlord shall be entitled not only to recover from the Tenant all loss or damage caused by the Tenant which they may thereby sustain and all rents due and which may become due in addition may forthwith put an end to this lease and may commence proceedings for possession.

Was this sufficient to comply with s 18(6)(b)? The sheriff (George Jamieson) held that it was not. 'The parties must contract in such a way that the contract itself sets out the grounds for bringing to an end the lease prior to determination of its ish. It is not sufficient for the tenancy agreement merely to refer to the number of the ground in schedule 5' (para 30).

(47) Graham's Exrs v Deanston Partnership
2014 GWD 13-245, Land Ct

This was an action to enforce an irritancy for non-payment of rent, the property in question being agricultural. The main line of defence was that the non-payment had been justified in view of alleged breaches of contract by the landlord. But the lease had a provision whereby rent had to be paid in full notwithstanding any such breach. 'We are bound by the decision in *Skene v Cameron* 1942 SC 393 to accept that operation of the principle of mutuality in relation to payment of rent can be excluded by express contractual provision' concluded the Land Court (para 12).

(48) Arveladze v MacFarlane
2014 Hous LR 61, Sh Ct

This case, in which former Rangers star Shota Arveladze sought to recover possession of a property from tenants David and Catriona MacFarlane, generated

considerable media interest, and it is for that reason that we note it here. However, the report of the case deals only with issues in the law of evidence.

(49) Sauchiehall Street Properties One Ltd v EMI Group Ltd 2015 GWD 1-3, Sh Ct

There was a long lease of property at 154–160 Sauchiehall Street, Glasgow. The tenant defaulted on its obligations. There was a guarantor, whom the landlord sued for the sum of £668,552.18. The guarantor pled that, since both the pursuer and the defender were English, the action could not be raised in Scotland. Had this simply been a case between landlord and tenant, the Scottish courts clearly would have had jurisdiction, regardless of whether the parties were English or not: see Brussels I Regulation, article 22. But the defender here was not the tenant but the tenant's guarantor. It was **held** (by Sheriff Stuart Reid) that the Scottish courts did not have jurisdiction.

(50) Cross v Aberdeen Property Leasing 2014 SLT (Sh Ct) 46, 2014 Hous LR 14

The Rent (Scotland) Act 1984 s 82 forbids the charging of premiums for residential tenancies, the term 'premium' being defined in s 90. The Private Rented Housing (Scotland) Act 2011 amended the definition: 'premium' now means 'any fine, sum or pecuniary consideration, other than the rent, and includes any service or administration fee or charge'. (What 'fine' is supposed to mean we do not know, but this was not an issue in the case.) The reference to 'administration fee' was new.

As a result of the 2011 Act, the residential-tenancy sector generally ceased charging administration fees. In the present case the tenancy dated from 2009, when the pursuer had been charged an 'administration fee' of £125. He now sued to recover this sum as an unlawful premium. The question for the court was whether the pre-2011 definition of 'premium' covered administration fees, even though that term had not been included in the legislation. It was held (by Sheriff Marysia Lewis) that the 2011 amendment clarified, but did not change, the law, and accordingly decree was granted in favour of the pursuer.

The case proceeded on the basis that the defender was the landlord's agent. The question of whether the case should have been brought not against the agent but against the principal was not raised. The question of whether the defender was acting for the tenant as well as for the landlord was also not discussed.

For background to the case, see Holly Bruce, Stephanie Dropuljic, Emma Morrice, David Ridley and Melissa Strachan, 'Premium Result' (2014) 59 *Journal of the Law Society of Scotland* Apr/32.

(51) Tenzin v Russell 2014 Hous LR 17, Sh Ct

The Tenancy Deposit Schemes (Scotland) Regulations 2011, SSI 2011/176, require private residential landlords to pay tenants' 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. 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 … the sheriff must order the landlord to pay the tenant an amount not exceeding three times the amount of the tenancy deposit'. We reported on the first such case last year: *Fraser v Meehan* 2013 SLT (Sh Ct) 119 (*Conveyancing 2013* Case (49)).

The present case also involved the tenancy of an Edinburgh property, 4/6 Admiralty Street. The landlords had admittedly not complied with the 2011 Regulations in relation to the deposit, which had been £750. The tenant, Mr Tenzin, sought payment of the maximum, ie £2,250. The main problem was that the writ he had drafted was for declarator only and lacked a crave for payment. The sheriff held in favour of the pursuer on the procedural issue, and ordered the landlords to pay the tenant the maximum. The defenders appealed. Sheriff Principal M M Stephen adhered to the sheriff's decision.

(52) AP v DO
2014 Hous LR 44, Sh Ct

The Tenures Abolition Act 1746 is not to the forefront of the modern conveyancer's mind, but in its day it was of great importance (see our *Conveyancing 1746*). Passed in response to the Jacobite Rising, the purpose of the Act was to reshape land law, especially with reference to the Highlands and Islands, so as to reduce the power of the clan chiefs. Most of the Act regulated feudal tenure, and as a result was repealed by the Abolition of Feudal Tenure etc (Scotland) Act 2000. The latter statute left only two sections of the 1746 Act in force, sections 21 and 22, and it is with the first of these that the present case is – among other matters – concerned.

P and P were elderly proprietors of land, on which two houses stood. They lived in one, and rented out the other to O and O, who were friends of P and P. There was nothing in writing. The rent was below the market rate, for the friends provided services to P and P. Eventually the couples fell out, and P and P served a notice to quit. O and O refused to move out, and the present action ensued, in which P and P sought to have O and O ordained to flit and remove. To a large extent the case is concerned with the grounds for recovery of possession of heritable property under the Housing (Scotland) Act 1988, an area of law that we do not seek to cover in this series. But two points are of more general interest. One concerns the 1746 Act, s 21 of which provides that leases which require the tenant to perform services, as well as to pay rent, must set out those services 'expressly and particularly'. The lease here did not comply with the 1746 Act. The sheriff (G Jamieson) concluded that, as a result, the obligations of service were unenforceable. The other point concerns the length of the lease, as to which no agreement had existed. The sheriff held, in accordance with existing authority, that where there is a lease but no agreed ish, the presumption is that the lease is for a period of 12 months.

STANDARD SECURITIES

(53) Cooper v Bank of Scotland plc [2014] CSOH 16, 2014 GWD 6-126

A standard security over Mr and Mrs Cooper's house in favour of the Bank of Scotland secured all debts owed by either of them. Mr Cooper was guarantor of his company's debts, and so those debts were, indirectly, secured over the house. Mrs Cooper raised an action to reduce the standard security *quoad* her half share, on the ground that her signature had been obtained by her husband's misrepresentation and that the bank had acted in bad faith. Decree of reduction granted. See **Commentary** p 182.

(54) Royal Bank of Scotland v O'Donnell [2014] CSIH 84, 2014 GWD 33-641

The two defenders, O'Donnell and McDonald, saw a development opportunity at Strone Farm, Glenbrae Road, Greenock, Renfrewshire. 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 the site in the autumn of 2007 for £1.5 million, the price being funded by a £1.65 million loan from Royal Bank of Scotland plc, 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, the bank wished to have further security. An agreement was reached with 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 a mere £65,000. 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: see [2013] CSOH 78, 2013 GWD 19-388 (*Conveyancing 2013* Case (59)). The pursuer reclaimed and the Inner House has affirmed the Outer House decision. The Opinion of the Court contains an extensive review of the law of misrepresentation.

(55) UK Acorn Finance Ltd v Smith
2014 Hous LR 50, Sh Ct

If a debt owed to X is secured by standard security, and the debt is assigned by X to Y, but the standard security is not assigned, can the original standard security holder (X) enforce the security? And what is a standard security over a standard security? See **Commentary** p 179.

(56) HSBC Bank plc v Collinge
2014 Hous LR 78, Sh Ct

This was a case on enforcing a standard security over residential property. The sheriff held that enforcement was reasonable in all the circumstances of the case. An appeal to the sheriff principal (B A Lockhart) was unsuccessful. The debtors were unable to propose any reasonable repayment schedule and had failed to provide adequate evidence of their financial situation.

(57) Din v Bridging Loans Ltd
[2014] CSIH 49, 2014 GWD 18-332

Bridging Loans Ltd held a standard security over residential property. It raised an enforcement action under s 24 of the Conveyancing and Feudal Reform (Scotland) Act 1970 and obtained decree. Tariq Din, husband of the owner, then petitioned for recall of the decree under s 24D of the 1970 Act, averring that he was an 'entitled resident' under s 24C. We quote from Lord Carloway, giving the opinion of the Second Division, at para 2:

> A proof took place, at which the petitioner, the debtor and their two children gave evidence. The sheriff held that: the petitioner was the debtor's spouse; the subjects were held in the debtor's sole name; they were not the petitioner's sole or main residence; and the petitioner and the debtor did not live together as husband and wife. He considered that neither the petitioner, nor his family, were credible or reliable. … The petitioner was found therefore not to be an 'entitled resident' for the purposes of the 1970 Act. The sheriff accordingly granted decree of new.

The petitioner appealed to the Inner House, but without success.

(58) Strickland v Blemain Finance Ltd
2014 Hous LR 75, Sh Ct

A heritable creditor who enforces the security by sale is under an obligation – both at common law and under s 25 of the Conveyancing and Feudal Reform

(Scotland) Act 1970 – to sell for the best price reasonably obtainable. Were it not for that obligation, the selling creditor would have no incentive to sell for any price higher than would be needed to clear its own claim. A creditor who sells in breach of the obligation is liable in damages, the quantum being the difference between the price actually obtained and the price that ought to have been obtained.

Here a heritable creditor sold a property for £150,000, in March 2010. The property had been on the market for about three months. The former owner sued for damages, averring that the property had been sold too quickly, and that if it had stayed on the market for a longer period it would have been sold for £175,000. Accordingly she sought damages in the sum of £25,000. After hearing evidence the sheriff **held** that a fair sale value would have been £160,000, and accordingly awarded £10,000 damages. The creditor appealed, and the sheriff principal (C A L Scott) affirmed the decision, though also awarding (as the sheriff had not) interest on the £10,000.

Details of the case are sketchy, but it is a reminder that a selling creditor needs to consider the briskness or sluggishness of the market – and in early 2010 the market was sluggish. Selling creditors are naturally attracted by the quick sale, but they need to be careful. Ordinary owners who decide that the merit of a quick sale outweighs the drawback of a disappointing price have only their own convenience to consider. A selling heritable creditor does not have just its own convenience to consider. (For another cause whereby heritable creditors may fail to obtain an appropriate price, namely poor conveyancing practice, see a most interesting letter by David Adie at (2014) 57 *Journal of the Law Society of Scotland* Sept/6.)

(59) Aronson v Keeper of the Registers of Scotland [2014] CSOH 176, 2015 SLT 122

Royal Bank of Scotland plc v Wilson [2010] UKSC 50, 2011 SC (UKSC) 66 was a decision that overturned 40 years of consistent interpretation as to how standard securities can be enforced: see *Conveyancing 2010* pp 129–49. The present case is part of the aftermath. It is one of a fairly limited number of titles (200 to 300) that were affected in a certain way, about to be described. This decision should lead to all such titles now being tidied up, and the various owners, and their solicitors, will be happy. For in these cases the Keeper reacted to *Wilson* in the wrong way, and the Court of Session has now put matters right.

The titles in question all involve a sale by a heritable creditor where there exist postponed securities. More narrowly, they concern cases where the sale figure is not enough to pay off the postponed creditors. The general law is well known: such securities are discharged by the sale, and the creditors are simply ordinary unsecured creditors for any sums they may still be owed: see s 26(1) of the Conveyancing and Feudal Reform (Scotland) Act 1970. Accordingly, the Keeper deletes such securities from the title sheet and the buyer obtains an unencumbered title.

This is what happened in all cases before *Wilson*, because the Keeper did not know then that there was anything wrong with the method of enforcement then commonly used. And in cases since *Wilson*, there has not normally been a problem, because heritable creditors have generally made sure that they enforced in the approved manner. But there were some cases that were unlucky in their timing: they were enforced before *Wilson* but the buyer applied to the Keeper for registration after *Wilson*. That was Mr Aronson's situation. In those cases, what the Keeper did was to register the buyer, but to leave on the title sheet the postponed securities, on the ground that it was not certain that the sale, having been done in a manner that was disconform to the *Wilson* decision, might be subject to challenge.

A property in Dean Street, Kilmarnock, Ayrshire, was owned by a Mr Alexander. He granted four standard securities over it. In order, they were to the Bank of Scotland, to Firstplus Financial Group plc, and to Progressive Financial Services Ltd (there being two securities in favour of the last). Mr Alexander unfortunately experienced financial difficulties and the Bank of Scotland enforced its security. It obtained authority to sell from the sheriff court under s 24 of the Conveyancing and Feudal Reform (Scotland) Act 1970, but it had not previously served a calling-up notice – something that the *Wilson* decision said is required in virtually every type of case. By the time that the buyer, Mr Aronson, applied for registration, in March 2011, *Wilson* had been decided. Mr Aronson, evidently a man of probity, disclosed the issue in his application form. The Keeper accepted his application and registered him as the new owner, in place of Mr Alexander. But the Keeper excluded indemnity, placing this note on the Proprietorship section of the title sheet:

> The title of the said Clive Joseph Aronson is founded on a Disposition by Bank of Scotland Plc to the said Clive Joseph Aronson registered 2 Mar. 2011 in implement of the power of sale under a standard security by Steven Alexander to the Governor and Company of the Bank of Scotland registered 19 Mar. 1998. Indemnity is excluded in terms of section 12(2) of the Land Registration (Scotland) Act 1979 in respect of any loss arising as a result of the Disposition being reduced or declared or found to be void because of any defect or failing in the exercise of the statutory procedures necessary for the proper exercise of the power of sale.

That was not all. The Keeper also left the three postponed standard securities in the charges section of the title sheet. In other words, the Keeper did not delete them as would normally be required by s 26 of the 1970 Act. (The Keeper did of course delete the Bank of Scotland standard security, for the latter was the seller.) To each of these three standard securities in the C section (ie one in favour of Firstplus Financial Group plc and two in favour of Progressive Financial Services Ltd) the Keeper added a note excluding indemnity 'in respect of any loss arising from rectification of the register to delete the above standard security or from the subjects in this title being declared or found not to have been disburdened of the above standard security in terms of section 26(1) of the Conveyancing and Feudal Reform (Scotland) Act 1970'.

At a guess, Mr Aronson would have approached the two postponed heritable creditors to ask them to grant discharges, perhaps with their reasonable expenses covered. If he did so, he was unsuccessful, for the securities remained on the title sheet. At a further guess, whilst neither creditor was, it seems, willing to grant a discharge, equally it seems that neither made any actual attempt to enforce their securities. Indeed, the two postponed heritable creditors seem to have adopted a stance of absolute passivity, for when the present action was raised, they were cited as co-defenders, but as far as we can see they did not enter appearance. But on all these matters the judgement has little to say.

Mr Aronson raised the present action to have the title sheet rectified by the deletion of the three postponed standard securities. The Keeper defended the action. The Lord Ordinary (Lord Doherty) held in favour of the pursuer.

The Keeper's defence was that the Bank of Scotland had not carried out its enforcement procedure in conformity with the statutory requirements. Admittedly, at the time in question there was a universal consensus that the method adopted was valid. But in *Wilson* the Supreme Court had held otherwise, and that decision could not be questioned. The Lord Ordinary summarised the view put forward by the Keeper's counsel (para 21):

> Mr Lake accepted that if the property had indeed been disburdened of the postponed securities there would be an inaccuracy in the register; and that rectification of the register would be competent and appropriate to remove the entries for those securities from the Charges Section. He submitted, however, that the property had not been disburdened of those securities.

As far as it went, that was logical: the three postponed securities remained on the title sheet because they were undischarged. But underlying that logical approach there was a deeper lack of logic. (i) If the enforcement was valid, the postponed securities should have been deleted. (ii) If it was not valid, Mr Aronson's application should not have been accepted, and his name should not have been entered as proprietor in lieu of Mr Alexander's name. It would be difficult to defend the Keeper's position from being self-contradictory. This inconsistency was to some extent explored in the case, but fruitlessly. 'No explanation' had been given in the Keeper's pleadings; '[n]o clarity on this point was provided' by counsel for the Keeper in the debate' (para 24). The Lord Ordinary noted (at para 29):

> It is difficult to see any basis upon which she [the Keeper] could lawfully have refused to register it [the disposition by the heritable creditor]. The disposition … bore to be in exercise of the creditor's right of sale, a right which the sheriff had granted the Bank warrant to exercise. The disposition and the decree which preceded it are both valid unless and until they are reduced. They might possibly be the subject of a challenge in the future (and a potential challenge might not be excluded by s 41(2) of the Conveyancing (Scotland) Act 1924 (as substituted by s 38 of the 1970 Act)), but the decree and the disposition are valid as matters stand. Neither is a nullity.

The *ratio* of the decision may, however, not lie in this line of thought, but rather in a common-sense interpretation of s 26 of the 1970 Act. The Lord Ordinary said (paras 32 and 33):

> On a plain reading of s 26(1) the ordinary and natural meaning of the word 'sale' is apt to include any case where the subjects have been sold by a creditor in a standard security – whether or not there has been any irregularity in the proceedings which preceded the sale. Reading 'sale' as meaning only those sales where every requirement of the 1970 Act preliminary to a sale has been complied with is a strained construction. Similarly, in s 27 'sale' appears to me to have its ordinary and natural meaning. There is no good reason to give it a narrower meaning. It cannot have been Parliament's intention that sale proceeds received by a creditor should be held in trust by him in terms of s 27 in cases where there was no such underlying irregularity, but that no such trust obligation should arise in cases where there had been an irregularity. That would make no sense at all.

He added, at para 36:

> While I do not rule out entirely the possibility that the circumstances of some sales might be so contrary to public policy that Parliament might be taken to have intended to exclude them from the ambit of s 26, I am very clear that the circumstances of the sale by the Bank to the pursuer do not fall within any such category.

Although the Lord Ordinary does not put it in quite these terms, what can be taken from the case, we think, is this: that if the sale by the heritable creditor appears unlawful, the Keeper should simply decline to register the disposition. But if it appears lawful, the Keeper should register the disposition, and accordingly delete any postponed securities.

The decision is, we suggest, one to be welcomed. We have heard that the Keeper is not appealing, and once again that is to be welcomed.

As a postscript, the Financial Ombudsman Service has intervened in connection with the expenses caused by the *Wilson* decision in as much as many lenders had to go back down the snake to square one. The lenders claimed that the additional expenses should be wholly borne by the defaulting debtors. The FOS has now held that the additional expenses should be divided equally between creditors and debtors. Full details are on the Glasgow Law Centre's website at http://govanlc.blogspot.co.uk/2014/06/up-to-10m-could-be-refunded-to-scottish.html.

(60) Hoblyn v Barclays Bank plc [2014] CSIH 52, 2014 Hous LR 26

Mr Hoblyn owned a house in Renfrewshire. He lived there with his wife until 1994 when they parted. They were divorced in 2004. Exclusive title was retained by Mr Hoblyn, while Mrs Hoblyn enjoyed exclusive possession. Mr Hoblyn was at some point sequestrated. There was a standard security over the property in favour of Barclays Bank plc.

For many years neither the bank, nor Mr Hoblyn's trustee in sequestration, insisted on the sale of the property. The reasons are not known to us except that the bank did receive some payments over the years. Eventually both the trustee and the bank began enforcement proceedings. What happened to the trustee's proceedings is not clear. The bank, however, obtained decree against Mr Hoblyn, including authority to sell the property and warrant to take possession. Mrs Hoblyn then raised the present action, seeking to reduce the decree against her former husband. She alleged irregularities in connection with the enforcement of the security, and also with her former husband's sequestration.

Her action failed at first instance: [2013] CSOH 104, 2013 GWD 26-533 (*Conveyancing 2013* Case (51)). 'Neither in her pleadings nor in her submissions has she stated anything approaching a *prima facie* case' said the Lord Ordinary (Drummond Young (para 12). Mrs Hoblyn, a party litigant, reclaimed. We quote the Inner House's summary of her case (para 24):

> *Ground 1*: The monies being reclaimed by Barclays Bank constituted monies illegally and irresponsibly lent to Mr Hoblyn as home improvement loans without the pursuer's knowledge or consent, when Mr Hoblyn was not living in the family home.
>
> *Ground 2*: In 2002 Mr Hoblyn managed to acquire a further mortgage from the Bank of Scotland at a time when he was already in default with existing mortgage payments and the home was in a state of repossession in Paisley Sheriff Court. That amounted to mortgage fraud.
>
> *Ground 3*: In the divorce settlement in 2005 Mr Hoblyn authorised any 'rump' of his bankruptcy estate remaining after all lawfully adjudicated claims to be made over to the pursuer. There were only two secured creditors, namely Barclays Bank and the Royal Bank of Scotland. The pursuer questioned whether their claims had been 'lawfully adjudicated', as she had been completely unaware of the level of debt secured over the matrimonial home.
>
> *Ground 4*: The original standard security over the property referred to Mr Hoblyn and his business partner. There was also a third partner in the business. The pursuer questioned where the partners featured in the indebtedness. Furthermore a ranking agreement dated 1989 altered the Royal Bank of Scotland's ranking from second charge to first charge: but the Royal Bank had never foreclosed.
>
> *Ground 5*: The pursuer questioned why the sale of the house was being instigated by Barclays Bank rather than the Royal Bank of Scotland. There had been a lack of information from those acting for Barclays Bank (including information that they might have been willing to enter into negotiations with her, as set out in paragraph [12] of Lord Drummond Young's opinion).
>
> *Ground 6*: Because of all those unanswered questions, and because she had contributed more than £40,000 towards the mortgage, the pursuer was entitled to the recovery of documents which she had sought.
>
> *Ground 7*: The pursuer challenged counsel's submission made on 9 January 2014 that the court action was now merely 'academic'. As at that date, the house had not been sold, but was being advertised for sale.

> *Ground 8*: Mr Hoblyn had behaved as a con-man/fraudster. During the time when he and the pursuer remained married, the pursuer had certain rights (for example under the Matrimonial Homes (Scotland) Act 1981). The pursuer also had human rights.

The pursuer failed to comply with procedural deadlines in the reclaiming motion. The court said (para 26):

> Had we considered that there was any possibility that the pursuer could achieve a stateable case and/or a remedy in these proceedings, we would have varied the time-table and permitted the pursuer further time within which to lodge her note of argument and her appendix or appendices. However we do not consider that any such possibility exists.

The case has generated a certain amount of publicity, including stories in *The Daily Record* and *The Herald*. Some background information about the pursuer can be found in *Law Society of Scotland v O'Donnell* [2014] CSOH 166, 2014 GWD 39-706.

SOLICITORS

(61) STV Central Ltd v Semple Fraser LLP [2014] CSOH 82, 2014 GWD 16-299

Small mistakes can have big consequences. Since rent review clauses were introduced in the 1960s, they have proved all too easy to get wrong. Here the pursuer took a 20-year lease of premises at Pacific Quay, Glasgow. The rent was composed of two elements, namely the basic rent plus an 'enhanced rent' which was agreed on because the landlord had had to spend a substantial amount of money making the premises meet the high-tech requirements of the pursuer. The enhanced rent was to be increased annually so as to track the Retail Prices Index. The wording was:

> subject to review and compounded (upwards only) at each successive anniversary ('the Relevant Date') of the Date of Entry, according to the formula $R = 1 \times A/B$ where R is the Enhanced Rent payable from and after the Relevant Date, 1 is the Enhanced Rent payable prior to the Relevant Date, A is the RPI for the date two months before the Relevant Date … and B is the RPI for the date two months before the Date of Entry.

The meaning of this formula may not be apparent at first glance. But careful scrutiny shows it to be absurd. We quote the Lord Ordinary (Lord Woolman) (though we have not checked his calculation): 'If … the retail prices index increased at the rate of 3 per cent each year, STV would have been liable to pay an annual rent of £100 million in 2025' (para 4).

Possibly this would have been a suitable case for a rectification action, but 'on the advice of senior counsel, it decided against raising an action for rectification' (para 4). Eventually, agreement was reached between landlord and tenant for a replacement formula, the details of which are unknown. But at all events the

tenant ended up with financial loss and sued the law firm that had acted for it, Semple Fraser, in professional negligence. The defender admitted liability and the claim was settled at an undisclosed sum. The defender then sought recovery from the firm of surveyors that had been involved, under s 3(2) of the Law Reform (Contributory Negligence) (Scotland) Act 1940, for the firm of surveyors had had some involvement with the terms of the rent review clause. The law firm framed its claim both in contract and in the law of 'voluntary assumption of responsibility', but it was **held** that its written pleadings failed to establish a relevant claim, and the action was dismissed.

(62) Hawthorne v Anderson [2014] CSOH 65, 2014 GWD 13-247

This was a claim for damages for professional negligence, the sum sued for being £525,000. In 1990 the pursuers bought Bielside House in Aberdeen, together with ground attached to it. They immediately resold it, but retained two areas out of the total. On one of these plots they built a new house, where they lived. Planning permission was at that time unavailable for the development of the other plot. Permission was eventually granted in 2012, but there was another problem: the plot did not have sufficient access rights to make development possible. The pursuers argued that their law firm should have noticed that issue back in 1990, and claimed that the failure to do so meant that the possibility of selling the plot for a large sum had been lost.

One defence was negative prescription, but the Lord Ordinary (Lord Woolman) did not sustain this, because the pursuers had become aware of the access issue only relatively recently. Nevertheless he held against the pursuers on two separate grounds: causation and negligence. On causation, he held as a matter of fact that even if the pursuers had known, back in 1990, about the access issue, they would have acted as they did act. On negligence, the Lord Ordinary found as a matter of fact that the pursuers had not told the defenders that they wished the plot to be capable of being developed. Moreover, he held that the access problem was one that a solicitor of ordinary competence would not necessarily have identified. On this latter issue there had been a difference of view between the two expert witnesses, Robert Rennie and Donald Reid.

Finally, an issue came up that had no relevance to the determination of the case, but which so concerned the Lord Ordinary that he understandably chose to highlight it. In 2004 there had been an excambion between the pursuers and a neighbour. Lord Woolman takes up the story (para 86):

> A material irregularity occurred in relation to the deed of excambion. The defenders inserted a provision into the document after it had been signed by the pursuers. The matter arose in this way. … The solicitors for Mrs Ruddiman wrote to the defenders on 7 October 2004 in relation to the buttresses to the garden walls. They stated that in their view, their clients had a servitude right of support for the walls, but they wished it to be expressly incorporated into the deed. The letter continued: 'We appreciate

> that you wouldn't want to go to the bother of having the deed re-executed but if your clients were agreeable to the change we would be happy for you to run off pages 1 and 2 (as amended on the copy pages attached) onto three pages which we would then attach to the last page of the deed.' The defenders acceded to that suggestion, but without seeking authorisation from the pursuers. Mr Anderson could not explain why this regrettable event occurred.

The word 'regrettable' is a judicial understatement. But the same thing happened in another case from 2014: *Knockman Community Co v McCort* (Case (68) below). It is not always appreciated that, apart from possible consequences of an even more serious nature, the substitution of pages is likely to render the deed in question a nullity.

(63) Northern Rock (Asset Management) plc v Steel [2014] CSOH 40, 2014 GWD 10-191

NRAM plc v Steel [2014] CSOH 172, 2015 GWD 1-34

These are two separate stages of the same case, the pursuer having changed its name during the course of the litigation. For the convoluted name history of this and its sister company, see *Conveyancing 2009* pp 58–59 and *Conveyancing 2012* pp 77–78.) This is one of two 2014 cases in which a standard security was mistakenly discharged, the other being *Cooper v Bank of Scotland plc* (Case (53) above). But the circumstances differed greatly as between the two cases.

Headway Caledonian Ltd borrowed extensively from the bank now called NRAM plc, the borrowing being secured by standard securities over various properties that it owned. NRAM plc did not use an independent law firm to handle the security work, but did everything in-house. Early in 2007 the debtor company was selling part of a property it owned in Lanarkshire, at Cadzow Business Park, Hamilton. The bank was happy with this, and the plan was that it would grant two deeds of restriction (two, because the property was held on two titles and each had a standard security over it) to enable the buyer to obtain an unencumbered title, and the proceeds of sale would go towards reducing the overall indebtedness of the company. The law firm acting for the company, however, drafted not deeds of restriction but deeds of discharge. It sent these to the bank, which executed them. They were registered. The effect was that the securities were discharged from the whole of the property, not just the part being sold. What happened next can be predicted: the company became insolvent and because of the accidental discharge of the securities the bank suffered a large loss. It sued the law firm that had acted for the company for damages (and the solicitor herself who had been involved, personally).

The central document was an e-mail that the solicitor acting for the company's law firm had sent to the bank. It attached the draft deeds of discharge (instead of draft deeds of restriction).

> Helen/Neil
>
> I need your usual letter of non crystallisation for the sale of the above subjects to be faxed through here first thing tomorrow a.m. if possible to 0141 221 0123 marked for my attention – I have had a few letters on this one previously for various other units that have been sold. I also attach discharges for signing and return as well as the whole loan is being paid off for the estate and I have a settlement figure for that. Can you please arrange to get these signed and returned again asap.
>
> Many thanks …

When it received this e-mail, the bank opened the attachments, printed them off, executed them, and returned them, without checking them properly. Just why the erroneous e-mail, with its erroneous attachments, had been sent was investigated in the proof, but no answers were obtained. The solicitor could not recall. The bank staff could not say why they had not checked.

The bank's argument was that this e-mail was one on which it was entitled to rely. In this it inevitably faced an uphill battle. The law firm was acting for the company, not for the bank. A law firm can, it is true, be liable to third parties, but there is a presumption against such liability. The bank tried two arguments. One was that there was a *de facto* contract between the bank and the law firm. This was a flimsy argument and was thrown out at the first stage: see [2014] CSOH 40. The other was an argument founded in delict: in the whole circumstances of the case, argued the bank, the defenders had owed a duty of care to the bank, and had been in breach of that duty. The defenders denied such a duty and argued that the bank should have attended to its own interests, and should have noticed the error itself.

After a proof, and an extensive review of the authorities, the Lord Ordinary (Lord Doherty) held in favour of the defenders. At para 78 he said:

> In the whole circumstances I have no real difficulty in concluding that it was not reasonable for a bank in the position of the pursuers to rely on the misstatement information without checking its accuracy; and that a solicitor in the position of the first defender would not foresee that such a bank would reasonably rely on that information without carrying out such a check. Any prudent bank taking the most basic precautions would have checked the information provided by seeking clarification from the first defender and/or looking at their file.

(64) McCann v Waddell & MacIntosh [2014] CSOH 15, 2014 GWD 7-149

Mr McCann, a property developer, concluded missives to sell a 3.9-hectare site at Sillyhole, Dalmellington, Ayrshire, to another property developer, the price being £800,000. The missives provided that, in the event that planning permission was not obtained within 12 months, the buyer could resile. Twelve months passed without planning permission, but the buyer did not resile. Thereafter Mr McCann received (as he averred) another offer from another

property developer to buy the site for £2.5 million. But he could not accept that offer because the missives with the first buyers remained in place. He sued the law firm that had acted for him for not having inserted in the missives a right to resile in his favour. He claimed damages in the sum of £2 million.

The case went to proof on two issues: had the law firm given appropriate advice, and had there in fact been a rival offer? After numerous days of evidence, the court held against the pursuer on both points.

The case has an aspect which is of some interest even though at the end of the day it was not relevant to the final decision. There were two McCanns, father and son, who worked together. The law firm's client was McCann junior, but in practice the contact person – the person with whom the law firm mainly dealt – was McCann senior. The discussions and the advice about the suspensive condition and the question of resiling had been with McCann senior, not McCann junior. Did that fact torpedo the defence? The answer was no, because it was found, as a matter of fact, that McCann junior had given a general mandate to his father to deal with the law firm on his behalf. But the issue gave rise to a difference of opinion between the two expert witnesses, Robert Rennie and Donald Reid. In the words of the Lord Ordinary (Brodie) (paras 36 and 37):

> The evidence of Professor Rennie ... was that a solicitor should never take instructions from an intermediary without express antecedent authority having been given to do so. He instanced the grant of a power of attorney as an example of such express authority. In the event of the circumstances averred by the defenders in the present case, with Mr McCann Senior purporting to give instructions on behalf of his son, Professor Rennie would have expected the defenders to have written to the pursuer, as their client, setting out the risks associated with contracting in terms of clause 4 and seeking confirmation of the instructions received from Mr McCann Senior. The reason for doing this was to ensure that the client did indeed understand the risks of proceeding in this way, although recording his advice in writing also provided protection for the solicitor in the sense of documenting the advice given lest there be any dispute as to what had been said in the course of advising orally. In cross-examination, Professor Rennie conceded that necessary advice might be given orally without the solicitor being in breach of duty. He recognised that as a matter of law an agent might have authority to instruct a solicitor on behalf of his principal but he emphasised the problem for the solicitor in knowing the extent of the agent's authority. The relationship between client and solicitor is a special sort of agency and the solicitor has to have the sort of certainty as to his position which is conferred by instructions in writing. The relevant Law Society of Scotland Code of Conduct advised against taking instructions through an intermediary; a solicitor just should not do it. Professor Rennie disagreed with the proposition that a solicitor of ordinary competence exercising reasonable care could properly take instructions from a father to conclude missives on behalf of a son on the basis of a course of conduct which indicated that the father repeatedly purported to act on his son's behalf and that the son was content with that.
>
> Mr Reid disagreed with Professor Rennie on what was necessary before a solicitor could regard himself as instructed in a matter such as the conclusion of missives. In

his opinion a solicitor would be entitled to make what he referred to as 'a judgment call' as to whether he did have his principal's authority on the basis of all of the facts and circumstances of the case.

(65) Frank Houlgate Investment Co Ltd v Biggart Baillie LLP [2014] CSIH 79, 2014 SLT 1001

If you discover that your client has been defrauding the other party, do you have an immediate duty to disclose that fact to the other side? For the first time there is now Inner House authority on this issue, arising out of the astonishing fraud carried out by John McGregor Cameron. See **Commentary** p 189.

(66) Stewart & McIsaac v Scottish Legal Complaints Commission [2014] CSIH 23, 2014 SC 569, 2014 SLT 454

A development took place near Forres. Services were laid but, when the units came to be marketed, a problem emerged. The services had been laid, in part, beneath a roadway which was not a public right of way, and although a servitude of way existed in favour of development, that servitude was limited to way (access) and did not extend to the right to lay pipes etc. The owner of the roadway had to be asked to grant the necessary servitude rights. This it eventually did, but various expenses were incurred. The developer considered its law firm to have been at fault for not having anticipated this problem. The specific issue in the case in this stage was whether the complaint was time-barred in terms of the Rules of the Scottish Legal Complaints Commission 2009 r 4(6). It was **held** that it was not.

JUDICIAL RECTIFICATION

(67) Mirza v Salim [2014] CSIH 51, 2014 SLT 875, 2014 SCLR 764

Khalil Ahmed, the owner of premises at 398 Cumbernauld Road, Glasgow, agreed to lease the premises 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. The counterclaim was successful and, 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); Land Registration (Scotland) Act 1979 s 9(3A)). The interdict action accordingly fell away.

Mr Mirza now raised the present action for damages of £250,000 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.

At first instance 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. See [2013] CSIH 73, 2013 GWD 17-348 (*Conveyancing 2013* Case (65)).

The pursuer appealed. Allowing the appeal (Lady Paton dissenting), an Extra Division of the Court of Session **held** (i) that as the effect of rectification was retrospective, it must be treated as retrospective for all purposes, including damages for wrongous interdict, and (ii) that accordingly the normal rule would be applied by which the recall of an interdict after proof on the merits gives rise to liability for any loss properly attributable to the interim grant. The case was remitted back to the commercial court for a proof on quantum of damages.

Lady Paton, in a dissenting judgment, did not support the approach of the Lord Ordinary. But she thought that the retrospective character of rectification did not interfere with the power of the court to decide, in the light of all the circumstances, whether damages were due following the recall of an interim interdict. Accordingly, she would have allowed a proof before answer on this question.

COMMUNITY RIGHT TO BUY

(68) Knockman Community Co v McCort 2014 SLT (Lands Tr) 30

Land which is subject to a registered community interest cannot normally be transferred without first giving the community body an opportunity to

buy: for details, see *Conveyancing 2003* pp 137–39. But there are some exceptions, one of which is where the transfer is not for value: see Land Reform (Scotland) Act 2003 s 40(4)(a). Where an exception potentially applies, however, the disposition must contain a declaration specifying which exception is being claimed and, in certain cases including gifts, stating that the transfer does not form part of a scheme or arrangement or is one of a series the main purpose or effect (or one of the main purposes or effects) of which is the avoidance of the community right to buy (s 43(2)). A deed without such a declaration will be rejected by the Keeper: see now Land Registration etc (Scotland) Act 2012 s 42.

The present application concerned Boreland Forest, near Lockerbie, Dumfriesshire, and resulted from a disposition by the owners in favour of trustees. Although the disposition bore to be a transfer without value, it failed to include the necessary declarations under s 43(2). The omission having come to the attention of Knockman Community Co, which had previously registered a community interest in the forest, Knockman applied to the Lands Tribunal seeking a finding that the disposition was in breach of the 2003 Act. The grantees of the disposition defended the action but failed to explain that, by now, they had dealt with the omission. Admittedly, the method by which they had done so was not one which invited public scrutiny. The Tribunal takes up the story (paras 15 and 16):

> [W]e have given more detailed consideration to the papers and see that it is suggested by a representative of the Registers of Scotland that the respondents' agents had corrected the disposition by sending in a new page to the Keeper and a member of staff had simply exchanged it for the original. This seems extremely surprising to us but as we have no idea of the procedures and policies of the Keeper in this respect it is impossible to comment fairly. The fact remains that the substitute document is false and misleading. … The present case seems to us to show a considerable weakness in the system of authentication of formal documents. It may be thought wrong to describe a document as 'false' when the change from the original is genuinely thought to be innocuous. But that sort of value judgment is not a sound basis for distinguishing the genuine from the false.

On the basis of this substituted page it appears that the Keeper registered the disponees as owners.

It took some time for news of the 'correction' to reach Knockman Community Co, but as soon as it did, Knockman withdrew the application. The only matter which then remained to be settled was expenses. As the application had been withdrawn, the respondents (ie the disponees) sought to recover their expenses. This was refused (para 17):

> The point in question [in the application] was a very short one. It was clearly focused. But, instead of meeting the point, the answers – like the letters from the respondents personally – appear to us simply to address the wrong issues. They failed to deal with the critical issues of fact. They made no attempt to deal with the legal implications of the original omission. The expense occasioned to the respondents

was caused by their legal advisers failing to deal with the substantive issue upon which the application was clearly based. The applicants unfortunately are left to carry their own expense.

SPECIAL DESTINATIONS

(69) Povey v Povey's Exr
[2014] CSOH 68, 2014 SLT 643

Mr and Mrs Povey owned a house in common, with a survivorship destination. Mr Povey, who held a power of attorney from his wife, granted a disposition of the property from him and her to him and her, with the intention of washing out the survivorship destination. After executing it (once for himself and once as attorney for his wife) he died. Thereafter his solicitors presented the deed for registration in the Land Register and it was registered. Who took Mr Povey's one half share in the property? Was it Mrs Povey? The present action was between Mrs Povey on the one hand, and her late husband's executor (his son, but not by her) on the other hand. See **Commentary** p 169.

INSOLVENCY

(70) Liquidator of Letham Grange Developments Ltd v Foxworth Investments Ltd
[2014] UKSC 41, 2014 SC (UKSC) 203, 2014 SLT 775, 2014 SCLR 692

This may be the last stage in one of the most protracted property law litigations in modern history. The Supreme Court has reversed the decision of the Inner House that a standard security was reducible. See **Commentary** p 200.

TRUSTS

(71) Glasgow City Council v Board of Managers of Springboig St John's School
[2014] CSOH 76, 2014 GWD 16-287

The defenders sought recall of an inhibition on the dependence of an action against them. The interest of the case lies in the endorsement by the Lord Ordinary (Lord Malcolm) of the modern 'dual patrimony' theory of the trust (paras 16 and 17):

> A trust is not a separate juristic entity. It is not a legal person. … The notion of a trustee's dual patrimony is helpful and can assist in an understanding of many of the implications and consequences of our law of trusts. … Trust property is immune to and cannot be attached in respect of a trustee's personal debt, not because it is owned by the trust, but because the trustee owns it qua trustee; which is another way of saying that it falls into his trust patrimony, not his personal patrimony.

CRIMINAL PROPERTY LAW

(72) Hughes v HM Advocate [2014] HCJAC 74, 2014 SCCR 506

Two secured loans were obtained to buy properties in Bridge of Weir and Kilmacolm, the loans being £429,955 for the first house and £858,000 for the second. The first loan was later paid off in full. As for the second loan, the monthly payments were kept up without default. Later it emerged (we do not know how – as one seldom does in such cases) that the application forms made deliberate misstatements as to income. There was a prosecution and conviction. The sentence was 43 months. On appeal this was changed to a fine of £45,000. It seems that the buyer of the properties was Mrs Hughes, but the prosecution was against Mr Hughes. We do not have the information needed to explain this oddity.

(73) Scottish Ministers v Ellis [2014] CSOH 10, 2014 SCLR 434

Brian Ellis was active in various types of theft and fraud. In the present case (for civil recovery under part 5 of the Proceeds of Crime Act 2002) Mr Ellis had sold a property, and the proceeds of sale were held in the client account of a law firm. A civil action was launched to seize those proceeds on the basis that the property that had been sold had been bought out of the proceeds of crime. (How the authorities found out about the sale and pounced at this particular moment is not disclosed.) It was found, after hearing evidence, that the deposit for the purchase of the property had been funded from crime, that the mortgage payments thereafter had been funded from crime, and moreover that the mortgage application had been fraudulent. Decree was granted in favour of the pursuers.

(74) Scottish Ministers v Stirton [2014] CSIH 92, 2014 GWD 37-683

In earlier years we have omitted to refer to Russell Stirton, for the property law issues involved have not, we think, been of particular interest, but the sheer scale of court work that he has generated merits an entry here. The present appeal was from an Outer House case that involved 130 days of proof and resulted in a judgment (by Lady Stacey) of more than 100,000 words. The Stirton cases must have made a measurable dent in the Scottish economy. See, in addition to the present case:

- *Scottish Ministers v Stirton* 2006 SLT 306;
- *Scottish Ministers v Stirton* 2008 SLT 505;
- *Scottish Ministers v Stirton* [2009] CSOH 61, 2009 SCLR 541;
- *Scottish Ministers v Stirton* [2012] CSOH 15, 2012 GWD 6-100;

- *Scottish Ministers v Stirton* [2012] CSOH 166, 2013 SCLR 209;
- *Scottish Ministers v Stirton* [2013] CSIH 81, 2014 SC 218, 2013 SLT 1141;
- *Scottish Ministers v Stirton* 2014 GWD 5-99, Sh Ct.

The courts have concluded that Mr Stirton raised money by illegal activities including extortion, and held (under part 5 of the Proceeds of Crime Act 2002) that the money could be traced into heritable property that he acquired.

(75) HM Advocate v Younas [2014] HCJ 123, 2015 SCL 162

These confiscation proceedings, under part 3 of the Proceeds of Crime Act 2002, followed on a conviction for heroin dealing. To set the scene, Lord Pentland noted (para 2) that Mohammed Younas:

> has other criminal convictions. These include offences of theft by housebreaking, housebreaking with intent, attempted theft by housebreaking and fraud. On 11 March 1994 he was convicted at Edinburgh High Court of conspiracy to rob and of offences under the Carrying of Knives etc (Scotland) Act 1993 and the Bail etc (Scotland) Act 1980. He was sentenced to a total of 33 months imprisonment for these offences. On 27 September 2001 the respondent was convicted at Glasgow High Court of two offences of contravening s 4(3)(b) of the 1971 Act and was sentenced to 10 years imprisonment.

The main issue was whether a property in Edinburgh fell to be regarded as one of his assets. He had bought it in 1990 and his title had been duly recorded in the Register of Sasines. He had been sequestrated in 1993. His trustee did not complete title in his own name but, after some time, concluded missives to sell the property to Younas's siblings. The price was paid to the trustee. But – strangely – the siblings refused to accept a disposition. Title thus remained in Younas. The property had throughout continued to be used by the Younas family. What counts as property for the purposes of criminal property law? Section 150(2) of the Proceeds of Crime Act 2002 (in that part of the Act applying to Scotland) says:

(1) Property is all property wherever situated and includes –
  (a) money;
  (b) all forms of property whether heritable or moveable and whether corporeal or incorporeal.

(2) The following rules apply in relation to property –
  (a) property is held by a person if he holds an interest in it;
  (b) property is obtained by a person if he obtains an interest in it;
  (c) property is transferred by one person to another if the first one transfers or grants an interest in it to the second;
  (d) references to property held by a person include references to his property vested in his permanent or interim trustee (within the meaning of the Bankruptcy (Scotland) Act 1985), trustee in bankruptcy or liquidator;
  (e) references to an interest held by a person beneficially in property include references to an interest which would be held by him beneficially if the property were not so vested;

(f) references to an interest, in relation to land in England, Wales or Northern Ireland, are to any legal estate or equitable interest or power;
(g) references to an interest, in relation to land in Scotland, are to any estate, interest, servitude or other heritable right in or over land, including a heritable security;
(h) references to an interest, in relation to property other than land, include references to a right (including a right to possession).

After picking oneself off the floor, and swallowing a tot of medicinal whisky, one might ask which bit of this is one's favourite? Perhaps s 150(2)(e), and indeed we thought of setting it as an exam question ('Give a critical analysis of s 150(2)(e) …'), though we have refrained from doing so, because the Chief Medical Officer for Scotland warned us that there would be a small but non-negligible risk of causing brain damage. But the circularity prize is won by s 150(2)(g).

Though s 150 may not withstand critical analysis, its purpose is well explained by Lord Pentland: 'The terminology used in the Act was deliberately conceived in broad terms because of an appreciation of the elaborate and often devious lengths to which criminals frequently resort in trying to conceal and protect the rewards of their criminality from discovery and seizure by the authorities' (para 51). He **held** that the property fell to be regarded as an asset of Younas for the purpose of the confiscation proceedings.

COMMON GOOD

(76) East Renfrewshire Council Ptr [2014] CSOH 129, 2014 GWD 27-549

The law of common good is generally not well known, but it comes before the courts surprisingly often. This case followed a standard pattern. A local authority wished to use part of a public park (Cowan Park, Barrhead, Renfrewshire), to build a school. The problem was that the park was, as parks typically are, common-good property. As a result, the local authority, though owner, was not free to do with it as it wished. The Local Government (Scotland) Act 1973 distinguishes 'disposal' and 'appropriation'. A local authority can be authorised by the court to 'dispose of' common-good property. As for 'appropriation' (ie change of use), it was at one stage thought that local authorities had wide powers, but matters changed as a result of the leading case of *Portobello Park Action Group Association v City of Edinburgh Council* [2012] CSIH 69, 2013 SC 184, which in effect held that 'appropriation' is simply not possible for common-good land. See *Conveyancing 2012* pp 172–77. (In the end a special statute, the City of Edinburgh Council (Portobello Park) Act 2014, was passed: see p 71 below.)

In the present case, the local authority proposed to grant a 25-year lease to a company and at the same time take a lease-back from the company for the same duration, ie 25 years. This structure seems to have been motivated by the financial planning: a funder was to take a standard security over the middle lease. But one may suspect that the structure was also intended to lead to the

result that the arrangement was not an 'appropriation' but a 'disposal', thereby making it possible to obtain the consent of the court. Of course a 25-year lease is not a complete disposal, but it is generally accepted that a long lease can count as a 'disposal' though the authorities on this point are sparse.

The Lord Ordinary (Lord Tyre) was not happy. At para 14 he commented:

> The question I have to determine is whether, in the circumstances narrated, there would be a disposal by the petitioners that the court, if it thinks fit, could authorise. The petitioners' submission proceeded upon an assumption that if the head lease was properly characterised as a disposal, it was unnecessary to go on to consider whether the arrangements as a whole amounted to appropriation by the petitioners of inalienable common good land. In my opinion that is not the correct approach. It risks focusing the court's attention on a single element of a more complex project and losing sight of the overall effect in relation to the future use of the common good land whose alienation is prohibited.

He concluded (para 16):

> The petitioners' proposals are properly to be characterised as appropriation. In essence, all that would change would be that the land would cease permanently to be used by the petitioners for the common good, and would be used by them instead for other purposes, namely the provision of education. In my opinion that could not reasonably be described as anything other than appropriation of inalienable common good land, which appropriation this court has no power to authorise. I should add, for the sake of completeness, that my view would have been the same if the draft Agreement had provided for the sub-lease in favour of the petitioners to be granted with effect from a slightly later commencement date, and hence for a shorter duration, than the head lease. …

Accordingly he refused to grant the petition. We would respectfully suggest that his reasoning is wholly convincing. Whether East Renfrewshire Council will now, like Edinburgh City Council, seek special legislation, remains to be seen. In the long run what is needed is a review of the whole law of common good.

(77) Aberdeenshire Council, Applicant
2015 GWD 1-33, Sh Ct

Battery Green is a public park in Banff, and is common-good property. A small part of it (135 square metres) had for about 30 years been used for parking, partly for those visiting a shop with the odd name of 'Bremner's 65th General Stores'. The owners of the shop had at some stage surfaced the area. People used the parking for other purposes as well, including visits to the local hospital. At some stage the shop closed but parking on the area continued. Then the owners of the former shop offered to buy the area from the County Council for £10,000, and missives were concluded, but subject to consent being obtained from the court for disposal of common-good property, since such property cannot be disposed of except with the consent of the court: see the preceding case. (What the buyers intended to do with the area does not appear.) The resulting petition

(or technically a summary application) was opposed by Banff and Macduff Community Council.

The sheriff (Philip Mann) noted, with reference to *West Dunbartonshire Council v Harvie* 1997 SLT 979, that 'the guiding consideration is what appears to be for the greatest benefit of the people who share the common good'. (We would mention that *West Dunbartonshire Council v Harvie* was subsequently appealed, and that the Inner House affirmed the approach taken at first instance: see 1998 SC 789.) The sheriff refused the petition, commenting (para 3.1):

> It appears to me that the people of Banff, and by extension the people of Macduff, would suffer a very significant loss of amenity were I to grant this application and if, as a consequence, they were to be excluded from using the ground for what has become its accustomed purpose. I do not see how it could reasonably be maintained that that loss of amenity would be counterbalanced by any benefit that might be gained by having a sum of £10,000 available for investment within the common good fund.

NHBC

(78) National House Building Council v Penman [2014] CSOH 120, 2014 GWD 25-474

Mr and Mrs Penman were the directors of JAD Homes Ltd, a housebuilding company. When the company had registered with the NHBC the Penmans had been required to give personal guarantees. Whether this is universal practice we do not know; the NHBC website (www.nhbc.co.uk/Builders/BuilderRegistration/BecomingNHBCregistered/FAQs/) says that registration 'may be subject to a form of security (eg personal indemnity, holding company indemnity, bank bond or cash deposit)'. One of the company's developments was a 27-plot site at Lyoncross, Glasgow Road, Falkirk, Stirlingshire. Some of the properties turned out to suffer from serious defects. Because the company went into administration in 2008, NHBC ended up with liability to the various purchasers in relation to the defects. After settling with the disgruntled purchasers, NHBC sought to recover its loss from the Penmans under their guarantee. The sum sued for was £957,157.59.

The Penmans, who represented themselves, pled, in the words of the Lord Ordinary, Lord Woolman (para 9):

a. Some of the problems at the properties were attributable to defects in the sewer and rainwater system. Scottish Water monitored its construction.
b. The problems with the windows and doors were attributable to Guardian Windows Systems.
c. The NHBC passed the houses after inspection at each stage. It should have detected problems itself.
d. The cost of some of the remedial works appeared excessive, particularly in relation to numbers 1, 32 and 36 Lyoncross.

e. The company went into administration because of the banking crisis in 2008. If that had not happened, all the houses in the development would have been completed to a satisfactory standard.

f. Mr and Mrs Penman have insufficient assets to meet any decree passed against them.

Summary decree was granted in respect of part of the claim (ie in respect of some but not all of the properties), amounting to £300,550.06. For the rest of the claim (ie in respect of the remaining properties), the case was continued. As to the six points mentioned above, the Lord Ordinary said (para 14), with reference to the part of the claim for which he granted summary decree:

> Although I have carefully considered the points made by Mr and Mrs Penman, they do not afford a basis for going to proof on these matters. Taking their other points in turn (a) the NHBC does not make any claim in respect of the sewer system, (b) the company is responsible for any problem caused by Guardian Windows Systems, (c) rule 10 places liability on the company, so any inspection by NHBC is irrelevant, (e) any issue arising from the withdrawal of financial support is a matter between the company and the bank, and (f) it is not normally pertinent for the court to consider a defender's financial position when granting decree for payment.

NON-SCOTTISH CASES

(79) Hubbard v Bank of Scotland Plc (t/a Birmingham Midshires) [2014] EWCA Civ 648, [2014] PNLR 23

This English Court of Appeal case is about liability for an allegedly negligent mortgage valuation report. The house in question had been built in 1979. Mrs Hubbard bought it in 2005. She did not obtain her own survey, but relied on the lender's survey, a scheme-one mortgage valuation, for which she was charged £750. The property was valued at £690,000. The report said, among other things:

> The property is in acceptable condition for lending purposes. My valuation reflects the fact that there is wear and tear to some items and that maintenance, repair or upgrading would be required. The property has suffered previous movement but I saw no evidence to suggest this is ongoing.

The valuation report contained the usual sort of cautionary text. We quote selectively:

> You have chosen a valuation report which is a limited inspection of the property highlighting only those items which we consider will materially affect value. It is prepared on instructions from Birmingham Midshires in accordance with the RICS Mortgage Valuation Specification a copy of which is available on request. … Valuers cannot see through solids or see things that are hidden by wall and floor coverings. They will not move furniture or obstructions inside or outside, lift carpets, crawl under floors, climb ladders outside or go on roofs or fully enter roof spaces. Valuers will look at the outside of the property from the garden and adjacent public

> areas. … You still have the option to request a more detailed report and we would be pleased to help you with this. If you wish to discuss any technical aspects of this report please contact the valuer. … Do not forget to read the Advice for Applicants section – it is important.

Following the purchase the property suffered from substantial structural movement, and eventually major work was required to stabilise the building. Mrs Hubbard sued the lender. She failed at first instance, and appealed. Her appeal failed. At para 34 Floyd LJ (with whom the others concurred) said:

> It is difficult to see in what respect Mr Handley's conduct [Handley was the valuer] fell below that of a reasonable surveyor carrying out a valuation report of this particular kind. Mrs Hubbard's case must, as it seems to me, depend on showing that it is on the face of it negligent for a valuation surveyor in these circumstances, who sees a small, long-standing crack which displays no signs of ongoing movement, to fail to recommend a full structural survey. The judge regarded this proposition as unrealistic and I do as well. To set the duty at that level would mean that the sale of any property which displayed cracking of almost any kind would be held up pending a full structural survey. Such a conclusion would, I would have thought, not be welcome by vendors, by lenders or by borrowers.

PART II

STATUTORY DEVELOPMENTS

STATUTORY DEVELOPMENTS

Landfill Tax (Scotland) Act 2014 (asp 2)

This is the second of three related Acts passed as a consequence of the tax powers devolved by the Scotland Act 2012, the others being the Land and Buildings Transaction Tax (Scotland) Act 2013 (see *Conveyancing 2013* pp 199–204) and the Revenue Scotland and Tax Powers Act 2014 (see below). It introduces a Scottish landfill tax which replaces the UK version as of 1 April 2015. See **Commentary** p 217.

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 taxes and penalties on unauthorised operators of landfill sites, which is seen as preferable to the imposition of fines through a court process.

The same list of qualifying materials will be used as applies elsewhere in the UK and tax rates are set in subordinate legislation. There are powers to establish more than two tax rates, and to vary the list of qualifying materials. 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. 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 10-mile radius of the relevant landfill site.

Tribunals (Scotland) Act 2014 (asp 10)

This Act bundles up the ragbag of existing (devolved) tribunals into a single new tribunal, to be known as the 'First-tier Tribunal' (s 28). Among the tribunals affected – and scheduled to be transferred in the first wave (probably by the end of 2016) – are the Private Rented Housing Committees and Homeowner Housing Committees (sch 1). The Lands Tribunal is expected to follow in 2019. While this means that the Lands Tribunal will disappear as such, it is likely to remain as a distinct organisation because provision is made in the Act for the First-tier Tribunal to be split into 'chambers' each headed by its own President (ss 20 and 21). Appeal from the First-tier Tribunal, on a point of law, will be to a

new 'Upper Tribunal' (s 46), which itself will be divided into different 'divisions' according to the subject-matter of the appeals (s 23). The new structure mirrors the reorganisation of English and UK tribunals by the Tribunals, Courts and Enforcement Act 2007. There is a further right of appeal, on a point of law, to the Court of Session (s 48). For further details, see Stewart Graham, 'An overview of the new structure for tribunals to be introduced by the Tribunals (Scotland) Act 2014' (www.bit.ly/1L6AaWf).

Buildings (Recovery of Expenses) (Scotland) Act 2014 (asp 13)

This short Act resulted from a member's Bill introduced by Labour Highlands and Islands MSP, David Stewart. Its purpose is simple. When the Building (Scotland) Act 2004 replaced the Building (Scotland) Act 1959 it did not carry forward the provisions which allowed local authorities to recover by charging order (ie a type of heritable security over the property) the cost of work which they had carried out on property which had been the subject of a statutory notice. The Act inserts new provisions (ss 46A–46H) into the 2004 Act which provide for charging orders in respect of 'qualifying expenses' (defined in s 46B) incurred by local authorities in respect of building regulation compliance notices (s 25), continuing requirement enforcement notices (s 26), building warrant enforcement notices (s 27), defective building notices (s 28), dangerous building notices (s 29), or urgent action taken to deal with a dangerous building (s 29).

Charging orders (and their discharge) are to be in the form prescribed in the **Building (Scotland) Act 2003 (Charging Orders) Regulations 2014, SSI 2014/369**. As with a notice of potential liability for costs (Title Conditions (Scotland) Act 2003 s 10 and Tenements (Scotland) Act 2004 s 12), a new owner of the affected property is liable jointly and severally with the former owner for the amount due under the charging order but can make recovery from that owner (ss 46F and 46G).

The Act is discussed by David Anderson at p 34 of the *Journal of the Law Society of Scotland* for October 2014.

Housing (Scotland) Act 2014 (asp 14)

This substantial Act, running to 105 sections and two schedules, is the latest of what has now become a regular series of Housing Acts (the last one being in 2010), each covering a wide range of subjects. The **Housing (Scotland) Act 2014 (Commencement No 1, Transitional and Saving Provisions) Order, SSI 2014/264**, brought a small amount of, mainly supplementary, provisions into force on 20 November 2014. The main provisions are summarised below.

Abolition of the right to buy

As was widely trailed (see *Conveyancing 2012* pp 90–91), part 1 of the Act abolishes the right to buy. Already, no public-sector tenancy granted on or after 2 March

2011 has carried such a right: see Housing (Scotland) Act 2010 part 14. Now the right is abolished for all tenancies, by the simple expedient of repealing the relevant legislation (part III of the Housing (Scotland) Act 1987) (s 1). For ECHR reasons tenants are to be given a period of two years, beginning with Royal Assent (1 August 2014), in which to buy their houses (s 104(4)); from 1 August 2016 the right will be lost for ever (see SSI 2014/264). Guidance for tenants still wishing to buy is provided at www.scotland.gov.uk/Publications/2014/11/8564. Around three-quarters of public-sector housing is subject to a right-to-buy entitlement: see *Housing Statistics for Scotland 2014: Key Trends* (www.scotland.gov.uk/Publications/2014/08/2448).

Allocation of social housing

Sections 3–6 amend the definition of 'reasonable preference' in the Housing (Scotland) Act 1987 s 20 on allocating social housing and insert a new s 20A and s 20B concerning the factors that may be considered in the allocation of social housing.

Scottish secure tenancies and short Scottish secure tenancies

Sections 7–15 amend the Housing (Scotland) Act 2001 to make provision for the use of short Scottish secure tenancies where there has been a history of antisocial behaviour, and for temporary lets to homeowners. They also extend the term of the short Scottish secure tenancy, and introduce qualifying periods before tenants can exercise rights to assign, sublet or request a joint tenancy.

Private-sector tenancies

The Tribunals (Scotland) Act 2014 (discussed above) 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 transferred is to 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 greatly extends the jurisdiction of what is now 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. Criminal cases are excluded. The idea is to provide a more specialised and rapid disposal of cases which matches the often brief duration of such tenancies. The main provision is s 16, and consequential amendments to the Antisocial Behaviour etc (Scotland) Act 2004 and the Housing (Scotland) Act 2006 are made by ss 17–20.

Part 3 makes a number of other changes in relation to private-sector tenancies. A new s 85B is inserted into the Antisocial Behaviour etc (Scotland) Act 2004 requiring local authorities to determine applications for landlord registration within a year, failing which they will be deemed to have registered the applicant in question (s 21). Sections 22–24 make a number of changes to the 'repairing

standard' which, by s 14 of the Housing (Scotland) Act 2006, landlords are required to adhere to for the duration of the lease. Carbon monoxide alarms will now be needed, and landlords are to arrange for electrical safety inspections at intervals of not more than five years.

The existing power of tenants to apply to the Private Rented Housing Panel (soon to be the First-tier Tribunal) on the ground that a landlord has failed to comply with the repairing standard (see Housing (Scotland) Act 2006 s 22) is extended to local authorities and any other third party specified by order made by the Scottish Ministers (ss 25–27).

Registration of letting agents

In a significant innovation, part 4 (ss 29–62) introduces 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 around 13% 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'.

The register is to be maintained by the Scottish Government rather than by local authorities (s 29). The criteria for acceptance (s 32) are that the applicant (i) is 'a fit and proper person to carry out letting agency work' (defined in s 34) and (ii) meets such training requirements as the Scottish Ministers may by regulations prescribe. Decisions must be made within a year, otherwise the registration is deemed to have taken place (s 33). Each successful applicant is given a registration number which must be displayed on documents and advertisements (s 36). Registration lasts for three years but can be renewed (s 38). Provision is made for a Code of Practice to be set out in regulations (s 46); duties owed under the Code cannot be excluded by letting agents in their contracts (s 47).

Mobile-home sites with permanent residents

There are 92 mobile-home sites across Scotland. Between them they have around 3,314 mobile homes spread across 22 local authority areas. An increasing number of people, many of whom are elderly, live permanently in mobile homes or park homes. The Caravan Sites and Control of Development Act 1960 requires occupiers of land to hold a licence before allowing land to be used as a caravan site. Hitherto the same licensing regime has applied to sites used for holiday caravans as for sites with permanent residents. Part 5 (ss 63–84) amends the 1960 Act by providing a separate licensing regime for most sites with permanent residents.

City of Edinburgh Council (Portobello Park) Act 2014 (asp 15)

This six-section Act marks what is presumably the 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 successfully promoted private legislation, over a large number of objections, which will allow the project to go ahead. The main work is done by s 1, which provides that:

> (1) Subject to subsection (2), for the purposes of Part VI of the 1973 Act [the Local Government (Scotland) Act 1973] Portobello Park is deemed to be land forming part of the common good of the Council with respect to which land no question arises as to the right of the Council to alienate.
> (2) For the purposes of subsection (1), no question shall arise as to the Council's right to alienate Portobello Park only to the extent that the alienation in question consists of the appropriation of Portobello Park for the purposes of the Council's functions as an education authority, including for the avoidance of doubt the Council's powers under section 17 of the 1980 Act [Education (Scotland) Act 1980].

Revenue Scotland and Tax Powers Act 2014 (asp 16)

This Act puts Revenue Scotland (which already existed) on a statutory footing as the tax authority responsible for collection and management of Scotland's two devolved taxes (land and buildings transaction tax and landfill tax) from 1 April 2015. This is a substantial piece of legislation (261 sections and five schedules), 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.

The Act commences with provisions to establish Revenue Scotland and to set out its structure and functions as a body corporate independent of the Scottish Government. Provisions follow on taxpayer information, and on setting up Scottish Tax Tribunals (First-tier and Upper). Part 5 introduces a General Anti-Avoidance Rule, which is intended to be wider than its UK equivalent (which is an anti-*abuse* rule). The basic provision (s 62(1)) is to the effect that it will be possible to counteract tax advantages from 'tax avoidance arrangements' that are 'artificial'. Later parts of the Act deal with matters such as tax returns, enquiries and assessments (part 6), investigatory powers (part 7), penalties (part 8), and enforcement (part 10). See **Commentary** p 217.

Finance Act 2014 (c 26)

A number of changes are made to stamp duty land tax by ss 109–13 and sch 23. See **Commentary** p 209.

Prohibition of residential leases to illegal immigrants

Part 3 of the **Immigration Act 2014 (c 22)** contains important new provisions in relation to private residential leases to illegal immigrants. The provisions are not yet in force, except (since 1 December 2014) in Birmingham, Wolverhampton, and some other parts of the Midlands: see **Immigration Act 2014 (Commencement No 3, Transitional and Saving Provisions) Order, SI 2014/2771**, art 6. The background to the provisions can be found in a public consultation in 2013, *Tackling illegal immigration in privately rented accommodation* (www.gov.uk/government/consultations/tackling-illegal-immigration-in-privately-rented-accommodation). Similar rules already apply to employers under ss 15–25 of the Immigration, Asylum and Nationality Act 2006. The idea is apparently to prevent illegal immigrants from establishing a settled life in the UK.

The key provision is s 22(1): 'A landlord must not authorise an adult to occupy premises under a residential tenancy agreement if the adult is disqualified as a result of their immigration status.' In the jargon of the Home Office, the adult must have a 'right to rent'. Only private-sector tenancies are covered: see sch 3 (which also contains some other exemptions, eg for care homes and holiday accommodation). Lodgers are included. Adults are 'disqualified as a result of their immigration status' if, not being EEA or Swiss nationals, they do not have the requisite permission to enter or remain in the UK (s 21). The EEA countries are: Austria, Belgium, Bulgaria, Croatia, Republic of Cyprus, Czech Republic, Denmark, Estonia, Finland, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Sweden, and the UK. Where a non-EEA national does have permission to be in the UK, it is likely to be time-limited, meaning that the landlord will have to be vigilant as to when the time limit expires.

Contravention of s 22 results in a civil penalty of up to £3,000 (s 23), but the landlord is exempted if (i) the 'prescribed requirements' were complied with before the tenancy was entered into, and (ii) the landlord did not know that s 22 was being contravened. If more than one adult is to occupy the property, the checks demanded by the 'prescribed requirements' must potentially be carried out in respect of each.

The 'prescribed requirements' are set out in the **Immigration (Residential Accommodation) (Prescribed Requirements and Codes of Practice) Order 2014, SI 2014/2874**, and are helpfully summarised and glossed in the *Code of Practice on illegal immigrants and private rented accommodation* (October 2014, available at www.gov.uk/government/uploads/system/uploads/attachment_data/file/376788/Code_of_Practice_on_illegal_immigrants_and_private_rented_accommodation__web_.pdf). The *Code of Practice* describes them as 'simple document checks', although the claim to simplicity may be questioned.

The normal procedure is for the landlord to obtain from the prospective occupier either (i) one document from List A or (ii) two documents from List

B, these being documents designed to verify directly or, in the case of List B, indirectly a right to be in the UK (arts 3 and 4). The relevant lists, which can be found in the schedule to the Order, are as follows:

List A

1. A passport showing that the holder is a British citizen or a citizen of the United Kingdom and Colonies having the right of abode in the United Kingdom.
2. A passport or national identity card showing that the holder is a national of an EEA state or Switzerland.
3. A passport or travel document which has not expired endorsed to show that the holder is allowed to stay in the United Kingdom for a time-limited period.
4. A registration certificate issued by the Home Office to a national of an EEA state or Switzerland under regulation 16 of the Immigration (European Economic Area) Regulations 2006.
5. A document certifying permanent residence issued by the Home Office to a national of an EEA state or Switzerland under regulation 18 of the Immigration (European Economic Area) Regulations 2006.
6. A permanent residence card issued by the Home Office to the family member of a national of an EEA state or Switzerland under regulation 18 of the Immigration (European Economic Area) Regulations 2006.
7. A residence card or derivative residence card which has not expired or been revoked.
8. A biometric immigration document which has not expired issued by the Home Office to the holder which indicates that the person named in it is allowed to stay indefinitely in the United Kingdom or has no time limit on their stay in the United Kingdom.
9. A biometric immigration document which has not expired issued by the Home Office to the holder which indicates that the person named is permitted to stay in the United Kingdom for a time-limited period.
10. A passport or other travel document endorsed to show that the holder is exempt from immigration control, is allowed to stay indefinitely in the United Kingdom, has the right of abode in the United Kingdom, or has no time limit on their stay in the United Kingdom.
11. An immigration status document which has not expired containing a photograph issued by the Home Office to the holder with an endorsement indicating that the person named in it is allowed to stay in the United Kingdom indefinitely or has no time limit on their stay in the United Kingdom.
12. A certificate of registration or naturalisation as a British citizen.

List B

1. A full birth certificate issued in the United Kingdom which includes the name of at least one of the holder's parents.
2. A full adoption certificate issued in the United Kingdom which includes the name of at least one of the holder's adoptive parents.
3. A birth certificate issued in the Channel Islands, the Isle of Man or Ireland.
4. An adoption certificate issued in the Channel Islands, the Isle of Man or Ireland.
5. A letter issued by a government department or local authority no longer than 3 months before the date on which it is presented, confirming the holder's name and the earliest known contact between that government department or local

authority and the holder and signed by a named official stating their name and professional address.

6. A letter, issued no longer than 3 months before the date on which it is presented, confirming the holder's name and signed by a British passport holder, stating how long the British passport holder has known the holder, the relationship between them, and giving the British passport holder's name, address and passport number.
7. A letter issued by a person who employs the holder issued no longer than 3 months before the date on which it is presented, which indicates the holder's name and confirming their status as an employee and employee reference number and states the employer's name and business address.
8. A letter issued by a police force in the United Kingdom no longer than 3 months before the date on which it is presented, confirming that the holder has been the victim of a crime and personal documents have been stolen, and stating the crime reference number.
9. A document issued by one of Her Majesty's forces or the Secretary of State confirming that the holder is or has been a serving member of that force.
10. An identity card issued by any of Her Majesty's forces.
11. A letter issued by Her Majesty's Prison Service, the Scottish Prison Service or the Northern Ireland Prison Service confirming that holder has been released from the custody of that service and confirming their name and date of birth .
12. A letter issued within 6 months of discharge by an officer of the National Offender Management Service in England and Wales, an officer of a local authority in Scotland who is a responsible officer for the purposes of the Criminal Procedure (Scotland) Act 1995 or an officer of the Probation Board for Northern Ireland confirming the holder's name and date of birth.
13. A current licence to drive a motor vehicle granted under Part 3 of the Road Traffic Act 1988 (to include the photocard licence in respect of licences issued on or after 1st July 1998) or Part 2 of the Road Traffic (Northern Ireland) Order 1981 (to include the photocard licence).
14. A current firearm or shot gun certificate granted by a chief officer of police under Part II of the Firearms Act 1968, a firearm certificate issued by the Chief Constable under article 5 of the Firearms (Northern Ireland) Order 2004 or a current authority issued by the Secretary of State or Scottish Ministers under section 5 of that Firearms Act 1968 or the Secretary of State under article 45 of the Firearms (Northern Ireland) Order 2004.
15. A certificate issued no longer than 3 months before the date on which it is presented, by the Disclosure and Barring Service under Part V of the Police Act 1997, the Scottish Ministers under Part 2 of the Protection of Vulnerable Groups (Scotland) Act 2007 or the Secretary of State under Part V of the Police Act 1997 in relation to the holder.
16. A document issued no longer than 3 months before the date on which it is presented, by Her Majesty's Revenue and Customs, the Department of Work and Pensions, the Northern Ireland Department for Social Development or a local authority confirming that the holder is in receipt of a benefit listed in section 115(1) or (2) of the Immigration and Asylum Act 1999.

As forgery is an obvious risk, the landlord must also (art 5):

(a) take all reasonable steps to check the validity of the document;
(b) if a document contains a photograph, satisfy themselves that the photograph is of the occupier or prospective occupier;
(c) if a document contains a date of birth, satisfy himself that the date of birth is consistent with the appearance of the occupier or prospective occupier;
(d) take all other reasonable steps to check that the occupier or prospective occupier is the rightful owner of the document;
(e) if the document is not a passport or other travel document, retain a clear and legible copy of the whole of the document in a format which cannot be subsequently altered;
(f) if the document is a passport or other travel document (which is not in the form of a card), retain a clear and legible copy of the following pages of that document in a format which cannot be subsequently altered –
  (i) any page containing the holder's personal details including nationality;
  (ii) any page containing the holder's photograph;
  (iii) any page containing the holder's signature;
  (iv) any page containing the date of expiry; and
  (v) any page containing information indicating the holder has an entitlement to enter or remain in the UK;
(g) if the document is a travel document in the form of a card, retain a clear and legible copy of the whole of that document in a format which cannot be subsequently altered;
(h) record the date on which the copies were taken;
(i) retain a clear and legible copy or copies securely for a period of not less than one year after the residential tenancy agreement has come to an end;
(j) take all reasonable steps to identify any additional occupants of the property at the time the occupier or prospective occupier enters into the residential tenancy agreement.

Given the nature of some of these checks, the landlord or the landlord's agent must actually set eyes on all potential occupiers, either in person or by Skype or other form of live video-link.

If the checks disclose there is a time-limited right to be in the UK, the landlord is required to carry out follow-up checks before the time limit expires. If, at this stage, the occupier cannot produce a document evidencing a right to be in the UK, the landlord should not evict the occupier but must instead make an immediate report to the Home Office at this link: www.gov.uk/report-immigration-crime.

If appropriate documentation cannot be produced, no lease should be entered into. If, however, the potential occupier claims to have an ongoing immigration application or appeal within the Home Office (full details can be found in art 4(b)), that is sufficient provided the landlord is able to obtain a Positive Right to Rent Notice in respect of the occupier from the Home Office's Landlord Checking Service using an online form. A Home Office reference number is needed, for example an application or appeal number.

What all this seems to amount to in practice is that, as a minimum, landlords (or their letting agents) will have to ask to see prospective tenants' passports. And indeed, to avoid race discrimination, the Home Office recommends that

this should be done as a standard procedure in all cases: see *Code of Practice for Landlords: Avoiding unlawful discrimination when conducting 'right to rent' checks in the private residential sector* (October 2014). If no qualifying passport is produced, then the further steps described above will need to be taken.

Checks are required in respect of all adult occupiers and not just the person who signs the lease. The guidance in the *Code of Practice on illegal immigrants and private rented accommodation* (pp 15–16) is as follows:

> Landlords should make reasonable enquiries of the prospective tenant about the people who will live at the property. The enquiries that are reasonable will depend on the specific situation involved. In some circumstances, limited enquiries may be required, for instance if the property being let is a room within the landlord's own home, or a studio apartment, and the tenant says that they alone will be living in the property, then no further enquiries may be required. In other cases, more detailed questions may need to be asked to ensure that only the adults named by them will share the property. Factors the landlord will want to consider will include whether the reported number of occupiers is proportionate to the size and type of property. Landlords are advised to keep a record of enquiries made and response obtained.

If the house is let through a letting agent, it is the agent who is liable for the penalty, but only where the agent was placed under a written obligation to comply with the prescribed requirements on behalf of the landlord (s 25).

Tenements: local authorities empowered to pay defaulter's share

Usually, repairs in tenements can be carried out by majority vote: see Tenement Management Scheme r 2.5. But to go ahead on this basis runs the risk that one or more of the dissenting minority will not or cannot pay his share. What then? Rule 5 of the TMS allows the other owners to grit their teeth and apportion the irrecoverable share amongst themselves. An attractive alternative to that unattractive way of proceeding is that local authorities are empowered, by s 50 of the Housing (Scotland) Act 2006, to step in and pay the missing share, which they can then seek to recover directly. The procedure under s 50, however, is complicated; further, it can only be used where the owners have invoked TMS r 3.2(c) and agreed to collect in the repairs money in advance. It is welcome news, therefore, that a wider and simpler provision – s 4A – is added to the Tenements (Scotland) Act by s 85 of the **Housing (Scotland) Act 2014** (without, however, repealing s 50 of the 2006 Act). Section 4A provides that where a flat-owner is unable or unwilling to pay his share of 'scheme costs' (including repair costs), or cannot be traced, the local authority 'may' pay instead, and then seek recovery from the defaulter. For that purpose the local authority can use a notice of potential liability for costs as well as a repayment charge under s 172 of the Housing (Scotland) Act 2006. How much will this power be used? Given that local authorities are not flush with cash, one fears that the answer will be: not very much.

Discharge of notices of potential liability for costs

Once registered, a notice of potential liability for costs lasts for three years. No provision is made in the legislation for discharge so that, even if the affected owner pays what is due (typically when the flat or other property is to be sold), the notice remains on the Land or Sasine Register until the three-year period has elapsed. Section 86 of the **Housing (Scotland) Act 2014** puts this right by making provision for discharges. This is contained in new subsections which are added to s 10A of the Title Conditions (Scotland) Act and to s 13 of the Tenements (Scotland) Act 2004. The procedure is straightforward. The affected owner executes and registers a notice of discharge in the form prescribed by the **Notice of Potential Liability for Costs (Discharge Notice) (Scotland) Order 2014, SSI 2014/313**. The application for registration must be supported by the person who registered the notice of potential liability for costs in the first place. On registration of the discharge, the notice is extinguished and the notice will be removed from the Register. The registration fee is £60: for this and other registration aspects, see Registers of Scotland, *Update 43* (December 2014, www.ros.gov.uk/__data/assets/pdf_file/0005/5954/update43.pdf).

The new provisions came into force on 16 December 2014: see **Housing (Scotland) Act 2014 (Commencement No 1, Transitional and Saving Provisions) Order 2014, SSI 2014/264**.

Slightly different forms of discharge are prescribed depending on whether the notice of potential liability was registered under the Title Conditions Act or the Tenements Act. In respect of the latter (which is much the more common), the form of discharge is:

> **NOTICE OF DISCHARGE OF A NOTICE OF POTENTIAL LIABILITY FOR COSTS UNDER THE TENEMENTS (SCOTLAND) ACT 2004**
>
> This notice is given by the owner of a flat in relation to which a notice of potential liability for costs has not expired, the liability for costs under section 12(2) of the Tenements (Scotland) Act 2004 to which the notice of potential liability relates has been fully discharged, and the person who registered the notice of potential liability for costs consents to the application for it to be discharged.
>
> Registration of this notice discharges the notice of potential liability for costs described below as it applies to the subjects described below.
>
> **Flat to which the discharge relates:**
> *(see note 1 below)*
>
> **Details of the notice of potential liability for costs (including a description of the work or maintenance) to which the discharge relates:**
> *(see note 2 below)*
>
> **Consenting person who registered the notice of potential liability for costs:**
> *(see note 3 below)*

Signature of consenting person who registered the notice of potential liability for costs:
(see note 4 below)

Date of signing:

Notes for completion
(These notes are not part of the notice)

1. Describe the flat in a way that is sufficient to identify it. Reference can be made to the description in the notice of potential liability for costs. Where the flat has a postal address, the description must include that address. Where title to the flat has been registered in the Land Register of Scotland, the description must refer to the title number of the flat or of the larger subjects of which it forms part. Otherwise, the description should normally refer to and identify a deed recorded in a specified division of the Register of Sasines.
2. Include the date on which the notice of potential liability for costs was registered in the Land Register of Scotland or recorded in the General Register of Sasines. Describe the maintenance or work in the same way as it is described in the notice of potential liability for costs.
3. Give the name and address of the person who registered the notice of potential liability for costs to which this notice of discharge relates, or that person's name and the name and address of that person's agent.
4. This notice must be signed by or on behalf of the person who registered the notice of potential liability for costs and who consents to the registration of this discharge. The signature will require to be self-proving in order to be accepted by the Keeper of the Registers of Scotland.

Standard securities: restrictions on the right to redeem after 20 years

Section 11 of the Land Tenure Reform (Scotland) Act 1974 gives borrowers the right to redeem a standard security over a private dwellinghouse after it has been in force for 20 years. Its purpose – rather oddly, to modern eyes – was to prevent the use of sales, in which the 'price' was repayable over a very long period and secured by a standard security, as a substitute for the leases of more than 20 years which, for dwellinghouses, were banned by s 8 of the Act. See J M Halliday, *Conveyancing Law and Practice* vol 2 (2nd edn, 1997) para 55–65. In practice, if that particular device was ever known it is unknown now. On the other hand, the 20-year rule has caused difficulty, especially in respect of the stipulation in subsection (5) that the amount due on redemption cannot be larger than, in essence, the amount originally advanced plus interest. This does not fit in well with certain types of financing arrangements that now exist such as shared equity loan and equity release schemes. With this in mind, an exemption has been added to s 11 by s 93 of the **Housing (Scotland) Act 2014** in respect of 'a heritable security which is in security of a debt of a description specified in an order made by the Scottish Ministers'. Since the provision was passed, the Scottish Government has consulted on a proposal to apply the exemption to the following Government schemes: the Help to Buy (Scotland) Scheme; Homestake;

New Supply Shared Equity Scheme; Open Market Shared Equity Scheme (for which see www.scotland.gov.uk/Publications/2014/04/7891; and the Help to Adapt Scheme. See www.scotland.gov.uk/Resource/0046/00461603.pdf. No Order has yet been made.

Land Registration etc (Scotland) Act 2012

The 'designated day' for the full commencement of the Land Registration etc (Scotland) Act 2012 was fixed for 8 December 2014 by the **Land Registration etc (Scotland) Act 2012 (Designated Day) Order 2014, SSI 2014/127**. In the run-up to that day a number of other SSIs were passed.

Provision for new Land Register Rules is made in the **Land Register Rules etc (Scotland) Regulations 2014, SSI 2014/150**. The Rules contain (in sch 1) application forms in respect of registration, advance notices, caveats, and variation of the Keeper's warranty, and (in sch 2) the form of notification to be used by prescriptive claimants. The Rules themselves deal with advance notices (rr 2–6), registration (rr 7–17), and prescriptive claimants (r 18). They are noticeably shorter than the Land Registration Rules 2006 which they replace because, by (deliberate) contrast to the Land Registration (Scotland) Act 1979, much of the administrative detail is contained in the 2012 Act itself.

The fees for the new system are set out in the **Registers of Scotland (Fees) Order 2014, SSI 2014/188**. The basic fee for registration remains unchanged. The **Registers of Scotland (Information and Access) Order 2014, SSI 2014/189,** makes provision for public access to the Land Register, and for 'plain' copies of title sheets and registered deeds (among other things). As well as correcting some slips in the 2012 Act, the **Land Registration etc (Scotland) Act 2012 (Incidental, Consequential and Transitional) Order 2014, SSI 2014/190,** amends the Register of Sasines (Application Procedure) Rules 2004, SSI 2004/318 (amended by SSI 2006/568), to provide forms for the Register of Sasines in respect of advance notices. Further slips are picked up by the **Land Registration etc (Scotland) Act 2012 (Amendment and Transitional) Order 2014, SSI 2014/346,** which also amends the Land Register Rules etc (Scotland) Regulations 2014 and the Registers of Scotland (Fees) Order 2014. Finally, the **Land Register of Scotland (Rate of Interest on Compensation) Regulations 2014, SSI 2014/194**, set the rate of interest on compensation payments by the Keeper at 1% above the Bank of England base rate.

Electronic deeds

Far-reaching amendments made to the Requirements of Writing (Scotland) Act 1995 by the Land Registration etc (Scotland) Act 2012, in force since 11 May 2014 (see **Land Registration etc (Scotland) Act 2012 (Commencement No 2 and Transitional Provisions) Order 2014, SSI 2014/41**), mean that electronic deeds are now, for the most part, an alternative to paper ('traditional') deeds. See **Commentary** p 140. In 2014 the primary legislation was supplemented by the **Electronic Documents (Scotland) Regulations 2014, SSI 2014/83** and by

the **Land Register of Scotland (Automated Registration) etc Regulations 2014, SSI 2014/347**.

High Hedges (Scotland) Act 2013

The High Hedges (Scotland) Act 2013 was brought into force on 1 April 2014 by the **High Hedges (Scotland) Act 2013 (Commencement) Order 2014, SSI 2014/54**. In order to cover the brief few months thereafter during which the Land Registration (Scotland) Act 1979 was still in force, the **High Hedges (Scotland) Act 2013 (Supplementary Provision) Order 2014, SSI 2014/55,** provides that no indemnity is payable by the Keeper under s 12(1) of the 1979 Act in respect of an inaccuracy in a notice of liability for expenses (2013 Act s 26(1)) or a notice of discharge (2013 Act s 29(2)).

A full account of the High Hedges Act can be found in *Conveyancing 2013* pp 163–67. For appeals against the refusal to issue a high hedge notice, see p 87 below.

Lands Tribunal fees

The **Lands Tribunal for Scotland Amendment (Fees) Rules 2014, SSI 2014/24,** adds new fees in respect of applications, referrals and other procedure under the Long Leases (Scotland) Act 2012 (as to which see p 174 below) and the Land Registration etc (Scotland) Act 2012.

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, the Title Conditions (Scotland) Act 2003 (Rural Housing Bodies) Amendment Order 2008, SSI 2008/391, and the Title Conditions (Scotland) Act 2003 (Rural Housing Bodies) Amendment Order 2013, SSI 2013/100. The **Title Conditions (Scotland) Act 2003 (Rural Housing Bodies) Amendment Order 2014, SSI 2014/130,** now adds Yuill Community Trust CIC, and the **Title Conditions (Scotland) Act 2003 (Rural Housing Bodies) Amendment (No 2) Order 2014, SSI 2014/220,** adds Mull and Iona Community Trust.

Following these amendments, 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
Mull and Iona Community Trust
North West Mull Community Woodland Company Limited
Orkney Islands Council
Pentland Housing Association Limited
Rural Stirling Housing Association Limited
Taighean Ceann a Tuath na'Hearadh Limited
The Highland Housing Alliance
The Highlands Small Communities' Housing Trust
The Isle of Eigg Heritage Trust
The Isle of Gigha Heritage Trust
The North Harris Trust
Tighean Innse Gall Limited
West Harris Trust
West Highland Housing Association Limited
West Highland Rural Solutions Limited
Yuill Community Trust CIC

PART III

OTHER MATERIAL

OTHER MATERIAL

Legal Writings (Counterparts and Delivery) (Scotland) Bill

Passed by the Scottish Parliament on 24 February 2015, this Bill implements the Scottish Law Commission's *Report No 213 on Formation of Contract: Execution in Counterpart* which was published in April 2013. The Bill makes clear that execution in counterpart (ie where different parties sign different copies of the same document) is competent (s 1). It also removes the doubts raised by *Park Ptrs (No 2)* [2009] CSOH 122, 2009 SLT 871 (*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 (s 4). The chosen means, however, must have been one which the recipient has agreed to accept or, failing such agreement, be reasonable in all the circumstances.

Community Empowerment (Scotland) Bill

As its name suggests, this Bill is intended to empower communities and community bodies in a number of ways. In particular, provision is made for community bodies to acquire land and buildings. To that end, three different routes are to be made available.

In the first place, the community right to buy contained in part 2 of the Land Reform (Scotland) Act 2003, is to be extended from rural areas to the whole of Scotland (s 27, amending s 33 of the 2003 Act).

Secondly, and unlike the community right to buy (which requires a willing seller), community bodies will be able to buy land (but not a person's home) which the owner does not wish to sell if, in the opinion of the Scottish Ministers, the land is wholly or mainly abandoned. For this purpose a new part 3A (comprising ss 97A–97Z) is inserted into the 2003 Act (s 48). The procedure involves an application to Ministers, which is registered in a Register of Community Interests in Abandoned or Neglected Land (ss 97F and 97G). Ministers cannot approve an application unless satisfied that the acquisition is in the public interest and compatible with the achievement of sustainable development, and that, if the current owner were to remain owner, that ownership would be inconsistent with sustainable development (s 97H). Market value is payable, calculated by a valuer in accordance with s 97S. If the owner refuses to co-operate, the disposition can be signed by the clerk to the Lands Tribunal (s 97P(6)).

Thirdly, community bodies will be able to request local authorities, the Scottish Government, or a whole range of other public bodies (listed in sch 3) including the Scottish Court Service, the Scottish Police Authority, and Scottish Water, to sell or lease to them land and buildings (s 52). In considering such an 'asset transfer request', the public body is required to assess the community body's proposals against the current use or any other proposal, and must agree to the request unless there are reasonable grounds for refusal (s 55).

The opportunity is also taken to reform and simplify the rules for the community right to buy contained in part 2 of the Land Reform (Scotland) Act 2003 (ss 28–47). The changes include:

- making it easier for communities to define their 'community' in ways other than by postcode;
- extending the legal entities that can use the community right to buy provisions to include Scottish Charitable Incorporated Organisations (SCIOs), and allowing for other legal entities to be added by subordinate legislation;
- in relation to the ballot required after the right to buy has been triggered, providing for the Scottish Ministers to arrange for this to be conducted by an independent third party, and for Ministers to meet the cost of this, making the community right to buy process easier for community bodies;
- extending the period available to complete the right to buy;
- replacing the 'good reasons' test for 'late' applications with one which sets out clear requirements to be met by community bodies when submitting a late application;
- making the valuation process more robust by allowing for counter-representations between the landowner and the community body;
- giving Ministers discretion to recover the cost of the independent valuation from the landowner where the landowner has withdrawn the land from sale after the valuer has been appointed, thus deterring landowners from allowing the process to proceed where the land is not genuinely being offered for sale.

The Bill also contains provisions on common-good property, a matter of increasing public interest and concern. Local authorities are directed to compile a register of all property which is held as part of the common good, and to make this available for public inspection free of charge (s 63). In addition, before taking any decision to dispose or change the use of common-good property, the local authority must publish details of its proposal, notify community councils and any community body with an interest in the property, and consider representations.

Finally, part 7 of the Bill replaces the existing legislation on allotments, mainly contained in the Allotments (Scotland) Act 1892 (as amended), with up-to-date (and generally simpler) provisions. Part 7 places a duty on local authorities to hold and maintain waiting lists for allotments, and to take reasonable steps to provide more allotments if the waiting list exceeds certain

trigger points. It also prevents local authorities from disposing of or changing the use of an allotment site without the consent of the Scottish Ministers, thereby providing a level of protection to allotment sites. In future, local authorities will have to publish an annual allotments report and a food-growing strategy, setting out land that has been identified for allotments or other community growing in the local authority's area and how it will meet demand (ss 77–79). This builds on the Scottish Government's *National Food and Drink Policy – Recipe for Success* (2009) and on the deliberations of the Grow Your Own Working Group.

The Bill is at an early stage having completed Stage 1 on 3 February 2015.

High hedges appeals

Since the High Hedges (Scotland) Act 2013 (for which see *Conveyancing 2013* pp 163–67) came into force on 1 April 2014, local authorities have been faced with applications by those who seek to have neighbours ordered, by means of a 'high hedge notice', to cut back or cut down their hedge. To assist decision-making, the Scottish Government has issued a 41-page booklet entitled *High Hedges (Scotland) Act 2013: Guidance to Local Authorities* (www.scotland.gov.uk/Publications/2014/06/1160). Where an application is refused, the applicant has a right of appeal to the Scottish Ministers, and already a number of appeals have been decided or are pending. They can be found by inserting the case reference 'HHA' into the search engine at www.dpea.scotland.gov.uk/casesearch.aspx?T=1. Although we do not in general intend to provide coverage of what are likely to be highly fact-specific cases, we mention here one case, decided on 19 November 2014, as a typical example of the issues that can arise.

The back garden of the applicant's house at 8 Braid Hills Crescent, Edinburgh, was adjacent to the back garden of 179 Braid Road. The gardens were separated by a beech hedge on number 179 which, at the time of the application, was between five and six metres in height. In determining the application, the City of Edinburgh Council relied mainly on the guidance in *Hedge Height and Light Loss* (2005) by the Building Research Establishment (BRE). This quantifies light loss in relation to the height of a hedge and its distance from the house. On that basis the Council concluded that the hedge would have had to be 6.54 metres in height for it to cause significant loss of light.

In allowing the appeal, the Reporter for the Scottish Ministers (Mike Croft) criticised what he regarded as an over-reliance on the issue of light. The statutory test, in s 6(5)(a) of the 2013 Act, was 'whether the height of the high hedge adversely affects the enjoyment of the domestic property which an occupant of that property could reasonably expect to have'. The Reporter continued (para 5):

> Enjoyment of a domestic property is a wide concept. Light levels to gardens and dwelling interiors are important components, but not the only ones. What may well be significant is what people see from their home or garden, and whether a feature

> they see, such as a hedge, is dominant and overbearing. Notwithstanding the BRE guidance, there is no objective way of assessing these sorts of impacts of a hedge on the visual environment. Although the council refers to factors other than light in this case, I have considerable sympathy with the appellant's criticism of what appears to be a very strong emphasis in the council's case on the BRE methodology.

In the Reporter's view, a hedge which was higher than five metres was indeed, in this particular setting, overbearing and dominant. Other relevant factors were the effect on sunlight in the garden (as opposed to the house), the amount of leaf-fall from the hedge on to the appellant's property, and the cost which the appellant had to bear of professional pruning of those branches which encroached on his garden. As it happens, the owner of number 179 had now cut the hedge back to 4.5 metres. That, concluded the Reporter after a site visit, was the maximum height that should be allowed. Accordingly, he quashed the Council's decision but, in view of the reduced height, did not order the issuing of a high hedge notice.

Registers of Scotland

The 2012 Act goes live

It can hardly be necessary to mention that the Land Registration etc (Scotland) Act 2012 came fully into force on the 'designated day' (8 December 2014). By what we take to be no more than a coincidence, the first houses to be registered were those of Fergus Ewing MSP, Minister for Business, Energy and Tourism, and Sheenagh Adams, Keeper of the Registers of Scotland. Full coverage of the new Act will be given in our book on *Land Registration* which is to be published by Avizandum Publishing Ltd in 2015. In the run-up to the designated day, Registers of Scotland provided a superb suite of explanatory materials (www.ros.gov.uk/about-us/2012-act/general-guidance), which they have continued to refine and update, as well as putting on excellent seminars in different parts of the country. Some further coverage of the 2012 Act is given at p 79 above and p 146 below.

All property to be on the Land Register within 10 years (perhaps)

In its final report published on 23 May 2014 (for which see p 98 below), the Land Reform Review Group recommended 'that the Scottish Government should be doing more to increase the rate of registrations to complete the Land Register, including a Government target date for completion of the Register, a planned programme to register public lands and additional triggers to induce the first registration of other lands' (p 34). To everyone's surprise, the response by the Scottish Government, two days later, went a great deal further than this:

> All of Scotland's land will be registered for the first time which will provide a clear understanding of who owns our land. An efficient, effective and indemnified land registration system is recognised by the World Bank as one of the most important

factors in achieving economic development and business growth. The Scottish Government have asked the Registers of Scotland to prepare to complete Scotland's Land Register within 10 years and have committed to registering all public land within 5 years. 26 per cent of the land mass of Scotland is currently on the Land Register.

How this ambitious target can be achieved is less clear. A certain amount can be done by the new triggers for first registrations contained in the Land Registration etc (Scotland) Act 2012 which, in a growing number of cases, will lead to the registration of a plot ('automatic plot registration') even where the deed being registered concerns only a subordinate real right such as a lease or standard security. But for the most part it will have to be done by non-transactional registration, whether on a voluntary basis by the owner (stimulated, perhaps, by a reduced fee or by fear of something worse), or by the Keeper without the owner's consent or, it may be, participation. The power to carry out such 'Keeper-induced registration' was conferred by the 2012 Act s 29, but it was conceived of as a last resort and not as the main means of getting land on to the Register. That is likely to have to change.

In July 2014 Registers of Scotland launched a public consultation on *Completion of the Land Register* (for the paper and the responses, see www.ros.gov.uk/consultations/completion-of-the-land-register). At the time of writing, RoS's final report was still awaited. The consultation document contains much of interest in relation to the volume of registration business and the extent of Land Register coverage, both nationally and by county. If the 10-year target is to be met, RoS estimates that there will have to be 113,000 property registrations per year for each of the 10 years. By way of comparison, the average number of first registrations per year for the last decade has been 45,000. Inevitably, there must be serious concerns both as to whether the 10-year target can be met, and as to whether fast registration will also produce accurate registration. The verdict of correspondents in the June issue of the *Journal of the Law Society* (p 6) was that 'Scotland heads towards a third class land register' and that a register done so fast will be 'a botched job that will lead to a two-tier register that cannot possibly be clear and reliable'.

Annual Report 2013–14: a return to profit for RoS

Registers of Scotland has returned to profit for the first time since the financial crisis began. According to the 2013–14 *Annual Report and Accounts*, RoS made a profit of £11 million in the last financial year, compared to a loss of nearly £2.5 million in 2012–13. The amount paid out by way of indemnity was £503,733, representing 82 separate claims (p 34). A further 15 claims were rejected.

The accounts disclose the surprising information that 'freehold land and buildings were revalued at £7,960k' (p 89). Can it really be true that the agency responsible for land registration in Scotland owns land only in England?

Fees frozen until 2017

Reflecting RoS's return to profitability, Fergus Ewing MSP, Minister for Energy, Enterprise and Tourism, announced in August 2014 that the fees charged by RoS will be frozen until April 2017, maintaining fees at the same level as 2011.

Dodgy deeds: the new policy

If a deed presented for registration is invalid, the Keeper is bound, under the new law, to reject it, and (like all decisions in relation to applications) to do so without delay: see Land Registration etc (Scotland) Act 2012 ss 23(1)(b), 25(1)(a), 26(1)(a), and 35(3). Further, the Keeper's decision is to be made on the basis of the legal situation as at the date of the application, not taking into account later developments. The only case in which an invalid deed can be accepted is in respect of *a non domino* dispositions, and then only where the requirements of s 43 (prescriptive claimants) have been met.

Sometimes, however, a deed may arouse suspicion without it being clear whether the deed is actually invalid. *Update 42* sets out the Keeper's policy in respect of such deeds: see www.ros.gov.uk/__data/assets/pdf_file/0013/6430/update42.pdf.

Potentially the Keeper can (i) reject the application, (ii) accept the application, or (iii) accept the application but only on the basis of a limitation on the Keeper's warranty. Where the risk is simply that the deed might be *voidable*, the Keeper's response will be (ii); this is because a voidable deed is good until reduced, and a later reduction (which, under the new law, leads to registration and not rectification) would not result in a claim under the Keeper's warranty. Where, however, the risk is that the deed might be *void*, the Keeper will make a decision based on a balance of probabilities. Response (iii) will be used only where the Keeper is in 'significant doubt' as to validity. *Update 42* gives the following guidance as to the meaning of 'significant doubt' in this context:

> There has to be more than simply a suspicion on the part of the Keeper. There requires to be some evidence to support a suspicion. An unsubstantiated telephone call from a member of the public alleging that a deed is void, for example, would not give rise to 'significant doubt'. But a letter from a person acting in an official capacity (a solicitor, the Law Society, the AiB, for example) setting out that there are reasons to believe that a deed presented for registration is flawed, would give rise to doubt significant enough to justify limiting warranty.

One way or another, the Keeper will make an immediate decision. The former practice of holding applications 'in abeyance', especially if litigation on the deed was in prospect, has now been abandoned.

Lender Exchange

After a year of controversy, Lender Exchange (www.lenderexchange.co.uk/) opened its (virtual) doors on 4 August 2014. The idea in itself seems unobjectionable. Instead of having to provide what is often the same information

to large numbers of individual lenders, solicitors' firms which wish to be included on lenders' panels provide the information to Lender Exchange which then makes it available to individual lenders. The decision as to whether to admit particular firms remains one for the lenders; the role of Lender Exchange is simply to hold and supply information.

The difficulty lies in the details. In its monthly *Professional Practice Updates* (www.lawscot.org.uk/members/member-services/professional-practice/professional-practice-updates/) the Law Society has raised a number of different issues. The state of play towards the end of 2014 was summarised in an article by the Law Society's Alison Mackay at p 48 of the October issue of the *Journal of the Law Society of Scotland*. Among the Law Society's concerns have been: lack of consultation; the cost to firms of paying the annual fee (the size of which depends on the size of the firm); the administrative time involved; the risks involved in supplying confidential or commercially sensitive information; and the potentially onerous nature of some of Lender Exchange's standard terms and conditions (available at www.lawscot.org.uk/media/334623/lender-exchange-final-terms-and-conditions.pdf). When the terms and conditions were still in draft form, the Law Society took legal advice on them and published the result: see *Professional Practice Update*, May 2014. This has since been updated in the light of the final version: see *Professional Practice Update*, October 2014.

Not everyone has been hostile. While accepting the difficulties to which Lender Exchange might give rise, Robert Rennie and Stewart Brymer draw attention to what they see as potential advantages (see (2014) 59 *Journal of the Law Society of Scotland* Feb/33):

> Lender Exchange is designed to allow lenders to communicate better with solicitors on their panels by electronic means rather than the present outdated requirement that fax be used. An added benefit is that solicitors should also be able to communicate in a secure manner with other solicitors on the portal, thus creating a secure dealing room on which conveyancing transactions can be carried out. This would be a good example of solicitors and lenders working together, irrespective of any decision with regard to separate representation. This would be a positive step forward, so long as it is introduced as a result of collaboration with and input from the Society on behalf of members. Anything less is a missed opportunity.

Lender Exchange is organised by Decision First Ltd, an English joint venture company between Decision Insight Information Group and First Title plc. So far only two (admittedly major) lenders are signed up – Lloyds Banking Group and Santander – but it is understood that they are likely to be joined by TSB, Nationwide, RBS, and Virgin Money.

CML *Lenders' Handbook*

Amendments from 1 December 2014

The undernoted amendments have been made with effect from 1 December 2014 (see www.cml.org.uk/cml/handbook). These appear to be the first fruits

of the ongoing negotiations between a CML Working Party of the Law Society and the CML.

Paragraphs 1.6; 1.7; 5.1.1; 5.8.1; 5.11; 9.2; 16.2.2

The removal of term proprietor and replacement with 'owner' or 'seller' as necessary, as proprietor was being used for both seller and buyer which could cause confusion. The addition of 'administrator' in the list at 5.5.1.

Section 3 Safeguards

To update s 3.1 to remove reference to independent licensed conveyancers which no longer exist in Scotland. Paragraph 3.2 was updated to ensure consistency across jurisdictions. It removes reference to 'note paper' and refers instead to the address 'provided to you'. This was changed to deal with the issue where the correspondence is in the main electronic, and to encourage the solicitor to check against any/all the addresses they are provided with as lenders have seen the use of both fictitious letter paper and addresses.

Paragraph 4.1.1 Valuation of the property

An amendment to clarify that solicitors and conveyancers are not expected to pick up any discrepancies between the valuation report they receive and what the lender has, if the lender doesn't supply the report directly to them.

Paragraph 5.4 Planning and building regulations

To update references with regards to building and planning regulations

Paragraph 5.7.1 title conditions

To replace obsolete terminology of 'real burden'.

Paragraph 5.9.1

An additional sentence has been inserted to clarify how solicitors should report if the borrower is in receipt of a gift or loan.

Paragraph 6.6 Properties let at settlement

Updating references to relevant legislation and procedures under that legislation at paragraphs 6.6.3; 6.6.7.

Paragraph 6.14 Insurance

This section has been radically simplified to remove the list of risks and range of Part 2 questions in relation to buildings insurance requirements. A part 2 has been retained to allow for lenders to include specific requirements

Paragraph 11.2 The standard security

Amends to clarify the responsibilities of the solicitor in relation to explaining the mortgage documents to the borrower.

Paragraph 16.4 Properties to be let after settlement

A minor clarification adding in the term 'borrower'.

The most recent previous amendment of the *Lenders' Handbook* was on 8 July 2013: see *Conveyancing 2013* p 154.

No amendments for the Land Registration etc (Scotland) Act 2012

The CML website (www.cml.org.uk/cml/handbook) contains the surprising information that 'the amendments to the Handbook for Scotland do not include amendments dealing with the Land Registration (Scotland) Act 2012 but Lenders have been advised to set out their requirements in their part 2 responses to clause 14'. In other words, it is up to individual lenders to make changes if they wish to do so.

Law Society review of client protections on house transactions

In May 2014 the Law Society commissioned an independent review of the consumer protections in place for clients buying and selling residential property, to be undertaken by retired Sheriff Principal Edward Bowen QC. The review follows high-profile and complex cases in Aberdeenshire and West Lothian where clients were left without proper title to land.

Sheriff Bowen's remit is:

> To review the circumstances surrounding the housing development on Happy Valley Road in Blackburn and the case of Mr Sinclair Brebner in Aberdeen; and
>
> (1) consider what consumer protections have been in place to assist these and other similar individuals who have been left without valid title following the purchase of their respective properties;
> (2) evaluate whether the protections offered by the Law Society and/or others are sufficient, and what if any changes the Law Society should now make to its own policies, rules and procedures in order to maintain public confidence;
> (3) assess how the relevant legislative environment has changed since these cases occurred and what impact any such changes may have had in terms of minimising the risk of such issues arising in the future;
> (4) examine, in discussion with the Society's executive team and Future of Conveyancing Working Party, what further changes may be required, either through reform of the law or conveyancing practice, in order to reduce the risk of such circumstances arising again;
> (5) consider what other specific action the Society should now reasonably take to help avoid such issues from arising in future, including the potential for further law reform;
> (6) make any other relevant recommendations which respond to the issues arising from the review.

Standard clauses

Scottish standard clauses

An early achievement of the Law Society Working Party on the Future of Conveyancing (see *Conveyancing 2013* pp 77–78) was the publication, in December 2014, of an all-Scotland set of standard clauses for offers in residential conveyancing: the 'Scottish Standard Clauses' (available at www.lawscot.org.uk/media/410027/scottish-standard-clause.pdf). This is based on the Combined

Standard Clauses which, in 2009, combined the existing standard clauses used in Glasgow and Edinburgh, but changes have been made to accommodate the clauses used in other parts of the country. A particularly welcome feature of the Scottish Standard Clauses is that they were timed to coincide with the commencement of the Land Registration etc (Scotland) Act 2012, and they make appropriate provision for that Act.

Updated PSG styles

The Property Standardisation Group (www.psglegal.co.uk/) has updated its admirable suite of styles in the light of the Land Registration etc (Scotland) Act 2012.

Government review of home reports

On 5 December 2013 the Scottish Government launched the promised five-year review of home reports. This comprised: (i) a public consultation and (ii) a research study.

Public consultation

The public consultation (www.scotland.gov.uk/Resource/0043/00439502.pdf) sought views on matters such as whether the cost of home reports was delaying or preventing sellers putting houses on the market, whether home reports were 'a useful marketing tool' for sellers, and to what extent they were accepted by lenders. The emphasis was on making changes to what is there already, and there was no suggestion that home reports might be scrapped. 144 responses were received and can be accessed at www.scotland.gov.uk/Topics/Built-Environment/Housing/BuyingSelling/Home-Report/HRReview.

In its response, the Law Society repeated its opposition to home reports, questioned whether they had met their original objectives, judged them a barrier to sale especially if the seller was in financial difficulties, and thought that, far from reducing multiple surveys – a problem which had already largely been solved by 'subject to survey' clauses in missives – home reports had actually increased their incidence. This was because the single survey quickly became out of date (a problem for the seller), while some mortgage lenders would not accept home report valuations and others insisted that they met certain criteria (a problem for the buyer). The lack of clarity as to lenders' attitudes was itself a serious problem (p 8):

> The absence of a consistent policy adopted by all lenders with regard to home reports and mortgage valuations causes serious problems. Purchasers and their agents simply cannot be sure that the valuation on which they are relying when submitting their offer will be acceptable to their lenders, who may refuse to accept the mortgage valuation, even if it is provided by a firm on their existing surveyors panel. As a result, offers 'subject to survey' are still commonplace, and there can often be substantial delays in obtaining clarification from lenders as to whether or not a home report valuation is acceptable to them, and even greater delays if they insist upon instructing their own report. Frequently this leads to delays in conclusion of

missives, which substantially undermines what has historically been one of the great benefits of the Scottish legal system.

Many other responses, however, were more favourable. An analysis of all the responses, published on 7 May 2014 (www.scotland.gov.uk/Publications/2014/05/2311), found that 'broadly a majority of respondents supported and valued home reports'. Key issues to emerge from the consultation were:

- A clear majority of respondents thought the home report is meeting its original objectives and that those objectives are still appropriate. A number of respondents pointed to the continuing importance of meeting the original objectives, including through the provision of robust and comprehensive information, and the use of a standardised approach with which both buyers and sellers will become increasingly familiar.
- The majority of respondents did not support the establishment of a national register of home reports.
- A clear majority of respondents did not think that the upfront costs are preventing potential sellers from putting their property on the market. However, most did think there are issues with the majority of home reports being commissioned through selling agents due to lack of transparency and perceived conflict of interest.
- Most respondents did not think the requirement for a home report before marketing is leading to delays in properties coming on to the market and did think home reports are a useful marketing tool for sellers.
- The majority of respondents thought the current enforcement arrangements and redress options for the home report are reasonable and appropriate.
- The majority of respondents thought the three documents within the home report are appropriate and useful. A very clear majority of respondents thought the single survey valuation to be useful with further comments often suggesting the valuation is potentially the most important element of a home report.

Research study

The research study, commissioned from Ipsos MORI, was published on 7 January 2015: see www.scotland.gov.uk/Resource/0046/00467130.pdf. As well as analysing market-performance data, the study surveyed buyers and sellers, and carried out in-depth interviews and focus groups among housing industry professionals and others. While buyers and sellers were found to be 'positive' about the content of home reports, industry professionals 'tended to be more critical' (p 5). The property questionnaire was too long. 'In order to limit surveyor liability, the writing in the home report was often "neutral" or "bland" and contained too much caveating.' Furthermore (p 5):

> Many industry professionals were concerned by what they saw as a conflict of interest between the buyer, the seller and the surveyor. The surveyor must produce a report that will be used by both the seller and buyer, two parties that have opposing interests in the property transaction – particularly in regards to the valuation and the repair

categories. Some front-line professionals reported that this led to pressure being placed on surveyors to produce more favourable condition reports or reach a certain valuation. However, they did not think that this was widespread and was mainly restricted to the Central Belt.

The hope that the single survey would encourage repairs and so improve the housing stock did not seem to have been met, at least in respect of sellers: the evidence suggested that half of all sellers paid £250 or less on repairs and that only 10% spent more than £1,000 (p 8). On the other hand, 75% of buyers carried out repairs.

On the basis of the research findings, the report made the following recommendations (p 7):

- the home report should be reduced in size, especially the property questionnaire;
- a front summary page should be included, providing the key findings together with a clear explanation of what the home report is and is not;
- more information and guidance should be provided to deal with misperceptions in order to manage buyer and seller expectations;
- retain the current objectives, but consider a further objective around energy efficiency;
- consider incorporating the classification in the energy report into the main repairs category to give it more prominence;
- the Scottish Government should reconvene the Home Report Implementation Group to consider how conflicts of interest should be resolved and to provide guidance on how to avoid future conflicts.

The report begins with the warning that the views expressed 'are those of the researcher and do not necessarily represent those of the Scottish Government or Scottish Ministers'. At the time of writing the views of the Scottish Government were still awaited.

Goodbye short assured tenancies: hello security of tenure?

The private rented sector ('PRS') in Scotland has more than doubled in size in the past decade and now covers 13% of homes. This increase in size has been matched by an increase in attention by government and parliament. Developments in the last few years 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), (iv) tenant information packs (2013), (v) a much-enhanced jurisdiction for the Private Rented Housing Panel (2014: see p 69 above), and (vi) a registration system for letting agents (2014: see p 70 above). Now the Scottish Government is consulting on a new form of tenancy to replace the assured and short assured tenancies which, since 1989, have been the only form of PRS tenancy available for ordinary houses. This follows on from *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), published in 2013 (see

Conveyancing 2013 pp 89–90), and from the work of the Government's PRS Tenancy Review Group, which reported in May 2014 (www.scotland.gov.uk/Topics/Built-Environment/Housing/privaterent/government/Tenancy-Review/report).

In the consultation document (www.scotland.gov.uk/Resource/0046/00460022.pdf) the headline proposal is the reinstatement of security of tenure. Currently, 94% of all PRS tenancies are short assured tenancies in which, once the contractual period of let comes to an end, the landlord can terminate the tenancy as of right: see Angus McAllister, *Scottish Law of Leases* (4th edn, 2013) para 17.4. Under the consultation proposals, the right to terminate would be lost, so that tenants 'feel secure in their homes' and are 'confident about asking their landlord to do necessary repairs without fear of being asked to leave at the end of the lease period' (para 29). Instead, as with assured tenancies, a 'statutory' tenancy would begin once the contractual tenancy came to an end, and landlords could bring that tenancy to an end only on specified grounds. These grounds, however, would be mandatory rather than, as in some cases at the moment, within the discretion of the court. The proposed new grounds would be (para 52):

- landlord wants to sell;
- mortgage lender wants to sell because the landlord has broken the loan's conditions;
- landlord or family member wants to live in the property;
- refurbishment;
- change of use;
- tenant has failed to pay full rent over three months;
- tenant has displayed antisocial behaviour;
- tenant has otherwise broken the tenancy agreement.

The core of the tenancy agreement itself would have to conform to a statutory style (the drafting of which, we would observe, may be challenging), although it will be possible to add 'extra clauses specific to the property and parties involved' (para 62). The statutory style would 'state all the current statutory requirements for a private tenancy as detailed in all the relevant legislation', eg the repairing standard; and it would 'come with a prescribed statutory guidance note that would further explain all the provisions in the document' (para 62). This would make it possible to dispense with tenant information packs.

A number of other changes are proposed. The minimum period of let which a landlord could offer would be six months, although a tenant would be able to ask for less (paras 37–41). And where a (contractual) tenancy continues by tacit relocation, it would no longer be possible to limit the extensions, in the contract, to a period shorter than the length of the lease itself (paras 31–35).

The centenary of the Rent Acts falls in 2015. Fittingly, these new proposals continue the familiar cycle of state intervention followed by state withdrawal followed by more state intervention. No proposal is made, so far, to return to rent control, the other key aspect of Rent Act intervention, although consultees are invited to express their views 'on rent levels in the private rented sector in Scotland' (p 34). (Statistics on PRS rent levels in the period 2010–14 can be found

at www.scotland.gov.uk/Publications/2014/11/2313). In this as in other matters it will be fascinating to see what happens next.

Land reform (1): the Land Reform Review Group

The LRRG

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, ranging from a couple of paragraphs to 266 pages from Scottish Land and Estates (www.scotland.gov.uk/Publications/2013/07/2790, and, for an analysis, www.scotland.gov.uk/Publications/2013/05/4519). An interim report was published by the LRRG in May 2013 (www.scotland.gov.uk/Publications/2013/05/4519) and was widely castigated by the land-reform lobby for what was seen as a lack of ambition. A year later that criticism is met to some degree by the LRRG's final report, *The Land of Scotland and the Common Good* (www.scotland.gov.uk/Resource/0045/00451087.pdf), which was published in May 2014.

The final report

In many ways the final report is an impressive document. Working under serious constraints both of time and resources, as is openly acknowledged (para 12), the LRRG had to consider an impossibly wide range of issues. Yet in its 263 pages the report manages to assemble a great deal of information, and to identify a number of key issues. Less impressive, perhaps inevitably, is the quality of the analysis. Too often the argument is weak, one-sided, superficial, and made without much reference to evidence. Many of the final recommendations are rather general in character. Where they are not, they should be seen only as a starting-point for discussion rather than as considered conclusions.

As the title chosen for the report indicates, the idea underlying the LRRG's work is that of the 'common good'. This is said to describe 'a comprehensive and complex concept which brings into its embrace questions of social justice, human rights, democracy, citizenship, stewardship and economic development' (p 235). The LRRG continues (p 236):

> Land is a resource not just for the present generation, but also generations to come. It is also home to other species. Care of the land therefore calls for a strong sense of stewardship. Finally, successful economic development is also a critical element of the common good: the way in which land is used to generate economic activity and sustainable livelihoods is, and will be, crucial to an economically successful Scotland. The Review Group therefore regards the common good as the general outcome which informs and drives land reform. It has guided decisions about which recommendations the Group should support, without the suggestion that any single action will realize the common good.

Among the 62 recommendations there is a call for more statistical information as to patterns of land ownership, and for a speeding-up of the task of getting

land on to the Land Register. The Crown Estate Commissioners should cease to operate in Scotland, and Crown rights should be pared back. Community control over land and buildings should be encouraged and extended. The law of riparian rights should be reformed to reflect the public interest. So should the law of common good, in the narrow, technical sense of that expression. Crofting law should be modernised and simplified. The exemption from non-domestic rates for agricultural, forestry and other land-based businesses should be reconsidered. The idea of a land value tax should be explored. In the interests of transparency, non-EU companies should be barred from acquiring land in Scotland, though it is accepted that the gains would be modest: 'The change, while it would not necessarily reveal the final beneficiary owner of the EU entity, would ensure the entity is governed by EU law and that there are named Directors legally responsible and accountable for the affairs of the company' (p 36).

Particularly controversial is the suggestion that there should be an upper ceiling on the amount of land which can be owned by any one person (p 166):

> The Group considers that there is a scale at which the ownership of a large extent of Scotland's land by one private owner should be considered inappropriate, and contrary to the public interest. Many owners of substantial land holdings take their responsibilities to the wider society and the local community seriously and manage their land well. However, this should not disguise the fact that they do so at their own discretion and that the present arrangements provide limited sanctions against those who do not. This situation arises because of the degree of 'monopoly' control large land owners effectively have over land and other community interests, in ways that can determine the future of whole localities.

No actual figure, however, is suggested.

An unexpected feature of the report is its attention to urban land. There is a proposal to empower local authorities to make a 'compulsory sale order' over vacant or derelict land. There is support for assisting site assembly by developers through a rule, such as exists in Hong Kong, by which a developer who has acquired 90% of the property interests in a target site is able to acquire the remaining 10% by application to the Lands Tribunal rather than by negotiation with the owners. There is a recommendation for the creation of a Housing Land Corporation which, working alongside local authority planners, 'would achieve its public interest objective by taking land into public ownership at a low but fair price, investing in the necessary infrastructure, and then selling the land to house builders as serviced sites or plots' (p 136).

Finally, the report argues that, rather than proceed by piecemeal reform, the Government should devise a 'National Land Policy', with a permanent 'Scottish Land and Property Commission' to 'provide a single, overall and integrated focus on the different aspects of Scotland's system of land ownership, including land information, property law, land use, fiscal measures and land markets' (p 238). Apart from anything else, such a Commission would be able to tackle issues which the LRRG lacked time to consider (p 237):

> The extent of our remit, and the influence of land in so many aspects of the lives of the people of Scotland, meant that the Review Group was unable to examine sufficiently all the ideas which emanated from various sources from submissions to our call for evidence, from the Group's advisers and from the Group members themselves. Among these were a proposal for a residency requirement for larger land owners, a requirement for development and land use plans as an integral part of the acquisition of large estates, and a proposal for prospective purchasers of larger areas of land to be assessed against selected 'sustainability test criteria' (as potentially emanating from the Land Use Strategy, or proposed by other land commentators). There were also proposals to transfer Government owned land to an independent charitable trust with the aim of putting it to more productive use in the public interest, and transferring public land to community bodies to own, manage and develop for local benefit.

In short, there should be a permanent revolution.

Reforms already in the pipeline

In fact, some of the LRRG's recommendations are likely to be enacted soon. The community right to buy is reformed and extended to urban land by the Community Empowerment (Scotland) Bill, currently before the Scottish Parliament, and there will be the possibility of the compulsory acquisition of 'abandoned' land: see p 85 above. The Bill also requires local authorities to establish a public register of common good property. In addition, the Scottish Government is consulting on the introduction of a new form of private rented sector tenancy of houses which will provide full security of tenure: see p 96 above.

A prospective change to company law will also contribute, indirectly, to the LRRG's goals. One of the difficulties in identifying who owns land is that the owner may be a company (or other body corporate) without it being at all clear who controls the company. The Small Business, Enterprise and Employment Bill, currently before the Westminster Parliament, inserts a new part 21A and sch 1A into the Companies Act 2006 which require all UK companies to keep a public register of people with 'significant control' of the company. A number of factors are identified as indicating 'significant control', including holding more than 25% of the shares or voting rights, or exercising significant interest over a trust which holds such shares or voting rights (prospective sch 1A paras 1–6). The particulars which must be held in the register include the name, address, nationality, and date of birth of the person in question (prospective s 790K(1)). The provisions follow on from a discussion paper by the Department for Business Innovation & Skills on *Transparency and Trust* published in July 2013 (www.gov.uk/government/consultations/company-ownership-transparency-and-trust-discussion-paper), and the Department's response to consultees' comments in April 2014 (www.gov.uk/government/uploads/system/uploads/attachment_data/file/304297/bis-14-672-transparency-and-trust-consultation-response.pdf). The main purpose of the provisions is not, of course, to identify the real owners of land but to expose criminal activity such as money-laundering and tax evasion.

The Scottish Government's response

In welcoming the LRRG report the Scottish Government announced a 10-year target for completion of the Land Register (see p 89 above), a policy which goes much further than the LRRG's recommendation. Furthermore, the Government's new legislative programme, *One Scotland: The Government's Programme for Scotland 2014–15* (www.scotland.gov.uk/Publications/2014/11/6336), published on 26 November 2014, carried a promise of immediate legislation (p 77):

> LAND REFORM BILL
>
> The relationship between the people living in Scotland and the land of Scotland is of fundamental importance. Our aim is to move the debate on land reform from one focused on historic injustices to a modern debate about the current balance of land rights in Scotland and how this can be managed to best deliver for the people of Scotland. Radical and effective land reform aims to ensure the correct balance of land rights and this can only be achieved through a package of measures, taken forward and understood together. In addition to progressing current land reform measures, such as new and improved community rights to buy, we will be announcing the intention to respond fully to the Land Reform Review Group's report and launching a consultation on both a Land Rights Policy for Scotland and a consultation on a Land Reform Bill to be taken forward within this parliamentary term.
>
> Proposals that will be contained – subject to consultation – in a Land Reform Bill within this parliamentary term include:
>
> - Withdrawing the business rate exemptions for shooting and deerstalking.
> - New powers for Scottish Ministers to intervene where the scale of land ownership and land management decisions are a barrier to local sustainable development.
> - A new duty on charity trustees to consult with local communities where decisions on the management and use of land under the trustees control may affect a local community.
> - A new Land Reform Commission tasked developing the evidence base for future reform, supporting public debate and holding this and future Governments to account.
>
> In addition to a Land Reform Bill we are announcing our commitment to:
>
> - Increase the Scottish Land Fund to £10 million from 2016–20 to meet demand.
> - Develop a dedicated resource within the Scottish Government to promote and facilitate community land ownership across the whole of Scotland.
> - Modernise succession law so that all children are treated equally when it comes to inheriting land.

The promised consultation – *A Consultation on the Future of Land Reform in Scotland* (www.scotland.gov.uk/Publications/2014/12/9659) – was published on 2 December 2014, with responses invited by 10 February 2015. The ministerial preface gives as the aspiration 'a fairer and more equitable distribution of land in Scotland where communities and individuals can own and use land to realise their potential. Scotland's land must be an asset that benefits the many, not the few'. Nonetheless, only a relatively small number of the LRRG's recommendations are consulted on with a view to inclusion in the forthcoming legislation. The

most important are: the creation of a Scottish Land Reform Commission; a rule preventing non-EU entities from acquiring land; empowering Scottish Ministers to direct private landowners who are dominant in a particular area to take action (of what kind is not clear) to 'overcome barriers to sustainable development'; and the ending of business rate exemptions for shootings and deer forests. The eventual Land Reform Bill is also likely to include provisions to implement some of the forthcoming recommendations of the Agricultural Holdings Legislation Review (p 17). Annex B of the document lists each of the LRRG's recommendations and sets out the Government's response.

As well as legislative measures, the document also proposes that there should be a 'Land Rights and Responsibilities Policies Statement' which would 'guide the development of public policy on the nature and character of land rights in Scotland' (p 7). The draft produced for the purposes of consultation comprises a 'vision' and seven 'principles':

> *Vision*
>
> For a strong relationship between the people of Scotland and the land of Scotland, where ownership and use of the land delivers greater public benefits through a democratically accountable and transparent system of land rights that promotes fairness and social justice, environmental sustainability and economic prosperity.
>
> *Principles*
>
> 1. The ownership and use of land in Scotland should be in the public interest and contribute to the collective benefit of the people of Scotland.
> 2. There should be clear and detailed information that is publicly available on land in Scotland.
> 3. The framework of land rights and associated public policies governing the ownership and use of land, should contribute to building a fairer society in Scotland and promoting environmental sustainability, economic prosperity and social justice.
> 4. The ownership of land in Scotland should reflect a mix of different types of public and private ownership in an increasingly diverse and widely dispersed pattern, which properly reflects national and local aspirations and needs.
> 5. That a growing number of local communities in Scotland should be given the opportunity to own buildings and land which contribute to their community's wellbeing and future development.
> 6. The holders of land rights in Scotland should exercise these rights in ways that recognise their responsibilities to meet high standards of land ownership and use.
> 7. There should be wide public engagement in decisions relating to the development and implementation of land rights in Scotland, to ensure that wider public interest is protected.

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 some of the legislative proposals that may result would in practice need to be passed by the Scottish Parliament. See www.parliament.uk/scotaffcom. 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*, gave 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 questioned the level of public subsidy available to private landowners (eg by fiscal arrangements, agricultural support, and forestry grants), criticised the devices used by such owners to avoid tax, and called for more community ownership (including 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 18 March 2014 the Committee issued an Interim Report (www.publications.parliament.uk/pa/cm201314/cmselect/cmscotaf/877/877.pdf) on the basis of the written and oral evidence received so far. In summary, its conclusions were these (p 3):

> Who owns and controls land is a matter of legitimate political interest. The first step in any meaningful strategy of land reform must be the creation of data on ownership and land values which is comprehensive and accessible. Regrettably Scotland lags behind most comparable European countries in providing such data and we therefore call, at this early stage in our enquiry, for the Scottish and UK Governments to give priority to this matter. Land information in Scotland should be of the same quality as that in Latvia, Georgia and Denmark to name but three, since no government which has any pretentions to land reform can avoid the need for full and clear information on its existing ownership patterns to be widely available. This must include beneficial ownership. We call on both the UK and the Scottish Governments to progress this as a matter of urgency.
>
> The evidence we have received to date suggests that state policy on inheritance tax, business property relief, agricultural property relief, non-domestic rates and similar contributes considerably to the preservation of inherited wealth in landed estates and to driving up the price of land, which has become a speculative commodity as much as a productive asset. Some witnesses have proposed an end to exemptions, subsidies and cosy tax deals, and we are seeking further evidence to clarify whether these are demonstrably to the public benefit.
>
> Turning to state aid rules, we believe that while these are complex, those responsible for their administration have been overly risk averse and unnecessarily restrictive in their interpretation of what is permissible. We wish to take further evidence and keep under review the current negotiations on state aid, the Scottish Government's Land Reform Review Group, and proposals for CAP implementation.
>
> We remain strongly supportive of community land ownership but note that other public policies serve to make this less affordable by driving up land prices.
>
> All the evidence that we have heard confirms that these are important, neglected and intensely political areas of public policy and we therefore intend to expand our areas of examination with a view to producing a more comprehensive report than we may have originally envisaged. We have also identified topics for future consideration

in this inquiry, and we would like further evidence on ownership of land both by charitable and by offshore companies.

Since publication, matters seem to have gone quiet, and it appears that nothing further can be expected this side of the 2015 General Election.

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' ('LUS'). Full details of all three can be found in *Conveyancing 2011* pp 75–76. In 2012 the Scottish Government commissioned research 'to evaluate the range of current land use delivery mechanisms, to ascertain their effectiveness in translating the strategic Principles of the LUS into decision-making on the ground'. The evaluation considered 11 case studies ranging from an urban Local Development Plan (LDP) to the Loch Lomond and the Trossachs National Park Partnership Plan. The results have now been published: see www.scotland.gov.uk/Publications/2014/05/7782. The key findings were that:

- There is significant capacity to deliver sustainable land use, as advocated by the LUS, within Scotland's existing land use delivery mechanism 'landscape'.
- The translation of the LUS Principles into decision-making on the ground by the case studies has been primarily implicit rather than explicit, with their consideration teased out by the research.
- The LUS Principles are relevant and can be applied in many different contexts, at different scales and across different land use/management sectors.
- Some LUS Principles are more readily translated into decision-making on the ground than others. A particular concern in this regard, given the provenance of the LUS within the Climate Change (Scotland) Act 2009, is that LUS Principle F on climate change was only partially translated by the majority of case studies.
- The suite of 10 LUS Principles is internally compatible and most Principles are relevant to land use delivery in most instances.
- There are many examples from the case studies of existing methods and approaches that can be used to help translate the LUS Principles into decision-making on the ground.

Notwithstanding the above findings, there were many examples of potential barriers to the translation of the LUS Principles identified through the research across several categories.

For a more general progress report for the previous year as well as a 'refreshed action plan', see www.scotland.gov.uk/Publications/2014/05/4575.

Compulsory purchase: Scottish Law Commission consultation

One of the recommendations in the final report of the Land Reform Review Group (see p 98 above) was that 'the Scottish Government should take forward

the modernisation and reform of Scotland's compulsory purchase legislation, with a clear timetable for introducing a Bill to achieve this into the Scottish Parliament' (p 44). The LRRG was, of course, aware that the subject was under consideration by the Scottish Law Commission, and a substantial consultative discussion paper (no 159) running to 339 pages was published by the Commission just before the end of the year, on 17 December. The overall approach is set out in the opening chapter (paras 1.12 and 1.13):

> We have formed the clear view that the legislation is not fit for purpose. It makes the work of those seeking to use the system more difficult, and it does not provide those affected by it with a clear view of how it operates. Our intention in undertaking this project is therefore to replace the diverse, overlapping and confusing layers of primary legislation – much of which survives on the statute book long after any use of it has ended – with a modern, comprehensive, statutory restatement.

As preparation for this daunting task, the discussion paper covers a whole array of topics including practical aspects of obtaining and implementing compulsory purchase orders, the Mining Code in the Railways Act 1845, compensation, and dispute resolution. Consultees are presented with no fewer than 177 questions, but responses even to a small number of these are also welcomed (paras 1.16 and 1.17). The closing date for comments is 19 June 2015.

Tenements and factors

In 2012 Glasgow City Council set up a Commission to look at problems concerned with the factoring of residential properties and especially of flatted property, which comprises 70% or more of the housing stock in Glasgow. In its final report, published on 21 February 2014 (www.glasgow.gov.uk/index.aspx?articleid=7475), the Glasgow Factoring Commission presents a gloomy, if familiar, picture of unpopular factors, recalcitrant owners, and undone repairs. Although little in the way of evidence is presented, the Commission concludes that the condition of tenements in Glasgow is deteriorating. Possible reasons are said to include the decline in owner-occupation and the consequent rise of absentee landlord-owners concerned only with financial returns, and an influx of new owners who are unfamiliar with the traditional culture of joining together to carry out repairs. In what is often a thoughtful analysis, the Commission has a whole range of suggestions for making things better. The rights and responsibilities of tenement owners should be set out in a simple and accessible guide and publicised on a website. Factors should be more open and transparent with their clients and seek feedback on their services. Owners should be encouraged, or even required, to have regular 'MOT' surveys of the building, establish reserve funds, and take out policies of common insurance.

Might the answer lie in legislation, to add to the Tenements (Scotland) Act 2004, the Property Factors (Scotland) Act 2011? That is the view expressed in the recently published final report of the Land Reform Review Group (see p 98 above),

which enjoins the Scottish Government to introduce 'a more comprehensive legal framework for common property [in tenements], which clarifies and modernises the rights and responsibilities of both the individual ownership and the collective governance of such property' (pp 141–43). The Glasgow Factoring Commission would also favour legislation. The Scottish Government's response to the LRRG, however, was 'Not at present. However the Scottish Government is committed to improving guidance on issues such as responsibilities for common property in tenement blocks': see *A Consultation on the Future of Land Reform in Scotland* (December 2014) p 31.

Even if the will to legislate were there, it is not clear what such legislation should do which is not already being done by existing legislation. The Land Reform Review Group appears to support a uniform model scheme of management which would override existing title provisions – an idea which was pressed hard at the time of the tenements reform in 2004 and which, even if desirable (on which views differ), might not be feasible. In any event, there is a limit to what any private-law regime can achieve, for the most serious problem appears to be cultural rather than legal. The Glasgow Factoring Commission is only the latest body to lament that 'at the heart of the problem is a cultural issue about maintenance …: too many owners often simply fail to acknowledge that their most valuable asset requires protection' (p 52). Of course, attitudes can be made to change, but in the case of tenements this might require active (and expensive) intervention by local authorities or some other public body coupled, probably, with a substantial injection of public money for common repairs schemes of the kind which took place in the 1980s. Left to themselves, and regardless of the private-law regime in force, many owners are likely to do nothing at all.

Scottish Household Survey 2013

The 2013 Scottish Household Survey (www.scotland.gov.uk/Publications/2014/08/7973/), published in August 2014, contains in chapter 3 a survey of different types of housing. Of particular interest is the relative size of the different sectors, and how this has changed over the years (table 3.1):

Tenure of household by year

Column percentages, 1999–2013 data

Households	*1999*	*2000*	*2001*	*2002*	*2003*	*2004*	*2005*	*2006*	*2007*	*2008*	*2009*	*2010*	*2011*	*2012*	*2013*
Owner occupied	61	62	64	65	65	64	66	65	66	66	66	65	64	63	61
Social rented	32	30	28	28	26	27	25	25	23	23	22	23	23	23	23
Private rented	5	6	6	6	6	7	8	8	9	9	10	11	11	13	13
Other	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2
Total	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100
Base	*14,680*	*15,550*	*15,570*	*15,070*	*14,880*	*15,940*	*15,400*	*15,620*	*13,410*	*13,810*	*14,190*	*14,210*	*14,360*	*10,640*	*10,650*

The survey summarises the trend as follows:

> There has been a substantial change in housing tenure in Scotland since the 1960s. The long-term trend has been a marked increase in the proportion of owner-occupier households, from a quarter in 1961 to around two-thirds in recent years. This increase was mirrored by the decline of the private and social rented sector, which in 1961 accounted for 34 per cent and 41 per cent of households, respectively, compared to 13 per cent and 23 per cent in 2013.
>
> Reflecting changes in cultural attitudes toward home ownership, two structural factors have contributed to this shift: the introduction of the right to buy for public authority tenants in 1979 coupled with the decline of public authority new build, and the increased contribution of private sector building.
>
> The short-term trend shown by more recent SHS data indicates that the rising trend in owner-occupation may have hit a peak in the last decade. The first year of SHS data collection showed that in 1999, 61 per cent of households were owner occupied. This proportion then increased towards peak of 66 per cent over the following decade. Since 2010 this trend has reversed and home ownership in 2013 was back at 1999 levels. This is possibly in part due to increasing pressure in the housing market.
>
> Recent years have also seen an increase in the private rented sector from 5 per cent in 1999 to 13 per cent in 2013, while a longer term decrease in the social rented sector has levelled off at around 23 per cent since 2007.

Scottish House Conditions Survey 2013

Key findings from this informative annual study are that:

- the level of disrepair to critical elements fell by around 4 percentage points to 57% in 2013;
- the rate of urgent disrepair also fell by around 3 percentage points to 36% in 2013;
- the rate of Scottish Housing Quality Standard (SHQS) failure in the social sector fell by around 9 percentage points between 2012 and 2013; 43% of social housing fails the SHQS, compared with 51% of private housing;
- the greatest improvement was found in the Energy Efficient criterion in the social sector: there was a 10 percentage point reduction in non-compliance, down to 28% in 2013;
- overcrowding levels in Scotland remain unchanged from previous years: 3% of all households (75,000) were overcrowded under the Bedroom Standard in 2013.

Further details can be found at www.scotland.gov.uk/Publications/2014/12/6903/0.

Housing Statistics 2013

After several years of decline, house-building is up, according to *Housing Statistics for Scotland 2014: Key Trends* (www.scotland.gov.uk/Publications/2014/08/2448). So too are applications under the right-to-buy scheme, presumably in anticipation

of its closure on 1 August 2016 (see p 68 above). The headline news on this and other matters is as follows:

Housing supply (private and public sector)

- *New housing supply:* New housing supply (new build, refurbishment and conversions) increased by 7% between 2012–13 and 2013–14, from 14,895 to 15,957 units, mainly driven by a 9% rise in private led new build completions.
- *New house building:* In 2013–14, 14,737 new homes were completed in Scotland, an increase of 5% on the 14,054 completions in the previous year. During the same time-period the number of homes started rose by 16% from 12,907 to 15,028, the highest number of starts since 2009–10.
- *Affordable Housing:* In 2013–14 there were 7,012 units completed through all Affordable Housing Supply Programme (AHSP) activity – this figure is up 17% on the previous year and is the 3rd highest figure since the AHSP began in 2000–01.

Public sector housing stock

- *Public sector housing stock:* At 31 March 2014, there were 317,572 local authority dwellings in Scotland, a decrease of 588 from the previous year.
- *Sales of local authority dwellings:* Sales of public authority dwellings (including local authorities with total stock transfers) rose by 26% in 2013–14, from 1,209 to 1,526. This follows years of declining numbers of right to buy sales and the increase is likely to be due to the recent announcement to end Right to Buy for all tenants.
- *Right to Buy:* Just over three-quarters (76% or 278,203) of tenancies provided by local authorities (or the relevant housing association following a stock transfer) had some Right to Buy entitlement on 31 March 2014, down from 81% the previous year.
- *Public sector vacant stock:* At 31 March 2014, local authorities reported 6,556 units of vacant stock, of which 43% consisted of normal letting stock. This represents 1% of all normal letting stock, and is down from 7,013 the previous year.
- *Lettings:* During 2013–14 there were 28,679 permanent lettings of local authority dwellings, an increase of 4% on the previous year (27,546). Lets to homeless households represented 37% of all lets made by local authorities in 2013–14, a decrease of 4 percentage points on the previous year.
- *Evictions:* Eviction actions against local authority tenants resulted in 921 evictions or abandoned dwellings in 2013–14 (550 evictions, 371 abandoned dwellings). This is down slightly on the previous year and continues the declining trend observed in the last few years.
- *Housing Lists:* Household applications held on local authority or common housing register lists decreased by 2% to 179,954 in 2014.
- *Scheme of Assistance:* In 2013–14, 9,560 scheme of assistance grants were paid to householders totalling £32.2 million compared to 9,987 grants in 2012–13, totalling £32.4 million.
- *Houses in multiple occupation:* In 2013–14, 8,588 applications were received in respect of the mandatory licensing scheme for houses in multiple occupa-tion. At 31 March 2014 there were 14,331 licences in force, representing an increase of 3% over the previous year.

Unifi Scotland and the quest for coordinated information about property

Unifi Scotland, an organisation which promotes the provision and coordination of information about land and property, has launched its own website: http://unifiscotland.com/. Unifi, chaired by Stewart Brymer, includes representatives from the Law Society, CML, Registers of Scotland, Ordnance Survey, Improvement Service, and RICS. Its 'agenda' is as follows:

> It is said and accepted that we live in the age of the 'information society' and 'knowledge economy', however how really informed are we? Just what proportion of the terabytes of information accumulated by both the public and private sectors is readily and conveniently available to the persons, organisations and communities to whom it is relevant? Furthermore, are both government and society able to derive the benefits, efficiencies, savings and opportunities that collective information resources have the potential to yield?
>
> Unifi Scotland is particularly concerned that information relating to Scotland's land and property base is not being shared as extensively and efficiently as it could be. Unifi suggests that:
>
> - we are not as informed as we could be;
> - only a small proportion of information is conveniently available; and
> - benefits are not being fully realised.
>
> Unifi Scotland believes that by linking and enabling sharing of the significant amount of, often disparate, land and property information in Scotland there are significant benefits to be realised in support of the Scottish Government's five Strategic Objectives and its National Outcomes. These benefits can be gained in three key ways:
>
> - by satisfying the citizen – through advocating and encouraging empowerment and enabling financial savings;
> - as improved efficiency – through advocating and encouraging innovation and enabling best value; and
> - by contributing to economic growth – thereby enabling Scotland to be recognised as a competitive place on the world stage.
>
> Some examples of current failings and inadequacies can be summarised as follows;
>
> - The relative inefficiency of property conveyancing transactions – when relocating, up to one hundred and forty separate items of information need to be collated by a purchasing party, eleven different organisations contacted linking to a further seven who reuse some of the exact same information.
> - Barriers that constrain citizen community groups from accessing and in turn using information that can enable them to take forward community initiatives.
> - The time and effort needed by the planning process to identify and engage with third party interests.
> - The inability to proactively convey prior warning of transport disruption to affected persons and organisations.
> - The many strands of information that could be used to prejudge and then subsequently appraise property investment decisions are not readily available.

- It is difficult to take full account of the extent of large property portfolios, public agencies who are able to account for their own property assets are liable to do so in ignorance of the entire public sector's 'civil estate'.

Regeneration, taxation, estate management, revenues and benefits, planning, building control and conveyancing all depend upon reliable, accurate and accessible land and property information.

The above problems and constraints do not need to be the case; other countries are seeking to gain competitive advantage and solutions to their issues and priorities through comparatively modest investment in their land, property and location information resources, primarily through refinement of 'information supply chains' so as to enable convenient collation of relevant information components.

Some of the building blocks that Scotland will need in order to follow suite [*sic*] are either already in place or are in the process of being actively pursued via the following initiatives:

- creation and use of address gazetteers by each of Scotland's thirty two local authorities now being collated into a single National Gazetteer for Scotland by the Improvement Service;
- the Registers of Scotland partnership programme to modernise Scotland's Land Register and a number of other registers;
- collation of a single view of each the three information repositories that Scotland's fourteen Assessors take responsibility for;
- the Scottish Government's Geographic Information Strategy for Scotland – 'One Scotland, One Geography'.

With clarity of objective and a shared vision these and other initiatives could now be harnessed to leverage benefit and make Scotland a wealthier, smarter, safer and stronger place to live.

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Craig Anderson, 'Cautionary wives again: *Cooper v Bank of Scotland*' 2014 SLT (News) 185 (considering *Cooper v Bank of Scotland plc* [2014] CSOH 16, 2014 GWD 6-126)

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Scott Brymer, 'Buying a new home from a builder – a purchaser's perspective' (2014) 130 *Greens Property Law Bulletin* 3

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Frank Burr, 'Division and sale: prevention is better than cure' 2014 SLT (News) 147 (considering *Collins v Sweeney* 2014 GWD 12-214)

Paul Carnan, 'Check and double-check' (2014) 59 *Journal of the Law Society of Scotland* Feb/32 (considering conditions in the *CML Handbook* in relation to new-build and newly converted houses)

Donald Carvel, 'LBTT: aligning payment and registration' (2014) 59 *Journal of the Law Society of Scotland* Oct/17

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Mark Hayward, 'The consumer protection challenge' (2014) 59 *Journal of the Law Society of Scotland* May/33 (considering the application of the Consumer Protection from Unfair Trading Regulations 2008, SI 2008/1277)

Alan Hughes, 'An onerous obligation?' (2014) 59 *Journal of the Law Society of Scotland* Jan/34 (considering letters of obligation in insolvency sales)

Cassie Ingle, 'Heritage regained' (2014) 59 *Journal of the Law Society of Scotland* March/32 (considering *Joint Liquidators of the Scottish Coal Co Ltd, Ptrs* [2013] CSIH 108, 2014 SLT 259)

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PART IV

COMMENTARY

COMMENTARY

REAL BURDENS

Burdens in restraint of trade

Setting the scene

The decision of the Inner House in *Hill of Rubislaw (Q Seven) Ltd v Rubislaw Quarry Aberdeen Ltd*[1] is the most important case on real burdens for many years. Fortunately, the opinion of the court, given by Lord Drummond Young, is of the highest quality and will, we think, come to be regarded as the definitive treatment of the matters with which it is concerned. That opinion, in turn, draws much from the 'valuable explanations of the policy underlying the [Title Conditions] Act' found in the Scottish Law Commission's *Report on Real Burdens*.[2]

The case concerns an issue which has troubled the law almost since real burdens were first used, at the end of the eighteenth century, namely whether it is competent to impose a restriction on one property the real purpose of which is to confer a commercial advantage on the owner of another. In what was, until now, the leading case, *Aberdeen Varieties Ltd v James F Donald (Aberdeen Cinemas) Ltd*,[3] the properties at issue were theatres: in selling one of their theatres in Aberdeen, the owners imposed a use restriction preventing the performance of certain types of entertainment which they intended to put on at another theatre in Aberdeen which they had retained. In *Hill of Rubislaw* the properties, more prosaically, were offices which were being offered for let.

The litigation arose out of plans to develop the northern quarry subjects at Hill of Rubislaw in Aberdeen.[4] To secure the co-operation of the owners of nearby office blocks[5] in respect of access and other matters, the developers entered into a minute of agreement, which was recorded in the Register of Sasines in 2005. (The

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1 [2014] CSIH 105, 2014 GWD 40-723. For the case in the Outer House, see [2013] CSOH 131, 2013 GWD 27-545, discussed at *Conveyancing 2013* pp 119–22. The Lord Ordinary's decision is upheld by the Inner House.

2 Paragraph 10. See Scottish Law Commission, *Report No 181 on Real Burdens* (2000) paras 2.9 ff.

3 *Aberdeen Varieties Ltd v James F Donald (Aberdeen Cinemas) Ltd* 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 For the Rubislaw quarry, which provided so much of the building stone for Aberdeen, see http://en.wikipedia.org/wiki/Rubislaw_quarry.

5 Notably Rubislaw House, Marathon House, and Seafield House.

formalities required by the Title Conditions (Scotland) Act 2003 were complied with.) Its purpose is evident from the preamble:

> In consideration of the rights granted by [the head landlords of the office blocks] and in recognition of the fact that the development of the northern quarry subjects might otherwise inhibit the ability of [the head landlords] to let vacant space within the respective office buildings in which they hold a long leasehold interest (and/or might otherwise adversely affect the rate fixed at rent reviews under the occupational leases of premises within those buildings), [the owners of the northern quarry subjects have] agreed (a) to accept certain restrictions with regard to office space within any development of the northern quarry subjects, and on the basis that the restrictions (or, as the case may be, the benefit of the restrictions) should transmit to the respective successors in right of the property interests held by the parties to this Minute of Agreement. …

Among the restrictions imposed on the northern quarry subjects was the following, found in clause 2.1:

> 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).

Subsequently, the developers sold the northern quarry subjects to Hill of Rubislaw (Q Seven) Ltd, the pursuer in the present action.[1] Clause 2.1 could only affect a successor such as the pursuer if it was a real burden. Accordingly, the action was for declarator that clause 2.1 did not constitute a real burden over the northern quarry subjects.

The meaning of 'net lettable floor area'

A preliminary issue was whether the reference to 'net lettable floor area of Office Space' in clause 2.1 of the agreement meant office space which was *capable* of being let – in effect, total office space in the development – or office space that was *actually* let. Adopting a commercial interpretation, and noting that the market for owner-occupied office space could not really be separated from that for tenanted office space, the court had no difficulty in opting for the former:[2]

> [O]n the pursuers' construction there could be a significantly adverse impact on rents in the Rubislaw area and on property values in that area. At a general level it appears to us unlikely that commercial parties would have wished to produce such a result. Rental levels and property values in the remainder of the Rubislaw area would not be protected by a mere prohibition on letting if substantial amounts of owner-occupied space were constructed. In our opinion that strongly suggests that the prohibition is on construction rather than letting.

1 The pursuers, however, continued to hold on missives and had not completed the purchase.
2 Paragraph 29.

On a proper interpretation, therefore, clause 2.1 restricted the northern quarry proprietors to 2,025.29 square metres of office space *in total* and regardless of whether that space was owner-occupied or rented.

Real burdens: two restrictions as to content

The preliminary issue out of the way, it is now possible to focus on the question of whether clause 2.1 was a real burden. Why should it not be? It was contained in a deed, a minute of agreement, which is recognised by the Title Conditions (Scotland) Act 2003 as capable of being a 'constitutive deed' for real burdens.[1] The minute of agreement was signed by all the relevant parties. And it was properly registered in the Register of Sasines.

The difficulties, however, were in respect of content and not of form. As real burdens have the privilege of running with land in perpetuity, it is evident that not every kind of provision can be allowed to qualify. Some restrictions as to content are needed, and these restrictions are set out in s 3 of the Title Conditions Act. Two were relevant to the present facts. In the first place, where (as almost always) there is a benefited property, 'a real burden must … be for the benefit of that property'.[2] This is the so-called 'praedial rule': a real burden must confer benefit on the *praedium* or property of the benefited proprietor and not merely on the benefited proprietor as an individual. In the second place, 'a real burden must not be contrary to public policy as for example an unreasonable restraint of trade'.[3] Neither restriction is new; both were taken over by the Title Conditions Act from the common law. But either or both have tended to be regarded as limiting or excluding real burdens in restraint of trade. That tendency has been firmly checked by the new decision.

The first restriction: the praedial rule

'The praedial rule', said the court, 'requires that there should be a benefit to the property rather than to the particular proprietor'.[4] The court continued:

> Nevertheless, property is not recognised by the law of and for itself; it is recognised because of the benefits that it confers on proprietors, tenants and other occupiers. Thus the expression that a real burden must confer a benefit on a property is essentially shorthand for saying that it must confer a benefit on the owners, tenants or occupiers of the property from time to time, whoever they may be. A benefit that is conferred only on the existing owner is personal, and cannot be the subject of a real burden.

For most conditions found in dispositions and deeds of conditions, this requirement creates no difficulty. But for conditions in restraint of trade the difficulty is obvious. If the use of property A is restricted for the commercial advantage of the owner of property B, the personal benefit to that owner is

1 Title Conditions (Scotland) Act 2003 s 4(2).
2 TC(S)A 2003 s 3(3).
3 TC(S)A 2003 s 3(6).
4 Paragraph 14.

obvious. What is far less obvious is whether there is also benefit to *future* owners. And that in turn depends on what counts as 'benefit'.

Traditionally, 'benefit' has tended to focus on matters pertaining to the *enjoyment* of property, such as preservation of amenity. That, plainly, is of no assistance in respect of burdens in restraint of trade. Yet there is no reason why enjoyment should be the only consideration. Here the rules on interest to enforce are of assistance. In terms of the Act, there is interest to enforce a real burden not merely on account of material detriment to the *enjoyment* of the benefited property but also of material detriment to its *value*.[1] And that in turn presupposes that the preservation of value is, like the protection of enjoyment, for the benefit of the property. The argument is a compelling one; yet up until now there has been no authority to say that it was correct.[2] The importance of *Hill of Rubislaw* lies above all in providing that authority.

The court approached the issue from a commercial perspective. At one time the praedial rule had been used to disallow such (feudal) conditions as a requirement to bring corn to the superior's mill or malt to his brewery, and 'on occasion this may have given rise to formulations that were wider than can be justified by modern economic and social conditions'.[3] Today the position was different:[4]

> Under modern conditions, we are of opinion that it is enough to say that a real burden must benefit the owner, tenant or occupier of property in such a way that the value of the property itself is enhanced or at least protected. That value will obviously pass on to later proprietors, and through them to tenants or occupiers. This requirement, of an effect on the value of the property, appears to us to be the critical feature that should permit a condition to have effect as a real burden, benefiting and binding singular successors as well as the original parties. . . . [I]t is important to recall that commercial property is used to carry on some form of business and thus to generate profits. In our opinion the law must recognise this feature. That means that a real burden must be regarded as benefiting a property if it enables the commercial activity in that property to be carried on more effectively, that is to say, in a more profitable manner.

Often, in cases such as the present, a relationship between burdened and benefited property may be indicated by physical adaptation of the benefited property for the commercial use which is forbidden on the burdened property. That, for example, was the position in respect of the pub which was protected by a prohibition on other properties from selling excisable liquor in *Co-operative Wholesale Society v Ushers Brewery*.[5] Yet, said the court in *Hill of Rubislaw*, physical adaptation should not be seen as a requirement. On the contrary:[6]

> the point is a more general one: the benefit to a commercial property may be specific to a particular trade carried on in that property. What is important is that the benefit

1 TC(S)A 2003 s 8(3)(a).
2 Scottish Law Commission, *Report No 181 on Real Burdens* (2000) para 2.25.
3 Paragraph 14.
4 Paragraphs 14 and 15.
5 1975 SLT (Lands Tr) 9.
6 Paragraph 16.

> should be to the trade or other commercial activity carried on by any proprietor or occupier of the subjects. In that way the value of the property will be enhanced or at least protected. Any more restrictive rule would in our opinion impose an unwarranted restriction on the development of commercial land, and would moreover be contrary to the indications from the Scottish Law Commission that the existing flexible approach to the praedial rule should be maintained (paragraph 2.10).

To this accommodating approach, an Inner House decision from the 1930s, *Aberdeen Varieties Ltd v James F Donald (Aberdeen Cinemas) Ltd* (mentioned earlier),[1] presented something of an obstacle, for not only had the court disallowed the restrictive condition in question, it had also taken the opportunity to question whether a perpetual restriction on trade could ever be reasonable or permissible.[2] But in *Aberdeen Varieties* the burdened and benefited properties were half a mile apart, and to satisfy the praedial rule, as the court in *Hill of Rubislaw* correctly pointed out, much greater proximity was required:[3]

> The opinions in *Aberdeen Varieties* were analysed in some detail by counsel, but we think that the importance of the decision should not be exaggerated. The opinions dealt with the particular facts of the case, where there was a total absence of physical proximity. That factor was critical by itself. In addition it is clear that the restriction under consideration was regarded as designed to confer a commercial monopoly rather than improving the enjoyment or value of the land retained by the disponing company. Overall, we consider that the case emphasises the importance of an element of physical proximity, but is no more restrictive than that.

And so, in a few short sentences, the difficult and, in some respects, confusing decision in *Aberdeen Varieties* was set on one side. Its place as the leading authority will now be taken by *Hill of Rubislaw*.

If protection or enhancement of value was a relevant measure for the praedial rule, had that measure been satisfied in the present case? The court was in no doubt that it had:[4]

> At any given time there will obviously be a finite demand for office space in the Rubislaw area. If the supply is substantially increased, in the absence of a corresponding increase in demand, the result is likely to be that rents will be driven downwards, which would obviously have an effect on the value of the neighbouring office blocks. The restriction thus protects their value, and that is sufficient to satisfy the test.[5]

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1 1939 SC 788, affd 1940 SC (HL) 52.
2 At 797 per Lord Wark. Compare Lord Justice-Clerk Aitchison at 802.
3 Paragraph 19.
4 Paragraph 24.
5 See also para 17: 'Clause 2.1 was intended to restrict the supply of property available to let in the Rubislaw area. That would be likely to protect or improve all rents in that area, including the rents received by the owners or mid-landlords of Rubislaw House, Marathon House and Seafield House. That benefit, however, is independent of the identity of the particular owner or mid-landlord. It is rather a benefit that accrues to the property itself, and indeed it would have an impact on the value of that property. Thus protecting rental values in the neighbourhood of a commercial property is likely to result in a benefit that satisfies the praedial rule.'

The second restriction: not in unreasonable restraint of trade

But there was also a second restriction imposed by the Title Conditions Act. For reasons of public policy, any restraint of trade contained in a real burden must not be 'unreasonable'.[1] In introducing this restriction, however, the Scottish Law Commission had declined to be drawn into the details beyond noting that 'it may be assumed that the basic rules are the same' as those in the law of contract from where the rules derived. Beyond that, 'questions of reasonableness seem best left to the courts to develop in the light of changing social and economic circumstances'.[2] In *Hill of Rubislaw* the court was happy to take up the challenge.

The court's starting point was with a *dictum* of Lord Birkenhead in an Irish case from 1919, *McEllistrim v Ballymacelligott Cooperative Agricultural & Dairy Society Ltd*: 'A contract which is in restraint of trade cannot be enforced unless (a) it is reasonable as between the parties; (b) it is consistent with the interests of the public.'[3] In considering reasonableness, said the court, particular attention should be paid to scope and to commercial context. As regards the former, 'a restriction that prevents a person from trading in a particular line of business will be regarded as more significant than a restriction that merely regulates the manner in which that trade may be carried on'; as regards the latter, 'it is relevant to consider the particular trade or profession or business that is affected by the restriction, and also the overall economic context in which it operates'.[4] The duration of the restriction, important in a contractual context, was unimportant in respect of real burdens because of the power of the Lands Tribunal to bring burdens to an end or to vary them.

When applied to clause 2.1, these factors indicated a restriction that, in the court's view, was entirely reasonable. So far as scope was concerned, clause 2.1 did not prevent an activity (ie the provision of office accommodation) but merely limited its intensity. As for the commercial context:[5]

> [T]he restriction was imposed as part of a commercial agreement to enable the effective development of the Northern Quarry Subjects by providing better access. Legal advice was available, and there is no suggestion that there was any disparity in the parties' bargaining power. That is itself a clear indication that the restriction is reasonable as between the parties. Furthermore, there was no suggestion that the extent of the actual restriction imposed was in any way unreasonable or disproportionate in the context of the whole of the Rubislaw developments.

A consideration of the public interest yielded the same conclusion. Far from being contrary to the public interest, the minute of agreement actually promoted it by allowing the development of an awkwardly-sited area of

1 TC(S)A 2003 s 3(6).
2 Scottish Law Commission, *Report No 181 on Real Burdens* (2000) paras 2.24 and 2.27.
3 [1919] AC 548, 562. See *Hill of Rubislaw* para 21 where Lord Birkenhead's *dictum* was mediated through Lord Macmillan's judgment in the later case of *Vancouver Malt & Sake Brewing Co Ltd v Vancouver Breweries Ltd* [1934] SC 181, 189.
4 Paragraph 22.
5 Paragraph 25.

land. And while the effect was to restrict office space on the Rubislaw area, 'that only relates to one site, and in assessing the public effect of the restriction it is the overall market that must be considered. In this case, we consider that that market can be defined as the market for office space in Aberdeen and the immediate area. We think it unlikely that the restrictions imposed by clause 2.1 could have any material adverse impact on the overall supply of office space in that area.'[1]

A third restriction: competition law

A third restriction on real burdens, not mentioned in *Hill of Rubislaw*,[2] may be mentioned briefly here. Since the withdrawal of an exemption in 2011,[3] real burdens (along with other 'land agreements') have been subject to the 'Chapter I prohibition' set out in s 2 of the Competition Act 1998.[4] Section 2(1) provides that:

> Subject to section 3, agreements between undertakings, decisions by associations of undertakings or concerted practices which —
>
> (a) may affect trade within the United Kingdom, and
> (b) have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom,
>
> are prohibited unless they are exempt in accordance with the provisions of this Part.

The consequences of a breach of the Chapter I prohibition are potentially serious. By s 2(4) the agreement is void. In addition, the Competition and Markets Authority (replacing the Office of Fair Trading with effect from 1 April 2014)[5] can investigate suspected infringements, impose financial penalties, and give directions to take steps to bring an infringement to an end. The maximum penalty is 10% of a party's worldwide turnover.[6]

In principle, a real burden in restraint of trade could breach the Chapter I prohibition if the effect on competition was 'appreciable' having regard to the parties' market power on the 'related market' and the extent to which the burden presented a barrier to entry or expansion in the market (which itself will often depend on the availability of suitable alternative land for competitors). The wide availability of rented office accommodation in Aberdeen, however, makes it improbable that this could be an issue on the facts of *Hill of Rubislaw*.[7]

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1 Paragraph 26.

2 Except for an incidental reference at para 26 to EU competition law. EU law would only apply where, most unusually, a real burden affected trade between different EU member states.

3 Competition Act 1998 (Land Agreements Exclusion Revocation) Order 2010, SI 2010/1709. For further discussion, see *Conveyancing 2011* pp 58–59.

4 This restriction is not found in the Title Conditions (Scotland) Act 2003 as such, but there is a general requirement in s 3(6) that a real burden must not be illegal.

5 By virtue of part 3 of the Enterprise and Regulatory Reform Act 2013.

6 Competition Act 1998 s 36(8). For further details, see the OFT's Guidance as to the appropriate amount of a penalty (OFT423).

7 For further guidance on this matter, see *Land Agreements: the application of competition law following the revocation of the Land Agreements Exclusion Order* (OFT1280a, March 2011) paras 4.11–4.14 and 9.44–9.60.

Assessment and implications

The decision in *Hill of Rubislaw* has done much to clarify the law in an area where the previous case law was sparse and difficult to interpret. It will be the first port of call for anyone involved in the creation or enforcement of real burdens in restraint of trade. The decision is also thoroughly welcome as to result, showing a flexibility and a commercial awareness which are not always apparent in conveyancing cases. Scots law is the better for it. Following *Hill of Rubislaw* it can be said that a real burden restricting the commercial use of the burdened property is likely to be valid and enforceable if it protects the enjoyment or the value of the benefited property, and is not in itself unreasonable (or in breach of competition law). The way now lies open for commercial conveyancers to make much greater use of this device.

Many burdens in pre-2004 dispositions no longer enforceable

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 was for real. That marked the end of the opportunity to register notices of preservation under s 50 of the Title Conditions (Scotland) Act 2003 or their (even) more obscure companions, notices of converted servitude under s 80. Only 159 notices were registered under s 50, and 18 under s 80.[1]

The purpose and scope of notices of preservation were given extensive coverage in our volume for 2013.[2] Here it is only necessary to consider the consequences of a failure to use them.

Since 28 November 2004 a deed creating a real burden must expressly nominate and identify not only the property which is to be burdened (which was always a requirement) but also the property which is to be benefited (which previously was not).[3] And since 28 November 2014 the same rule has been extended to real burdens created before 28 November 2004 if they were created in a disposition, or in a deed of conditions which was granted in association with dispositions.[4] The only way of avoiding that extension was to register a notice of preservation, but it is now too late to do so. The consequences are both simple and stark. No real burden created in a disposition which was registered before 28 November 2004 is enforceable today unless one of the following applies:

- the disposition expressly nominated a benefited property; or
- a notice of preservation was registered before 28 November 2014; or

1 We are grateful to Sarah Meanley of Registers of Scotland for providing this information.
2 *Conveyancing 2013* pp 131–39.
3 Title Conditions (Scotland) Act 2003 s 4(2)(c).
4 TC(S)A 2003 s 49.

- the burden affects a group of properties (ie not just the property under consideration) under a common scheme such that enforcement rights arise under ss 52 or 53 of the Title Conditions Act: that could arise if either a series of dispositions was granted imposing the same or similar burdens or if the property disponed by a single disposition came later to be divided so that two or more plots were subject to the same burdens deriving from the same disposition;[1] or
- the burden concerns the maintenance or management of a 'facility' (such as the common parts of a tenement or a private road) or the supply of services (such as water or electricity).[2]

All real burdens not falling into one of these categories were extinguished on 28 November 2014. The result has been to bring an end to thousands, or more probably tens of thousands, of burdens, leaving the affected owners free to develop their properties as they will.[3] Servitudes in pre-2004 dispositions, however, remain in force: extinction is confined to real burdens.

The implications for the Land Register are also of importance. It would be nice to suppose that the (now extinguished) burdens will disappear automatically from the Register. That, however, would be unrealistic.[4] The Keeper will remove burdens on application where satisfied that they are spent and that their continued presence on the Register is an inaccuracy.[5] Otherwise they will linger on, misleadingly and inappropriately, for the foreseeable future.

But if burdens already on the Land Register are likely to remain there, conveyancers have an opportunity – indeed a duty[6] – to prevent spent burdens from entering the Register in the first place. For under the new regime of 'tell me don't show me' it is for the applicant's solicitor to determine, on first registration, which burdens affect the property in question and which do not. The burdens which remain live must be listed in the relevant box of the application form; those which do not should be omitted. Of course, it may often be hard to be sure which burdens are and are not still alive, in which case the path of caution is to include them all on the form. But with burdens in pre-2004 dispositions it will usually be possible to be sure, and the appropriate selection should then be made.

COMMON AREAS: LEASEHOLD DEVELOPMENTS

Shared areas can exist in leasehold developments as well as in developments done by outright ownership. For instance, in a shopping centre, or in an industrial

1 For this and the next case, see G L Gretton and K G C Reid, *Conveyancing* (4th edn, 2011) para 13–15 (ii)–(v).
2 TC(S)A 2003 s 56.
3 TC(S)A 2003 s 49(2).
4 See TC(S)A 2003 s 51, a provision which has now been repealed by the Land Registration etc (Scotland) Act 2012 sch 5 para 43(4).
5 By s 80 of the LR(S)A 2012 the Keeper is bound to rectify any inaccuracy on the Register that is 'manifest'.
6 See LR(S)A 2012 s 111.

estate, the leases will often include *pro indiviso* shares of circulation areas, parking areas and so on. These *pro indiviso* shares are, of course, *lease* shares not *ownership* shares. But the arrangements mirror those in which the various units are conveyed outright, with each buyer receiving a *pro indiviso* share of the common areas. Such arrangements have not, we think, caused conveyancers particular concern as to their general validity. But in 2014 there was a full-scale attack on them. The case is *Gyle Shopping Centre General Partners Ltd v Marks and Spencer plc*.[1]

The Gyle Centre and the Primark crisis

Adorning (if that is the right word) the western outskirts of Edinburgh is the Gyle Shopping Centre.[2] The original landlord was the City of Edinburgh District Council ('EDC'); the current landlord was the snappily-named 'Gyle Shopping Centre General Partners Ltd as Trustee for and General Partner of Gyle Shopping Centre Limited Partnership'.[3] The Centre consists of two major stores, one being Marks and Spencer plc, plus a substantial number of small outlets. The two major stores were let out on 127-year leases running from 1990.[4] The leases were recorded in the Register of Sasines and were in virtually identical terms.

Clause 2 of the M & S lease said:

> EDC hereby lets to M & S ALL and WHOLE the said subjects shown coloured blue on the Boundary Plan together with (a) the building(s) and structure(s) (or part(s) of building(s) and structure(s)) to be constructed thereon from time to time and (b) a one-third pro indiviso share of and in the Shared Areas. …

The 'shared areas' were, in particular, the unbuilt areas surrounding the shopping centre, mainly used for car-parking. Thus each of the two major stores was to have a one-third share of those areas, being a share by way of lease. What about the other one-third? It remained unleased. In respect of the shared areas the landlord would thus have 100% ownership, of which one-third would be unencumbered by the leases.

Later, the landlord wished to extend the Centre by building a new wing which would be leased to Primark Stores Ltd. This was to be built on the shared areas, one consequence being some loss of car-parking. The proposal was approved by the 'management committee' of the Centre, on which M & S had a representative, after which the landlord entered into an agreement with Primark. Construction was due to begin early in 2013. But a problem emerged. A standard security was to be granted over the new wing, and the law agents for the funders, having looked at the titles, wished to obtain the formal consent of

1 [2014] CSOH 59, 2014 GWD 18-352 and, for a later stage, [2014] CSOH 122, 2014 GWD 26-527.

2 Those whose aesthetic capacities are so retarded that they are unable to appreciate the beauty of the Gyle Centre may, however, appreciate the Lewisian gneiss used in parts of the circulation spaces.

3 We quote here the designation in the litigation.

4 As is so common, the leases were executed long after the commencement date. They were executed in February 1992 and recorded in the GRS in March 1992.

the two major stores. M & S refused its consent. Whatever position it may have adopted when the matter had been discussed in the management committee, it was not now willing to agree to the new Primark store. The landlord responded by raising the present action, for declarator that it was entitled to proceed with the development of the new Primark wing. The defender was M & S. We infer that the proposed Primark wing was not objected to by the other major store, Morisons.[1]

The pursuer's arguments

Overview: the three arguments

There were three main lines of argument for the pursuer. The *first* was that the grant of a one-third share of the common areas was a mere contractual right, binding only on the original owners, EDC, and so not binding on the current landlord, as a singular successor. Accordingly, argued the pursuer, it was free to do as it wished with the shared areas. The *second* argument was that M & S had already agreed, via the management committee, to the new Primark development. The *third* argument was that, *esto* M & S had not agreed, it was personally barred from objecting. Of course, if the first argument succeeded, the second and third were unnecessary, and the same was true as between the second and third arguments. The hearing of the case was divided, the first two arguments being considered first.

The first argument itself had two branches: (i) that the car-parking area was not part of the lease, and (ii) that *esto* it was part of the lease, its terms did not transmit against a successor landlord. The first branch can be called the 'no real right' argument, and the second the 'not *inter naturalia*' argument.

The pursuer's first argument, first branch: no exclusive possession, so no real right[2]

The pursuer argued, to quote the Lord Ordinary (Lord Tyre):[3]

> The subjects let to the defender, in the sense of the defender having a real right to those subjects, did not include any part of the Car Parking Area. Clause 2 of the lease, in so far as it purported to include within the subjects let 'a one-third pro indiviso share of and in the Shared Areas' did not create a real right. … A one-third share remained unleased and, therefore, in the possession and control of the landlord. … An essential feature of a lease creating a real right, transmissible against singular successors, was that the landlord surrendered possession to the tenant. … The defender's[4] only remedy for loss sustained (if any could be proved) as a consequence of a modest reduction in the number of spaces in the car park would be a claim against the original landlord, EDC, based on a personal right conferred by the terms of the lease.

1 The current trading name of Safeway Stores Ltd.
2 This was argued at the first hearing: [2014] CSOH 59, 2014 GWD 18-352.
3 Paragraph 20.
4 The transcript says 'pursuer's' but we take this to be a slip for 'defender's'.

This is difficult legal terrain. The main issue is not what can and cannot be *contracted for*: if an owner of land, X, contracts with Y that Y can have shared possession, that is perfectly lawful. The question is whether an agreement, albeit perfectly binding as a matter of contract law, is *a lease*. Why does that matter? It can matter for more than one reason, but one is whether the contract binds successors of the owner. In general, contracts are simply personal rights, and so do not bind successors of the owner, or, to be more precise, do not bind singular successors of the owner. But if a contract relating to property falls into the class of real rights, such as a lease,[1] then the position is different. In fact, at common law even leases do not bind singular successors, but there are two statutes which confer on leases real effect: the Leases Act 1449 and the Registration of Leases (Scotland) Act 1857.[2] So: to argue that an agreement allowing the use of land binds the singular successors of the owner who made the agreement, it is necessary (i) to show that the agreement counts as a lease, as opposed to some other sort of contract, and (ii) to bring the lease under either the 1449 Act or the 1857 Act.

Exclusive possession is a major element in distinguishing leases from other contracts. As Paton and Cameron say:[3]

> If possession is given, the question is whether the possession is intended to be exclusive or only partial. If the right to possession is exclusive, the contract may be a lease, but if it is only partial, the contract will be merely a licence. … An agreement taking the form of a lease and giving exclusive possession to the grantee may yet fail to qualify as a lease.

In other words, exclusive possession is not a sufficient condition but it is a necessary one, ie 'exclusive possession, therefore a lease' is not true, but 'if no exclusive possession, therefore no lease' is true.

The rule is one about the *tenancy* rather than about the *tenant*. Thus there is no objection to a lease to Mr and Mrs Smith. Neither, individually, is granted exclusive possession, but that does not matter, because the tenancy as such confers exclusive possession. Because of this, it is competent for X to grant a lease to X, Y and Z,[4] for in such a case X's possession is *qua* tenant and not *qua* landlord.

Since the two major stores each received, under their leases, a one-third share of the common areas, what was the position for the remaining third? Had it been included in the lease there would have been no problem, ie it would have been acceptable if the lease, in respect of the car-parking areas

1 Another example would be a real burden. For a comparable case this year, involving the question of whether an agreement was simply a contract, and thus not binding on singular successors, or a real burden, and therefore binding, see *Hill of Rubislaw (Q Seven) Ltd v Rubislaw Quarry Aberdeen Ltd* [2014] CSIH 105, 2014 GWD 40-723.

2 As amended, the 1857 Act applies both to the Register of Sasines and to the Land Register. Occasionally neither statute is applicable, in which case even though the contract in question counts as a lease, the common law position applies, and so it lacks real effect. The main example in practice is an unregistered long lease.

3 G C H Campbell and J G S Cameron, *The Law of Landlord and Tenant in Scotland* (1967) pp 14–15.

4 *Pinkerton v Pinkerton* 1986 SLT 672.

etc, had been to the landlord itself, plus the two stores, equally. But that was not what had happened. The one-third share retained by the landlord was retained *qua* landlord. So, argued the pursuer, the arrangement could not be one of lease. It was, no doubt, perfectly valid contractually, but that was not the issue. The issue was whether it bound the present landlord. If it was not a lease, then the answer had to be negative. Put another way, the lease granted to M & S had been valid in part (*quoad* the store itself) and invalid in part (*quoad* the car-parking areas etc).[1]

The court rejected this idea of partial invalidity. No doubt a lease of a third share[2] of a given plot of land would, *by itself*, be invalid as a lease. But that was not the situation here. The Lord Ordinary observed:[3]

> The argument presented by the pursuer focused to a significant extent on whether a self-standing grant of a purported tenancy of a one-third *pro indiviso* share of an area of land could, according to Scots law, meet the requirements of a lease conferring a real right upon the grantee. The case law cited in this connection was largely concerned with the quality of possession necessary to satisfy the requirements of a lease of land, as opposed to some lesser right such as a licence which could confer only a personal and non-transmissible right upon the grantee. That, however, is not the situation in the present case. The purported grant to the defender of a lease of a one-third *pro indiviso* share of and in the Shared Areas does not stand alone: it is an adjunct of the grant of a 127-year registered lease of the area of land.

This is an important clarification of the law. In order to reach it, the Lord Ordinary relied in particular on a nineteenth-century case, *Campbell v McLean*.[4] In or about 1791 a 99-year lease had been granted of land at Tobermory, Mull. The lease had included a right to graze one cow on land retained by the granter of the lease. Thereafter a singular successor of the landlord argued that this did not bind him. At first instance the landlord was successful, but the Inner House reversed, and the House of Lords affirmed the decision of the Inner House.[5] The Lord Ordinary quotes Lord Deas in the Inner House:[6]

> The Lord Ordinary, no doubt, seems to hold, that if the privilege in dispute could not, by itself, have been made the subject of a lease binding on singular successors, the privilege must be held ineffectual against the pursuer, although the lease, in other respects, is to stand good. I am not prepared to assent to that doctrine. It appears to me that where the privilege is, as it is here, purely of a pertinential nature, the privilege must remain effectual against the singular successor, if the lease be effectual against him as respects the principal subjects let. … Many things may be let as pertinents which a singular successor cannot take away, although he might not have been bound by a lease which let only these things themselves.

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1 That is to say, invalid as a real right.
2 Or two-thirds, taking into account the other store.
3 Paragraph 26.
4 (1867) 5 M 636 affd (1870) 8M (HL) 40.
5 It may be asked why a case involving one cow ended up in London. The explanation is that numerous properties at Tobermory had similar rights. This was a test case.
6 Paragraph 27. The quotation is from p 651 of the Inner House case.

In short: what would be incompetent as a stand-alone lease can be competent as a pertinent. That disposed of the 'no exclusive possession so no real right' way of framing the argument.

The pursuer's first argument, second branch: not *inter naturalia*[1]

The pursuer also presented a variant of the argument:[2] the shared right to the common parts was not a matter that was *inter naturalia* of a lease and so could not bind a singular successor.

A few words may be appropriate to explain the *inter naturalia* doctrine. Even where a contract counts as a lease, that does not mean that *every* term necessarily binds a successor of the landlord. To take an extreme case: a lease says that the landlord must abstain from alcohol. That may be a contractually valid term, binding the party who signed it, but it does not bind a singular successor. It has nothing to do with the *lease*.

The pursuer argued that 'the right to use of a car park was not *inter naturalia* of a lease and the defender did not offer to prove that it had been rendered *inter naturalia* through custom and practice. Rather, it was analogous to a personal right to enjoy the use of an area of land near to or adjacent to the subjects of let'.[3] This was, surely, not a strong argument, and it was dismissed by the Lord Ordinary without difficulty:[4]

> Nor am I persuaded that the present case turns to any extent on the question whether a particular condition in a lease transmits against a singular successor on the basis that it is *inter naturalia* of the lease. The issue here is not the characterisation of a condition in the lease; it is rather the more fundamental question of the extent of the grant. This, in my opinion, places the instant case in a different category from those in which the court has required to consider whether conditions such as an option to purchase, or an exclusivity clause prohibiting the letting of nearby premises to a business competitor, were to be regarded as *inter naturalia* of the type of lease in question. As the right granted to the defender in relation to the Shared Areas is properly to be regarded as a pertinent of the real right created by the lease, it is, in my view, unnecessary to consider further whether or not it transmits against singular successors. If, however, I were wrong in that view, I would have no difficulty in holding that the right granted in relation to the Shared Areas is transmissible as being *inter naturalia* of this lease. In *Montgomerie v Carrick* (1848) 10 D 1387 … Lord President Boyle observed at p 1395, without employing Latin terminology:
>
> > It is no doubt most plain and obvious, as maintained by the pursuers, that there is a distinction between those stipulations which are extrinsic to the lease, and do not transmit against singular successors, and those other stipulations which are of the essence of the contract, and do therefore of necessity transmit against them.

1 This was argued at the first hearing: [2014] CSOH 59, 2014 GWD 18-352.
2 Here, and above, we reconstruct the pursuer's case in our own way. It seems not to have been presented to the court in precisely this way.
3 Paragraph 20.
4 Paragraph 31.

> In my opinion, I would not have required to hear evidence of custom and practice in order to decide that it was of the essence of a 127-year lease of ground, on which a large retail store was to be constructed to provide one of the two focal points of an out-of-town shopping development, that the grantee would acquire rights enabling it to offer car parking facilities and pedestrian and vehicular access to its customers, staff and service vehicles.

The pursuer's second argument: consent[1]

The pursuer's second argument was that M & S had consented to the Primark development, through the proceedings of the shopping centre's management committee. We quote:[2]

> The pursuer has produced minutes of meetings of the Management Committee held on 24 February 2011, 24 March 2011 and 24 November 2011. In each case an employee of the defender (though not always the individual who attended the meeting) has, on behalf of the defender, signed a page annexed to the minute containing the following text: 'I confirm I have read the minutes of the above date and that they are an accurate reflection of the meeting. The proposals made therein are hereby approved.'
>
> Paragraph 2.1 of the minute of the meeting on 24 February 2011 includes the following … under a heading 'New Lettings': 'Units 33, 34, 35 & 36 – agreed to Primark. Letting will also require enlarged unit to be extended to circa 56,000 sq ft over 2 floors. Reconfiguration of service yard and some car parking spaces required. Notification of this letting was made to [the defender's representative] at a meeting on the 31 January attended by [initials of persons attending]… Public consultation presentation to go on Mall in early March 2011. The lease will be a term of 15 years.'
>
> Paragraph 2.2 of the minute of the meeting on 24 March 2011 includes the following … under the same heading: 'Units 33, 34, 35 & 36 – agreed to Primark (as per Minutes 24 Feb 11). Letting will also require unit to be extended to circa 55,000 sq ft over 2 floors. Reconfiguration of service yard and some car parking spaces required. Plans enclosed. Lease to be 15 years. M&S and Morrisons both expressed their endorsement of the proposals stating that it was a positive move for the Gyle and will open up a new demographic to the scheme.'

So in some sense there had been an agreement by or on behalf of M & S to the Primark development. But in what sense? And was that agreement, whatever it was, legally binding? The issue ultimately was fairly simple. Did the management committee have power to agree to a development of this sort? The answer was reasonably clear. 'The proposed grant to Primark would … constitute a variation of … the M & S lease';[3] yet 'there is nothing in the lease that confers upon the Management Committee a power to agree to a variation of the defender's lease.'[4] The management committee's role related to matters of 'routine management'[5] and the Primark development was clearly not a matter that the committee could

1 This was argued at the first hearing: [2014] CSOH 59, 2014 GWD 18-352.
2 Paragraphs 16 to 18.
3 Paragraph 32.
4 Paragraph 33.
5 Paragraph 33.

consent to. The lease would have had to have been varied in formal writing. That had not happened.

The pursuer's third argument: personal bar[1]

The pursuer's third argument was that M & S was personally barred from objecting to the Primark development. We quote the Lord Ordinary:[2]

> The pursuer contends that the parties entered into a contract – or the defender undertook a unilateral obligation – for the variation and partial extinction of the defender's real rights so as to permit the Primark development. That agreement – or obligation – was said to have been entered into verbally by the defender's representatives at meetings of the Management Committee and by signature of minutes of these meetings 'for and on behalf of' the defender. The pursuer acted in reliance on the contract or unilateral obligation, with the knowledge and acquiescence of the defender, by incurring fees, removing shop tenants, and entering into an agreement to lease to Primark. If the defender were permitted to withdraw from its contract or obligation, the pursuer would be materially adversely affected.

The pursuer split its personal bar attack into three parts: (i) 'statutory personal bar' under the Requirements of Writing (Scotland) Act 1995 s 1(3) and (4); (ii) *rei interventus*, and (iii) waiver. As to the first, it was held that statutory personal bar relates only to personal rights and not to real rights, and accordingly could not be relevant to the variation of a lease. The Lord Ordinary put it thus:[3]

> The relationship between s 1(2)(a) and 1(2)(b) [of the 1995 Act] in the context of leases was discussed by Lord Drummond Young in *The Advice Centre for Mortgages v McNicoll* 2006 SLT 591. At paragraph 18, Lord Drummond Young observed that the legislative intention is clearly to separate contracts relating to land (ie transactions giving rise to merely personal rights) on the one hand from dispositions and other deeds that actually effect the creation or transfer of an interest in land (i.e. transactions giving rise to real rights) on the other hand. He accepted a submission that the personal bar provisions should be confined to transactions that create rights which are purely personal and were not intended to apply to a transaction creating rights that could be made real by registration or taking possession.

The Lord Ordinary agreed with that approach:[4]

> The 1995 Act draws a fundamental distinction between the creation of personal rights, where a party's actings may bar him from founding upon a failure to constitute the contract in a written document complying with s 2, and the creation of real rights, good against third parties, as regards whom a party's actings can have no such effect. As Lord Drummond Young explained, there are sound policy reasons for drawing such a distinction. … It also accords with the views of the Scottish Law Commission,

1 This was argued at the second hearing: [2014] CSOH 122, 2014 GWD 26-527.
2 Again Lord Tyre.
3 Paragraph 14.
4 Paragraphs 16 and 17.

> expressed in their Report no 112 on Requirements of Writing which led to enactment of the 1995 Act. . . .
>
> Applying this analysis to the circumstances of the present case, the statutory personal bar would be capable of applying to an agreement to vary the terms of the defender's lease, but not to a variation of the lease itself. The difficulty for the pursuer is that its case is necessarily based on the latter, not the former, having occurred. It is not averred by the pursuer, and there has been no evidence to suggest, that the agreement said to have been reached at Management Committee meetings was an agreement to vary the terms of the lease; on the contrary, it seems from the evidence of the pursuers' witnesses that no thought was ever given by the Management Committee to the terms of the lease. It must follow, in my opinion, that no relevant case is made by the pursuer that the lease has been varied.

As to *rei interventus*, the Lord Ordinary held that it was a doctrine that had not survived the 1995 Act. And, finally, the waiver argument also failed:[1]

> The evidence falls well short of establishing that there has been voluntary, informed and unequivocal waiver by the defender of its right to prevent the construction and leasing of the building. It seems to me that the pursuer's analysis perpetuates its original error of treating the defender's representatives who attended and approved the minutes of Management Committee meetings as equivalent to the defender itself. It wrongly characterises the conduct of those individuals as the conduct of the defender.

Final reflections

It may be thought that the facts of the *Gyle* case are special, in that the shared areas were not wholly leased out, but only leased out to the extent of a two-thirds *pro indiviso* share. We do not know how common that type of arrangement is; but, whether common or not, something of the sort must happen, albeit transitionally, in almost all developments,[2] even where the eventual intention is to lease out 100% of the common parts along with the remaining units in the development.

But the challenge posed by the *Gyle* case was not, we think, confined to cases of partial disposal of common areas. For if arguments put for the landlord had prevailed, the decision would appear to have affected *any* lease of a (mere) share of common areas, even if no (lease) share had been allocated to the developer. In other words, the decision would have been authority for the proposition that a *pro indiviso* share is incapable of being made the subject of a real right of lease. The consequences would have been very serious. Just as, in the realm of owned development units, *PMP Plus v Keeper of the Registers of Scotland*[3] has resulted in a windfall gain for developers in respect of the shared areas, so, in the realm of leased development units, the *Gyle* case, if decided the other way, would have resulted in a windfall gain for developers' singular successors, who would have taken the shared areas free of what would now be seen as a merely contractual

1 Paragraph 32.
2 Unless all the leases are granted simultaneously.
3 2009 SLT (Lands Tr) 2. See pp 134 ff below.

arrangement between the original developer and the lessee. Thankfully, such an unwelcome result has been avoided.

It is important, however, to acknowledge the limits of Lord Tyre's decision. The lease of a *pro indiviso* share was good only because it was a pertinent of a lease of other subjects, ie of (100% of) a unit in the development. A stand-alone arrangement in respect of a *pro indiviso* share could not be constituted as a real right of lease. That thought, however, is unlikely to cause much concern to commercial conveyancers.

Lastly, by way of footnote, it might be worth mentioning that the Land Registration etc (Scotland) Act 2012 has provisions about shared areas held by tenants in common: see sch 1 to the Act. These provisions are not substantive, but rather are about the way that such areas are to be dealt with in the Land Register.

COMMON AREAS: 'OWNED' DEVELOPMENTS

The story so far

In 2008 *PMP Plus Ltd v Keeper of the Registers of Scotland*[1] decided that, in a conveyance of *pro indiviso* shares in a common area (as in a conveyance of anything else), the subjects conveyed must be fully identified at the time of the conveyance. Split-off deeds which described common areas by reference to a future event, such as what was left of the site after completion of the development, did not meet this test. Accordingly, in cases where this sort of formulation had been used, no real rights in the common areas had passed to disponees, and the common areas remained the property of the developers. Unfortunately, it turned out that this situation was one which arose rather frequently, meaning that in numerous housing estates the home-owners had no property rights in respect of the recreational and other common areas.

PMP Plus was followed, in 2013, by *Lundin Homes Ltd v Keeper of the Registers of Scotland*.[2] This closed off what, at one time, had been suggested as a possible escape route from *PMP Plus*. The idea had been that, even if the description of the common areas was insufficient at the time of the split-off writs, it might become sufficient once the future event (eg the completion of the development) had definitively occurred. Any disposition granted after that date, though using the same descriptive words as before, would thus be capable of transmitting rights in the common areas. Of course, such dispositions would, to that extent, be *a non domino* (for the disponer would have acquired no rights in the common areas from the developers owing to the defective description). But, on registration in the Land Register, the absence of title would be cured by the Keeper's Midas touch, in terms of the Land Registration (Scotland) Act 1979.

In *Lundin Homes*, the Lands Tribunal rejected this approach. While the argument just described might be sound in principle, it could not, the Tribunal held, lead to the conferral of ownership because of the manner in which the

1 2009 SLT (Lands Tr) 2; for discussion, see *Conveyancing 2008* pp 133–49.
2 2013 SLT (Lands Tr) 73; for discussion, see *Conveyancing 2013* pp 105–16.

common areas were actually described on the title sheet. These descriptions were unintelligible without recourse to extrinsic information, and such recourse was, in general, impermissible. Ownership of the common areas would thus remain with the developers, as before.

PMP Plus and *Lundin Homes* led to a change of practice in respect of new developments, a change indeed insisted on by the Keeper.[1] But for existing developments the difficulty remained that, in many housing estates, home-owners would have no rights to the common areas. Those acting for purchasers would have to be especially alert as to how the common areas were described in title sheets. If they were delineated on the title plan, all was well. If they were not so delineated but were sufficiently identified by words, then that was also sufficient, provided the words could be understood without recourse to extrinsic evidence other than, perhaps, the title sheets of other registered properties. In all other cases, the description was inept, and the common areas were not included in the title. Clients would still receive the house (assuming the title to be otherwise in order), but they would be denied ownership of the common areas.

Miller Homes: might positive prescription help?

Might positive prescription help? Even if a description is not sufficient to carry the common areas at the time of the split-offs, might it nonetheless be sufficient for the purposes of prescription? If so, home-owners would, after 10 years, acquire ownership of the common areas provided they could show an appropriate amount of possession. We have ourselves made this suggestion, although without much enthusiasm or conviction.[2] And with the coming into force of the Land Registration etc (Scotland) Act 2012, on 8 December 2014, it has become a little more attractive because, in an important change from the 1979 Act, Land Register titles too are now capable of being cured by positive prescription.[3] But hitherto the idea had not been tested in the courts. That test has now arrived in the form of the decision in *Miller Homes Ltd v Keeper of the Registers of Scotland*.[4]

This was yet another case in which developers sought to test the limits of the *PMP Plus* doctrine. In the mid-1980s an estate of 80 houses, known as the South Beechwood Estate, was built by Miller Homes Two Ltd[5] on a site off Corstorphine Road in Edinburgh. After the houses had been sold, a certain

1 Registers of Scotland, *Update 27: Creation, Identification, and Transfer of Rights in Common Area in Developments* (July 2009), as amended by *Update 27 Additional Information: Lundin Homes Ltd v Keeper* (January 2014).

2 *Conveyancing 2008* pp 142–43; *Conveyancing 2013* pp 115–16.

3 Prescription and Limitation (Scotland) Act 1973 s 1, as amended by the Land Registration etc (Scotland) Act 2012 sch 5 para 18(1), (2). Previously, prescription ran only where the Keeper had excluded indemnity.

4 2014 SLT (Lands Tr) 79. The Tribunal comprised J N Wright QC and A Oswald FRICS.

5 Earlier called Miller Homes Ltd and, still earlier, Miller Homes Northern Ltd. The company involved in the present litigation, called Miller Homes Ltd, seems thus to be a separate company from the company formerly called Miller Homes Ltd. (See para 8 of the Land Tribunal's judgment.) That the law allows this sort of thing is remarkable, for it is a fertile cause of confusion.

amount of land was disponed as amenity ground to the residents association in implement of an obligation to do so in the deed of conditions governing the estate. But some land remained, and in 2011 the Miller Homes company which had carried out the development disponed it to another Miller Homes company. In registering the disposition, the Keeper excluded indemnity, in the following terms:

> The title of the proprietor of the subjects in this Title is founded on a Disposition by Miller Homes Two Limited to Miller Homes Limited, registered 28 September 2011. Indemnity is excluded in terms of section 12(2) of the Land Registration (Scotland) Act 1979 in respect of any loss arising as a result of the said Disposition being reduced or declared or found to be void, in consequence of the proprietors of the remaining properties of the development at South Beechwood, as edged brown on the Title Plan, being found to have any right to the subjects in this Title.

The Keeper's reasoning, it seems, was as follows. The original split-off conveyances in the 1980s had, as well as conveying the individual house in question, also conveyed:

> (Three) a right in common with the proprietors of all the other dwellinghouses in the development of which the subjects hereby disponed form part to areas of open space amenity ground and/or wooded areas and unallocated parking spaces formed or to be formed in accordance with the requirements of the Local Planning Authority (the exact extent of which areas may not yet have been defined). . . .[1]

Now it was true that the uncertain nature of this description had prevented the transfer of the common areas from taking place, on the principles identified in *PMP Plus*. And it was also true that certain amenity land was subsequently conveyed by Miller Homes to the residents association. But the land now being conveyed between associated Miller Homes companies was also, potentially, part of the common area. And while the split-off conveyances did not validly convey a share of that land *at the time*, in the mid-1980s, those conveyances – or subsequent dispositions of the houses – might be capable of acting as foundation writs for prescription. There was thus a possibility that one or more home-owners had acquired rights in the land in question. It was against this risk that indemnity required to be excluded.

Miller Homes appealed against the exclusion of indemnity. The issue before the Lands Tribunal was whether positive prescription might have run in the manner suggested by the Keeper. For prescription to operate, of course, two things are required. First, there must be a title, and secondly there must be possession for 10 years. The Tribunal's deliberations were largely confined to the problem of title, but later we will say just a little about the problem of possession.

1 It then added as a further qualification: 'unless and until said areas and unallocated parking spaces may be formally taken over by the Local Authority'. For a discussion of this rider, see *Miller Homes* para 38.

The problem of title

It was accepted on all sides that the wording used for the common areas in the split-off conveyances was not sufficient to carry ownership to the grantees. This was because the identification of the areas depended on an event which might only take place in the future, namely formation in accordance with the requirements of the local planning authority; and, following *PMP Plus*, there could be no *de praesenti* (ie present) conveyance of land where the description used depended on a future event.

But did the same objection affect the status of the conveyances for the purposes of prescription? The Lands Tribunal thought that it did. '[T]he principle of property law, not just "registration law", that real rights to land can only operate *de praesenti*, renders *ex facie* invalid any conveyance of land ascertainable only under reference to an uncertain future event, so that such a title cannot found prescriptive possession.'[1] And an *ex facie* invalid deed cannot found prescription. Thus far we would agree. Where a deed's wording is such that the transfer could *only* operate in the future, being a time which, indisputably, has not yet arrived, the deed cannot found prescription.[2]

But matters are often not as clear as this, and they were not clear in the present case. For in respect at least of the later split-offs – and indeed subsequent transmissions – the possibility existed that, by the time they were granted, the common areas had in fact been identified. If so, these writs, thought the Tribunal, would be sufficient for prescription.[3] It could not, therefore, be said for certain that *none* of the home-owners had a competing title. Evidence of identification might show otherwise.

It was, however, up to individual home-owners to argue the case. None chose to do so.[4] In those circumstances it must therefore be assumed, the Lands Tribunal thought, that prescription had *not* run, and hence that the land at issue still belonged 100% to Miller Homes. The appeal against exclusion of indemnity would be allowed.[5]

The decision is important, not just for the law pertaining to common areas but for the law of positive prescription as well. At issue was the question of whether a conveyance, which on its face might – but, equally, might not – depend for the identification of the subjects conveyed on an event that had not yet occurred, could form a good title for the purposes of prescription. As we will see shortly, there is something to be said for giving the answer 'yes' to this question. There is also – because the issue is difficult and untested – something to be said for the answer 'no'. But there seems little merit, we think, in saying, as the Tribunal did, that 'it depends on the actual circumstances at

1 Paragraph 30.
2 That would be the case, for example, where the conveyance specified an actual (and future) date for taking effect.
3 Paragraph 37.
4 Despite being given ample opportunity. The Tribunal intimated the appeal to all proprietors for a second time and allowed six weeks for representations (para 46). None was received. We are grateful to Neil Tainsh, Clerk to the Tribunal, for this information.
5 See Lands Tribunal Order of 29 May 2014.

the time the conveyance was granted, and those circumstances will require to be investigated by extrinsic evidence'. For prescription supposes that the adequacy of a foundation writ is judged simply by looking at it. That extrinsic evidence is irrelevant is built into the very distinction between *ex facie* nullity, which is fatal to a deed as a foundation writ, and nullity which can only be established by extrinsic evidence, which is, for this purpose, disregarded.[1] The Tribunal's decision seems to deny this distinction by requiring an investigation of the background circumstances at the time when the conveyance was granted. Indeed, even if there were no technical objection, this approach would cause practical difficulties, especially in respect of elderly deeds. It is also of no assistance in respect of the original split-offs for, if the specified event had occurred by the time they were granted (as the Tribunal requires), they would have been effective in the first place as conveyances of the common areas and so be in no need of prescription.[2]

Where, therefore, the description of common areas refers to a future event which might or might not have taken place (the actual position being discoverable only by investigation of the circumstances at the time when the deed was granted), the proper choice seems to lie between always allowing, or always disallowing, such a deed as a foundation for positive prescription. At this point it will be helpful to look at the statutory language, found in s 1 of the Prescription and Limitation (Scotland) Act 1973.[3] That language is much the same regardless of whether the deed was registered in the Land or the Sasine Register.[4] As applied to Sasine writs (the topic of discussion in *Miller Homes*) what is required as to title is that the possession was founded on and followed:[5]

> [A] the recording of [B] a deed which is sufficient in respect of its terms to constitute in favour of that person a real right in [C] that land, or land of a description *habile* to include that land … [D] [except where] possession was founded on the recording of a deed which is invalid *ex facie* [E] or was forged.

Of the five requirements set out in the Act, only two – [B] and [D] – are germane to the current discussion. They plainly overlap. More than that, [D] appears to qualify [B] so that a deed is only insufficient in respect of its terms if that insufficiency is conclusively apparent from the face of the deed. The test here is severe. A deed, it has been said, must be 'self-destructive' before it is regarded as *ex facie* invalid. 'The deed must *per se* afford complete and exclusive proof of

1 See eg W M Gordon and S Wortley, *Scottish Land Law* (3rd edn, 2009) paras 12–36 ff.

2 That would not, however, be true of later transmissions because, if the original split-off did not carry a share in the common areas, the granter of a later disposition would not have title to convey, and the aid of prescription would be required.

3 An examination of the statutory language is absent from the Tribunal's Opinion.

4 That was not true until the Land Registration etc (Scotland) Act 2012 sch 5 para 18(2) came into force on 8 December 2014. Since then the main difference has been that for Land Register deeds there is no requirement of *ex facie* validity. The reasons for the omission are unclear, to us at least. The explanation in D Johnston, *Prescription and Limitation* (2nd edn, 2012) para 17.19, that 'if there is *ex facie* invalidity, this should presumably be noticed by the Keeper and lead to rejection of the deed', is not convincing.

5 Prescription and Limitation (Scotland) Act 1973 s(1)(a), (2)(a); our lettering.

its nullity.'[1] If the position is merely that the deed is *highly likely* to be invalid, but only extrinsic evidence could disclose the true position, the deed will still qualify for the purposes of prescription.[2]

Now, consider the wording in the split-off deeds under consideration in *Miller Homes*. As already mentioned, what was conveyed (in addition to the house) was:

> a right in common with the proprietors of all the other dwellinghouses in the development of which the subjects hereby disponed form part to areas of open space amenity ground and/or wooded areas and unallocated parking spaces formed or to be formed in accordance with the requirements of the Local Planning Authority (the exact extent of which areas may not yet have been defined)

The 'exact extent' of the areas, we are told, 'may not yet have been defined'. But equally, they *may* have been defined. Only extrinsic evidence could tell which is the case. Such a deed, therefore, is not 'self-destructive'; such a deed – and, depending on the wording, other *PMP Plus*-style deeds as well[3] – is capable of founding prescription.

The problem of possession

There remains the problem of possession. Even if a *PMP Plus*-style deed founds prescription, as we think it often does, an owner wishing to establish a right to the common areas will need to show possession of those areas for the 10 years required for positive prescription. That may not be too difficult, for example, in respect of car-parking areas, or a wooded area used to walk the dog. It will be harder in respect of, say, flower beds, or a children's play area which the owner, being childless, does not use,[4] although some help may be derived from the principle that possession of a part can be treated as possession of the whole.[5]

Future implications

On the whole, we remain doubtful as to the value of prescription as the solution to the common areas problem, at least in the typical case. To the problem of possession, which was already well known, *Miller Homes* has added – wrongly, in our view – a new problem of title. And even if both can be dealt with, there will be the further difficulty of satisfying the Keeper, following *Lundin Homes*, that the area claimed can be adequately plotted on the cadastral map.

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1 *Cooper Scott v Gill Scott* 1924 SC 309, 323 per Lord Justice-Clerk Alness.

2 W M Gordon and S Wortley, *Scottish Land Law* (3rd edn, 2009) paras 12–36–12–39; D Johnston, *Prescription and Limitation* (2nd edn, 2012) para 17.31.

3 Sometimes the wording will be on the edge. Common areas which are described as whatever is left after completion of the development could, with almost equal plausibility, be said to be (i) *ex facie* valid, because the development *might* have been completed at the time of the grant, or (ii) *ex facie* invalid, because one can never know when or if a development is 'complete', and so it is a time which can never arrive.

4 The same point is made by Andy Duncan: see 'Lundin Homes Ltd v the Keeper: the Keeper's response' (2014) 130 *Greens Property Law Bulletin* 5, 6–7.

5 Stair, *Institutions* II.1.13. See also p 164 below.

E-CONVEYANCING

'Traditional' documents and 'electronic' documents

For centuries beyond number, conveyancing has been conducted in Scotland by means of deeds written, first, on parchment, then on heavy 'deed paper', and finally, due to the frailties of modern printers, on ordinary and perishable paper of the kind used to print e-mails, entries from Wikipedia, and other ephemera. The requirement for writing, moreover, has long been embedded in statute, beginning with the Subscription of Deeds Act 1540 (c 37) which insisted, for the first time, that the writing be subscribed rather than sealed:

> Item, it is statute and ordanit that, becaus mennys selis may of aventure be tint, quhairthrow grett hurt may be generit to thaime that aw the samin, and that mennis selis may be fenyeit or putt to writtingis eftir thair deceise, in hurt and prejudice of oure soverane lordis liegis, that therefor na faith be gevin in tyme cuming to ony obligatioune, band or uther writting under ane sele without subscriptioune of him that aw the samin and witnesses, or ellis, gif the party can nocht write, with the subscriptioune of ane notary tharto.[1]

The current legislation, less attractively expressed, is of course the Requirements of Writing (Scotland) Act 1995.

Back in 1995 it would not have occurred to many people that, within a couple of decades, deeds in electronic form might supplement or even replace paper deeds. At any rate, no provision was made in the 1995 Act for anything other than traditional deeds written on paper. Suddenly, all that has changed. As a result of wide-ranging amendments to the 1995 Act,[2] which came into force on 11 May 2014, electronic deeds can be used as an alternative to paper deeds in all cases where writing is required by the Act. The only exceptions, for the moment, are wills, codicils, and other testamentary writings: although the amendments would extend to these deeds as well, they have not, to that extent, yet been brought into force.[3]

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1 The translation given on the Records of the Parliament of Scotland website (www.rps.ac.uk) is 'Item, it is statute and ordained that, because men's seals may be lost through adventure, whereby great hurt may be generated to those who own the same, and that men's seals may be forged or put to writings after their death, in hurt and prejudice of the lieges of our sovereign lord, that therefore no faith be given in time coming to any obligation, bond or other writing under a seal without subscription of he who owns the same and with witnesses, or else, if the party cannot write, with the subscription of a notary thereto.' We would observe that the anxiety about the misuse of seals was no different from the anxiety about misuse of electronic signatures. Yet, while subscription was introduced because seals were considered unsafe, subscription is now being abandoned in favour of electronic signatures. Perhaps seals would have survived if, in the sixteenth century, they had been protected by a PIN-number.

2 By the Land Registration etc (Scotland) Act 2012 ss 96–98 and sch 3. These provisions are based on recommendations of the Scottish Law Commission: see *Report No 222 on Land Registration* (2010) pt 34.

3 Land Registration etc (Scotland) Act 2012 (Commencement No 2 and Transitional Provisions) Order 2014, SSI 2014/41, sch pt 2.

As a result of the amendments, the 1995 Act is substantially re-cast, and divided for the first time into parts.[1] Part 1 (s 1) makes provision as to when writing is required – the legislation here is unchanged – and explains that the requirement of writing can be met either by 'traditional' documents or by 'electronic' documents. A 'traditional' document is defined as one 'written on paper, parchment or some similar tangible surface';[2] an 'electronic' document is, unsurprisingly, a document 'created in electronic form'.[3] The existing and familiar rules for executing traditional documents are set out in part 2 (ss 1A–9) of the Act. The rules for executing electronic documents can be found in a group of new provisions collected together in part 3 (ss 9A–9G). These are supplemented by the Electronic Documents (Scotland) Regulations 2014[4] and by the Land Register of Scotland (Automated Registration) etc Regulations 2014.[5]

Nothing further needs to be said here about traditional documents, because the only thing that has changed is the name: in other respects the legislation remains the same. But the new electronic documents open the way to e-conveyancing and need to be explored in some detail.

Electronic documents

Formal validity and probativity

A traditional document is valid as to formalities if it is subscribed by the granter, but 'probative' or 'self-proving' (ie *presumed* to be so subscribed) only if it bears to be subscribed and also (in the normal case) to be signed by a witness.[6] In principle, this distinction is maintained in respect of electronic documents, so that a deed is formally valid if it is 'authenticated' by the granter and probative if it bears to be authenticated and also to be certified by a 'qualified certificate'.[7] Authentication is thus the equivalent of subscription, and certification is the equivalent of witnessing. An additional requirement for probativity, in both traditional and electronic deeds, is that nothing on the face of the deed must indicate that it was *not* subscribed or, as the case may be, authenticated.[8] This is because probativity, like beauty, is about *appearance*: a deed is probative if it *bears* to subscribed and witnessed or, as the case may be, authenticated and certified.

It is necessary to say something more about authentication and certification.[9]

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1 For a detailed account of the Act in its new form, see K G C Reid, *The Requirements of Writing (Scotland) Act 1995* (2nd edn, 2015).
2 Requirements of Writing (Scotland) Act 1995 s 1A. The definition is new: in its original form the 1995 Act did not attempt to define what constituted a writing.
3 RW(S)A 1995 s 9A.
4 SSI 2014/83.
5 SSI 2014/347.
6 RW(S)A 1995 ss 2, 3.
7 RW(S)A 1995 ss 9B, 9C.
8 RW(S)A 1995 ss 3(1)(c), 9C(1)(b).
9 See also S Brymer, 'Secure digital signatures' (2014) 131 *Greens Property Law Bulletin* 3.

Authentication

An electronic document is authenticated by being signed by means of an electronic signature,[1] which must be 'incorporated into, or logically associated with' the document.[2] In practice, granters of documents will not have electronic signatures of the type that is needed, with the result that they will typically sign through an agent (generally a solicitor). Section 12(3) of the Act makes clear that an agent can carry out authentication on behalf of a granter.

By itself, the term 'electronic signature' can cover anything from a name typed on the end of an e-mail to something immeasurably more sophisticated.[3] For the purposes of the 1995 Act only an 'advanced electronic signature' will do,[4] that is to say[5]

> an electronic signature –
>
> (a) which is uniquely related to the signatory,
> (b) which is capable of identifying the signatory,
> (c) which is created using means that the signatory can maintain under his sole control, and
> (d) which is linked to the data to which it relates in such a manner that any subsequent change of data is detectable.

The final criterion brings out a key advantage of such a signature over one which is merely handwritten: an advanced electronic signature evidences not merely the assent of the granter at the time of signing ('authenticity', in the new jargon) but also that the document has not been altered after execution ('integrity'). Unlike with handwritten signatures, there is no requirement that the signature includes the person's name, and in practice it is much more likely to comprise a number.

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1 RW(S)A 1995 s 9B(1), (2). Self-evidently, as subsection (2)(b) says, the electronic signature must be 'created by the person by whom it purports to have been created' and so not be a signature which is stolen or used without authority.

2 RW(S)A 1995 s 9B(2)(a). This uses what has become standard terminology for the connection between electronic signature and electronic document: see Directive 1999/93/EC of the European Parliament and of the Council on a Community framework for electronic signatures (the E-Signatures Directive) art 2 (definition of 'electronic signature'); Electronic Communications Act 2000 s 7(2)(a). 'Incorporated' speaks for itself. A signature is 'logically associated' with an electronic document if there is a link or connection between the data which comprise the document and the data which comprise the signature (in the same way as, to take a familiar example, between an e-mail and one of its attachments).

3 'Electronic signature' is defined, rather generally, in s 12(1) of the Act as 'so much of anything in electronic form as (a) is incorporated into, or logically associated with, an electronic document, and (b) purports to be so incorporated or associated for the purpose of being used in establishing the authenticity of the electronic document, its integrity or both its authenticity and its integrity'. By s 12(4), 'authenticity' means whether a document has been electronically signed by a particular person, and 'integrity' whether there has been any tampering with, or other modification of, the document

4 Electronic Documents (Scotland) Regulations 2014, SSI 2014/83, regs 1, 2.

5 The definition comes from reg 2 of the Electronic Signatures Regulations 2002, SI 2002/318, and is in turn taken from the E-Signatures Directive (Directive 1999/93/EC).

Certification

The equivalent of attestation in traditional deeds, certification is a third-party verification of the validity of the granter's signature. An electronic signature is 'certified' by means of a statement, incorporated into or logically associated with the document, that the signature is a valid means of establishing the document's authenticity or integrity.[1] For the purposes of the 1995 Act, the certification must be by a 'qualified certificate',[2] which is defined, not very helpfully, as 'a certificate which meets the requirements in schedule 1 and is provided by a certification-service-provider who fulfils the requirements in schedule 2'.[3] We will come back in a minute to certification-service-providers. As for schedule 1,[4] this stipulates that qualified certificates must contain:

(a) an indication that the certificate is issued as a qualified certificate;
(b) the identification of the certification-service-provider and the State in which it is established;
(c) the name of the signatory or a pseudonym, which shall be identified as such;
(d) provision for a specific attribute of the signatory to be included if relevant, depending on the purpose for which the certificate is intended;
(e) signature-verification data which correspond to signature-creation data under the control of the signatory;
(f) an indication of the beginning and end of the period of validity of the certificate;
(g) the identity code of the certificate;
(h) the advanced electronic signature of the certification-service-provider issuing it;
(i) limitations on the scope of use of the certificate, if applicable; and
(j) limits on the value of transactions for which the certificate can be used, if applicable.

Thus far, the only certification-service-providers active in the Scottish legal market are the Keeper of the Registers of Scotland and the Law Society of Scotland. The Keeper has of course been issuing electronic signatures and certification to solicitors since 2006 in connection with deeds used within the ARTL system.[5] The entry of the Law Society of Scotland into the market, in 2014, is so as to enable solicitors to execute the much wider range of electronic documents which are permitted by the 1995 Act. In practice, both electronic signature and certificate are held on a single chip embedded within a PIN-protected smartcard. In the case of the Law Society, the chip is included in the smartcard which will

1 RW(S)A 1995 s 12(1) (definition of 'certification'). For the meaning of 'authenticity' and 'integrity', see s 12(4).
2 Electronic Documents (Scotland) Regulations 2014 reg 3(b).
3 Electronic Signatures Regulations 2002 reg 2. This, again, is taken from the E-Signatures Directive (Directive 1999/93/EC).
4 Ie sch 1 of the Electronic Signatures Regulations 2002.
5 Originally, the use of electronic deeds within the ARTL system (only) was authorised by a series of provisions added to the 1995 Act in 2006 (most notably ss 2A, 2B, 2C, and 3A) and repealed in 2014; the new provisions in part 3 of the Act are sufficient to encompass ARTL deeds as well as other electronic documents. Certain transitional provisions were in operation between 11 May and 8 December 2014: see the Land Registration etc (Scotland) Act 2012 (Commencement No 2 and Transitional Provisions) Order 2014, SSI 2014/41, arts 3, 4.

replace the current practising certificate.[1] As at the end of 2014, 1,000 smartcards had already been issued by the Law Society, and the remainder will be issued during the course of 2015.

To lawyers the technology involved is barely comprehensible. It is based on what is known as an asymmetric key-pair public-key infrastructure ('PKI'). The certification-service-provider creates a 'key pair' (two extremely large numbers), one 'public' and the other 'private'. The private key is given to the signatory, who uses it to create electronic signatures; the public key is publicly available in the form of a certificate, which confirms that signatures created by the private key were created by the identified individual.[2] Fortunately, the system is easy to work in practice.[3] Solicitors make an electronic signature by using the Law Society smartcard in association with a smartcard reader, which provides the interface from smartcard to computer via a USB cable. Obviously, only the person issued with the smartcard should use it; to allow an assistant or a secretary to use it instead is rather like allowing them to forge one's signature.

Formal validity or probativity?

As already explained, authentication by advanced electronic signature is needed for the formal validity of an electronic document, and authentication plus certification by a qualified certificate is needed for probativity. In the case of probativity, the order of doing things is unimportant for, unlike with witnessing, there is no requirement that certification comes after authentication.[4]

Which, then, should be used: formal validity or probativity? In fact, under current technology and practice, there is no choice. The chip on smartcards includes *both* an advanced electronic signature *and* a qualified certificate. Any deed authenticated with such a smartcard is thus both formally valid and also probative.

Which deeds?

Electronic documents can be used for *any* deed or document employed in ordinary conveyancing: for missives, dispositions, standard securities, discharges, leases, and so on. But as it is not yet possible to register electronic deeds in the Land or Sasine Register or the Books of Council and Session (other than within the ARTL system), only those documents not requiring registration, such as missives, are in reality available.[5]

1 See www.lawscot.org.uk/smartcard.
2 This explanation is based on the account given by the Scottish Law Commission in para 34.20 of its *Report No 222 on Land Registration*.
3 For guidance, see www.lawscot.org.uk/smartcard; www.lawscot.org.uk/media/355316/Using-your-digital-signature.pdf.
4 RW(S)A 1995 s 12(1) (definition of 'certification').
5 In addition, it has been suggested that 'the full effects of the change to electronic signatures will not be harnessed until a secure electronic document exchange facility is available': see R Rennie and S Brymer, 'E-missives: what now?' (2014) 59 *Journal of the Law Society of Scotland* Jan/18.

Registration of e-deeds

As with traditional documents,[1] an electronic document can only be registered in the Land or Sasine Register or the Books of Council and Session if it is in probative form.[2] More than that, before registration is permissible, the Scottish Ministers must also make appropriate regulations.[3] So far they have done so only in relation to deeds within the ARTL system (which hardly anyone uses).[4] It may be a while before the registration of e-deeds is allowed, other than within ARTL. A further limitation is that, for the moment at least, the form applying for registration requires to be on paper and signed by a handwritten signature.

Delivery

Documents in unilateral form normally do not take effect without delivery, and as electronic deeds cannot simply be handed over, some alternative method of delivery is required. The 1995 Act, as amended, allows delivery by electronic means, for example as an e-mail attachment, by fax, or by delivery within an electronic system such as ARTL.[5] Rather elliptically, the Act also allows delivery 'by such other means as are reasonably practicable', which might include, for example, physical delivery of a DVD or USB memory stick containing the document. Whichever method is used, it must be one which either the recipient has agreed to accept or 'which is reasonable in all the circumstances' for the recipient to accept.[6] It is assumed that electronic delivery will almost always meet this test.

One practical result of the new rules is to allow missives to be concluded by an electronic document transmitted by e-mail, because the e-mail will itself count as delivery. Under the previous law that was not so. Thus a paper offer or acceptance transmitted (as a PDF attachment) by e-mail is not delivered until the paper copy is itself sent.[7] For electronic documents, that limitation is removed by the new legislation. This is a helpful change but not, of course, one which will do much to solve the delays attendant in concluding missives, the causes of which are substantive rather than matters of form.

Execution by companies and other juristic persons

As companies and other juristic persons cannot hold a pen, the 1995 Act has always included special rules as to who is to wield a pen on their behalf.[8]

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1 RW(S)A 1995 s 6.
2 RW(S)A 1995 s 9G(1), (2). For exceptions, see s 9G(6).
3 RW(S)A 1995 s 9G(3).
4 Electronic Documents (Scotland) Regulations 2014, SSI 2014/83, reg 6, inserted by the Land Register of Scotland (Automated Registration) etc Regulations 2014, SSI 2014/347, reg 9(3).
5 RW(S)A 1995 s 9F.
6 RW(S)A 1995 s 9F(2).
7 *Park Ptrs (No 2)* [2009] CSOH 122, 2009 SLT 871. See *Conveyancing 2009* pp 85–89. The requirement of sending a paper copy is substantially removed by s 4 of the Legal Writings (Counterparts and Delivery) (Scotland) Act 2015.
8 RW(S)A 1995 sch 2.

Comparable rules have now been made in respect of electronic signatures.[1] So for example, an electronic document granted by a company must be signed electronically by a director, secretary, or authorised person; a document granted by a limited liability partnership must be signed electronically by a member of the partnership.

LAND REGISTRATION: THE 2012 ACT

The rush to the Register

The last day for registration under the Land Registration (Scotland) Act 1979 was Wednesday 3 December 2014. And so attached were people to the old system, and so tearful about its demise, that there was an unseemly rush to register before the stern new world of the 2012 Act commenced on 8 December. According to figures provided by Registers of Scotland,[2] the number of applications for registration on the last Monday, Tuesday and Wednesday of the 1979 Act was not far from double the number in the equivalent week (ie five full days) in 2013:

	2014	2013	Multiple
FR[3]	1,793	696	258%
TP[4]	1,032	387	267%
DW[5]	8,315	5,243	159%
Sasine	1,288	749	172%
Total	12,428	7,075	176%

A surprising number of the dispositions registered were elderly, or at least contained antique dates of entry; 18 even had dates of entry that were more than 10 years ago. The following table gives a complete account:

Difference between application date and entry date	Number	Percentage
Same Day	119	2%
1–7 Days	4495	71%
8–14 Days	510	8%

1 Electronic Documents (Scotland) Regulations 2014 reg 5, inserted by the Land Register of Scotland (Automated Registration) etc Regulations 2014 reg 9(3).
2 We are grateful to John King, Business Development Director at Registers of Scotland, for suppling these figures.
3 First registration.
4 Transfer of part.
5 Dealing with whole.

Difference between application date and entry date	Number	Percentage
15–21 Days	243	4%
22–28 Days	162	3%
29–42 Days	201	3%
43–70 Days	147	2%
71–140 Days	132	2%
141–210 Days	57	1%
211–356 Days	54	1%
357–712 Days	56	1%
over 712 Days	189	3%
Total	6,365	100%

Early uncertainties and evolving practice

In the following pages we give some account of the position as it was in the weeks following the commencement of the Land Registration etc (Scotland) Act 2012 on 8 December 2014. But during those weeks there was a good deal of change, as both conveyancers and RoS staff grappled with the new system, and as the Keeper developed her policies in the light of experience. Practice and policies are likely to continue to develop during 2015, and some of what is said below may already be history by the time this text is published. In any event, the subject of land registration is so large that what we offer below can only be snippets: we intend to publish a book on land registration before the end of 2015.

Advance notices

Advance notices are wholly new to Scottish practice, and will take some time to become fully familiar. The RoS website has excellent material on them.[1] Advance notices have already appeared in the news, when Rangers granted an advance notice for proposed standard securities over certain of their property.[2]

For which deeds?

For which deeds are advance notices needed? For all deeds, or only for some? And what about back-to-back deeds, such as dispositions and standard securities: if there is an advance notice for the seller's disposition (as there will be), is a

1 www.ros.gov.uk.
2 www.bbc.co.uk/sport/0/football/30827483.

second advance notice needed for the buyer's standard security? The legislation does not lay down any rules: it is merely facilitative, saying that advance notices can be used if so wished. Nor has there been any official guidance from the Law Society of Scotland. At the time of writing the CML *Lenders Handbook* is silent about advance notices.[1]

It would be possible to have an advance notice for every deed. But this would involve bother and (modest) expense without, in some cases, any real gain. As advance notices are intended to replace letters of obligation, the sensible rule of thumb is to use them wherever, under former practice, a (classic) letter of obligation was used, but not otherwise. Indeed a statement to that effect has been issued by the professors of conveyancing.[2] That would mean, for example, that in a residential purchase, where the same solicitor is acting for both borrower and lender, an advance notice is needed for the seller's disposition but not for the buyer's standard security. Where, however, borrower and lender are separately represented, an advance notice would be needed for the standard security if, under former practice, the borrower's solicitor would have granted a letter of obligation.

The purpose of the rule of thumb, just described, is to preserve essentially the *same* level of protection as was formerly provided by letters of obligation. Of course, it would be possible to seek *enhanced* protection by using an advance notice even where a letter of obligation would not have been used. On the other hand, the risks protected against by such a notice would often be remote and theoretical – which is why letters of obligation were not used in the first place. For example, it would be possible to use an advance notice for *all* 'purchase-money' standard securities in respect of residential property. And in theory that might give the lender additional protection against the borrower's insolvency or possible predilection (if he or she has one) for granting competing deeds such as other standard securities. But where there is already a clear personal search against the borrower, where the same solicitor acts for both borrower and lender, and where both disposition and standard security will in practice be registered of even date, it would require a fertile imagination to detect much in the way of danger for the lender.

There have been suggestions that, in the type of case just described, the lender might be at risk from an inhibition against the borrower.[3] But we do not find it easy to conceive of cases where there would be a real risk. An

1 Of course, individual lenders may have their own requirements.

2 The statement, which is signed by Professors Gretton, Paisley, Reid and Rennie, reads: 'There has been some uncertainty as to when it is and is not appropriate to use an Advance Notice. Whilst this must be a matter for professional judgement according to the circumstances of the individual case, we would suggest that, as a rule of thumb, an Advance Notice should be used where a classic letter of obligation would have been used, but that where a classic letter of obligation would not have been used one would not normally expect to see an Advance Notice. Accordingly, in the normal case we consider that there is no need to request an Advance Notice in a dual representation scenario when the solicitor is acting for both borrower and lender.' The statement appeared on the RoS website on 19 December 2014 and was also published at 2015 SLT (News) 8.

3 See eg letter by John Lunn in (2015) 60 *Journal of the Law Society of Scotland* Jan/6.

inhibition is ineffective against a deed that the inhibitee is, at the time of the inhibition, already bound to grant (the 'future voluntary acts' rule). Moreover, an inhibition does not affect property that the inhibitee acquires after the date of the inhibition (the *'acquirenda'* rule). Hence in the type of case just described, an inhibition against the borrower will be either too early or too late, or indeed both. Of course, in a sense the debate is of limited significance because, even if an advance notice confers no real benefit in this type of case, the cost is only £10 plus a little paperwork. Some will consider this worth paying for peace of mind.

Finally, at the risk of stating the obvious, it should be mentioned that the protection of an advance notice by seller to buyer will protect the buyer's lender in respect of (to use a traditional term) 'deeds and diligences' affecting the seller.

> *Example:* There is an advance notice on 1 May, in respect of a W/X sale. The W/X disposition is registered on 15 May. Purchaser X is also granting a standard security to lender Z, which is also registered on 15 May. It turns out that a standard security by W to Y was registered on 13 May.

The effect of the advance notice is that the Keeper will, on 15 May, simply delete the standard security granted in favour of Y. It will have existed for just two days. X obtains an unencumbered title. (The same would be true if some other type of deed had been granted by W to Y, such as a long lease or a competing disposition.) Since the W/Y standard security is now non-existent, the X/Z standard security is a fully effective first-ranking security. This is true not only if the X/Z standard security is registered of even date with the W/X disposition, as would typically be the case, but even if the X/Z standard security were to be registered say two months later. All that is necessary, in the situation described, is that the W/X disposition be registered within the protected period.

Revising and saving draft forms

The emerging practice is that, as formerly with letters of obligation, draft forms for advance notices are prepared by the seller's agents and revised by the purchaser's agents.[1] A practical difficulty, however, is that the electronic facility available from Registers of Scotland does not allow a draft to be prepared, saved and revised. Registers of Scotland explain that 'As there is no application form as such, just a small amount of data, this has not been part of the system development as we seek to pass on the advantages of real-time digital verification'.[2] We have heard that RoS will look at the possibility of a software change. For the moment, at any rate, the Property Standardisation Group has prepared styles which can be saved and used as drafts: see www.psglegal.co.uk. Of course, once the draft has been approved it will still be necessary to input the agreed data into the electronic form on the RoS website.

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1 For the suggestion that they should be prepared by the purchaser's agents, see p 156 below.

2 *Essential Guide to the 2012 Act changes* (www.ros.gov.uk/services/registration/land-register/faqs) Advance notices Q2.

Continued use of letters of obligation?

One welcome result of the introduction of advance notices is that letters of obligation will, in general, cease to be necessary. But letters of obligation will continue to be needed in respect of matters not covered by an advance notice (eg delivery of a discharge) or where the transaction does not lead to registration (eg the granting or assignation of a short lease).[1] And they will also be needed if, for one reason or another, an advance notice cannot be obtained. On that subject, the Law Society's Professional Practice team has recently issued the following statement about the continued use of letters of obligation:[2]

> In the view of the Professional Practice team it is still appropriate to grant a letter of obligation for the present time (although the preferred route is an advance notice) and Marsh have advised that as the Master Policy certificate has not changed, it would still be competent for a letter of obligation to be granted. The two principal situations will be as follows:
>
> *Problems with settlements where advance notices are not presently available*
>
> If there is a delay in the application for the granting of an advance notice, and if the application for advance notice is pending (and there is no particular reason why it will not be granted), then a letter of obligation is required for the period until the advance notice protection kicks in. In those circumstances, the letter of obligation can be limited to the gap period between settlement and the start of the protection. There is no universally agreed style but possible wording would be:-
>
> > 'With reference to the settlement of this transaction today we undertake to clear the records of any deed, decree or diligence (other than such as may be created by, or against, the Purchaser) which may be recorded in the Personal Registers or to which effect may be given in the Land Register in the period from [date of settlement] to the date of commencement of the protected period under the advance notice to be obtained by the Seller for the Disposition in favour of the Purchaser inclusive (or to the earlier date of registration of the Purchaser's right in the Property) and which would cause the Keeper to make an entry on, or qualify her warranty in respect of the title sheet for that right;'
>
> The usual pre-letter of obligation steps (searches etc) would obviously need to have been done.
>
> *Problems with settlements where advance notices have been rejected*
>
> If the advance notice application is rejected (eg because the plan isn't suitable), and the protected period might never start (say because a new plan would have to be prepared and that would take too long), then the undertaking should still refer to the current 14-day maximum period allowed.
>
> Possible wording would be:-

1 Law Society of Scotland, *Rules and Guidance* (www.lawscot.org.uk/rules-and-guidance/) Section F, Division C: Letters of Obligation, para 1. This has been revised in the light of the 2012 Act.

2 *Professional Practice Update*, December 2014 (www.lawscot.org.uk).

> 'With reference to the settlement of this transaction today we undertake to clear the records of any deed, decree or diligence (other than such as may be created by, or against, the Purchaser) which may be recorded in the Personal Registers or to which effect may be given in the Land Register in the period from [date of settlement] to (i) the date of commencement of the protected period under the advance notice to be obtained by the Seller for the Disposition in favour of the Purchaser inclusive or (ii) fourteen days after today's date inclusive, whichever is the longer period (or to the earlier date of registration of the Purchaser's right in the Property) and which would cause the Keeper to make an entry on, or qualify her warranty in respect of the title sheet for that right;'

The difficulty of course with this situation is that if the advance notice application has been rejected because of the plan, the application for registration by way of disposition which incorporates the same plan will also be likely to be rejected. Therefore urgent measures should be taken to produce a fresh plan in a form acceptable to the Registers to allow registration to take place.

If there is any doubt as to whether an advance notice will be granted, then a letter of obligation referring to the fourteen-day period might be needed.

Hitherto, letters of obligation, if 'classic', have been covered by the Master Policy. We quote from the Law Society of Scotland website: 'For the rest of the insurance year Nov 2014 to Oct 2015, there will be no change to the Master Policy regarding the grant of letters of obligation. Once practice develops under the 2012 Act, the position may be reviewed at renewal of the Master Policy in 2015.'[1] So classic letters of obligation issued by law firms in the insurance year that began in November 2014 are covered, but the position for future insurance years is, at present, undecided. We would note that, as anticipated, letters of obligation almost wholly disappeared from use following 8 December 2014.

Designation of juristic persons

In its *Professional Practice Update* for December 2014,[2] the Law Society refers to a number of enquiries in relation to deeds which have been submitted to the Land Register for registration but which have been rejected on the basis that they did not include a full designation of parties to the deed where the parties were banks or other juristic persons. This was also a dominant theme of those who responded to our request for reactions to the new Act (for which see the next section).

The full reason for the rejection is as follows. One of the 'general application conditions' for registration is that 'the application is such that the Keeper is able to comply, in respect of it, with such duties as the Keeper has under Part 1'.[3] Part 1 of the 2012 Act, in turn, describes what the Keeper must enter in the constituent parts of the Land Register. So far as the title sheet is concerned,

1 www.lawscot.org.uk/rules-and-guidance/section-f-guidance-relating-to-particular-types-of-work/division-c-conveyancing/guidance/letters-of-obligation-and-advance-notices/.
2 www.lawscot.org.uk.
3 Land Registration etc (Scotland) Act 2012 s 22(1)(a).

the Keeper must include the 'designation' of any parties entered there;[1] and 'designation' is defined, in the case of companies and other juristic persons, as requiring:[2]

> (i) the legal system under which the person is incorporated or otherwise established,
> (ii) if a number has been allocated to the person under section 1066 of the Companies Act 2006 (c 46) that number, and
> (iii) any other identifier (whether or not a number) peculiar to the person.

Accordingly, the applicant must provide Registers of Scotland with this information either in the deed or on the company number field of the application form, failing which the application will be rejected.[3] The issue has arisen above all with standard securities. Lenders' *pro forma* standard securities do not always have the requisite information, at least at the moment.[4]

After an initial period, the Keeper adopted a more relaxed view as to how the requirement can be satisfied. We quote the guidance issued in January 2015:[5]

> In some cases, the legal system under which the non-natural person is incorporated may be clear to the Keeper without express mention in the deed or on the form. In such cases the Keeper will be able to comply with her statuary duties[6] and the application will not be rejected. Examples of such cases include:
>
> - Scottish companies where the company number is provided in the deed or the application form and it is prefixed with 'SC'.
> - Cases where the designation in the deed or form provides a registered office address from which the legal system may be extrapolated.
> - Cases where the unique company number is included in the deed or form and the Keeper is aware of the legal system under which that company is incorporated. This is likely to apply mainly to large UK or Scottish lenders who submit high volumes of deeds.

As an aside, it might be worth mentioning that it can be dangerous to make hasty assumptions as to place of incorporation. For example, many companies in the Bank of Scotland group, which have 'Bank of Scotland' in their name, are incorporated in England, such as, to take a random example, Bank of Scotland Equipment Finance Ltd.

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1 LR(S)A 2012 ss 7(1)(a), 8(1), and 9(1)(a)(iii).
2 LR(S)A 2012 s 113(1).
3 Registers of Scotland, *Essential Guide to the 2012 Act changes* (www.ros.gov.uk/services/registration/land-register/faqs) Standard security designations Q 1. One respondent to our consultation (below) said that even though the information was provided the Keeper was not in fact always inserting it on the title sheet: 'The Keeper is not complying with s 8 of the Act as not including in the designation of the non-natural person in the Securities Section the legal system under which it is incorporated.'
4 A respondent to our consultation (below) commented that: 'It seems amazing that this wasn't sorted out with the lenders beforehand.'
5 Registers of Scotland, *Application for Registration Form – Guidance Notes* (www.ros.gov.uk/services/registration/land-register/general-guidance/application-forms) 8.
6 When quoting, we usually correct typos silently, but 'her statuary duties' is too delightful to be corrected.

The requirements as to legal system of incorporation and company number only apply to those parties who are to be entered on the Land Register, ie to the grant*ees* of deeds; but it is probably simpler to adopt the same practice for all parties to a deed.

Telegrams from the battlefield

We invited practitioners to let us know how the new land registration system has been working out in its first weeks in operation, and by the time we went to print we had had about 50 responses. In what follows we pick out some of the themes, and offer one or two thoughts of our own. We are very grateful to everyone who responded. At the same time we should acknowledge that, by its very nature, an invitation of this kind is likely to yield complaints rather than compliments. The many things that have gone well with the new Act are thus largely unrecorded.

In the abstract, problems could be divided into four categories:

(a) Problems with the 2012 Act itself.
(b) Problems with the subordinate legislation made under the Act. This includes the application forms, for they are laid down by subordinate legislation.[1]
(c) Problems with the Keeper's policies, ie policies that are within the province of the Keeper's judgment, rather than policies mandated by the legislation.
(d) Other issues, such as delays and problems with e-mails.

It would be too much to hope that the 2012 Act itself will prove to be problem-free, but the responses we received were almost wholly concerned with (b), (c) and (d). Registers of Scotland ('RoS') are aware of the issues detailed below and are working hard to resolve those which seem in need of fixing.

Plans reports

Many respondents complained that turnaround times for plans reports are too slow and that the 'vast' delays can mean reports not being available in time for settlement. RoS are aware of the problem and have allocated additional sources to preparing reports. At the same time, they comment that 'part of the spike in reports appears to be related to transactions where we take the view that one is not required'.[2] Revised guidance on plans reports was issued on 19 December 2014. As RoS emphasise, a plans report (like the former P16 report which it replaces) is usually only needed on first registrations:[3]

1 Land Registration Rules etc (Scotland) Regulations 2014, SSI 2014/150.
2 http://2012act.ros.gov.uk/latestnews.html.
3 *Essential Guide to the 2012 Act changes* (www.ros.gov.uk/services/registration/land-register/faqs) Reports Q 4.

> A plans report is appropriate when the plot of land (to which the deed or voluntary registration relates) is being registered for the first time in the land register. A plans report will ensure you minimise the likelihood of rejection of an application by helping identify conflicting registrations and deficiencies in deed plans prior to submission. While plans reports are primarily intended to support applications for first registration, in certain limited cases a report over registered subjects may be appropriate. For example where parties wish to ensure that the extent of a proposed transfer of part falls entirely within a parent title.

Equally, a plans report is *not* needed for a transfer in whole of property already registered in the Land Register. There has been some confusion here concerning the risk of competing titles. But, in the view of RoS, that risk – very small, in any case – is no reason for obtaining a plans report. For on the one hand, if there is a competing title, this will *already* be clear from the registers; plans reports play no role in this process:[1]

> The issue of competing titles in the land register is an important one, but it affects a very small number of titles which will ultimately be identified and resolved by completion of the land register. The position on competition will be clear from the existing 1979 Act title sheets with the existence of the competition disclosed in the Proprietorship Section of the affected title sheets. Where the competing title exists in the Register of Sasines this is disclosed by way of a note in the following form 'C also has title to the subjects in this title/part tinted X on the Title Plan by virtue of a disposition recorded G.R.S. (xxx) xxx'. Where the competing title exists in another land register title sheet the competing proprietor(s) will be shown in each affected title sheet so that each title sheet, taken alone, shows the position. Indemnity would also have been excluded based, largely, on the order of registration because, generally, the issue of competition will only become apparent on the second title being registered. The position will therefore be clear from a legal report and also from the title sheet when exhibited by the seller.

On the other hand, in the unlikely event that a competition of title is disclosed, the full extent of the competition will already be apparent and there is nothing to be gained by instructing a plans report:[2]

> Plans reports are designed to assist in identifying potential problems with title extent. Here the problem is already known and is evident from the face of the title sheet. A plans report thus adds no value. In the case of two registered titles which overlap before designated day where one title is transacted upon after designated day, this will not result in a rejection. The competition would continue to be reflected in the updated title although the note/exclusion of indemnity would become a note/exclusion of warranty.

Anecdotal evidence, however, suggests that competing titles are *not* always apparent from the Register, and it may be that in high-value commercial transactions a plans report is sometimes a sensible precaution.

1 *Essential Guide* Reports Q 2.
2 *Essential Guide* Reports Q 3.

In order to make sure that the plans report is available on time, RoS emphasise the importance of applying 'at the earliest possible stage in the transaction'[1] and of supplying the correct information in the form. As to the latter, RoS explain what is needed:[2]

> In order to correctly identify the extent(s) for comparison, a plan or bounding description sufficient for the Keeper to reconcile the same with the OS map (the base map to the cadastral map) must be submitted. The additional information field of the online form should be used to specify the extent(s) you wish compared, so for example where a plan contains multiple references, you must clarify on the request which of the references you wish to be compared. For example – the plot edged red or the car park space tinted pink. Similarly, where you wish a report to be carried out over an extent described by way of a bounding description, the text of the same should preferably be reproduced within the additional information field. Where it is deemed more appropriate to provide a copy of a prior deed containing a bounding description, the additional information field should make clear what subjects you wish to be considered. Where necessary the relevant descriptions should be highlighted or otherwise defined on the copy deed provided. If the required information is not submitted the report cannot be completed.

Tenements

There was some confusion in the early weeks as to whether a steading plan was needed for the first registration of tenement flats. In late January 2015 the following reassuring statement appeared on the RoS website:[3]

> The requirements for tenement mapping have been further clarified, in particular the requirement to define the tenement steading when submitting an application to register an individual flat. Where the Keeper already holds an acceptable extent for the tenement steading, the application can proceed based on that extent; for example where there is a previous registration of a flat within that tenement, and the extent of the tenement steading is already delineated on the cadastral map.

Advance notices: some responses

A repeated complaint was that the online system does not allow the saving of advance notices. As mentioned above, the interim solution is to use, at the drafting stage, the style available at www.psglegal.co.uk; but this will still mean having to input the data again on the online form once the terms of the advance notice have been agreed.

One respondent considered that, at 35 days, the protected period was too short. We should mention that the period is not hard-wired in the 2012 Act: the Scottish Ministers have the power to lengthen, or shorten it.[4] But advance notices

1 *Essential Guide* Reports Q 1.
2 *Essential Guide* Reports Q 5.
3 http://ezine.ros.gov.uk/ezine/articles/Update_to_application_rejection_guidance#sthash.tlIV2r6w.dpuf/.
4 Land Registration etc (Scotland) Act 2012 s 58(6).

were designed as a substitute for letters of obligation, where the protected period was in fact a little shorter. The 35-day period is also broadly comparable with the position in English law.

Another concern was that, to confer protection, the names in an advance notice must match the names in the deed. How exact must the match be? The specific query was whether 'plc' and 'public limited company' are sufficient matches. Whilst it is difficult to give an overall view of 'how near is near' we consider that in the specific example the match is near enough. The rules are certainly not as stringent as they are in, for example, personal searches; it is much easier to identify a particular *deed* – which is the object of an advance notice – than a particular *person*, and in any event the advance notice contains other information by which the deed could be identified.

Finally, one respondent thought that 'it would make more sense for the purchasing solicitor to lodge the advance notice' rather than the selling solicitor. In fact there is nothing in the legislation to prevent this from being done. The Act allows the application to come from either the granter of the deed or from a person who has the consent of the granter.[1] So the purchasing solicitor could apply on behalf of the purchaser provided the consent of the seller had been obtained. It would then be a matter of selecting the appropriate declaration at the end of the form.[2] We suspect, though, that, practice having settled on this point, it will not now change.

Communications from the Keeper

The use of electronic communication is one of the big, and welcome, changes in the new system. A number of respondents, however, considered that the system of e-mails from the Keeper had room for improvement.[3] There were complaints that in a few cases no e-mail at all was sent. One respondent wrote that 'e-mails from Register House [have] no intelligible heading', and other respondents made similar comments. An example: 'In respect of Advance notices, we receive e-mail "alerts" about these with nothing more than the reference number. No indication of client names or even property addresses which makes it less than helpful when received.'

There are also too many e-mails. Is it really necessary, some asked, to send an e-mail announcing that an advance notice has expired? And why is the same e-mail sent a number of times, as sometimes happens? 'I am getting around 20 e-mails overnight from RoS Notifications and would estimate that only two are usually relevant', wrote one beleaguered respondent. 'Goodness knows how many I'll need to trawl through when we hit the busy months.' As well as making it hard to get up in the morning, this assault by e-mail creates the risk

1 LR(S)A 2012 s 57(1), (2).

2 Ie, 'we have the consent of the person who may validly do so, in accordance with section 57(2)(a) or (b) respectively, of the Land Registration etc (Scotland) Act 2012'.

3 We understand that RoS are very aware of the issues raised in the following lines and are working hard to resolve them.

of missing the e-mails that *are* relevant, such as that crucial one with the link to the new title sheet.

Turning from electronic to physical communication, one respondent commented that: 'Deeds submitted and thereafter registered are returned from the Keeper without so much as a stamp to show they have been registered. I simply cannot see the logic behind that as we now end up with say four deeds returned for a single transaction, often with the receipts mixed up and no way to tell whether a particular deed has been registered or not.'

Application form

Many respondents remarked that the application form for registration is not 'user-friendly' and complained of specific glitches. For example: 'You will be aware of the update confirming that the form for a discharge has a question that shouldn't be there and RoS advice is simply to answer the question wrongly (to state that the granter of the discharge is the current registered proprietor of the property).' Or again: when 'registering a discharge, you answer "no" to having done a full examination of title, and your form then defaults to saying it is a prescriptive claim'. In relation to the latter problem we would comment that it can be avoided by completing a paper copy of the form rather than the smart (or in this case, not-so-smart) version on the RoS website. But that, of course, may be unattractive for other reasons.

The form is not well designed, a local authority solicitor commented, for deeds such as statutory notices or notices of title. For the former, 'we are being asked to state that the [local] authority is the granter and that an examination of title has been undertaken'; for the latter 'it is not appropriate for us to insert a consideration or valuation or date of entry … [yet] the form does not let us proceed without this information'. These responses show the difficulty of having a single form to cover a range of deeds, and in particular the challenge of making the 'dynamic' version behave correctly.

Another agent noted the following problem:

> Where we're registering a security dependent on a disposition which triggers a first registration, RoS say we should answer 'no' to the question 'Is the granter of the deed the last recorded proprietor?' However if we answer 'no' the form automatically produces another question, 'Is the disposition to be treated as valid by virtue of section 43(1) prescriptive claimants?', and automatically answers this question 'yes'. RoS say this is a known bug which has been passed to their IT team to resolve and an application to register a standard security would not fall to be rejected where this question appears on the application form.

Unlike advance notices, the electronic version of the application form can be saved and then returned to, although some thought that the method of doing so was overly complicated. RoS explains how it is done:[1]

1 *Essential Guide* Application forms Q1.

> The online application form leads you through the questions relevant to your deed. You can save and exit at the foot of each page. This will provide the unique URL to which you should add your own reference to assist you in matching with your client's case. You must save the URL yourself by copying and pasting it into your own files or emailing it to yourself. If you exit without noting the URL you will not be able to retrieve your draft form. The form can be viewed by another user by forwarding the URL. The application can be edited at this stage. Once details are complete and no further amendments required, continue to the confirm stage when a pdf will be created for printing and posting to RoS.

Pre-registration Enquiries

'The Pre-registration Enquiries Section is being missed – there's a sense of being alone on a battlefield now.' A number of others took the same view, or lamented the difficulty of obtaining clear advice from RoS. 'The staff at RoS are as much in the dark as we are'; it is a matter of 'the blind leading the blind'. Though the old Pre-registration Enquiries will not be reinstated, early in February 2015 the Keeper announced that:[1]

> From Monday 9 February, Registers of Scotland (RoS) will operate a dedicated helpline providing advice to solicitors on the completion of applications and general guidance on how to avoid rejections. Solicitors are encouraged to contact the helpline on 0800 028 9311 if they are unsure about what is to be completed and what is to be submitted.

Extension of amnesty for rejection fees

Given the above difficulties and the lack of reliable information on certain points, some respondents called for an extension of the amnesty for the rejection fee of £30. The amnesty, however, expired, as previously announced, on 9 February 2015.

Matrimonial homes

'When we receive the PDF from the Keeper showing the amended title sheet, it seems not to contain the Matrimonial Homes/Civil Partnership note', observed one respondent. That is indeed the new position. The 'matrimonial homes note' was not a requirement of the 1979 Act. The 2012 Act in this respect left the position as it was. The change has happened not at the level of the primary legislation, but at the secondary level. The Land Registration (Scotland) Rules 1980[2] and 2006[3] required a 'matrimonial homes note' to be inserted, but that requirement is not to be found in the new rules.

APR

A new feature of the land registration system is 'automatic plot registration' (APR) in which, in addition to the ordinary case of a disposition, certain other types

1 www.ros.gov.uk/about-us/news/2015/update-to-application-rejection-guidance/.
2 Land Registration (Scotland) Rules 1980, SI 1980/1413, r 5(j).
3 Land Registration (Scotland) Rules 2006, SSI 2006/485, r 5(i).

of transaction will trigger the first registration of unregistered property. One agent explained the difficulties that he experienced where he sought to register an assignation of a long lease, the lease dating from 1871, and the property in question having been split off (by partial assignation) from the lease title in 1950. As the agent observed, 'under the Keeper's requirements for APR, the purchasing agent is required to provide to the Keeper information to allow the Keeper to make up the landlord's title sheet for the plot in question'. But this could not easily be done and, given that the transaction was for a low value (£58,500), extensive title research would not have been cost-effective. In the end a satisfactory solution was negotiated, but we suspect that APR is quite often going to be a source of difficulty. The agent noted that, in Ayrshire, lease titles of this sort are common. We would, however, draw attention to the fact that the problems, in Ayrshire and elsewhere, will be reduced – though not eliminated – when the Long Leases (Scotland) Act 2012 comes into force on 28 November 2015.[1] A great many long lease titles will, overnight, become ownership titles, and as a result the next transaction after that date will be an 'ordinary' transaction, ie one not involving APR.

Liferents

Several respondents brought to our attention the Keeper's change of practice concerning proper liferents. These are now entered in the D section of the title sheet (burdens) and not, as formerly, in the B section (proprietorship). Some respondents considered this not to be a change for the better. We would only comment that in our view the new approach is legally correct.[2]

The 2024 objective

The proposed objective of having 100% of properties in the Land Register by 2024 was criticised by one respondent. 'I support the aim of having all of our land in a public map-based register. I think it is somewhat folly to think it can all be done by 2024.' Our views are not dissimilar.

Overall views

Most responses were about particular issues, but there were one or two that offered a broader view, such as: 'A complete and utter SHAMBLES is my most polite response lest I breach the Telecommunications Act with my real feedback!!!' The respondent did not specify whether his concerns were with the legislation or with RoS or both. 'Thus far I am less than impressed with the new Land Registration Act and the system that surrounds it', remarked another respondent, rather less dramatically, before going on to mention specific issues.

Others took a more favourable view. For example:

> I welcome many of the changes brought in by the 2012 Act. I qualified in the late 70s and remember the changes that were brought in by the 1979 Act. The changes took

1 See p 174 below.
2 Land Registration etc (Scotland) Act 2012 s 9(1)(f).

> a bit of getting used to and adapting to back then, but we had to just get on with it. The new Act seems to be better thought out in terms of its purpose of reformation of land registration.

Yes, we too remember the introduction of the 1979 Act. The respondent added, perhaps presciently, 'whether or not there are unintended consequences will remain to be seen'.

Many of the issues identified are just the sort of settling-in problems to be expected of any new system. It will not be long before most are either resolved or no longer seem the problems they once were. A year from now the picture is likely to look rather different.

LAND REGISTRATION: THE 1979 ACT

Inaccuracies and proprietors in possession

Although a new Land Registration Act must be learned, this does not mean that the old one can be forgotten. At the moment, and for quite a number of years to come, most titles on the Land Register will be 1979 Act titles and not 2012 Act titles. And to some extent 1979 Act titles will continue to be governed by the 1979 Act.

One issue which is bound to remain important is the effect of errors on the Register. What happens if the indemnified 1979 Act title given by the Keeper contained a mistake – an 'inaccuracy' in the language of the Act? Such inaccuracies may take a multiplicity of forms but probably the most common case is where, on first registration of property A, the Keeper, in an act of generosity, included on the title plan a part of neighbouring property B, being property still held on the Register of Sasines. Our 2013 volume considered one example of this fact type.[1] In 2014, remarkably, there have been four more: *Burton v Keeper of the Registers of Scotland*,[2] *Gray v Keeper of the Registers of Scotland*,[3] *Van Eck v Keeper of the Registers of Scotland*,[4] and *Mathers v Keeper of the Registers of Scotland*.[5] Of three of those cases not much need be said here, and a discussion of the facts and result can be found elsewhere in this volume.[6] The fourth case, *Gray*, however, is a decision of some significance, and one to which we will need to return.

For 1979 Act titles, errors – whether in respect of boundaries or other matters – are potentially troublesome. Despite the indemnified title, the Register is inaccurate and hence vulnerable to rectification.[7] The registered proprietor, in other words, could lose the property and the 'rightful' or 'true' proprietor could regain it. Whether that actually happens depends largely on the state of

1 *Nicol v Keeper of the Registers of Scotland* 2013 SLT (Lands Tr) 56. For a discussion, see *Conveyancing 2013* pp 29 and 186–88.
2 2014 SLT (Lands Tr) 69.
3 2014 SLT (Lands Tr) 117.
4 2014 SLT (Lands Tr) 92.
5 2015 GWD 3-68.
6 See p 20 above.
7 Land Registration (Scotland) Act 1979 s 9.

possession. If the person registered as proprietor is also in possession, then he is invulnerable to a challenge and the 'true' owner must make do with indemnity from the Keeper; but if the registered proprietor is not in possession, rectification can go ahead and the property may be lost.[1] The risk is indeed a real one: in only one of the four cases from 2014 (*Burton*) was the proprietor found by the Lands Tribunal to be in possession.

As well as being real, the risk, until very recently, was long-lasting. For in the 1979 Act scheme as originally enacted, a person holding on an inaccurate title was vulnerable to challenge into the indefinite future. For as long as he remained in possession, all was well; but if, *at any time in the future*, he lost possession, the 'true' owner could seize the moment and proceed to have the Register rectified. Happily, that vulnerability as to the future has been removed by the 2012 Act. The new rule is for the position to be judged, once and for all, on the day immediately before the designated day (ie on 7 December 2014).[2] Further, by a new statutory presumption, the registered proprietor is presumed to have been in possession on that day.[3] Only if the contrary can be shown and the presumption rebutted can a future application for rectification succeed. In such an application the *current* state of possession is of no importance;[4] what matters is the state of possession on 7 December 2014.

This focus on 7 December 2014 gives rise to certain further implications under the 2012 Act. Where, on that day, the Keeper would have had power to rectify an inaccuracy on the Register – typically because the registered proprietor was not in possession – the legal position of the parties is determined from that point on as if the power had in fact been exercised.[5] 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.[6]

An example makes this clearer.[7] Suppose that when Angus applies for first registration in 2013, the Keeper includes in the title plan a strip of land to which he was not entitled and which is held by a neighbour (Betty) on a Sasine title. On registration Angus will become owner of the strip of land, 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 to the strip becomes unchallengeable and Betty must make do with compensation from the Keeper.[8] But if it was Betty who was in possession and not Angus, ownership reverted to Betty on the designated day – without

1 LR(S)A 1979 s 9(3)(a).
2 LR(S)A 2012 sch 4 paras 17, 22.
3 LR(S)A 2012 sch 4 para 18.
4 Except insofar as it provides evidence as to the state of possession on 7 December 2014.
5 LR(S)A 2012 sch 4 para 17.
6 LR(S)A 2012 sch 4 para 22.
7 For further examples, see Scottish Law Commission, *Report No 222 on Land Registration* para 36.13.
8 For compensation, see LR(S)A 2012 sch 4 paras 23 and 24.

any action on her part and regardless of what the Register says – and it is Angus who is, or may be, entitled to compensation.[1] Betty can then have the Register rectified at her leisure.[2]

If, therefore, there is something wrong with a 1979 Act title, and the title is challenged, it will be necessary to determine whether the registered proprietor was in possession on 7 December 2014. In the next section we consider the rules by which possession is judged. Before doing so, however, we should emphasise that the issue here is not primarily one which affects conveyancing transactions. On the contrary, if a transaction takes place in respect of a 1979 Act title – if the registered proprietor (Angus) today (ie after 7 December 2014) conveys to Colin – the position of the purchaser (Colin) will be determined, not by the 1979 Act and the rules as to proprietors in possession, but by the 2012 Act. And under that Act Colin will receive a good title, notwithstanding Angus's lack of ownership, if the conditions for s 86 are satisfied, ie, broadly, if Angus had possessed for a year and Colin is in good faith. The requirements imposed by s 86 for possession – that it must be continuous, open, peaceable, and without judicial interruption – are the same as those already found in the law of prescription[3] and are likely to be interpreted in the same way.[4] As we will see, they are somewhat different from the requirements by which a registered proprietor's possession is judged for the purposes of the 1979 Act. The focus of this account, therefore, is with when a transaction has *not* taken place – with where a client, holding on a 1979 Act title, finds that that title is challenged by a neighbour. Such cases, mercifully, are uncommon; but when they do occur they often give rise to expense and distress.

The requirements for possession

In the absence of any kind of definition in the 1979 Act, it has taken a long time to develop a clear idea of how it is that a registered proprietor is to demonstrate the 'possession' needed to protect his title. An important first step was the discussion of the issue by the Lands Tribunal[5] and then the Inner House in *Safeway Stores plc v Tesco Stores Ltd*.[6] The fullest analysis was by Lord Hamilton:[7]

> 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

1 For compensation, see LR(S)A 2012 sch 4 paras 19–21.
2 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.
3 See Prescription and Limitation (Scotland) Act 1973 s 1.
4 For an examination of the requirements for possession in the context of positive prescription, see D Johnston, *Prescription and Limitation* (2nd edn, 2012) ch 18.
5 2001 SLT (Lands Tr) 23, under the name of *Tesco Stores Ltd v Keeper of the Registers of Scotland*.
6 2004 SC 29.
7 2004 SC 29 at para 77.

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.

Thereafter, more case law was slow to follow, but in the last few years the issue has been litigated on a number of occasions, mainly before the Lands Tribunal. To the four new cases – *Burton*, *Gray*, *Van Eck*, and *Mathers* – mentioned above, there can also be added some decisions from previous years, namely *Burr v Keeper of the Registers of Scotland*,[1] *Nicol v Keeper of the Registers of Scotland*,[2] and *Rivendale v Keeper of the Registers of Scotland*.[3]

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[4] 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.[5] 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. This approach is, however, challenged by the new case of *Gray* which suggests that it may be possible for *both* parties to be in possession at the same time and argues that a consideration of the position of the 'true' owner is misplaced. For reasons which we give later, we are not attracted by this analysis.

Secondly, the relevant date for determining possession is 7 December 2014.[6] Nonetheless – and this is the third point – it will usually be necessary to look at the state of possession *before* this time.[7] This is because, in order to be in possession, one has to acquire it, and the main acquisitive act may have taken place some time ago. In *Mathers* the Lands Tribunal was even prepared to consider the possession of the parties' predecessors.[8]

Fourthly, once possession has been acquired, a person is taken to remain in possession without further possessory acts.[9] So in *Rivendale*, for example, the Lands Tribunal found that some earlier possessory acts, neither repeated nor challenged in the period that followed, were sufficient to constitute possession.[10]

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1 *Burr v Keeper of the Registers of Scotland* 12 November 2010, Lands Tribunal (discussed in *Conveyancing 2010* pp 159–62).
2 2013 SLT (Lands Tr) 56.
3 30 October 2013, Lands Tribunal (this case and *Nicol* are discussed in *Conveyancing 2013* pp 29–30 and 186–88).
4 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.
5 *Burr* para 24; *Nicol* para 28.
6 LR(S)A 2012 sch 4 paras 17, 22. Where, however, the application for rectification was determined before that date, the relevant date was 'the date of the application to rectify … or perhaps the [Keeper's] decision': see *Burr* para 27.
7 *Safeway* para 80; *Rivendale* para 60.
8 *Mathers* para 40.
9 *Tesco Stores Ltd v Keeper of the Registers of Scotland* 2001 SLT (Lands Tr) 23 at 36F.
10 *Rivendale* para 60.

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'.[1] On the other hand – and this is the sixth point – possession is measured by the nature of the property being possessed,[2] and in the case of uncultivated or open ground, the number of possessory acts needed may be rather small.[3]

Seventhly, where, as often, 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 taken place on the disputed part itself. But this rule applies only where the disputed part is 'an integral element of the registered subjects viewed as a whole'[4] amounting to a single 'unit',[5] and whether that is so depends on the layout and use of the subjects.[6] In one case, 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.[7]

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,[8] although the issue has not been definitively determined. In *Rivendale*[9] 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.

Ninthly, as well as the physical elements of possession, there must be the necessary mental element. Possession, in Scots law as in Roman, requires *animus* as well as *corpus*.[10] That mental element is possession as owner.[11] For that reason a person does not possess in the necessary sense if he does not know that his registered title extends to the area in question.[12] But good faith is not needed:

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1 Although Lord Hamilton somewhat detracts from the effect of this statement by saying, later on in the same sentence, that 'possession' suggests 'actual use or enjoyment, to a more than minimal extent': see *Safeway* para 77. In *Gray* the Lands Tribunal (para 81) expressed 'some reservations about the reference to activities being "more than a minimal extent". That might be an appropriate requirement in some contexts but it may distract from the need for assessment to have regard to the extent of use appropriate to the nature of the subjects.'

2 *Gray* para 81: 'The type of acting required to establish possession depends on the nature of the subjects.' See also para 83.

3 See *Gray* but compare *Burton* (which, however, seems to give too little weight to the possessory acts by the registered proprietor).

4 *Safeway* para 77.

5 *Gray* para 80.

6 *Burr* para 26.

7 *Rivendale* paras 54 and 55. See also *Mathers* paras 44 ff.

8 *Kaur v Singh* 1999 SC 180, 191 G 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.'

9 *Rivendale* para 58.

10 See eg K G C Reid, *The Law of Property in Scotland* (1996) para 117.

11 *Gray* para 82: 'if a person understands that the effect of the law is to make him owner of the land and he acts as if he was, we are entirely satisfied that is sufficient mental element to give his actings the character of possession'.

12 As for example during the period before he has received a copy of his title sheet on registration: see *Gray* para 84.

a proprietor is entitled to stand on his registered title even if he knows it to be incorrect.[1] This is a point to which we will return.

Finally, each case turns on its own facts and circumstances. As the Lands Tribunal has emphasised:[2]

> 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.

Rectification applications before 8 December 2014: the 'tennis-match' principle

Any application for rectification which had not been determined by the designated day (8 December 2014) fell on that day and will have to be re-commenced under the rectification provisions of the 2012 Act.[3] On the other hand, there remains the live possibility of appeals after the designated day against a refusal of rectification by the Keeper before that day. The new cases of *Burton*, *Gray*, *Van Eck*, and *Mathers* are examples of such appeals.

For applications for rectification made and disposed of before the designated day, the relevant date for measuring possession was not 7 December 2014 but the date on which the application was made or, perhaps, the date of the Keeper's decision.[4] The fact that the date was thus current rather than, as it is now, historic (ie 7 December 2014 regardless of the date of application for rectification), encouraged active competition as to possession, and competition moreover which was artificially engendered. For if both parties knew that the success or failure of the application might depend on which of the two was currently in possession, the mere knowledge that an application was likely or pending could lead the parties to take competing possessory steps. In *Kaur v Singh*[5] this involved each party in breaking into the disputed property; in *Safeway Stores Ltd v Tesco Stores plc*[6] it involved the placing by one and the removal by the other of marker posts in a river. In the new case of *Burton* it was a boundary fence that was erected and removed, on several occasions.

Over time the courts moved to the position of discounting acts of this kind, dismissing them as part of a 'tennis match' of claim and counter-claim.[7] So for example in the new case of *Burton* the Lands Tribunal said that 'the repeated erection and removal of a fence at the boundary, sometime after the

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1 *Gray* paras 56–71.
2 *Nicol* para 26.
3 LR(S)A 2012 sch 4 para 14.
4 *Burr* para 27.
5 1999 SC 180.
6 2004 SC 29.
7 *Burr* para 26; *Nicol* para 26. The expression 'tennis match' was first used in *Safeway* para 81. This belated development removes the force of the Scottish Law Commission's criticism (*Discussion Paper No 125 on Land Registration: Void and Voidable Titles* (2004) paras 4.23–4.26) that s 9(3)(a) of the LR(S)A 1979 was 'an invitation to self -help'.

interested parties [ie the registered proprietors] were aware of the appellants' application to rectify, does not establish control by the interested parties and seems to us to be the sort of tit for tat activity which has been characterised as a "tennis match" '.[1] Similarly, in *Van Eck* the Tribunal disregarded the laying down of gravel which occurred long after the dispute between the parties had begun.[2]

The justification for this approach was considered by the Tribunal in another new case, *Gray*:[3]

> That expression [ie 'tennis match'] has come to be used, a little loosely, in relation to activities of the nature of possession carried out after a challenge and seen as intended primarily to provide evidence of possession. It has been recognised that once a challenge or dispute has come to light, the Tribunal has to consider with care the evidence of activities which follow. It is implicit in all discussion of the matter that wilful acts intended simply to assert possession in face of protest are either irrelevant or entitled to little weight. They may properly fall to be disregarded as actions designed to provide evidence in relation to a dispute rather than as acts of possession as such.

In *Gray* itself the tennis-match principle was used by counsel to argue for an implicit requirement of good faith on the part of the person seeking to establish possession. That argument is considered more fully below. But first it is necessary to say something about *Gray* as a whole.

Gray v Keeper of the Registers of Scotland[4]

The facts of *Gray* concern a small group of houses surrounded by mature woodland in what was formerly the arboretum of Durris House in Aberdeenshire. Mr and Mrs Gray had owned their house and accompanying area of woodland since 1983 and so held on a Sasine title. In 2012 the house next door was sold, leading to first registration in the Land Register. The purchasers, Mr and Mrs Horrell, took entry in May but did not receive their land certificate until September. It was immediately apparent that the title plan was incorrect insofar as it showed the boundary to the west as cutting through the stable building, cultivated garden and paved area of the Grays' property. The full extent of the error, however, was not at first clear. It was only after the Grays became alerted to possessory acts by the Horrells, in February 2013, that there was a proper investigation of the plans. This showed that the Keeper had included in the Horrells' title sheet a triangular area which was part of the Grays' property and extended to more than half an acre.

The fact of the error was not disputed. But, unless the Horrells were willing to consent, the Grays could not recover their lost property by rectification if, by

1 *Burton* para 61.
2 *Van Eck* para 27. See also *Mathers* para 40.
3 *Gray* para 60.
4 2014 SLT (Lands Tr) 117. The Lands Tribunal comprised Lord McGhie and A Oswald FRICS.

now, the Horrells were proprietors in possession.[1] In the end the Horrells were willing to consent to rectification to the extent that their title included the Grays' stable building and cultivated garden. Beyond that, however, they would not go. They had acquired the property on an indemnified title and were entitled to assume that, obvious error apart, the title plan was correct. And they had, they said, taken possession on that basis.[2]

The issue before the Lands Tribunal, therefore, was whether the Horrells – admittedly the 'proprietors' of the triangular area (albeit due to error)[3] – were also proprietors 'in possession'. If so they were protected against the rectification sought by the Grays.

The evidence showed that, from the summer[4] of 2012 onwards, various possessory acts were carried out by the Horrells. These amounted in particular to (i) visiting the triangular area several times to collect wood for fuel; (ii) clearing brushwood; (iii) pruning trees; and (iv) planting part of a row of saplings which Mr Horrell had bought as a Christmas present for his wife and which included several different types of fruit.[5] It was the last of these which, in February 2013, caught the attention of the Grays and led to discussion, confrontation, an interim interdict, and ultimately to the application for rectification. After this the possessory acts necessarily came to an end. No doubt they did not amount to a great deal. But the Tribunal thought, surely correctly, that they were enough. What was needed was that the Horrells had 'exercised possession and control of the disputed triangle in a manner and to an extent consistent with the nature of the subjects'; and, realistically, 'little is to be expected by way of use and enjoyment of this type of woodland area, at least in winter months'.[6] As the Horrells were thus proprietors in possession it followed that the Grays failed in their attempt to recover their property by rectification.[7]

Three points require further comment. First, the Tribunal rejected an argument advanced strenuously on behalf of the Grays to the effect that a registered proprietor must possess in good faith.[8] It was true that the tennis-

1 Land Registration (Scotland) Act 1979 s 9(3)(a). It was accepted that the Horrells had not been responsible for the error and so were not 'careless' within s 9(3)(a)(iii). Carelessness would have allowed rectification even against a proprietor in possession.

2 *Gray* para 2.

3 The mere act of registration made the Horrells the owners (and took ownership away from the Grays) by virtue of the Keeper's Midas touch: see LR(S)A 1979 s 3(1)(a).

4 Although the Horrells took entry in May, the Tribunal discounted any acts before the receipt of the land certificate in September showing the boundary to the west. This was because 'they could not have had the necessary mental intention to possess when they had no good reason to think that they owned that area' (para 84).

5 *Gray* paras 19 and 85–88.

6 Paragraph 94.

7 That would, of course, only be true to the extent that they possessed the triangular area. Rather than seek to indicate the possessed area, the Tribunal urged the parties to reach their own accommodation on this point (paras 95–97) which they duly did. The Tribunal issued an Order on 20 October 2014 requiring the Keeper to rectify the Land Register to the extent of the area which, it was now agreed, had not been possessed. We are grateful to the Clerk to the Tribunal, Neil Tainsh, for this information.

8 Paragraphs 58–71.

match principle[1] might seem to suggest a role for good faith. Yet, as the Tribunal pointed out, a general requirement of good faith was inconsistent with the logic of the rectification provision (s 9) of the 1979 Act. On the one hand, that provision provided protection against rectification for proprietors in possession; on the other hand, it removed that protection from proprietors in possession where the inaccuracy complained of had been caused by the proprietor's fraud or carelessness. Not only did this demonstrate that a person who, worse than being in bad faith, was actually fraudulent still qualified as a proprietor in possession; it also indicated that, in listing exceptions to the protection, the provision did not contemplate that there should be any others.[2] The decision in *Dougbar Properties Ltd v Keeper of the Registers of Scotland*,[3] in which a proprietor was held entitled to indemnity following rectification despite having known all along that the Register was inaccurate, was a further ground for rejecting the argument. It might also be added that, in a case (like *Gray*) where the error was clear and accepted, the registered proprietor could never possess in good faith and so could never, on that argument, resist rectification. That would be contrary to what the Tribunal identified as a fundamental principle, namely that 'people' – including those who know better – 'should be able to rely on the registered titles'.[4]

Secondly, the Horrells were not alone in engaging in possessory acts during the months in question. The Grays too carried on using the triangular area on much the same basis as before. Admittedly, this did not amount to much. Mr Gray walked through the area roughly once a month to check trees, particularly after stormy weather, and to clear up broken or fallen branches; Mrs Gray allowed the dogs to run through the area on a daily basis although she did not venture there herself.[5] This led the Tribunal to conclude that '*both* parties exercised a type of physical possession' although the Horrells 'established a greater degree of possession than the appellants [the Grays] in the sense that they established positive physical use of the land'. 'But', continued the Tribunal, 'we are satisfied that in assessing the defenders' status for the purposes of the section, it is unnecessary and inappropriate to attempt a comparison with the extent of possession established on the part of the "true" owner.' This was because 'the effect of s 9 is to direct attention to the *Horrells*' physical possession'.[6] And that possession, as already mentioned, was sufficient to get them home.

We doubt whether this is the right approach. Implicit in it is the rejection of what the Tribunal calls 'the supposed principle' that there can be only one person in possession of property at a time.[7] Yet that supposed principle is indeed part of Scots law provided it is understood to refer to *competing* parties. Of course it is

1 Discussed above.
2 See also on this point Scottish Law Commission, *Discussion Paper No 125 on Land Registration: Void and Voidable Titles* (2004) paras 7.1–7.7.
3 1999 SC 513.
4 Paragraph 70.
5 Paragraph 21.
6 Paragraph 94; our emphasis.
7 Paragraph 89. This was done without any consideration of the authorities on the law of possession.

obvious that parties can agree or, as co-owners, be entitled to share possession.[1] But where two parties are in competition to possess the same property, as was the case with the Grays and the Horrells, there can be no sharing. Either one must win, or each must so detract from the possessory acts of the other that no one can be regarded as being in possession. The point was made succinctly by the Roman jurist, Paul:[2]

> [S]everal persons cannot possess the same thing exclusively; for it is contrary to nature that when I hold a thing, you should be regarded as also possessing it. … For it is no more possible that the same possession should be in two persons than that you should be held to stand on the same spot on which I stand or to sit in the place where I sit.

Scots law is to the same effect.[3] Two things follow. First, contrary to the view expressed by the Tribunal, it was not possible for *both* the Horrells and the Grays to be in possession; a choice had to be made between them. And secondly, the very fact that a choice is likely to be involved means that in considering, as directed by s 9, the possession of the registered proprietor (the Horrells), it is difficult to do so without considering the possessory status of the 'true' owner (the Grays). That indeed has been the approach usually adopted by the Tribunal.[4]

Finally, note should be taken of the Tribunal's comment that 'some of the problems and apparent unfairness arising from the approach taken in the 1979 Act and illustrated by the present case have been addressed by the provisions of the Land Registration etc (Scotland) Act 2012'.[5] That is indeed the case. A key weakness of the 1979 Act was the way in which an error by the Keeper could lead to the loss of an innocent person's property. If, in *Gray*, the Keeper's registration error had been made after 8 December 2014 and not before, the Grays would not have lost (nor would the Horrells have gained) ownership of the triangular area[6] and the Register could have been rectified accordingly.[7] The Horrells would not have been 'proprietors', and no protection would have derived from their few months of intermittent possession.

SPECIAL DESTINATIONS AND THEIR EVACUATION

Special destinations have always been a source of litigation and continue to be so, with evacuation being the main focus of disputes. *Povey v Povey's Exr*[8] is the latest such case.

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1 And it is equally obvious that one person (for example a tenant) can be in natural possession and another (for example the landlord) in civil possession. These examples were cited and given too much weight in para 89.

2 *Digest* 41.2.3.5.

3 Stair II.1.20; Bankton II.2.27; Erskine II.2.21. And see also K G C Reid, *The Law of Property in Scotland* (1996) para 118; C Anderson, *Possession of Corporeal Moveables* (Studies in Scots Law vol 3, forthcoming 2015) paras 3–76 ff and especially para 3–100.

4 *Burr* para 24; *Nicol* para 28; *Burton* para 35.

5 Paragraph 4.

6 Except where LR(S)A 2012 s 86 applies, a disponee cannot become owner where the disponer has no title to grant: see ss 49(4), 50(2). The Midas touch does not operate under the 2012 Act.

7 For an inaccuracy which is admitted is 'manifest' within s 80 of the LR(S)A 2012.

8 [2014] CSOH 68, 2014 SLT 643.

The facts

What is known

Mr and Mrs Povey bought a house together, the disposition in their favour being registered in the Land Register on 2 April 2003. The disposition was to them both, equally, and with a survivorship destination. Later Mrs Povey began to suffer from ill health (of what nature is unclear), and on 19 August 2008 she granted a power of attorney in favour of her husband. At that time her husband was already suffering from cancer; on 16 March 2009 he was admitted to hospital, where he remained until his death on 23 July 2009. Mrs Povey survived him.

On 25 April 2009, when he was already in hospital, Mr Povey executed a disposition of the house. The two granters were himself as an individual, and himself as attorney for his wife, and the two grantees were himself and his wife. The aim of the deed was to wash the destination out of the title. It appears that Mrs Povey was neither consulted nor informed about this deed.[1] Mr Povey signed twice, in respect of his two capacities. The deed began:[2]

> WE, WILLIAM GRAHAM POVEY and MRS ISABELLE ADDISON POVEY, Spouses … registered proprietors of the subjects and others hereinafter disponed without consideration being paid hereby revoke the survivorship provisions contained in Disposition by Alex Penman (Builders) in our favour, registered in the Land Register of Scotland on Second April, Two Thousand three DO HEREBY DISPONE to and in favour of us the said William Graham Povey and Mrs Isabelle Addison Povey and to our respective executors and assignees whomsoever heritably and irredeemably ALL and WHOLE the dwellinghouse and others known as and forming. …

Although the disposition was executed about three months before, by the time of Mr Povey's death it had still not been registered. On 24 July, the day after the death, the law firm acting for the deceased submitted the deed for registration. The application was accepted. As a result, the title sheet, instead of showing the owners as Mr and Mrs Povey and the survivor, now showed the owners as being Mr and Mrs Povey, full stop.

Mrs Povey then raised the present action:[3]

> The pursuer seeks declarator that title to the deceased's one-half *pro indiviso* share passed to her on his death by operation of the survivorship special destination; that she is entitled to be entered as sole proprietor of the subjects in the Land Register; and that the existing entry in the Register is inaccurate and requires deletion. She also seeks reduction of the 2009 disposition and an order ordaining the second defender to rectify the inaccuracy in the Register.

The action called as defenders Mr Povey's executor and the Keeper. It appears that the action was defended solely by the executor.

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1 This is what Mrs Povey averred (see para 3), and we see nothing in the case as reported to indicate that the defender averred the contrary.
2 See para 2 of the judgment of the Lord Ordinary (Lord Doherty).
3 Paragraph 3.

And what is not known

Not much is known about the background to the case. One thing we do know is that Mr Povey's executor was his son, and that he was not Mrs Povey's son, ie he was her stepson. No doubt that fact is relevant in some way to the story. It is unknown whether Mr Povey left a will or, if he did, what it said, but obviously one possibility would be that there was a legacy of Mr Povey's half share to someone other than Mrs Povey. That would account for the litigation. There is also the question of why no application was made to register the disposition while Mr Povey was still alive. There was an averment by the defender that 'the executed disposition together with instructions for its registration were not received by Mr Bruce until shortly before the death of Mr Povey'.[1] This factual issue was not explored in the case as reported. We would finally add that it is not clear why the case was not decided until nearly five years after Mr Povey's death.

The arguments[2]

The pursuer's argument

The essence of the pursuer's case was straightforward. There was a survivorship destination in the title. The new disposition had not been registered by the time that Mr Povey died. So on that date, 23 July 2009, there was nothing to prevent the operation of the destination. Therefore, when her husband breathed his last breath, ownership of his half share passed to Mrs Povey, making her 100% owner. This was evidently a strong argument.

The defender's main argument

The defender's 'principal submission was that while automatic infeftment had been well recognised under the feudal system of land ownership, it no longer had any place in the system of land registration which had been introduced by the Land Registration (Scotland) Act 1979' and 'that on the death of the institute the substitute obtained only a personal right which was not made real until the Keeper registered the change in title'.[3] This was a bold position to take, and counsel candidly admitted to the judge that 'he was unable to direct me to any authority or textbook which supported his proposition'.[4] The Lord Ordinary (Lord Doherty) rejected the argument, surely rightly.[5] The point seems too clear for discussion.

In any event, even if the argument had been successful, it is difficult to see that it would have been of much assistance to the defender. Suppose that it was true that the survivorship destination gave Mrs Povey, on her husband's death, only a personal, and not a real, right to his half share. What then? In that

1 Paragraph 6.
2 For an account of the applicable law, see G L Gretton and K G C Reid, *Conveyancing* (4th edn, 2011) para 26–20.
3 Paragraph 9.
4 Paragraph 9.
5 Paragraphs 18, 21 ff.

case she would still have had a right to that half share, albeit not by automatic completion of title.

Feudalism: a digression

We would note that the reference to feudalism is misplaced, though admittedly some judicial pronouncements on the law of special destinations have spoken of it as a feudal doctrine. The law of destinations has nothing to do with feudalism, which is why it was unaffected by the final disappearance of feudalism by virtue of the Abolition of Feudal Tenure etc (Scotland) Act 2000. About the only relevance of that Act to special destinations is terminological: one should not now, strictly speaking, refer to 'automatic infeftment' because the term 'infeftment' is indeed a feudal term. Rather one should refer to 'automatic completion of title'.[1] In practice, however, the term 'automatic infeftment' survives, and does no harm.

Does death affect registrability?

The effect of death on an as-yet unregistered conveyancing deed is not as well understood as it might be. The rules are that the death of the granter does not matter, but that the death of the grantee does matter. A deed cannot validly be registered if the grantee is no longer alive.[2] Mr Povey's death in his capacity as granter thus did not matter. But his death in his capacity as grantee did matter. And it was *his* share that was in question, not hers.

The defender's subsidiary argument

The defender had a subsidiary argument, namely:[3]

> that a special destination could be evacuated *inter vivos* by a simple declaration to that effect. Here, even if there had been no effective alienation before the deceased's death, the 2009 disposition had nonetheless been an effective *inter vivos* evacuation by the deceased of the special destination affecting his *pro indiviso* share.

In other words, the argument was that the disposition, even unregistered, of itself constituted a valid evacuation by the deceased.

Counsel for the defender admitted that this argument was inconsistent with extensive *obiter dicta* in the Inner House case of *Fleming's Trustee v Fleming*,[4] but he invited the court not to follow those *dicta*. The Lord Ordinary, however, thought that what had been said in that case was correct. In our view, the Lord Ordinary's view of the law was correct. Indeed, we would venture to say that this has always been the law of Scotland, and has never before been questioned. If someone with property subject to a special destination conveys it to someone else, that does indeed take off the destination. But the conveyance of heritable property requires registration. Here nothing had been registered.

1 As the Lord Ordinary does at para 20.
2 The existing law is re-enacted by s 47 of the Land Registration etc (Scotland) Act 2012.
3 Paragraph 10.
4 2000 SC 206, discussed in *Conveyancing 1999* pp 64–66.

Counsel for the defence offered a variant of this subsidiary argument, namely that Mr Povey had indeed conveyed his share by registered deed, albeit to himself, and albeit that he was already dead at the relevant time (ie registration). This variant did not commend itself to the court, understandably.

Some further issues

An unexplored argument

As was mentioned above, the defence argued that the disposition, even without registration, validly evacuated the destination over Mr Povey's share simply by virtue of his declaration as owner of that share. That argument failed. But what of the argument that the disposition, albeit unregistered, was a valid evacuation of that destination by *her* declaration – acting through her attorney? This would have been the more obvious line of argument. It was Mrs Povey who was the beneficiary of the destination over Mr Povey's share. Beneficiaries can, in general, renounce their rights. It will be observed that the disposition contained a *de praesenti* mutual renunciation 'we … hereby revoke the survivorship provisions …'. We quote the Lord Ordinary:[1]

> It formed no part of Mr Wallace's argument that I should treat the unregistered disposition as being an effective renunciation by each of the pursuer and the deceased of the destination to him or her. The *dicta* in *Fleming's Trustee* suggest that an unregistered renunciation by a substitute would not be effective to evacuate a survivorship special destination: but that particular matter does not appear to have been addressed specifically in the arguments of counsel or in the opinions which were delivered. I prefer to reserve my opinion on it.

Our own view is that the beneficiary – the substitute – in a special destination can indeed renounce *inter vivos*.[2] After all, it is a general principle of private law that rights can be disclaimed.[3] Assuming that the destination is a survivorship destination, that will mean a mutual renunciation. In practice this is quite often done,[4] the reason being that it is cheaper and simpler than a registered disposition by X and Y to themselves, the disposition omitting the destination.[5] We understand that mutual renunciations of this sort are sometimes part and parcel of a trust deed. In our view, the difficult question is not whether an unregistered mutual renunciation works, but the manner in which it does so. Probably it does not prevent automatic completion of title on the death of the first to die; rather, it imposes on the survivor an obligation to transfer the share

1 Paragraph 24.
2 G L Gretton and K G C Reid, *Conveyancing* (4th edn, 2011) para 26–19.
3 There are qualifications to this principle. For instance, in consumer law there are non-waivable rights. But we do not see that any qualification applies to rights under a destination.
4 Cf *Rezac's Exrs v Rezac's Exx* 2014 GWD 15-281 (Case (8) above).
5 Where title is still in the Register of Sasines, a disposition of this sort will trigger first registration. That has been the position since the Land Registration etc (Scotland) Act 2012 came into force, because under that Act, unlike the position under the previous law, any disposition – even gratuitous – of unregistered property triggers first registration.

in question to the executor of the deceased. In other words, it may be that a mutual renunciation operates at the level of personal rights rather than at the level of real rights. But this is a technical more than a substantive issue. It should be acknowledged, however, that the effect of a mutual renunciation has yet to be pronounced upon by the courts. That might have happened in *Povey*, had it been differently pled, but it did not happen.

Auctor in rem suam

One underlying issue was whether Mr Povey, as attorney, had power to act as he did. An attorney must act in the interests of the principal, to the exclusion of his own interests. The disposition on its face was equal-handed: each spouse gave up the potential right to inherit the other's half share. But in substance it was not even-handed, because Mr Povey was dying, and so the overwhelming likelihood was that the deed would operate to the principal's detriment.[1] The pursuer had a plea on this subject, but it does not seem to have been explored in the case as reported. We merely note the general issue.[2]

Registration before Mr Povey's death?

If the disposition had been registered before Mr Povey died, what would have been the position? The pursuer's case would have fallen away, except for the *auctor in rem suam* argument.

Delivery?

A final issue concerns delivery. After Mr Povey signed the deed, it remained, so to speak, in his hands. So was it ever delivered?[3] Had Mr Povey effected any juridical act at all? The answer to that question would involve mixed issues of fact and of law, and it was not explored in the case as reported.

CONVERSION OF ULTRA-LONG LEASES: ACTION NEEDED NOW

Under the Long Leases (Scotland) Act 2012 the rights of all tenants holding under a 'qualifying lease' will be upgraded on the 'appointed day' to the right of ownership.[4] 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), registered, and with an unexpired duration, immediately before the appointed day, of either 100 years (where the lease subjects are mainly a dwellinghouse) or 175 years (in

1 Though whether it would have operated to his benefit is a difficult question, because the results of the evacuation would have appeared only on his death.

2 Of course, Mr Povey might have thought of a deed that not merely evacuated the destination but actually conveyed (validly or not) the whole of the property to himself. He did not, however, seek to go so far.

3 Had it been registered before Mr Povey's death, delivery would not, we think, have been an issue. But at his death it was still unregistered.

4 Long Leases (Scotland) Act 2012 s 4.

other cases).[1] If more than one lease potentially qualifies in respect of any plot of land, the qualifying lease is the lowest such lease.[2] The 'appointed day' is 28 November 2015.[3]

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. But a landlord who ceases to be owner is not left bereft of all rights. Potentially the ex-landlord (as he now will be) may be able to:

(i) claim a 'compensatory payment' for loss of rent;[4]
(ii) claim an 'additional payment' for loss of certain other rights such as development value;[5]
(iii) continue to act as a manager for that and other 'related' properties,[6] although only for five years after registration of the lease;[7]
(iv) continue to exercise mineral rights;[8]
(v) continue to exercise access rights and other rights which resemble servitudes;[9]
(vi) continue to be able to enforce such of the leasehold conditions as have been converted into real burdens;[10] and
(vii) continue to exercise sporting rights.[11]

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.

Of the seven items just listed, *items (i) and (ii)* (compensatory and additional payments) involve the service of a notice on the tenant, but this can only be done after the appointed day. 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

1 LL(S)A 2012 s 1. There are, however, some exceptions, the most important being where the annual rent is over £100.
2 LL(S)A 2012 s 3.
3 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.
4 LL(S)A 2012 ss 45–49.
5 LL(S)A 2012 ss 50–55.
6 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.
7 Title Conditions (Scotland) Act 2003 s 63(4).
8 LL(S)A 2012 s 6(5)(b). Except where they are part of the lease subjects, the minerals are excluded from leasehold conversion and will in future continue to be held in ownership by the ex-landlord but as a separate tenement.
9 LL(S)A 2012 s 7.
10 LL(S)A 2012 pt 2.
11 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.

likely to exceed £500.[1] Failure to do so will cap any claim at £500.[2] Given the small amounts of rent typically due, however,[3] 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.

Finally, *items (vi)* (enforcement of leasehold conditions as real burdens) and *(vii)* (exercise of sporting rights) also involve the service and registration of a notice and, importantly, this must be done before the appointed day.

So far our focus has been on the position of landlords. But tenants too have the possibility of registering a notice, though only if they wish to opt out of conversion. Why they might want to do so is unclear. Any exemption notice must be registered not later than two months before the appointed day (ie by 28 September 2015).[4]

In our annual volume for last year we gave much fuller details of all of these notices as well as providing a style.[5] Here it seems sufficient to summarise matters by listing those notices which, if they are to be served (and in many cases registered) at all must be served (and registered) before the appointed day. Where registration is required in the Land or Sasine Register, the registration fee is £60. The notices are:

- conversion of leasehold conditions to praedial real burdens by nomination of a benefited property;[6]
- conversion of leasehold conditions to praedial real burdens by agreement;[7]
- conversion of a leasehold pre-emption or redemption to a personal pre-emption or redemption burden;[8]
- conversion of leasehold conditions to economic development burdens;[9]
- conversion of leasehold conditions to health care burdens;[10]
- conversion of leasehold conditions to climate change burdens;[11]
- conversion of leasehold conditions to conservation burdens;[12]
- conversion of reserved sporting rights to separate tenements;[13]
- advance notice of a claim for compensation in excess of £500 (not later than 28 May 2015);[14]

1 LL(S)A 2012 s 56.
2 LL(S)A 2012 s 56(4).
3 Not to mention the fact that a lease is not eligible for conversion where the rent is over £100.
4 LL(S)A 2012 s 63.
5 *Conveyancing 2013* pp 63–66 and 139–50.
6 LLS(S)A 2012 s 14.
7 LL(S)A 2012 s 17.
8 LL(S)A 2012 s 23.
9 LL(S)A 2012 s 24.
10 LL(S)A 2012 s 25.
11 LL(S)A 2012 s 26.
12 LL(S)A 2012 ss 27, 28.
13 LL(S)A 2012 s 8.
14 LL(S)A 2012 s 56.

- exemption notice by tenant in respect of conversion (registration being required by 28 September 2015);[1]
- agreement or Lands Tribunal order to the effect that the annual rent exceeds £100 (registration being required by 28 September 2015).[2]

In addition a landlord[3] wishing to apply to the Lands Tribunal for exemption from the 100-metres rule or an order that the annual rent is more than £100 must do so by not later than 21 February 2015.[4]

Further guidance on the notices and other matters can be found in Registers of Scotland's *Update 40* (February 2014, www.ros.gov.uk/__data/assets/pdf_file/0020/5951/update40.pdf). Further updates are to be issued by the Keeper in the course of 2015.

SECURITIES: THE MYSTERIES OF ACCESSORINESS

The basic idea

Security rights are 'accessory' rights. They exist, not independently but parasitically, to secure an obligation. What is primary is the obligation itself. That can exist perfectly happily without the security, but the converse is not true: no obligation, no security.

Suppose X lends Y £100,000, secured by standard security over Blackmains. Y pays off the loan. Does the security continue to exist until a discharge is registered? No. When the obligation dies, the security dies with it. That is the consequence not only of extinction by payment, but also of other kinds of extinction, such as, say, negative prescription.[5] A discharge can still be demanded, and can still be registered, but such a discharge is merely *evidential* of something that has already happened. The discharge does not kill the security: it merely buries it.

That, at least, is the position for a security for a fixed-sum loan. Where, as of course is usual nowadays, a security secures possible future debts too, the position is not so simple. For example, a standard security is granted to secure a debt owed to a bank on a current account. If one day the account is temporarily in credit, and later sinks back into overdraft again (a familiar experience), the security is still valid and effective, even though for a period it secured no debt.[6] In such cases, the discharge of a standard security has more than a mere evidential function. It not only buries the security, but kills it first as well.

Another illustration is where an attempt is made to have a security where there is no obligation at all, even potential. Thus in *Trotter v Trotter*[7] an attempt,

1 LL(S)A 2012 s 63.
2 LL(S)A 2012 s 64.
3 Or a tenant entitled to enforce a leasehold condition.
4 LL(S)A 2012 ss 21(4)(b), 69(4)(b).
5 *Cameron v Williamson* (1895) 22 R 293 is the most commonly-cited example. For a modern example see *Albatown Ltd v Credential Group Ltd* 2001 GWD 27-1102 (*Conveyancing 2001* Case (8) and (63)).
6 It secured potential debt, ie *debitum non in esse sed in posse*.
7 2001 SLT (Sh Ct) 42 (*Conveyancing 2001* Case (57)).

in a divorce action, to obtain a standard security for a certain amount without any actual obligation imposed to pay that amount was held incompetent as involving something that in property law terms was impossible.

Back to the millennium: *Watson v Bogue*

If the right to a debt is assigned, and the debt is a secured debt, normally both the debt and the security are assigned. That puts the assignee in the same position as the cedent, ie holding both the right to be paid and the security for that right. But a little reflection will show that there could be problems. What if the debt is assigned but not the security? Or the security but not the debt? Perhaps the assignation of the one implies the assignation of the other? What if a security secures two debts, and one is to be assigned but not the other? Faced with such questions the clarity of the law fades.

In *Watson v Bogue*,[1] a decision of the millennium year, a standard security was assigned but the debt that it secured was not assigned – or at least was not assigned expressly. At first instance the sheriff held that the assignation of the standard security carried with it, by implication, the debt that it secured. On appeal, Sheriff Principal Nicholson held that:[2]

> An assignation of a standard security which does not itself include the personal obligation[3] will be effective to assign the standard security but will not be effective to assign the personal obligation unless either that obligation is expressly described … in the document of assignation, or alternatively the personal obligation is itself assigned by a separate deed.

Whilst that was what was held, however, just what it meant in practice was never fully developed, because the case was an odd one. William Watson was owed money by Mrs and Mrs Johnson, secured by standard security. He assigned the security, but not the debt, to Jeanette Watson. This assignation was duly recorded. Later a creditor of William Watson arrested in the hands of the Johnsons. Jeanette Watson sued the solicitors involved for negligence, this claim proceeding, it would seem, on the basis that the arresting creditor of William Watson had priority over the debt owed by the Johnsons. This basis never seems to have been actually tested. If the security granted by the Johnsons continued to exist, then arguably the secured debt was not arrestable at all because the appropriate diligence would have been adjudication. The sheriff principal held that the debt had not been assigned, but he did *not* hold that it had ceased to be a secured debt.[4] This angle seems not to have been explored. That exploration would have to wait until 2014.

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1 2000 SLT (Sh Ct) 125.

2 At p 129.

3 That is to say, a form B standard security. A form A security contains within it the secured obligation. In both *Watson v Bogue* and the new case, *Acorn*, the security was a form B security. In the case of a form A security, the assignation of the security will also assign the debt, although the question of intimation is not free from difficulty.

4 Eventually the solicitors who were sued were successful on quite other grounds: see *Watson v Bogue (No 2)* 2000 SLT (Sh Ct) 129.

UK Acorn Finance Ltd v Smith

The new case, *UK Acorn Finance Ltd v Smith*,[1] is in some respects the converse of *Watson v Bogue*. In *Watson v Bogue* the security was assigned but not the debt; in *UK Acorn Finance Ltd v Smith* the debt was assigned but not the security. But both cases involved the splitting of debt from security, and in the new case the question was considered head-on, as it had not been in the earlier case: what happens in the event of separation?

Mr Smith borrowed money from UK Acorn Finance Ltd, the loan being repayable after nine months.[2] He granted to that company a standard security. Later he fell into financial difficulties. But meanwhile Acorn had assigned the debt owed to it by Mr Smith to a company called Connaught Administration Services Ltd, and granted to Connaught a standard security over the standard security. We will return to this second point below, merely noting for the present that a standard security over a standard security is not the same as an assignation of the standard security: if X grants to Y a standard security and Y grants to Z a standard security over the X/Y standard security, the first (X/Y) standard security continues to be held by Y.

We do not know the reason for this rather curious arrangement between Acorn and Connaught. If, as seems to be the case, the Acorn/Connaught assignation was done shortly after the loan was granted to Mr Smith, one might wonder why the loan was not made direct by Connaught to Mr Smith.

When Mr Smith defaulted, Acorn raised the present enforcement action. The action was of a fairly standard kind. We quote the sheriff (Philip Mann):[3]

> Firstly, it [the pursuer] seeks a declarator that the defender has failed to make payment on demand of the principal sum and interest due to it and secured by the standard security; that the defender is thereby in default within the meaning of standard condition 9(1)(a) of the standard security; and that the pursuer is entitled to exercise all of the remedies of a heritable creditor on the defender's default by virtue of the Conveyancing and Feudal Reform (Scotland) Act 1970. Secondly, it seeks ejection of the defender from the security subjects in terms of section 5 of the Heritable Securities (Scotland) Act 1894.

It will be noted that there was no crave for payment of the debt for, after all, Acorn was no longer owed the debt.

The defence, predictably, was no title to sue. To quote the sheriff again:[4]

> Mrs Daley [for the defender] maintained that if there was no debt due to the pursuer there remained nothing secured by the first standard security and thus the pursuer could not have had the right to serve the calling up notice. Therefore, it had to follow that the pursuer had no title to sue in this action and the action fell to be dismissed.

1 2014 Hous LR 50.
2 See para 3.3 of the sheriff's judgment. There is some evidence on the internet that Acorn was a provider of bridging finance, so this may have been a bridging loan.
3 Paragraph 1.1.
4 Paragraph 2.3.

The sheriff did not agree:[1]

> Mrs Daley may be right to say that there is no longer any debt due to the pursuer but the personal obligation undertaken by the defender … is owed to the pursuer and its assignees. The obligation is to repay money advanced as a loan by the pursuer. It is the same obligation after the assignation … as it was before it except that it is owed now to the assignee of the pursuer. It cannot be the case that the obligation has failed to survive the assignation. Mrs Daley effectively acknowledged this by asserting that a retrocession of the obligation would cure the pursuer's lack of title. There could be no retrocession of the obligation unless it were the same obligation.

He noted that 'enforcement of the standard security will result ultimately in payment not to the pursuer but to Connaught as creditor in the personal obligation'[2] but he did not explore this point further.

We offer one or two thoughts. Suppose that Acorn enforces its decree. The price obtained, after paying expenses etc, would be held by Acorn on statutory trust for 'payment of the whole amount due under the standard security'.[3] The wording here is interesting: the money is earmarked not to a creditor but to a debt.[4] So Acorn would be bound to hand over the money to Connaught. That works out. On the other hand, what would happen if Acorn did not pay Connaught? Where would that leave Mr Smith?

Standard securities over standard securities

To state the obvious, a standard security is itself a real right in land. Section 9 of the 1970 Act says: 'it shall be competent to grant and register in the Land Register of Scotland or to grant and record in the Register of Sasines a standard security over any land or real right in land'.[5] So it would seem to follow that there can be a standard security over a standard security.

Possibly that result was not one contemplated by the drafter. The provisions of the 1970 Act are hardly well-adapted to such a strange beast as a standard security over a standard security. But given the language of s 9, a different conclusion would be hard to reach. Moreover, since in those cases where a standard security *is* competent, any *other* form of security is declared *not* to be competent,[6] the *only* way a security could be created over a standard security is by means of a standard security. In short, (i) there can be a standard security over a standard security, and (ii) no other type of security over a standard security is competent.[7] As a matter of terminology we shall call the first standard security

1 Paragraph 3.4. The sheriff's judgment is impressive, even without having been directed to the available literature (as to which see below).
2 Paragraph 3.9.
3 Conveyancing and Feudal Reform (Scotland) Act 1970 s 27(1)(c).
4 Arguably this is an example of a 'purpose trust' rather than a 'person trust'.
5 CFR(S)A 1970 s 9(2), as amended, to be read in conjunction with s 9(8)(b), as amended.
6 CFR(S)A 1970 s 9(4).
7 If a creditor in a standard security grants a floating charge, that charge would cover the standard security. But that is another story.

the 'primary' security and a standard security over that standard security a 'derivative' security.

In his book on the 1970 Act,[1] Professor Halliday wrote that a standard security over a standard security is competent. Professor Noble, however, thought that the proper method was an *ex facie* absolute assignation, though he was prepared to use both methods, on the belt-and-braces philosophy.[2] Perhaps it was because of this that Halliday later took the view that a security over a standard security could be created *either* by a standard security *or* by an *ex facie* absolute assignation, and that the latter was preferable in practice.[3] But, for reasons already mentioned, that view does not seem to be correct. It may be added that, if *both* a standard security and an assignation in security are competent, then to use both would presumably mean the extinction of the (derivative) standard security by *confusio* just as, in the ordinary case, a security is extinguished if its holder acquires ownership of the encumbered land.

Although a standard security over a standard security seems competent, when one tries to define its consequences one enters Nobody-really-knows-land. We offer a few thoughts. If there is a standard security over a standard security, does that second or 'derivative' standard security cover not only (i) the 'primary' security but also (ii) the primary loan? At a guess, the answer is negative, because the idea of a standard security over a loan seems impossible. What would seem to be needed would be an assignation in security of the primary loan. That is what happened in *Acorn*, and indeed without such an assignation in security, a standard security over a standard security would not probably achieve very much.

If a standard security over a standard security is granted, and the need arises to enforce the primary standard security, such enforcement could, we think, only be at the instance of the primary standard security holder. That is because a standard security does not divest the granter. So suppose Heather owns land and grants a standard security over it to Ian, and Ian grants to Jill a standard security over the standard security. If Heather defaults, enforcement must be by Ian, not by Jill. Again, this is what happened in *Acorn*.

What if Ian defaults to Jill? How is a standard security over a standard security enforced? Jill could not sell the land itself. Presumably she could seek to sell the primary standard security. If a buyer could be found, Jill would execute an assignation of the primary standard security. When that was registered, the derivative standard security would vanish. These events would have no effect on Heather, except to the extent of replacing the old heritable creditor with a new one.

Final reflections

This whole area of law is difficult. *Watson v Bogue* and *Acorn* cast some light on the issue of the separation of security and secured loan, but Court of Session

1 J M Halliday, *Conveyancing and Feudal Reform (Scotland) Act 1970* (2nd edn, 1977) para 6–06.
2 Review of the second edition of Professor Halliday's book, 1977 JR 169 at 172.
3 J M Halliday, *Conveyancing Law and Practice in Scotland* vol 2 (2nd edn, 1997) para 51–04.

authority is absent, and the lack of reference in the new case to the literature on the subject is unfortunate.[1] As for standard securities over standard securities, little is known. The structure adopted here by UK Acorn Finance Ltd and Connaught Administration Services Ltd seems to us brave, even if it did survive challenge in this case.

SEXUALLY TRANSMITTED DEBT

AD 681: the story begins

> From the depths of Mauchline Sandstone Basin emanates the pure naturally filtered crystal clear waters of Burnswell Spring. The Spring has been in use since Mauchline became a settlement in AD 681. In 1137 the monks of Melrose Abbey formed a monastery. There still remains the Abbots tower which was built about 1420. Robert Burns arrived at Mossgiel Farm by Mauchline in 1784 where he penned most of his great works. He is also responsible for the 'world's' anthem Auld Lang Syne. 'So tak a cup o kindness yet', and drink to your health in water.

So we learn from the website for the Burnswell Spring.[2] But this wondrous water has not been conferring its benefits since 681 without a break. In 1994 Andrew Cooper and his son David:[3]

> lifted a manhole cover and discovered an artesian well rising into a brick vaulted chamber. Enquiries provided the information that the existing structure had been built in 1902 by Ayr County Council and that it provided water to the village of Mauchline for 10 years and was then abandoned when the new mains water pipeline was laid to serve Mauchline.

The water proved to be of good quality and Andrew Cooper saw a business opportunity. His wife Catherine, however, 'was not enthusiastic; at a time when she and her husband were approaching retirement, she did not regard it as appropriate to be taking on a new business venture'.[4] Nevertheless Mr Cooper went ahead. A resonant name was chosen ('Burnswell') and in 1996 a company was established, Burnswell Spring (Mauchline) Ltd.[5] And so the scene is set. But before taking the story first, some background theory is needed.

Cautionary wives: guarantors and quasi-guarantors

Jack and Jill are co-owners of their house. They have a loan with a bank, secured by standard security. The security is expressed to secure all debts owed to the bank by either of them. Jill thinks of the security as securing the house purchase

1 R G Anderson, *Assignation* (2008) paras 2–10 ff; A J M Steven, 'Accessoriness and Security over Land' (2009) 13 *Edinburgh Law Review* 387.
2 www.burnswellspring.com/products.htm.
3 www.burnswellspring.com/about.htm.
4 *Cooper v Bank of Scotland plc* [2014] CSOH 16, 2014 GWD 6-126 at para 2 per the Lord Ordinary (Tyre).
5 The Burnswell website uses the name 'Burnswell Spring Ltd' but that seems to be an error.

loan. So if the house is worth £200,000 and the house purchase loan has, after some years, been reduced to £50,000, she thinks of the equity in the house being £150,000, of which half is hers, ie £75,000. And that is usually the true state of affairs.

But now vary the facts. Jack borrows money from the same bank on a separate account, such as a credit card or a car loan. This debt will automatically be secured over the house – and (because of the wording of the security) not just over Jack's share of the house. Often this does not make much difference. A debt is a debt whether it is secured or unsecured, and so must be paid off one way or another. But in the event of Jack's insolvency it may make a real difference. Much depends on the figures. Once Jack has borrowed more than his own equity, Jill's equity is affected. Suppose that he borrows £90,000. The secured debt over the house is £50,000 (outstanding house purchase loan) plus £90,000 (Jack's separate loan) = £140,000. The equity in the house is now only £60,000. Taking it that it is Jack's equity that is affected first, all that figure of £60,000 will be Jill's equity, but is still less than the £75,000 figure.

Vary the facts again. Jack has a company, Jack (Unwise Enterprises) Ltd. This company borrows from the same bank and Jack gives to the bank a personal guarantee. The effect is as before. The standard security over the house secures any debt due to the bank by either spouse. That includes the debt that Jack will owe the bank if Jack (Unwise Enterprises) Ltd becomes insolvent. What has happened is that Jill's share in the property is (indirectly)[1] security for the company's borrowings, and she may be wholly unaware of that fact. Of course if the company prospers, all that matters nothing. Security makes little difference either way in the absence of insolvency.

In these examples, Jill is not strictly speaking a guarantor, or cautioner. In the first example she is not a guarantor for Jack, and in the second she is not a guarantor for the company. She might be described as a quasi-guarantor, in that she is giving security, but not engaging personal liability. The distinction may or may not matter, according to the circumstances of the case. Suppose that the company becomes insolvent owing the bank £1 million. If Jack has guaranteed all that,[2] the effect would be to reduce the equity in the house to nil. But it would impose no personal liability on Jill. She would lose her share in the house, but she would not be personally liable for a penny. Any other assets she had, she could keep, and the bank could not lay its hands on them. But if she had actually guaranteed the company's borrowings, she would be liable for the whole debt. The distinction makes a practical difference when the debt exceeds her equity. This distinction – between an actual guarantee and a quasi-guarantee – is stressed here because in some of the cases it has been overlooked.

Whether Jill is a true guarantor (ie one with personal liability), or merely a quasi-guarantor, may not be immediately obvious. A standard security may

1 In both this and the previous example the house is security for *Jack's* debts. The company's debts are not directly secured: what is secured is Jack's guarantee of those debts, which comes to much the same thing.

2 But guarantees can have, and commonly do have, a liability ceiling.

simply say that the debts secured are the debts of Jack and Jill, but no more than that. In that case Jill's share of the house secures Jack's debts, but she incurs no personal liability for those debts.[1] Alternatively, the wording may be such that she binds herself personally to liability for Jack's separate debts. That was the position in the new case, *Cooper v Bank of Scotland plc*.[2] The standard security that Mr and Mrs Cooper granted was for 'the debtor's present and future debts' and 'debtor' meant either or both of them; that wording did no more than make Mrs Cooper a quasi-guarantor (ie her equity was put at risk). The security deed, however, went further than that, and contained a positive obligation 'to pay and perform to the Bank the Debtor's Present and Future Obligations (including but not limited to the Debtor's Present and Future Debts) to the Bank'.[3] Thus the Bank of Scotland was making sure that Mrs Cooper's neck was well and truly in the noose: not only was her share of the house security for her husband's separate debts, but she was personally guaranteeing them as well. Any other assets she had were at risk too.

The *Smith* doctrine

In 1997 the House of Lords delivered a bombshell decision, which had all the appearance of applying English law and thus changing Scots law. We are referring here not to *Sharp v Thomson*[4] but to another decision of that year, *Smith v Bank of Scotland*,[5] on the subject of what has been called 'cautionary wives' or 'sexually transmitted debt' though both terms are somewhat misleading.[6] Neither decision proved popular with the Scottish judiciary. *Sharp* was eventually distinguished almost to death: though never overruled, it now applies only within narrow circumstances.[7] Something similar happened to *Smith*. It has never been overruled, but in case after case it was distinguished, until it seemed that it had become more or less dead law.[8] Until now. 2014 has seen what may be the first case in which the Scottish courts have actually applied *Smith*.

Before *Smith* was decided in 1997, the law was that if an obligant (Jack) induced a guarantor or quasi-guarantor (Jill) to sign by undue influence or misrepresentation, that did not constitute a defence against the creditor, assuming, of course, that the creditor was in good faith. But in *Smith* the House of Lords said that in certain circumstances the creditor would cease to be in good faith unless positively satisfied that the obligant's signature

1 Though the house-purchase loan itself will involve solidary (ie joint and several) liability.
2 [2014] CSOH 16, 2014 GWD 6-126.
3 See para 3 of the Opinion.
4 1997 SC (HL) 66.
5 1997 SC (HL) 111.
6 G L Gretton, 'Sexually Transmitted Debt' 1997 SLT (News) 195.
7 See in particular *Burnett's Tr v Grainger* [2004] UKHL 8, 2004 SC (HL) 19. For a full study, and complete references to the extensive literature, see Scottish Law Commission, *Report No 208 on Sharp v Thomson* (2007).
8 See in particular *Royal Bank of Scotland plc v Wilson* 2004 SC 153, mentioned below and discussed in *Conveyancing 2003* pp 73–82. See also G L Gretton and K G C Reid, *Conveyancing* (4th edn, 2011) para 1–11.

had been fairly obtained. These circumstances were 'such as to lead a reasonable man to believe that owing to the personal relationship between the debtor and the proposed cautioner, the latter's consent may not be fully informed or freely given'.[1] What should the creditor do to make reasonably sure that the consent was fully informed and freely given? Lord Clyde's answer in *Smith* was that:[2]

> All that is required of him [ie the creditor] is that he should take reasonable steps to secure that in relation to the proposed contract he acts throughout in good faith. So far as the substance of those steps is concerned it seems to me that it would be sufficient for the creditor to warn the potential cautioner of the consequences of entering into the proposed cautionary obligation and to advise him or her to take independent advice.

The doctrine came to be more fully defined by subsequent cases. We quote from the Lord Ordinary (Tyre) in *Cooper*:[3]

> In *Braithwaite v Bank of Scotland* 1999 SLT 25, it was held by the Lord Ordinary (Hamilton) that the effect of *Smith v Bank of Scotland* was that where the parties were cohabiting husband and wife, proof of an actionable wrong perpetrated by the husband was a prerequisite to the wife having a remedy against the bank. This was approved by the Second Division in *Royal Bank of Scotland v Wilson* 2004 SC 153, in which it was held that a person seeking to set aside his or her cautionary obligation (which expression for present purposes may be taken to include the obligation of a debtor under an 'all sums' standard security), in addition to proving that an actionable wrong was perpetrated by the principal debtor and that the creditor was in bad faith, must show that the obligation sought to be set aside was undertaken gratuitously. In *Wilson* the security in question was granted in consideration of a loan to both husband and wife and the cautionary obligation arising by reason of the security being an 'all sums' security could not be said to have been incurred gratuitously.

Thus there are three elements in the *Smith* doctrine:

(i) Jill was induced to sign by Jack's wrongful conduct (typically misrepresentation);[4]
(ii) the creditor was in bad faith, in the loose sense of not having taken reasonable steps to ensure that the consent was fully informed and freely given; and
(iii) Jill acted gratuitously.

To establish all three of these elements is extremely difficult, which explains why, until 2014, attempts to invoke the *Smith* doctrine were so unsuccessful.

1 At 121 per Lord Clyde.
2 At 122.
3 Paragraph 22.
4 This really involves two parts, the wrongful act, and the causality (had it not been for the wrongful act, Jill would not have signed). So overall one could speak of four elements rather than three.

The *Cooper* case

Guarantee, remortgage, mistaken discharge, new security

Back to the wondrous waters. The new company, Burnswell Spring (Mauchline) Ltd, borrowed substantial sums from Bank of Scotland plc, which was – and this point is vital – the same bank that was providing the secured house-purchase loan. In February 2006 Mr Cooper granted a personal guarantee for the company's borrowings.[1] The effect of that was (see above) that Mrs Cooper became, all unawares, an (indirect) guarantor, while in addition her equity in the house was subject to the company's debts. In December 2006 the Coopers remortaged with Halifax plc.[2]

A remortgage is in principle straightforward: the new loan is used to pay off the old loan, the new loan is secured by a new standard security granted to the new lender, and the old lender grants a discharge of the old standard security. But as always with security rights, one must keep in view the question: what does the security secure? The typical standard security secures only the house-purchase loan, but the Coopers' security to Bank of Scotland plc also secured their contingent liability to meet the debts owed by the company to the Bank. The Bank was well aware of the position. We quote from the case:[3]

> On 30 November 2006, the defenders' mortgages department wrote to Golds to advise that the redemption figure for the loan obtained in 2002 was £46,214.50, increasing at £8.77 per day. The defenders also noted, however (in bold type): 'In addition – Bank of Scotland Business/Corporate Banking … has a debt secured on this property. Our charge will not be released until all indebtedness to the Bank is fully repaid.' It appears from what follows that Golds overlooked this instruction.

The proceeds of the new loan (from Halifax plc) were used to pay off the Coopers' house-purchase loan, and the Bank of Scotland discharged its security (the discharge being executed by Golds by virtue of a power of attorney).

The result was that Mrs Cooper's neck was now out of the noose. The company still owed its debts to Bank of Scotland plc, and Mr Cooper was still guarantor for those debts. And the house was still security for a loan. But instead of one bank being the creditor both of the Coopers personally and of the company, now there were two banks involved, and the company's debts no longer had any connection with the house or with Mrs Cooper.

In March 2007, however, Golds wrote to the Coopers: [4]

> I refer to previous correspondence regarding your recent re-mortgage from Bank of Scotland to Halifax. The Bank of Scotland confirm that although your residential

1 This guarantee had a liability ceiling of £75,000 plus interest.

2 This was in fact a second remortgage. The first loan had been when they bought the property in 1994. Then in 2002 they remortgaged with Bank of Scotland plc.

3 Paragraph 8.

4 Paragraph 13. The Lord Ordinary notes: 'Neither the defenders' "Customer Comment Details" file nor Golds' file contains any document casting light on how the error regarding the discharge of the 2002 security came to be identified.' For another case from 2014 where a standard security was discharged in error, see *NRAM plc v Steel* [2014] CSOH 172, 2015 GWD 1-34.

> mortgage account has been transferred to Halifax plc, the Bank have a continuing requirement to hold a security over your property for business borrowings. Accordingly, they have asked that we send you the enclosed fresh standard security for your signatures. This replaces the similar document signed by you in 2002.

The Coopers signed and the new security was recorded[1] in April 2007. There were now two securities over the property: one to Halifax plc and one to Bank of Scotland plc. The latter secured the company's borrowings. Bank of Scotland plc was thus restored to its previous position. Or was it? When Mrs Cooper signed this new security, was her consent fully informed and freely given?[2]

Action of reduction

In August 2012 Bank of Scotland served a calling-up notice in respect of its (new) security.[3] In response, Mrs Cooper raised the present action to have the standard security reduced *quoad* her one-half share of the property. The Lord Ordinary, after hearing detailed evidence, was satisfied that the three requirements of the *Smith* doctrine had been met. As to the *first* element (being induced to sign), it was apparent that Mrs Cooper had not understood the nature and effect of the new security and that she had signed because of misrepresentations by her husband. We quote from the Lord Ordinary's summary of Mrs Cooper's evidence (which he accepted):[4]

> Mr Cooper presented her with a document in early 2007 and asked her to sign it. He told her that the document related to 'the mortgage' and that the payments would increase. According to the pursuer's understanding, Mr Cooper's reference to 'the mortgage' was to their home loan, and the reason for the increase in the monthly payments was to pay off this loan more quickly, which she regarded as a good idea. Mr Cooper showed her only the page that she had to sign. She did not read the document before signing it. She did not sign it – or indeed any other document – in the presence of any family member as a witness. She trusted Mr Cooper and had no reason to believe that he would mislead her as to the nature of a document that he was asking her to sign. If she had known that by signing the document she was granting a security over her share of the house for the debts of Burnswell, she would not have signed it. In her evidence in chief she accepted that the signature on the

1 Ayrshire became an operational county on 1 April 1997. The property had been bought by the Coopers in 1994 and thus remained in the Register of Sasines. All the standard securities and discharges were recorded in the Register of Sasines.

2 The same question might be asked about the original standard security that she, with her husband, had signed in favour of the Bank of Scotland. But that security was granted in consideration of a loan to both parties, and the case law indicates that such a security is not 'gratuitous' and so escapes the *Smith* doctrine.

3 There seems to be a missing bit of the story here which we are not able to explain. The calling-up notice makes sense only on the assumption that the company – which was the primary debtor – had failed to meet its obligations to the bank. But not only is nothing said about this in the decision, but (i) the Companies House website (searched 9 January 2015) does not disclose any liquidation, receivership or administration in relation to Burnswell Spring (Mauchline) Ltd, and (ii) the company's website (checked 9 January 2015) gives no indication of insolvency.

4 Paragraph 18. Her evidence was corroborated by Mr Cooper's, and accepted by the Lord Ordinary (para 28).

> 2007 standard security in favour of the defenders looked like her signature, but in cross-examination and re-examination she did not think that it was. She accepted that she had been given something to sign by her husband but thought that this was a different document. She had never seen the letter from Golds dated 27 March 2007 until it was produced for the purposes of this action. She considered that her husband had betrayed her trust by procuring her signature through misrepresentation.

In respect of the *second* element (creditor's bad faith), the Lord Ordinary was:[1]

> satisfied that the defenders were not in good faith in the *Smith* sense. There is no evidence that either they or their solicitors took any steps whatsoever to bring to the pursuer's attention the consequences for her of signing the standard security. The letter from Golds dated 27 March 2007 is in bland terms and conveys an impression that the execution of the security is something of a formality. It does not attempt to explain the significance for the pursuer of granting the security; nor is there any mention of her obtaining legal advice. The defenders themselves took no steps, far less reasonable steps, to warn the pursuer as a potential cautioner of the consequences of executing the standard security or to advise her to take independent advice.

The *third* element (gratuitousness) was conceded by the defender. The grant of the new standard security brought with it nothing in exchange. Decree was therefore granted in favour of Mrs Cooper.

Windfall?

One of the arguments for the defender was that reduction should be refused 'to prevent the windfall benefit that would accrue to the pursuer if she were allowed to escape from obligations previously incumbent upon her by the mere chance of an error having been made by the defenders or their agents'.[2] The Lord Ordinary dealt with this argument thus:[3]

> I accept that there was a period (albeit unknown to the pursuer) following the execution in 2006 by Mr Cooper of a personal guarantee of Burnswell's debt when the house, including her share, was burdened with that debt. This situation came to an end when the security was discharged. … It is equally arguable that refusal of reduction would operate as a windfall benefit to the defenders by relieving them of the result that would otherwise flow from their own error had they fulfilled their duty of good faith towards the pursuer by informing her of the consequences of signing the standard security and recommending to her that she obtain independent legal advice.

Unfair Terms Regulations?

Mrs Cooper fought, and successfully fought, under the banner of the *Smith* doctrine. Perhaps she could have fought under another banner, and perhaps in other cases that banner might be the better choice. It is sometimes supposed

1 Paragraph 30.
2 Paragraph 32.
3 Paragraph 32.

that the Unfair Terms in Consumer Contracts Regulations 1999[1] do not apply to contracts relating to heritable property. That is a misconception.[2] We offer no definite view, but merely suggest that the possibility of invoking the 1999 Regulations in cases of the *Cooper* type would be worth considering.

FRAUDULENT TRANSACTIONS

'A solicitor … is a special person'[3]

The story

The weather in the first half of January 2007 had been mild, but the morning of Tuesday the 16th was frosty, with snow arriving later in the day.[4] We do not know what time of day it was that a conveyancing client of Messrs Biggart Baillie told the partner, Mr Mair, that he was a fraudster. His name was John McGregor Cameron.

In 2004 Mr Houlgate, the main person running Frank Houlgate Investment Co Ltd ('FHIC'),[5] was introduced to J M Cameron by investment advisers called St James's Place Partnership. Cameron persuaded FHIC to lend money for a business project. After advancing about £100,000, FHIC took the view that it would be unwise to advance further funds without security. Cameron offered a standard security over a valuable property at Balbuthie in Fife. His solicitors were Biggart Baillie ('BB'). FHIC was separately represented. A standard security was granted and registered in the Land Register. FHIC then advanced further sums.

The Balbuthie property was indeed owned by John Cameron – but a different and wholly unconnected John Cameron, John Bell Cameron, who was a prominent sheep farmer and businessman.[6] So what had happened was that J M Cameron had stolen the identity of J B Cameron.[7]

What about the fact, awkward for the fraudster, that the Balbuthie property was in the possession of John B Cameron? 'In the middle of 2006 Mr Houlgate was taken to see the property by John M Cameron. He was told by John M Cameron that the farmhouse was let to the Church of Scotland, and that neither the tenants nor the local community were at the time aware of the proposals for development.'[8] Simple when you know how.

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1 SI 1999/2083.

2 This is too well-established to require citation of authority. For a 2014 development in which the Financial Conduct Authority took steps against Kensington Mortgage Co Ltd for breaching the 1999 Regulations, see www.fca.org.uk/your-fca/documents/undertakings/undertaking-kensington-mortgage-company-limited.

3 *Frank Houlgate Investment Company Ltd v Biggart Baillie LLP* [2014] CSIH 79, 2014 SLT 1001 at para 89 per Lord McEwan.

4 www.metoffice.gov.uk/climate/uk/summaries/2007/january.

5 The shares were held equally by himself and his wife.

6 http://en.wikipedia.org/wiki/John_Cameron_(farmer).

7 Photographs of both Camerons and of Balbuthie Farm can be found at www.dailyrecord.co.uk/news/scottish-news/bogus-sheep-farmer-impersonated-landowner-4369460.

8 [2009] CSOH 165, 2010 SLT 527 at para 3 per Lord Drummond Young.

J M Cameron was an identity thief of an unusual kind. The typical identity thief assumes the name of the victim and makes or buys forged papers (fake passport, fake utility bills etc). J M Cameron simply used his own name. Surely, it may be asked, the discrepancy would have come to light when the standard security was granted?[1] Whilst no full explanation exists, there is some background. We quote from Lord Hodge, who heard one of the stages of the case:[2]

> JMC first instructed Mr Mair in January 2004 when he sought to obtain funding from HSBC. At that time he told Mr Mair that he owned Balbuthie jointly with his cousin, whom Mr Mair described in a file note as Mr Bell. At a meeting on 17 February, after Mr Mair had seen the title sheet to Balbuthie farm, JMC explained that his cousin was Mr John Bell Cameron. In July 2004, when Mr Mair was on holiday, a representative of HSBC told Mr Mair's secretary that he understood that JMC and a female called Bell Cameron, who was elderly and in a nursing home, owned the property jointly. The HSBC representative did not wish to process the loan application unless it was shown that the property was jointly owned and that JMC and 'Bell Cameron' could grant the security. JMC confirmed to Mr Mair's secretary that the property was jointly owned with Bell Cameron and that she was in a nursing home. JMC said that he owned 80% of the property and his cousin, Bell Cameron, owned 20%. He represented that an attorney acted for his elderly cousin and agreed to give Mr Mair his contact details. …
>
> Time passed. In a telephone conversation in July 2005, JMC informed Mr Mair that there was confusion about the ownership of the property. The registered proprietor of Balbuthie was Mr John Bell Cameron. But JMC informed Mr Mair that the land certificate should have read 'John and Bell Cameron' and that he and his female cousin owned the property in the ratio of 80:20. Mr Mair obtained a copy of the land certificate and sent it to JMC. At a meeting on 28 September 2005 Mr Mair expressed concern about the ownership of the property but JMC confirmed the joint ownership.[3]
>
> Later, when FHI proposed the security transaction, JMC came up with a different story. On about 29 March 2006 JMC informed Mr Mair that he had not used his name, John McGregor Cameron, when he took title because he had been a 'name' at Lloyds and wished to shield the property from any liabilities from that involvement. Over the following months JMC discussed with Mr Mair his proposals to develop Balbuthie farm in a joint venture with Mr Houlgate. At a meeting on 24 August 2006 JMC again explained that he had used the name 'John Bell Cameron' on the title deeds in order to keep at arm's length from his involvement as a name in Lloyds. In accordance with normal conveyancing practice, Mr Baxter of ABAM[4] prepared a request for a form 12A report for 'John Bell Cameron' residing at Balbuthie Farm and Mr Mair approved the terms of that request.

All this will raise eyebrows. We make no comment. As will be seen, liability attached to BB not because of what has just been recounted, but because of a later failure.

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1 There is also the fact that the only address that BB had for their client was in Leeds, and yet the standard security designed him as 'residing at Balbuthie Farm, Kilconquhar, Elie, Leven': see [2014] CSIH 79, 2014 SLT 1001 at para 3 per Lord Menzies.

2 [2013] CSOH 80, 2013 SLT 993 paras 9–11.

3 What happened to the proposed HSBC loan is not wholly clear, but it seems that the bank simply declined to go ahead given the doubt as to J M Cameron's title.

4 A B & A Matthews LLP, which was acting for FHIC.

The standard security in favour of FHIC was granted and registered. A few months' later, in December 2006, BB acted in a deed of variation of the standard security. This was important because it increased the sum potentially secured. Thus post-December 2006 advances would be possible on a secured basis.[1]

In December 2006 the real owner of the Balbuthie property, J B Cameron, was contacted by a company called Galen Finance Ltd saying that they had decree against him and intended to enforce it. He had never heard of that company. Enquiries with Galen were pursued which revealed, among other things, that BB was named as the law firm acting for the person that Galen was dealing with. On 10 January 2007 J B Cameron's law firm faxed BB to make it clear that J B Cameron had had no dealings with Galen. Next day BB emailed and faxed J M Cameron, copying the fax that it had received, and saying:

> This is a development which concerns me greatly and I am sure you will understand the full ramifications relative to your arrangements with Frank Houlgate. It is essential that matters are clarified immediately and, in my view, it is also necessary to make Mr Houlgate and his solicitors fully aware of the position … I shall not contact them however until we have spoken again, on the understanding that you will contact me first thing tomorrow morning, Friday 12 January 2007.

Never short of a plausible explanation, J M Cameron said he was attending a funeral. But eventually, on 16 January, he arrived at BB's office and confessed. That was the day on which the snow arrived. Things, however, were set to get even worse.

In his letter, just quoted, the partner in BB had said 'it is … necessary to make Mr Houlgate and his solicitors fully aware of the position'. Of course. But that never happened. J M Cameron's resources as a fraudster were not exhausted. We do not know the full story, but a key element was that he was, he told the BB partner, arranging to pay FHIC back, and when that happened the fake standard security could be discharged and everyone would be happy. The partner held back. He did not inform FHIC or its law firm. He did not consult his fellow partners. He did not contact the Serious Organised Crime Agency,[2] though that course of action was pressed upon him by J B Cameron's law firm. Meanwhile, as fate would have it, FHIC, still wholly in the dark, advanced to the fraudster a further £100,000, taking the total loan up to about £480,000.[3]

After some time J M Cameron told BB that he had managed to repay the FHIC loan, and asked for a deed of discharge to be prepared. It might be thought that the deed of discharge would have been adjusted between the two law firms. But J M Cameron worked his usual spells and the BB partner prepared the discharge and gave it to the self-confessed fraudster. What happened now? Well of course

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1 In other words, it appears that the standard security as originally granted was not an all-sums security. We have, however, not seen the standard security or the deed of variation.

2 Later replaced by the National Crime Agency.

3 This figure is, at any rate, what we take from the information available, for it seems that by the end of December 2006 the loan stood at £280,000 (see para 49 of the Inner House decision) and that two further tranches each of £100,000 were advanced, one at the beginning of January 2007 and the other at the end of that month.

the loan had *not* been repaid. J M Cameron forged Mr Houlgate's signature on the deed,[1] and returned it to BB. It was registered in the Land Register on 16 July 2007. Thus a fake standard security came to an end with a fake discharge.

That same month Mr Houlgate happened to be reading a Yorkshire newspaper. His eye fell on a story in which a Mr Cameron had been convicted of a fraud in England. He realised that this was the man to whom he had been lending money. What steps the company took to attempt to recover its (unsecured) loan from J M Cameron is not known, but the fact that the company sued BB shows (if evidence were needed) that J M Cameron never repaid the debt. Mr Cameron the fraudster ended up in prison, and the BB partner ended up convicted of professional misconduct by the Scottish Solicitors Discipline Tribunal.

The litigation: an overview

The litigation history of FHIC against BB has been complex and, before going further, an overview may be of use. The case is a single one in all its phases, its name being *Frank Houlgate Investment Company Ltd v Biggart Baillie LLP*.

- The case was first heard in the Outer House, on a debate before Lord Drummond Young, who dismissed the action: [2009] CSOH 165, 2010 SLT 527 (*Conveyancing 2009* Case (80)).[2]
- The pursuer reclaimed, and the Inner House allowed the pleadings to be amended. This hearing is unreported.
- The case was then heard, again on a debate, by Lord Glennie, who allowed a proof before answer: [2011] CSOH 160, 2012 SLT 256 (*Conveyancing 2011* Case (68)).[3]
- Next was the proof before answer, heard before Lord Hodge: [2013] CSOH 80, 2013 SLT 993 (*Conveyancing 2013* Case (61)). Lord Hodge held in favour of FHIC, but only to the extent of £100,000, ie a figure based on the final tranche of the loan, advanced at the end of January 2007.
- Then comes the latest and perhaps final stage, in which the defenders reclaimed, and the Inner House has upheld the decision of Lord Hodge: [2014] CSIH 79, 2014 SLT 1001.

The initial damages claim

The advances by FHIC to the fraudster had been made in several tranches. The last two were made on 2 January 2007 and on 30 January 2007, each being for £100,000. To begin with, the action sought damages against BB in the amount of £380,000, which we take to be the whole amount due under the standard security.[4]

1 He also forged the signature of a witness, choosing for that purpose Mr Houlgate's daughter-in-law. Cameron was a bold and imaginative fraudster.
2 See *Conveyancing 2009* pp 108–13.
3 See *Conveyancing 2011* pp 121–25.
4 See [2009] CSOH 165, 2010 SLT 527 para 2. The first tranche of the loan had been unsecured. Later the figure seems to have been reduced to £300,000: see [2011] CSOH 160, 2012 SLT 256 para 1. We are unsure of the basis of this latter figure.

The legal basis was negligence and, separately, breach of implied warranty of authority. The latter argument was that BB had held itself out as agent for the Mr Cameron who was the owner of the Balbuthie property.

Although a law firm can owe a duty of care to a non-client, establishing such a duty is usually an uphill battle.[1] After an extensive review of the law, Lord Drummond Young held that this line of attack failed, finding that BB had not held itself out as acting for J B Cameron but only as agent for J M Cameron.[2] In other words, this was a case of 'genuine client, bad property title' rather than a 'good property title but bad client'. This has always appeared to us as a decision that might easily have gone the other way.[3]

The attack renewed

As mentioned above, FHIC was allowed by the Inner House to amend its pleadings, and as a result the case went back to the Outer House, where it went through two rounds, first before Lord Glennie (debate) and thereafter before Lord Hodge (proof before answer). Before Lord Glennie, both the previous arguments (duty of care and warranty of authority) were again advanced and again rejected.[4] But FHIC now also had a new line of attack: 'certain duties', it said, 'arose once the defenders knew of JMC's fraud'.[5] In one respect this was less satisfactory for FHIC for it would, if successful, yield damages only for loss incurred after the middle of January 2007, which is to say in respect of the final tranche of the loan, £100,000, advanced on 30 January. The written pleadings set out this new argument thus:[6]

> Having in fact become aware that JMC was not the registered title holder, ie the owner, of the Property and indeed that he had no connection therewith as he had apparently claimed and that his instructions in relation to the granting of a security over the Property had been part of a fraud on his part, it was the duty of the Defender to relay that information immediately to the Pursuer and to refuse to accept further instructions in the matter from JMC. … By at least 10 January 2007, the Defender further knew that the security documents which it negotiated, had executed and witnessed, were not in fact executed by the registered title holder. It knew that these matters were of the essence of the transaction. The imposition of a duty to withdraw from acting on behalf of JMC and to inform the Pursuer or its agents of JMC's fraud once the Defender was actually aware that JMC's instructions in the security transaction had been fraudulent is no more than a recognition of Mr Mair's existing professional obligations.

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1 For other cases in 2014 in which a lender sued the borrower's law firm for negligence, see *Northern Rock (Asset Management) plc v Steel* [2014] CSOH 40, 2014 GWD 10-191, and *NRAM plc v Steel* [2014] CSOH 172, 2015 GWD 1-34.
2 [2009] CSOH 165, 2010 SLT 527.
3 *Conveyancing 2009* pp 111–13.
4 [2011] CSOH 160, 2012 SLT 256. As to the first, Lord Glennie concisely noted (para 23) that 'as a general rule, a solicitor acting for one party to a conveyancing and security transaction does not normally owe any duty of care to the other party'.
5 [2011] CSOH 160 para 27.
6 Quoted at para 28.

After proof, the Lord Ordinary (Hodge) accepted this argument, finding that 'when Mr Mair learned of JMC's fraud in mid-January 2007 he made himself an accessory to the fraud when he failed (i) to withdraw from acting for JMC and (ii) to warn FHI or its solicitors that FHI could not rely on the security over Balbuthie Farm'.[1] He commented that 'while it may be possible to analyse the liability of a solicitor in such circumstances in terms of implied representation, I wonder if that might not be unnecessarily complicated'.[2]

The defender reclaimed, and the Inner House has now affirmed the decision, though not wholly for the same reasons as the Lord Ordinary.[3] Moreover, there was some disagreement among the appellate judges, though only as to the correct analysis of the law and not as to the ultimate outcome. The majority (Lord Menzies and Lord McEwan) took the view that liability was established both (i) on the basis of the BB partner having been 'accessory to fraud' and (ii) on the basis that BB gave a continuing representation to the other side. As to the latter we quote Lord Menzies:[4]

> A solicitor acting for the recipient in a transaction which involves the transfer of money from one party to another secured by a security over heritable subjects gives a continuing implied representation to the solicitor for the transferor that he is not aware of any fundamental dishonesty or fraud which might make the security transaction worthless. … As soon as Mr Mair learned of JMC's fraud … he was under an obligation immediately to tell the pursuers' solicitor that JMC had admitted to fraud and that the standard security was worthless.

Lord Malcolm's analysis was different. He was doubtful about the whole idea of being 'accessory to fraud' and in any event was 'of the view that a person cannot make himself liable as an accessory to a crime without having, to some degree, the mental element necessary for commission of the wrong itself'.[5] As to the latter:[6]

> The Lord Ordinary accepted that he [Mr Mair] was not deceitful. He neither knew nor foresaw that his inaction would result in further gains for the fraudster. The Lord Ordinary said that there was 'no subjective dishonesty'. Mr Mair did not intend to harm the pursuers. He did not deliberately act in a manner which would result in further losses. On the contrary he genuinely thought that he was doing what was best for the pursuers.

Lord Malcolm was also dubious about whether BB could be said to have been giving a continuing representation. He preferred to hold BB liable on general principles of delict. But he agreed with the overall result: BB was liable.

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1 [2013] CSOH 80, 2013 SLT 993 at para 38. For critical discussion of the decision, see E Reid, '"Accession to Delinquence": *Frank Houlgate Investment Co Ltd (FHI) v Biggart Baillie LLP*' (2013) 17 *Edinburgh Law Review* 388.
2 Paragraph 37.
3 [2014] CSIH 79, 2014 SLT 1001.
4 Paragraph 36.
5 Paragraph 69.
6 Paragraph 56.

Confidentiality?

Why did Mr Mair not, in the middle of January 2007, contact the agents for FHIC to warn them of the true position? One reason, no doubt, was psychological. J M Cameron was a clever con-man and like all clever con-men he could work magic on the minds of others. But in addition we know that Mr Mair thought that he was under a continuing duty of confidentiality.[1] Evidently he was mistaken in that view. Lord McEwan was prepared to state the law baldly and without qualification: 'The fraud of the client relieves the solicitor of any duty of confidentiality.'[2] Lord Malcolm said essentially the same thing: 'Given the fraud, there was no obligation of confidentiality.'[3]

Afterthought (1): claiming against the lender's law firm?

This epic litigation has been by the lender against the fraudster's law firm. The other possible avenue of attack would be a claim against the lender's own law firm. As far as we know there was no such claim here, and, indeed, we are not aware that this avenue of attack has been adopted in any such case[4] in Scotland. By contrast, in England defrauded lenders do sometimes pursue their own law firm.[5]

Afterthought (2): claiming against the Keeper?

Might there have been the possibility of recourse against the Keeper? Suppose that, before the forged discharge, J B Cameron (the true owner) had noticed the problem, had pointed out to the Keeper that the security was by a fraudster, and asked the Keeper to rectify the Register by deleting FHIC's security. What would have happened? Presumably the Keeper would have agreed. It is true that, under s 9(3)(a) of the Land Registration (Scotland) Act 1979, the Keeper was normally forbidden to rectify the Register against the interests of a 'proprietor in possession', but FHIC was not a proprietor in possession.[6] Had rectification taken place, FHIC (unless 'careless') would presumably have been entitled to indemnity.[7] So FHIC would have been protected by the land registration system. The Keeper would have been subrogated to the company's claims against third parties,[8] so it might have been the Keeper who ended up suing BB. But that is not what happened. The forged deed of discharge meant that the security no longer appeared on the Balbuthie title sheet. The Register was now accurate

1 See [2014] CSIH 79, 2014 SLT 1001 para 55.
2 Paragraph 88.
3 Paragraph 56.
4 That is to say, cases where a fraudster impersonates the owner of property and obtains a secured loan.
5 See such cases as *Lloyds TSB Bank plc v Markandan & Uddin* [2012] EWCA Civ 65, [2012] 2 All ER 884; *Nationwide Building Society v Davisons* [2012] EWCA Civ 1626; *AIB Group (UK) Plc v Mark Redler & Co* [2013] EWCA Civ 45, [2013] PNLR 19; *Ikbal v Sterling Law* [2013] EWHC 3291 (Ch), [2014] PNLR 9; *Santander UK v RA Legal* [2013] EWHC 1380 (QB), [2013] PNLR 24. The results of these cases have been mixed. For some discussion see *Conveyancing 2012* pp 146 ff.
6 Cf *Kaur v Singh* 1999 SC 180.
7 Land Registration (Scotland) Act 1979 s 12(1)(a). For carelessness, see s 12(3)(n).
8 Land Registration (Scotland) Act 1979 s 13.

again. So under the 1979 Act, FHIC would seemingly have had no claim against the Keeper.

The secret flat

The facts

The facts of *Chalmers v Chalmers*,[1] insofar as they can be determined from what the Lord Ordinary[2] described as the 'cobweb of conflicting evidence' at proof,[3] were remarkable. Paul and Therese Chalmers were husband and wife and also partners in a house-rental business known as Rentier Property. As Rentier Property was an ordinary partnership, title to the various Rentier houses was taken, on behalf of the firm,[4] in the name of Mr and Mrs Chalmers or sometimes of Mr Chalmers alone. The business was run by Mr Chalmers, and Mrs Chalmers played little or no part in it.

When Mr Chalmers went to work in Dubai in 2007, the marriage, which by then had lasted for almost 30 years, began to break down. The couple were divorced in 2013, having in the previous year entered into a minute of agreement in respect of the matrimonial property. Among its terms was a transfer by Mrs Chalmers of all her rights in Rentier Property. Each party renounced any further rights against the other.

By this time Mrs Chalmers had found out about a secret flat, following title investigations by her solicitor. It turned out that in 1998 title to a flat at 38 Hotspur Street, Glasgow, had been registered in Mrs Chalmers' name but without her knowledge. The flat had been bought by Mr Chalmers, partly using Rentier Property money and partly money of his own. The flat did not become part of the Rentier portfolio. It did not appear in the partnership accounts, and the rental income was paid to Mr Chalmers and not to Rentier Property. One of the reasons for this method of doing things may have been to avoid paying income tax on the rental income.[5]

The Chalmers had two children, a son and a daughter, and in 2006 a disposition was drawn up which disponed the flat to the son, Chris, who at that time was aged 18. The disposition was registered after some delay, on 9 April 2008.[6] Once again, the transaction was organised by Mr Chalmers, who also signed the disposition as a witness. The signature of Mrs Chalmers, however, was forged – by whom has not been determined. When asked during the proof whether he had forged his wife's signature, Mr Chalmers responded: 'I cannot recollect.'[7] The reasons for the transfer are not entirely clear. In part it seems to have been a 'normal' transfer of assets from parent to child; a different

1 [2014] CSOH 161, 2014 GWD 38-699.
2 Lord Boyd of Duncansby.
3 Paragraph 69.
4 Whether this was done expressly or relied on inference, perhaps with the aid of s 21 of the Partnership Act 1890, is not known.
5 Paragraph 81.
6 One reason for the delay may have been the death of the solicitor who was acting in the transaction.
7 Paragraph 11.

property was to be given to the Chalmers' daughter later on. But it may also have reflected the deteriorating relationship between husband and wife. In any event, nothing changed on the ground as a result of the transfer. The flat continued to be rented out, and the rental income was paid to Mr Chalmers and not to Chris. It was to be a number of years before Chris came to use the flat for himself.

None of this was known to Mrs Chalmers. It appears that solicitors acted, first in the purchase of the flat and later in its transfer to Chris, without taking instructions from Mrs Chalmers or verifying that those who purported to speak on her behalf were authorised to do so.[1] But when she finally found out about the flat, at the time of the divorce action in 2012–13, she too chose to maintain the secrecy and keep the knowledge to herself. On the Lord Ordinary's interpretation of the evidence, this was so that, once her husband had signed away his rights in the minute of agreement, she could obtain a reduction of the disposition to her son and thus restore title to her name.[2]

The law

It is worth pausing to consider the legal implications of the facts just described. Two issues arise in particular. First, did Mrs Chalmers become owner when, in 1998, a disposition of the flat in her favour was registered in the Land Register? And second, did ownership then pass to her son, Chris, when a disposition in his favour was registered in 2008? Neither issue seems to have been considered in the litigation which was to follow; yet they are fundamental to an understanding of the facts, and indeed of the questions which were to be litigated.

The answer to the first question is less clear than one would wish. It is true, of course, that Mrs Chalmers' name was entered on the Land Register as proprietor. And it is also true that, by s 3(1)(a) of the Land Registration (Scotland) Act 1979, the Keeper's Midas touch operates so that the person registered as owner becomes owner. But is it certain that registration, in a legal sense, had taken place? Under the Land Registration Rules, an application for registration must be made 'by the person in whose favour a real right will be created', ie in this case by Mrs Chalmers.[3] And behind this requirement is a general principle of property law that the transfer of ownership requires the consent of the transferee as well as of the transferor.[4] But no consent was given by Mrs Chalmers; nor did she apply for registration. In those circumstances can the Keeper's act in entering

1 Paragraph 44.

2 Paragraph 90: there was 'a deliberate decision' by Mrs Chalmers to delay raising the action of reduction until after the divorce. 'I am satisfied that the reason for doing this was so that the pursuer could gain an advantage over her husband and not have to put 38 Hotspur Street into the pot of matrimonial property.'

3 Land Registration (Scotland) Rules 1980, SI 1980/1413, r 9(1). These were the Rules in force in 1998. This was the equivalent of the warrant of registration in the Register of Sasines, which in turn was the equivalent of the former instrument of sasine.

4 There must be *animus acquirendi dominii* (intention to acquire ownership) on the grantee's side, as well as *animus transferendi dominii* (intention to transfer ownership) on the granter's side: see K G C Reid, *The Law of Property in Scotland* (1996) para 613.

her name in the Register properly be classified as an act of registration?[1] If not, ownership remained with the granter of the disposition[2] and did not pass to Mrs Chalmers. Of course, even if Mrs Chalmers did become owner, as seems likely,[3] there may be a question as to whether she was holding as trustee for Mr Chalmers or for someone else; on this point the evidence, as disclosed in the proof, is unclear.[4]

No such doubts affect the second transfer. Even assuming Mrs Chalmers to have been owner, the fact that her signature was forged means that the disposition was void. Nonetheless, registration transferred ownership. Why? This time, unlike the last, a proper application was made on behalf of a grantee (Chris Chalmers) who consented to the acquisition. And, that having been done, the Keeper's Midas touch did the rest. On 9 April 2008, therefore, Chris Chalmers became owner of the flat. So far as we know, he remains owner today.

The action

The divorce now being out of the way, Mrs Chalmers raised an action against her son for reduction of the 2008 disposition. The forgery was admitted by the defender. Nevertheless the action was defended, on two separate grounds.

The first can be dealt with quickly. Mrs Chalmers' title to the flat, it was argued, had been merely as a partner of, and so on behalf of, Rentier Property. In terms of the minute of agreement she had given up any interest in Rentier Property. Hence she had no title to sue. The Lord Ordinary disposed of this argument by finding that the flat was not held on behalf of Rentier Property. To which we would add that, even if the evidence had supported a finding of partnership property, Mrs Chalmers, as the former owner,[5] would still have had title to sue even if that title had been that of a trustee for the firm.

The second ground of defence is that, having entered into a minute of agreement with her husband, Mrs Chalmers was personally barred from pursuing the action.[6] That personal bar can be a defence to a reduction is not in doubt.[7] But, so far at least as the Opinion discloses, the defender failed to cite any of the relevant authorities on personal bar[8] or to explain how the particular

1 After all, under the 1979 Act there are other reasons why an entry might be made on the Register, namely rectification, and the entering of an overriding interest. The suggestion here, however, is that the entering of Mrs Chalmers' name was not authorised by any of the provisions of the Act.

2 The name of the granter is not disclosed in the court's Opinion.

3 On the basis that primary legislation (s 3(1)(a) of the LR(S)A 1979) trumps secondary (r 9(1) of the Land Registration Rules).

4 It appears, however, that she was not holding as trustee for Rentier Property: see paras 72–80. Counsel for Mrs Chalmers argued that she held for Mr Chalmers, or rather (in an expression devoid of technical meaning) that 'Paul Chalmers remained the beneficial owner' (para 82).

5 Assuming of course that she became owner in the first place, as to which see above.

6 Paragraphs 66 and 70.

7 It is one of the three defences to reduction listed by D M Walker, *Civil Remedies* (1974) pp 162–63 (the others being the interests of third parties and the need for *restitutio in integrum*).

8 Instead the defender relied mainly on *Dodd v Southern Pacific Personal Loans Ltd* [2007] CSOH 93, 2007 GWD 21-352, a case in which an action of reduction failed on the ground that, in substance, the deed in question was *not* forged. In *Chalmers*, by contrast, the forgery was admitted. For doubts as to the correctness of *Dodd*, see *Conveyancing 2007* pp 21–22.

facts could be made to fit within the framework of that doctrine which, according to the accepted view, requires (i) inconsistent conduct on the part of the person said to be barred leading to (ii) unfairness to the other party to the dispute.[1] Indeed, fitting the facts to the framework would have been hard to do because, even if signing the minute of agreement could be regarded as conduct which is inconsistent with the subsequent action of reduction, the person potentially prejudiced by such conduct would be the pursuer's (former) husband and not her son, the actual defender in the action of reduction.

Nonetheless, the Lord Ordinary upheld the defence.[2] On the one hand, the pursuer had sought to gain advantage by raising the action of reduction only after the signing of the agreement put the flat beyond the reach of her husband. On the other hand, the defender, while not blameless, had not been part of the fraud and was now living in the flat as his home. We do not think that this decision can be correct.

Whilst the decision is open to question, it is not clear how much it really matters. For, unlike a voidable deed, a disposition which is void stands in no need of reduction: it is, and always has been, without legal effect.[3] Nothing therefore changed on 7 November 2014, when the Lord Ordinary refused the reduction, except that the fact of the forgery had now been publicly established. As the disposition was and always had been void, the Register was and always had been inaccurate in showing Chris Chalmers as owner. Admittedly, rectification of the Register was unlikely to be allowed in practice, because Chris Chalmers was a proprietor in possession, and not, so far as we know, fraudulent or careless in the conduct of the transaction.[4] *But that would have been true even if Mrs Chalmers had been successful in her action*. Further, it is provided by the Land Registration etc (Scotland) Act 2012 that where, on the day when that Act came into force (8 December 2014), the Register was inaccurate but could not be rectified, the Register was deemed no longer to be inaccurate.[5] It follows therefore that, since 8 December, Chris Chalmers' title has been good beyond challenge.[6] But, in exchange, it would likewise follow that Mrs Chalmers would have a claim against the Keeper for indemnity for the value of the property.[7] (Whether, in that event,

1 See eg *Tonner v Reiach and Hall* 2008 SC 1; *Prow v Argyll and Bute Council* [2012] CSOH 77, 2012 GWD 21-438; *Patersons of Greenoakhill Ltd v Biffa Waste Services Ltd* [2013] CSOH 18, 2013 SLT 729; *IGL Ltd (In Liquidation) v Malcolm Insulation Supplies Ltd* [2014] CSOH 170, 2014 GWD 40-726. The model comes from the standard modern work on personal bar (which also does not seem to have been cited to the court): E C Reid and J W G Blackie, *Personal Bar* (2006). See p lxv and, for personal bar as it applies to civil litigation, ch 19.

2 Paragraphs 86–93.

3 D M Walker, *Civil Remedies* (1974) pp 145–46.

4 Land Registration (Scotland) Act 1979 s 9(3). Of course, it is possible to argue that Chris Chalmers was careless in failing to determine that the disposition in his favour was validly signed. We do not have sufficient information to assess that argument.

5 Land Registration etc (Scotland) Act 2012 sch 4 para 22.

6 Again, assuming that he was neither fraudulent nor careless.

7 LR(S)A 2012 sch 4 para 23. In principle, the amount due would appear to be the value of the property because, by the date on which indemnity became due (8 December 2014), Mrs Chalmers would have been entitled (but for her son having been in possession) to the return of the flat free (it seems) of any claim by her former husband.

the Keeper might have a right of relief against any other party is not an issue we will seek to explore here.)

LETHAM GRANGE: A LITIGATION CATASTROPHE

Letham Grange is an estate in Angus, nowadays run as a golf club. The mansion-house survives, and is a listed building, described in the listing order thus:

> Two-storey classic mansion house, ashlar and slate, with semi-circular Doric portico west front. 1828. Archibald Simpson, archt. Extensive alterations and additions 1887. Alexander Ross Archt.

Letham Grange is also a full-scale litigation catastrophe. It has gone on for more than 10 years, up and down to the Inner House like a yoyo, and to London twice. Already in 2011 the *Dundee Courier* said that 'the cost of the court case has … run into the millions of pounds'.[1] 2014 saw what may (or may not) prove to be the last episode in a litigation that is not a credit to the Scottish legal system. In what follows, we do not enter into every issue raised over the years, but give an overview, and focus on some particular issues.

The background

Conveyancing history, 1994 to 2003

The conveyancing history of Letham Grange, in so far as relevant to the litigation, consists of three steps.

- In 1994 it was bought by Letham Grange Development Co Ltd[2] ('LGDC') for about £2 million.[3]
- LGDC sold it to a Canadian company, 3052775 Nova Scotia Ltd ('NSL'), for a sum stated in both the missives and disposition (dated February 2001) to be £248,100.
- At the beginning of 2003, NSL granted to another Canadian company, Foxworth Investments Ltd ('Foxworth'), a standard security over the property.[4]

As we understand the position, the LGDC/NSL disposition was presented for registration in the Land Register on 12 February 2001 but has sat in the Keeper's in-tray ever since. On 20 June 2003 the standard security was lodged for registration and we understand that it joined the disposition in the Keeper's in-tray. In the jargon employed by Registers of Scotland, both deeds were held

1 *Dundee Courier*, 14 April 2011.
2 A Scottish company incorporated in 1994.
3 The price was either £2,105,000 or £1,800,000; which figure is correct is unclear but the difference does not matter for the purposes of the litigation. Possibly the lower figure was for the heritable property and the difference represented the value of moveables.
4 We understand that both this company and NSL are registered in Nova Scotia.

'in abeyance' pending the outcome of the various court actions.[1] It is curious that the non-registration of the two deeds, over which there has been such prolonged litigation, has not attracted the attention of the courts. We return to the registration issue at the end. At this stage we would only add that there are, we understand, two further pending registration applications, one a disposition by LGDC (in liquidation) to P I Ltd, and a standard security by the latter in favour of the former. We have no further information about this, but the involvement of P I Ltd would seem not to be relevant to the litigation.[2]

Insolvency strikes

LGDC went into liquidation in December 2002. It had been in financial difficulties for some time, and it does not seem to have been in dispute that it was already absolutely insolvent in February 2001, when the disposition was granted.[3] The liquidator was M P Henderson CA.[4]

The ubiquitous Mr Liu

At first sight three wholly separate companies were involved: LGDC, NSL and Foxworth. In reality they were all companies that belonged to a single family, the Liu family, and all were in practice controlled by a single member of that family, a man who used a variety of names, including 'Dong Guang Liu', 'Tong Kuang Liu', 'Peter Liu', 'Toh Ko Liu' and 'J Michael Colby'. Some of the documents in the case were written from Mr Liu to himself, using different names for himself as sender and as recipient.[5]

The litigation

The litigation has been so long and convoluted that some overview is needed. There were three separate actions. The first was by the liquidator of LGDC to reduce the LGDC/NSL disposition as a gratuitous alienation by an insolvent granter, in terms of s 242 of the Insolvency Act 1986. The second was an action by the liquidator of LGDC to reduce the NSL/Foxworth standard security. It is in relation to this second action that the Supreme Court has issued a decision

1 How, in 2001, the Keeper knew that the LGDC/NSL disposition might be challengeable is not known. At that stage (February 2001) the company was not yet in liquidation: that did not happen until more than 18 months later.

2 We are grateful to John King and Caroline Mair, both of RoS, for information about the Letham Grange title.

3 In the Supreme Court, Lord Reed, giving the Opinion of the Court, says that in 2001 'a balance sheet would have shown that its liabilities exceeded its assets' but also says, in the same paragraph, that 'it is not clear from the evidence that LGDC was in financial difficulties in 2001'. See [2014] UKSC 41, 2014 SC (UKSC) 203 at para 31.We do not find this easy to follow: if in 2001 the company was absolutely insolvent then surely it was 'in financial difficulties'. At all events, it may be noted that the criterion for the reducibility of gratuitous alienations is absolute insolvency (balance sheet insolvency), not relative insolvency (cashflow insolvency).

4 In some of the cases he is described by his own name, and in others he is described as 'the Liquidator of Letham Grange Development Co Ltd'.

5 See eg para 3 of the House of Lords judgment: *Henderson v 3052775 Nova Scotia Ltd* [2006] UKHL 21, 2006 SC (HL) 85 (*Conveyancing 2006* Case (86)).

in 2014. Each of the first two actions had several stages, including a trip to the House of Lords (for the first) and to the Supreme Court (for the second). The third action, a mere sideshow, was an action by NSL to obtain possession of Letham Grange from the liquidator. As far as we can ascertain, the various stages of the various actions are as described below.

Action to reduce the LGDC/NSL disposition

(1) *Henderson v 3052775 Nova Scotia Ltd* 2003 GWD 40-1080 (*Conveyancing 2003* Case (58)). The Lord Ordinary (Lord Carloway) considered that no stateable defence existed and accordingly granted summary decree in favour of the liquidator.

(2) The defender reclaimed. The Inner House granted permission to the defender to amend its pleadings and the case was remitted back to the Outer House. We have not found any report of this stage of the case.

(3) *Henderson v 3052775 Nova Scotia Ltd* 2004 GWD 40-831 (*Conveyancing 2004* Case (53)). The Lord Ordinary once again considered that the defender had pled no stateable defence and accordingly granted summary decree in favour of the liquidator. This was thus the second time that summary decree had been granted in the liquidator's favour.

(4) *Henderson v 3052775 Nova Scotia Ltd* [2005] CSIH 20, 2005 1 SC 325 (*Conveyancing 2005* Case (47)). The defender reclaimed against the Outer House decision just mentioned. The Inner House rejected the appeal.

(5) *Henderson v 3052775 Nova Scotia Ltd* [2006] UKHL 21, 2006 SC (HL) 85 (*Conveyancing 2006* Case (86)). The defender appealed from the Inner House to the House of Lords. The appeal was successful. The decision was not on the merits, but only that the case ought not to have been decided under the summary procedure. Yet again the case went down the snake to re-start in the Outer House.

(6) Having thus, after unimaginable effort and expense, won the right to have the case re-heard yet again in the Outer House, on non-summary procedure, NSL then *abandoned the case*, and allowed decree by default to pass against it. Why? We do not know. We have not found any report of this stage of the case. Decree against NSL was granted in 2009. This decree was solely for the reduction of the LGDC/NSL disposition. As mentioned above, the action did not cover the NSL/Foxworth standard security; this was to be the subject of a separate action.

Action to reduce the NSL/Foxworth standard security

(7) *Liquidator of Letham Grange Development Co Ltd v Foxworth Investments Ltd* [2011] CSOH 66, 2011 SLT 1152 (*Conveyancing 2011* Case (64)). Here the Lord Ordinary held that the NSL/Foxworth standard security could not be reduced, even though the LGDC/NSL disposition had been reduced.

(8) *Liquidator of Letham Grange Development Co Ltd v Foxworth Investments Ltd* [2013] CSIH 13, 2013 SLT 445 (*Conveyancing 2013* Case (70)). The defender reclaimed. The Inner House reversed the decision of the Lord Ordinary, and reduced the NSL/Foxworth standard security.

(9) *Liquidator of Letham Grange Development Co Ltd v Foxworth Investments Ltd* [2014] UKSC 41, 2014 SC (UKSC) 203, 2014 SLT 775, 2014 SCLR 692. The defender appealed to the Supreme Court, which has reversed the decision of the Inner House and reinstated the decision of the Lord Ordinary. This is the latest, and possibly last, stage of the litigation. The Supreme Court applied the rule that, where a court of first instance has heard evidence and made an evaluation of that evidence, an appeal court should not normally question that evaluation. Appeals should generally be on matters of law rather than on matters of fact. As the Supreme Court put it:[1]

> In the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified.

The Supreme Court held that the evaluation of the facts made by the Lord Ordinary in case (7) above ought to have been accepted by the Inner House. So the position reverts to what it was after case (7) was decided, back in April 2011.

The action for possession

(10) *3052775 Nova Scotia Ltd v Henderson* [2006] CSOH 147, 2006 GWD 32-675 (*Conveyancing 2006* Case (47)). This was the action, in which the liquidator was the defender, about interim possession pending the final determination of the first action. It was decided in favour of the liquidator. It has no significance in terms of the final outcome of the dispute, but it contains a valuable analysis by Lord Hodge of the theory of personal rights and real rights.[2]

Was the LGDC/NSL disposition reducible as a gratuitous alienation?

LGDC's liquidator sought reduction of the LGDC/NSL disposition as a gratuitous alienation by an insolvent granter, in terms of s 242 of the Insolvency Act 1986. As mentioned above, LGDC had acquired the property for about £2m, yet more

1 Paragraph 67, and see also para 57. The Supreme Court was following the approach taken in another conveyancing case, where in the same way it reversed the Inner House so as to reinstate the decision at first instance: *McGraddie v McGraddie* [2013] UKSC 58, 2014 SC (UKSC)12 (*Conveyancing 2013* Case (32)).

2 The key passage is quoted in full at p 39 of *Conveyancing 2006*.

than six years later LGDC sold the property to NSL for a sum stated in both the missives and the disposition to be just £248,100. NSL's defence to the reduction action was that the £248,100 figure represented only part of the consideration. In addition, NSL averred, NSL had assumed £1.85 million of debt which LGDC had owed to the Liu family as a result of loans made in 1994.

The financial affairs of Mr Liu were so complex and obscure that the solidity of the defence is not easy for an outsider to evaluate. Nor is this just a problem for an outsider. In the Outer House of the Court of Session it was held, twice over,[1] that the defence was so transparently and obviously lacking in merit that a full hearing would be pointless, and accordingly summary decree was granted. The Inner House likewise held, twice over, that the defence failed.[2] Yet in another of the cases it was held, by another Lord Ordinary, that the defence was valid.[3] At all events, as indicated above, NSL eventually gave up, and decree passed against them, so the disposition was finally reduced. As a result ownership remains with LGDC.

In fact it was later to be found (see below) that the LGDC/NSL disposition was made for adequate consideration, with the consequence that if NSL had persevered with its defence it would have been successful; but it is difficult to see how the decree of reduction of the disposition could now be opened up.

Was the NSL/Foxworth standard security reducible?

One might have expected the liquidator of LGDC to have sought the reduction of the NSL/Foxworth standard security in the same action, but that is not what happened. A separate action was raised. There were two grounds of attack. One was that, as the LGDC/NSL disposition had been reduced, and as Foxworth had not (it was averred) acted in good faith, the NSL/Foxworth standard security fell too. The other was that the standard security was in itself invalid anyway, regardless of any question as to the validity of the granter's title. We will not discuss the latter here.[4]

As to the former, the Lord Ordinary accepted that, because the three companies were all run by the same person (Mr Liu), Foxworth was aware of the circumstances of the LGDC/NSL disposition. Nevertheless he held that the LGDC/NSL disposition had not been voidable, and so it was not possible for Foxworth to have been in bad faith in taking the standard security, for, so to speak, there was nothing to have been in bad faith about. Though the disposition

1 Cases (1) and (3) above.
2 Cases (4) and (8) above.
3 Case (7) above.
4 For discussion see *Conveyancing 2011* pp 134 ff. One of the oddities of the standard security is that it contained the following remarkable clause: 'Upon any of the above named defaults, Foxworth Investments Limited will immediately take possession of the Collateral and become the rightful owner of the whole subjects.' An edict of the Emperor Constantine, issued AD 326, which became part of the law of most European countries, including Scotland, renders such clauses void. (See *Codex* 8,34,3.)

had been reduced, it should not have been reduced.[1] And, as explained above, this decision, though reversed by the Inner House, has now been reinstated by the Supreme Court.[2]

The current title to Letham Grange

So how does title to Letham Grange stand now? That is a conundrum we shall attempt to say something about. It may be that yet more litigation will ensue.

As at the close of 2014, neither the LGDC/NSL disposition nor the NSL/Foxworth standard security had been accepted for registration in the Land Register. If the former, having been reduced, is never accepted for registration, the NSL/Foxworth standard security would prove to have been granted *a non domino*. The *prima facie* result would be that it would be invalid even though, following the 2014 decision of the Supreme Court, it has not been reduced.

In the meantime, however, registration practice has changed. With the coming into force of the Land Registration etc (Scotland) Act 2012, on 8 December 2014, the Keeper has abandoned her policy of holding suspicious deeds 'in abeyance' for long periods of time; instead a quick decision will be made to accept or reject.[3] Furthermore, this policy is to be extended to pending applications made under the previous legislation, although abeyance can still be used if 'there are compelling reasons for doing so (such as an imminent court decision)'. How this will be applied to the Letham Grange deeds remains to be seen. But one possibility (we merely speculate) would be for the Keeper to accept the LGDC/NSL disposition with effect from February 2001 and also the standard security with effect from 2003, and thereafter to delete the disposition so as to give effect to the decree of reduction. We understand that the liquidator of LGDC has already lodged an application for rectification, to give effect to the decree of reduction of the LGDC/NSL disposition. Since that disposition had not (by the end of 2014) been accepted for registration, the liquidator's application might at first sight seem pointless, but it makes sense if the Keeper does in fact proceed as we have outlined.

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1 Case (7) above. At first sight, it might be thought that this approach was barred by the doctrine of *res judicata*. Lord Glennie considered that issue but rejected it (para 6): 'There was at one time an issue between the parties as to whether, in the present action, that decree, being by default and not being a decree upholding any one of the three separate grounds of action, could give rise to a plea of *res judicata* against NSL. The pursuer, rightly in my view, does not now take the *res judicata* point, recognising that, even if the issue were *res judicata* against NSL, it would not be *res judicata* against Foxworth.' This was surely correct. *Res judicata* affects the parties to the decision but, subject to certain qualifications, does not affect third parties. To take an extreme example, were Jack to obtain declarator against Jill that he is the owner of Edinburgh Castle, that would not be *res judicata* against the Scottish Ministers. (Edinburgh Castle is owned by the Scottish Ministers under title number MID 1.)

2 Respectively cases (8) and (9) above.

3 Registers of Scotland, *Update 42* (www.ros.gov.uk/__data/assets/pdf_file/0013/6430/update42.pdf) discussed at p 90 above.

NON-STANDARD BURDENS AND THE LANDS TRIBUNAL

The Lands Tribunal's power to vary or discharge real burdens is too well known to require discussion here. Hardly less well known is the Tribunal's equivalent power in respect of servitudes. But the ambit of the Tribunal's jurisdiction is wider than this. It can, for example, save real burdens that would otherwise be extinguished under the 'sunset rule' or because a majority in a development have agreed to discharge them.[1] More than that, it can vary or discharge what may be referred to as 'non-standard' burdens.[2] Of these, the leading examples are conditions in long leases and affirmative obligations (eg to maintain a private road) imposed on the benefited proprietor in a servitude. But the list also includes conditions 'in an agreement entered into under s 7 of the National Trust for Scotland Order Confirmation Act 1938'.[3] *Grant v National Trust for Scotland*[4] is the first case in which this jurisdiction has been invoked. It is also, as far as we know, the first case to consider a condition enforceable by a body (in this case, the National Trust for Scotland) without reference to a benefited property. The reasoning employed in the case will thus be of interest for personal real burdens.

The power to enter into conservation agreements with landowners was included in the foundation statute of the National Trust for Scotland ('NTS') in 1938.[5] But, although successors were bound, a landowner could be relieved of a condition only if the NTS felt so inclined. Even when, in 1970, the Lands Tribunal was given jurisdiction to vary and discharge real burdens, its powers did not extend to conservation agreements. The position was thought unsatisfactory by the Scottish Law Commission, especially as the new conservation burdens were to be subject to the Tribunal's jurisdiction. Accordingly, on the Law Commission's recommendation,[6] the Title Conditions (Scotland) Act 2003 gave the Tribunal power to vary or discharge conservation burdens.[7] *Grant*, as already mentioned, is the first case.

The background was the acquisition by the NTS in 1948 of the Leith Hall Estate in Kennethmont, Aberdeenshire. Leith Hall is a grade-A listed building from the seventeenth century set in 366 acres of landscaped garden and woodland. In 1962 the NTS disposed of 46 acres of the estate comprising farmland in and around the village of Kennethmont. At the same time the purchaser entered into a conservation agreement with the NTS which, in effect, restricted the land to agricultural use. The applicants in the present case were the owners of around 38 acres of the 1962 subjects, lying on both sides of the main road (the B9002) running through Kennethmont. Currently used for arable farming, this land had

1 Title Conditions (Scotland) Act 2003 s 90(1)(b), (c).
2 TC(S)A 2003 s 90(1)(a) read with the definition of 'title condition' in s 122(1).
3 TC(S)A 2003 s 122(1) (definition of 'title condition').
4 8 August 2014, Lands Tribunal. The Tribunal comprised R A Smith QC and D J Gillespie FRICS.
5 National Trust for Scotland Order Confirmation Act 1938 s 7.
6 Scottish Law Commission, *Report No 181 on Real Burdens* (2000) para 6.33. The Commission went on, at para 6.34, to consider whether the Tribunal's jurisdiction should be extended to agreements made under s 75 of the Town and Country Planning (Scotland) Act 1997 but concluded, 'with some hesitation', that it should not.
7 TC(S)A 2003 ss 90(1)(a), 122(1) (definition of 'title condition').

in part been zoned in the local plan for residential use for the construction of up to 35 houses as well as certain industrial units. The application to the Tribunal was for discharge of the conservation agreement insofar as it prevented the building of houses and industrial units. Planning permission, however, had not been sought and there were no definite proposals for building.[1]

The main interest of the application lies in how it was to be determined in the absence of a benefited property. For although the Lands Tribunal is directed, by s 100 of the Title Conditions Act, to have regard to no fewer than 10 different factors, most applications are decided by balancing factor (b) (the extent to which the condition confers benefit on the benefited property) against factor (c) (the extent to which the condition impedes enjoyment of the burdened property).[2] If there is no benefited property, factor (b) cannot be used in this way. How, then, would the application be decided? Fortunately, there is an alternative version of factor (b) for cases where no benefited property exists. Read in full, factor (b) is 'the extent to which the condition confers benefit on the benefited property; or where there is no benefited property, confers benefit on the public'. If, therefore, the factor (b)/factor (c) evaluation is to be maintained in cases like this, the task of the Tribunal will be to set public benefit against the private inconvenience caused by the condition.

In the event, the issue was largely avoided due to the fact that both parties argued the case as if Leith Hall Estate *were* the benefited property.[3] And while this could not, strictly, be an application of factor (b),[4] it could readily be justified by factor (f) (the purpose of the title condition) for, the Tribunal found, the main purpose of the conservation agreement was to preserve the setting of Leith Hall Estate.[5] That leap having been made, the application could then be decided in the usual way by comparing benefit and burden in respect of the two properties.

So far as benefit was concerned, the Tribunal found that the restriction of the burdened property to agriculture allowed for the preservation of certain views from Leith Hall Estate which would be threatened if house-building were to go ahead.[6] As for burden, the prohibition of building, for which planning permission might well be obtained, meant that the enjoyment of the applicants' property was being 'significantly impeded'.[7] It was true, of course, that if the conditions were lifted, the applicants would receive a considerable windfall benefit, especially as they had acquired the land at agricultural value. However, the Tribunal could 'find nothing in the wording of (c) which might restrict the weight to be given to the factor on account of the sums paid for the land'.[8] Further, one of the applicants had lived in Kennethmont all his life, was closely involved in village life, and

1 As for the difficulties of considering an application in the absence of specific proposals, see para 54.
2 G L Gretton and K G C Reid, *Conveyancing* (4th edn, 2011) paras 16–10 and 16–11.
3 Paragraph 37.
4 The Tribunal's attempt (in para 37) to argue that the 'or' in factor (b) is conjunctive rather than disjunctive is unconvincing.
5 Paragraph 50.
6 Paragraphs 37–46.
7 Paragraph 47.
8 Paragraph 48.

stressed that an important purpose of the proposed building projects was to inject life into a village which was now in decline.[1] Indeed, for the purposes of factor (a) (any change in circumstances since the title deed was created), the Tribunal noted 'a decline in the vibrancy of Kennethmont, as is evidenced by the loss of the shop, post office, garage and public house, and, in particular the reduction in the school roll'. The fact that there was an identified need for new housing under the local plan was said to be 'a significant factor in favour of the development of the sites'.[2]

Having considered all the factors, but in particular those just mentioned, the Tribunal decided to grant the application in respect of the land on the far side of the road from Leith Hall Estate but to refuse it in respect of the nearer land except for such limited development as the parties might agree. The main objective was to preserve the view from Leith Hall Estate. No doubt a development on the scale envisaged by the local plan might, as the NTS argued, tend to overwhelm the village by reason of its large scale, deep layout, and inconsistency with the current linear nature of the village. But that was primarily a planning judgment and it did not bear on the protection of the amenity of Leith Hall Estate.[3]

In following what came close to a standard approach, the Tribunal did not entirely neglect questions of public interest. If the amenity of Leith Hall Estate was to be protected, this was because the public had recourse to it during the summer months when it was opened up by the NTS. 'The property itself and the public interest which the respondents serve are inextricably linked.'[4] But public interest, the Tribunal recognised, might be of more than one kind:[5]

> What is striking about the present case is that there are competing public interests. There is the public interest of the planning authority in bringing forward sites in order to meet a housing requirement and need for employment land. On the other hand there is the public interest of the respondents in maintaining the integrity of the GDL [ie Leith Hall Estate] for the future, in terms of its own constitution and the conservation agreement.

This, however, is slippery territory. Through factor (b), s 100 directs the Tribunal to have regard to public *benefit* arising out of the condition, but there is no matching direction in respect of any public *burden* which the condition might create. On the contrary, the burden against which public benefit is to be weighed is, by factor (c), a purely private one. It is no part of the Tribunal's task, therefore, to make an overall assessment of the public interest. If that falls to any body, it is to the planning authority and not to the Lands Tribunal. For the most part, this seems to have been accepted in *Grant v National Trust for Scotland*. It is true that, as already mentioned, the Tribunal gave some attention to the need for development in Kennethmont. At the same time, however, it steadfastly held

1 Paragraph 12.
2 Paragraph 35.
3 Paragraph 63.
4 Paragraph 37.
5 Paragraph 55.

back from considering the potential impact of the development on the size and character of the village, characterising this as *'par excellence* a planning judgment'.[1]

One other aspect of public interest may be mentioned. In considering the public benefit conferred by the conditions, the Tribunal insisted on the link with Leith Hall Estate. That public benefit might arise even for those who were not using the Estate was not considered. Yet the Estate is not mentioned in the conservation agreement, and the preamble is expressed in terms which are exceptionally wide:

> The first party is the Proprietor of the lands and others hereinafter described and is with consent aftermentioned agreeable that the said lands should remain forever as agricultural lands, open spaces, garden ground or woodlands for the enhancement of the beauty of the neighbourhood and so far as possible for the benefit of the nation …

Might not continuing agricultural use enhance the beauty of Kennethmont village even for those villagers who never set foot on Leith Hall Estate? Might it not, as the preamble says, benefit even 'the nation'? Probably such considerations would have carried little weight in a case where it was so easy to attribute public interest to a particular property, and if that is correct their omission is of little importance. In a future case, however, it might be a different matter.

PROPERTY TAXES IN SCOTLAND[2]

Even as the details of a separate Scottish tax system were being finalised, following the further tax devolution deriving from the Scotland Act 2012, the ground was shifting under Scottish taxpayers' feet; and the earthquakes look set to continue for some years to come. Thus there was the real prospect of a completely separate system being required by 2016 until the result of the independence referendum eliminated or at least deferred that necessity. But one consequence of the referendum was the Smith Commission, whose report seems certain to lead to significant further tax devolution in the near future.[3] The Smith Commission's proposals have now been followed by a Command Paper containing draft legislation (see below).[4]

In the meantime, the UK Government made important changes to stamp duty land tax, ironically (or otherwise) bringing its structure into line with that which will come into effect for land and buildings transaction tax in Scotland from 1 April 2015. The result is that those purchasing property in Scotland between December 2014 and April 2015 will require to consider two systems and three sets

1 Paragraph 63.
2 This part is contributed by Alan Barr of the University of Edinburgh and Brodies LLP.
3 *Report of the Smith Commission for further devolution of powers to the Scottish Parliament* (27 Nov 2014; www.smith-commission.scot/). See below.
4 *Scotland in the United Kingdom: An Enduring Settlement* (Cm 8990, 22 January 2015; www.gov.uk/government/publications/scotland-in-the-united-kingdom-an-enduring-settlement).

of tax rates, the exact tax payable depending not only on the date of settlement of the transaction but also on when the underlying contract was concluded.[1]

Land and buildings transaction tax

Rates

The great if unsurprising gap in the information previously released about land and buildings transaction tax was the anticipated rates. LBTT abandons the 'cliff-edge' approach of stamp duty land tax; tax will instead be charged at the lower rates (including a zero rate) on consideration up to particular thresholds and then at higher rates only on the amount above those thresholds.[2] The first indication of rates arrived with the draft Scottish Budget, on 9 October 2014. In this, the proposed rates for residential purchases were announced, with four rates proposed, ranging from 0% for consideration up to £135,000 up to 12% for consideration in excess of £1 million[3] But before these rates could pass into law, the UK Chancellor of the Exchequer made announcements (which took immediate effect) about a reformed structure and revised rates for SDLT.[4] Following a great deal of speculation, the Scottish Government, as part of the Scottish Budget process, announced a revised set of rates which now seem certain to be the ones to come into effect on 1 April 2015.[5] These are as follows:

Cost	Rate
Up to £145,000	Nil
£145,001 – £250,000	2%
£250,001 – £325,000	5%
£325,001 – £750,000	10%
Over £750,000	12%

Under these proposals, the 'break-even' point is £333,000, at which point tax is the same as under (revised) SDLT.[6] Below that figure, LBTT will attract a lower amount of tax, while above it more LBTT will be payable.

The proposed rates for non-residential purchases were announced in October 2014 and were not changed by later announcements. These are as follows:

1 Land transactions in Scotland will continue to be liable to stamp duty land tax until a date appointed by Treasury Order, now (in the absence of unanticipated developments) certain to be 1 April 2015: see Scotland Act 2012 s 19(4). Given that the Scottish Government announced intended rates in October 2014, four actual or potential rates required to be considered since then.
2 Land and Buildings Transaction Tax (Scotland) Act 2013 s 25.
3 http://news.scotland.gov.uk/News/Land-and-Buildings-Transaction-Tax-1118.aspx.
4 Autumn Statement, 3 December 2014 – see below.
5 See www.scotland.gov.uk/Topics/Government/Finance/scottishapproach/lbtt. An Order will be introduced to confirm these rates in February 2015.
6 For unrevised SDLT, the break-even point comes at £380,711.

Cost	Rate
Up to £150,000	Nil
£150,001 – £350,000	3%
Over £350,000	4.5%

The break-even point for commercial property above which more will be payable under LBTT than under SDLT is £1,950,146.

Under LBTT, there is to be no tax on residential leases. (Virtually no residential lease in Scotland is liable to SDLT, because the maximum length of a Scottish residential lease restricts the net present value on which tax is charged.) For non-residential leases, already subject to a progressive system under SDLT, the proposal was to maintain the same rates for LBTT, that is 0% on net present value up to £150,000, and 1% on the amount above that threshold.

Amendments to the 2013 Act

A number of details in relation to LBTT required to be amended by secondary legislation.[1] Commencing with a paving provision,[2] a series of SSIs has now been laid before the Scottish Parliament and passed.

Land and Buildings Transaction Tax (Transitional Provisions) (Scotland) Order 2014

The most important of the SSIs is the Land and Buildings Transaction Tax (Transitional Provisions) (Scotland) Order 2014,[3] which makes provision in respect of certain transactions that began under SDLT but which have an effective date on or after commencement of LBTT. Article 3 concerns contracts entered into before 1 May 2012 for a land transaction under which the transaction is to be completed by a conveyance and there has been an intervening event that dis-applies SDLT in respect of the land transaction where the effective date is on or after the commencement date for LBTT. Article 4 (in rather confusing fashion) concerns contracts entered into after 1 May 2012, but before the commencement date, for a land transaction under which the transaction is to be completed by a conveyance and there is an effective date in relation to the transaction after the commencement date, but there was also substantial performance of the contract prior to the commencement date. In fact that creates *two* transactions for the purposes of the legislation, one completing on substantial performance and one on actual completion. Article 4 ensures that sections 9 and 10 of the Land and Buildings Transaction Tax (Scotland) Act 2013 apply to the completion of the land transaction if the effective date for the completion of the contract is on or after the commencement date.

1 The primary legislation is, of course, the Land and Buildings Transaction Tax (Scotland) Act 2013.
2 Land and Buildings Transaction Tax (Scotland) Act 2013 (Commencement No 1) Order 2014, SSI 2014/279, allowing Ministers to make secondary legislation under specified provisions.
3 SSI 2014/377.

Article 5 makes provision where alternative finance arrangements that give rise to a series of land transactions are entered into; it ensures a transition from the relief under SDLT to that deriving from sch 7 of the 2013 Act. Article 6 makes similar provision in relation to alternative finance bonds; the relevant relief will be available under sch 8 of the Act.

Article 7 ensures that LBTT is payable in respect of a transfer of an interest in a partnership pursuant to earlier arrangements involving a land transaction under para 17 of sch 17 to the 2013 Act, even though the earlier land transaction was prior to the commencement date and thus governed by SDLT rules. Article 8 ensures that LBTT is payable in respect of any withdrawal of money etc from a partnership after the transfer of a chargeable interest under para 18 of sch 17 although the transactions straddle the commencement date. Article 9 makes similar provision in relation to steps set out in para 26(1) of sch 17.

Article 10 ensures that the discount in respect of overlapping leases under para 24 of sch 19 to the 2013 Act can apply, notwithstanding that the old lease was entered into prior to the commencement date. Article 11 makes provision for any lease with an effective date prior to the commencement date that was entitled to a relief under SDLT that was later withdrawn; it ensures that para 27 of sch 19 applies so that an assignation of such a lease on or after the commencement date is treated as a new lease for LBTT purposes. Finally and probably most importantly, articles 12 and 13 provide that variations and extensions of leases that were initially granted prior to the commencement date are to be treated as grants of a new lease for LBTT purposes, with sch 19 applying so as to ensure that tax is chargeable.

Other SSIs

The Land and Buildings Transaction Tax (Prescribed Proportions) (Scotland) Order 2014[1] deals with two reliefs that reduce the amount of tax payable in particular circumstances. Where multiple dwellings are purchased, the minimum amount chargeable is to be 25% of the amount that would be chargeable but for the relief.[2] Where a company acquires the whole or part of the undertaking of another company in return for the issue of shares (and subject to certain other conditions), 12.5% of the tax that would be chargeable but for the relief is to be charged.

The Land and Buildings Transaction Tax (Definition of Charity) (Relevant Territories) (Scotland) Regulations 2014[3] extends the territories in which charities can be established in order to qualify for charitable relief. Apart from Scotland, the territories are England and Wales, Northern Ireland, and the rest of the European Union (but including Iceland, Liechtenstein and Norway).[4]

1 SSI 2014/350.
2 LBTT(S)A 2013 sch 5 para 11.
3 SSI 2014/352.
4 LBTT(S)A 2013 sch 13 para 15(3).

The Land and Buildings Transaction Tax (Qualifying Public or Educational Bodies) (Scotland) Amendment Order 2014[1] alters the definition of 'qualifying body' for the purposes of relieving tax on certain re-organisations of educational bodies. It is now to include any post-16 education body within the meaning of s 35(1) of the Further and Higher Education (Scotland) Act 2013.[2]

The Land and Buildings Transaction Tax (Ancillary Provision) (Scotland) Order 2014[3] deals with applications for registration in the Books of Council and Session. The Keeper need not accept an application for registration of a document effecting or evidencing a notifiable transaction unless that application provides any information reasonably required by the Keeper to enable compliance with the Keeper's duty, under s 43(1) of the 2013 Act, to ensure that a land transaction return has been made and that any tax payable in respect of the transaction has been paid.

The Land and Buildings Transaction Tax (Administration) (Scotland) Regulations 2014[4] make provision for two particular aspects of administration. The first is the application necessary to defer payment of LBTT in cases of contingent or uncertain consideration.[5] There are detailed rules about the timing and contents of an application, the postponement of tax, the giving of decisions on an application and grounds for refusal, the procedure for payments and returns after a successful application, and for an application to be of no effect in certain circumstances. The second concerns the evidence required for certain transactions for the purpose of the relief for alternative finance investment bonds.

Finally, the Land and Buildings Transaction Tax (Addition and Modification of Reliefs) (Scotland) Order 2015 corrects a small error in relation to relief for social landlords[6] and makes a minor modification to the relief for the crofting community right to buy.[7] More importantly, the Order introduces new reliefs[8] which apply to amalgamations and similar transactions affecting friendly societies and building societies,[9] visiting forces and international military headquarters,[10] property accepted in satisfaction of tax,[11] and to certain transactions involving or affecting lighthouses.[12] Secondary legislation is also anticipated to provide for a limited form of sub-sale relief for developers.[13]

1 SSI 2014/351.
2 LBTT(S)A 2013 sch 2 para 17.
3 SSI 2014/376.
4 SSI 2014/375.
5 LBTT(S)A 2013 ss 41, 42.
6 LBTT(S)A 2013 sch 6.
7 LBTT(S)A 2013 sch 9. The Order is SSI 2015/93.
8 Under powers contained in LBTT(S)A 2013 s 27(3).
9 LBTT(S)A 2013 schs 13A, 13B.
10 LBTT(S)A 2013 sch 16A.
11 LBTT(S)A 2013 sch 16B.
12 LBTT(S)A 2013 sch 16C.
13 See the draft Land and Buildings Transaction Tax (Sub-sale Development Relief and Multiple Dwellings Relief) (Scotland) Order 2015.

Licences

One significant omission from secondary legislation relates to licences. Scottish Ministers may, by regulations, prescribe descriptions of non-residential licences to occupy property, transactions in relation to which are to be land transactions for the purposes of LBTT.[1] This was one of the matters requiring subordinate legislation on which consultation took place in May 2014;[2] but while most other subjects of consultation have been followed by regulations or orders, for the moment at least the Scottish Government has decided not to attempt to tax licence transactions.

Stamp duty land tax

From 'slab' to 'slice'

It is probably fair to say that the 'slab' system was the most criticised aspect of both stamp duty land tax and its predecessor, stamp duty. Under that system, once consideration moves above any threshold for a higher rate, tax is charged at that higher rate on the *whole* of the consideration. This leads to distortions in the market and 'spikes' in the numbers of transactions falling on or just below tax thresholds – as well as to such moveable items as carpets and curtains apparently changing hands for sums that would only make sense if they were woven in gold, by eunuchs. Nevertheless, it was still a surprise when the Chancellor of the Exchequer announced in the (ill-named) Autumn Statement, given on 3 December 2014, a series of fundamental changes to that system, at least for residential property. With immediate effect, the slab system was to be replaced with the slice system already enacted for LBTT in Scotland. The tax rates announced would be paid only on the amount of consideration within the relevant slice.[3]

The rates announced were as follows:

Cost	Rate
Up to £125,000	Nil
£125,001 – £250,000	2%
£250,001 – £925,000	5%
£925,001 – £1,500,000	10%
Over £1,500,000	12%

1 LBTT(S)A 2013 s 53.

2 See *Moving Forward with Land and Buildings Transaction Tax: A Consultation on Proposed Subordinate Legislation* (www.scotland.gov.uk/Publications/2014/05/8387).

3 The change is achieved by the Stamp Duty Land Tax Act 2015. Immediate effect was given by a House of Commons resolution under the Provisional Collection of Taxes Act 1968.

The break-even point at which purchases would attract less SDLT under these rates was £937,500. One can see why the Scottish Government felt the need to look again at LBTT rates; and although the new SDLT system bears a distinct similarity to that for LBTT, perhaps long memories of the poll tax prevented even a passing acknowledgement of the fact that a major tax change previewed in Scotland was now to apply throughout the UK.

The new system and rates of SDLT are not to apply to non-residential or mixed property, which will, until the introduction of LBTT, still be taxed on the 'slab' system at their long-standing rates.

Enveloped dwellings

There was in fact an earlier change to an SDLT rate, but it was to one which applies only in limited circumstances. That is where the purchaser of residential property is a non-natural person – a company, a partnership with a corporate member, or a collective investment scheme. This was introduced as part of the package of measures to discourage such ownership, now encompassed in the term 'enveloped dwellings'. SDLT is charged at 15% for such purchasers.[1] When this charge was introduced, the threshold was consideration in excess of £2 million but, with effect from 20 March 2014, this is reduced to £500,000.[2]

As with the other measures in this package, there are important reliefs for purchases for genuine commercial purposes. Thus property-letting businesses and property developers purchasing or holding stock in the course of their business should not be affected. But there are important exclusions and restrictions on these reliefs, notably to prevent business owners from making personal use of the enveloped property.[3]

As yet, there is no equivalent in land and buildings transaction tax of the penal rate of SDLT for purchases by non-natural persons. However, there is power, not so far exercised, for regulations to be made to treat transfers of interests in residential property-holding companies as chargeable land transactions.[4] This, combined with a low threshold for a general anti-avoidance rule,[5] may obviate the perceived need for such a rate.

Charities relief

A further change to SDLT relates to charities relief. Where a charity purchases property jointly with a person other than a charity, the charity is to be entitled to claim relief for its share.[6]

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1 Finance Act 2003 sch 4A, inserted by Finance Act 2012 s 214, sch 35.
2 Finance Act 2014 s 111, amending Finance Act 2003 sch 4A.
3 Finance Act 2003 sch 4A paras 5–5K.
4 LBTT(S)A 2013 s 47.
5 Revenue and Tax Powers Act 2014 pt 5.
6 Finance Act 2014 s 113, sch 23, amending FA 2003 sch 8, principally by inserting paras 3A–3C, which provide for partial relief and its withdrawal in certain circumstances.

High-value, foreign-held and other residential property

A penal rate of SDLT was only one part of the package aimed at discouraging the ownership of high-value residential property by non-natural persons. Perhaps even more significant was the annual tax on enveloped dwellings (ATED).[1] This has been further developed since its introduction in 2013.[2]

Firstly, the threshold for the application of the tax is to be lowered substantially from its current £2 million level. Unlike the SDLT threshold on purchases, this reduction is to be phased in. Thus from 2015–16, enveloped dwellings with a value between £1 million and £2 million will be subject to the charge;[3] from 2016–17, enveloped dwellings with a value between £500,000 and £1 million will be affected.[4] The UK Government did not stop at lowering the threshold. In the Autumn Statement, substantial increases in the amount of the charge itself were announced. These are to rise by 50% above the rate of inflation.

Following consultation over the summer, it has been confirmed that there will be simplifications of the reporting obligations in relation to properties within the ATED regime that qualify for reliefs. This is a welcome change, as currently full reporting is required even if a relief means that no tax is payable.

The final element of the package on enveloped dwellings relates to capital gains tax. The lowered thresholds will apply to this charge also. The rule here is that, as from April 2013, non-natural persons pay capital gains tax at the highest individual rate (28%) rather than at corporation tax rates. This will apply to gains accruing since April 2013.

It should be noted that the enveloped dwellings package will continue to apply in Scotland after LBTT takes over from SDLT. Although the package was introduced at least in part to prevent avoidance of SDLT, the annual charge is an independent tax, unaffected by the introduction of LBTT. It will continue as a UK tax and no change is proposed to this even as part of the Smith Commission recommendations. This is perhaps something of an anomaly.

The changes just described are not the end of developments affecting residential property. Following a consultation launched in March 2014, it has been announced that *all* non-residents (not just non-natural persons) will be liable to capital gains tax on the disposal of residential property from 1 April 2015. This will affect only gains accruing from that date. The intention is to target property held as an investment rather than for trading purposes (although such property should be liable to corporation tax, capital gains tax or income tax in any event). There will be exemptions for student accommodation, care homes, and property funds. Unless affected by the ATED thresholds, CGT will be chargeable at the rates appropriate to the non-resident owner – 20% for companies, and 18% and 28% for individuals.[5]

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1 Finance Act 2013 pt 3, schs 33–35.
2 See *Conveyancing 2013* pp 206–07.
3 Finance Act 2014 s 109, amending Finance Act 2013 ss 94, 99, 159, 163.
4 Finance Act 2014 s 110, amending Finance Act 2013 ss 94, 99.
5 See HM Treasury, *Implementing a capital gains tax charge on non-residents: summary of responses*, published on 27 November 2014.

A further change to capital gains tax potentially affects any person qualifying for the principal private residence relief. Only the last 18 months of ownership (rather than the current 36 months) will qualify automatically for relief, should the person disposing of the property no longer be in occupation during that period. This takes effect for disposals (which means the conclusion of contracts) on or after 6 April 2014.[1] An exception (thus leaving the relevant period at 36 months) is made for disabled persons and for those resident in care homes (or, in either case, their spouses).[2]

Landfill tax

The Landfill Tax (Scotland) Act 2014 received Royal Assent on 21 January 2014. It will come into force on 1 April 2015, when the Scottish version will replace UK landfill tax. Basic administration will be delegated to the Scottish Environmental Protection Agency. To an even greater extent than applies to LBTT, Scottish landfill tax mirrors its United Kingdom parent.[3]

After an enabling commencement order,[4] two sets of regulations have been added. The Scottish Landfill Tax (Prescribed Landfill Site Activities) Order 2014[5] prescribes a range of landfill site activities to be treated as disposals.[6] More importantly, the Scottish Landfill Tax (Administration) Regulations 2015[7] provide a framework for administration, including giving notice of liability, returns, claims, payment, and credit.

Tax administration

The Revenue Scotland and Tax Powers Act 2014 received Royal Assent on 24 September 2014. It sets out the basic administrative framework for all devolved taxes. A basic commencement order was made on 7 November 2014, which allowed for Ministerial powers to make subordinate legislation and to provide for consequential amendments to the Land and Buildings Transaction Tax (Scotland) Act 2013 and the Landfill Tax (Scotland) Act 2014.[8] As well as setting up an administrative framework, the Revenue Scotland and Tax Powers Act established Revenue Scotland and set out its structure and functions as a body corporate independent of the Scottish Government.[9] This establishment as an independent body was confirmed on 1 January 2015.[10] The Revenue Scotland Board was appointed on 31 December 2014.[11]

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1 Finance Act 2014 s 58(2), amending Taxation of Chargeable Gains Act 1992 s 223.
2 Finance Act 2014 s 58(3), inserting Taxation of Chargeable Gains Act 1992 s 225E.
3 For more details, see p 67 above.
4 Landfill Tax (Scotland) Act 2014 (Commencement No 1) Order 2014, SSI 2014/277.
5 SSI 2014/367.
6 Landfill Tax (Scotland) Act 2014 s 6.
7 SSI 2015/3.
8 Revenue Scotland and Tax Powers Act 2014 (Commencement No 1) Order 2014, SSI 2014/278.
9 Revenue Scotland and Tax Powers Act 2014 pt 3.
10 By the Revenue Scotland and Tax Powers Act 2014 (Commencement No 2) Order 2014, SSI 2014/370.
11 See www.revenue.scot/who-we-are/revenue-scotland-board.

The Revenue Scotland website has been launched[1] and will expand considerably as the date for implementation of the devolved taxes approaches. In particular, work is ongoing on extensive guidance on all three Scottish tax statutes and on the returns required under them, virtually all of which are expected to be submitted electronically. Further commencement and development work on the administrative front can be expected before the new taxes come into effect. Consultations have been launched on tribunal rules and on further subordinate legislation.

One issue that has been addressed in some detail is that of payment of LBTT. Where tax is due, payment has to be made at the same time as the return is made.[2] For transactions which are notifiable for LBTT, registration in the Land Register is not to be permitted by the Keeper unless and until a return has been made and tax has been paid.[3] Tax is treated as having been paid if 'arrangements satisfactory to the Tax Authority' are made for payment of the tax.[4] Revenue Scotland has now agreed and published details of when 'arrangements satisfactory' are treated as having been made, which will vary depending on whether one is dealing with a paper or an electronic return. A greater variety of payment methods is available with electronic returns; and it is to be noted that the arrangements include a reasonable time after electronic submission within which Revenue Scotland must be put in funds.[5]

The UK drive against tax avoidance continues, with new legislation dealing with the promotion of tax avoidance schemes;[6] and with 'follower notices', which demand accelerated payment of tax when the effectiveness or otherwise of schemes is still under dispute with HMRC and possibly subject to appeal.[7]

Beyond the referendum

Following the independence referendum, the Smith Commission was convened to prepare a report on further devolution. The Commission was commendably swift and its equally commendably concise Report was published on 27 November 2014.[8] Substantial further tax devolution was recommended.[9] A Command Paper with draft legislation was presented by the Secretary of State for Scotland on 23 January 2015.[10] This provides for further restrictions to the reserved powers contained in the Scotland Act 1998, following on from the earlier restrictions to those reservations in the Scotland Act 2012. The most important further devolution of tax is to be in relation to rates and bands of income tax for

1 https://www.revenue.scot/.
2 LBTT(S)A s 40(2).
3 LBTT(S)A s 43.
4 LBTT(S)A s 40(4).
5 For details see D Carvel, 'LBTT: aligning payment and registration' (2014) 59 *Journal of the Law Society of Scotland* Oct/17.
6 Finance Act 2014 pt 5.
7 Finance Act 2014 pt 4.
8 *Report of the Smith Commission for further devolution of powers to the Scottish Parliament* (www.smith-commission.scot/smith-commission-report).
9 *Smith Commission* paras 75–95.
10 *Scotland in the United Kingdom: An enduring Settlement* (2015, Cm 8990).

those deemed to be Scottish taxpayers.[1] This is not intended to extend to savings income but will extend to income from land. However, income from land in Scotland arising to those who are not Scottish taxpayers will not be subject to the Scottish rates of tax.

Until a more complete devolution of income tax takes place, preparations continue for the partial devolution of income tax (of up to 10p in relation to all rates) provided for in the Scotland Act 2012 and scheduled to come into effect from April 2016.[2]

More directly related to land, it is intended that aggregates levy should be devolved to the Scottish Parliament.[3]

1 There is a definition of a 'Scottish taxpayer' in the Scotland Act 2012 s 27.
2 Scotland Act 2012 ss 25–27.
3 *Smith Commission* paras 89–91.

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.

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 3 October 2007	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.
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 1.5-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.
Trustees of John Raeside & Son v Chalmers 2014 GWD 35-660	1989 disposition. Agricultural purposes only.	Erection of two houses.	Granted.
MacKay v McGowan 2014 GWD 37-687	Feu disposition prohibiting building.	Erection of new house and extension of existing house.	Granted in respect of new house (only).

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

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.
Duffus v McWhirter 2014 GWD 34-647	2005 disposition prohibiting commercial use.	Commercial equestrian use.	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.

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 20 December 2013	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.

Personal real burdens

Name of case	*Burden*	*Applicant's project in breach of burden*	*Application granted or refused*
Grant v National Trust for Scotland 8 August 2014	Conservation agreement from 1962 prohibited non-agricultural use.	Building of houses.	Granted in part.

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).
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.
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.
Pollacchi v Campbell 2014 SLT (Lands Tr) 55	Servitude of vehicular access.	Re-routing to allow creation of garden.	Refused.

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)

Collins v Sweeney

2013 GWD 11-230, Sh Ct, 2013 Case (3) *affd* 2014 GWD 12-214, Sh Ct, 2014 Case (4)

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, 2012 SC 51, 2011 SLT 987, 2011 Hous LR 32, 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) *rev* [2014] UKSC 9, 2014 SC (UKSC) 121, 2014 SLT 521, 2014 SCLR 484, 2014 Case (31)

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)

Frank Houlgate Investment Co Ltd v Biggart Baillie LLP
[2013] CSOH 80, 2013 SLT 993, 2013 Case (61) *affd* [2014] CSIH 79, 2014 SLT 1001, 2014 Case (65)

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)

Hill of Rubislaw (Q Seven) Ltd v Rubislaw Quarry Aberdeen Ltd
[2013] CSOH 131, 2013 GWD 27-545, 2014 Case (11) *affd* [2014] CSIH 105, 2014 GWD 40-723, 2014 Case (10)

Hoblyn v Barclays Bank plc
[2013] SCOH 104, 2013 GWD 26-533, 10313 Case (51) *affd* [2014] CSIH 52, 2014 GWD 30-376, 2014 Case (60)

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) *rev* [2014] UKSC 27, 2014 SC (UKSC) 174, 2014 SLT 593, 2014 Case (39)

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 (47) *rev* [2014] UKSC 41, 2014 SC (UKSC) 203, 2014 SLT 775, 2014 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)

McSorley v Drennan

May 2011, Ayr Sheriff Court, 2011 Case (14) *rev* [2012] CSIH 59, 2012 GWD 25-506, 2012 Case (6)

Mehrabadi v Haugh

June 2009, Aberdeen Sheriff Court, 2009 Case (17) *affd* 11 January 2010 Aberdeen Sheriff Court, 2010 Case (15)

Mirza v Salim

[2013] CSOH 73, 2013 GWD 17-348, 2013 Case (65) *rev* [2014] CSIH 51, 2014 SLT 875, 2014 Case (67)

Moderator of the General Assembly of the Free Church of Scotland v Interim Moderator of the Congregation of Strath Free Church of Scotland (Continuing)

[2009] CSOH 113, 2009 SLT 973, 2009 Case (96) *affd* [2011] CSIH 52, 2011 SLT 1213, 2012 SC 79, 2011 Case (77)

Morris v Rae

[2011] CSIH 30, 2011 SC 654, 2011 SLT 701, 2011 SCLR 428, 2011 Case (39) *rev* [2012] UKSC 50, 2013 SC (UKSC) 106, 2013 SLT 88, 2013 SCLR 80, 2012 Case (41)

Multi-link Leisure Developments Ltd v North Lanarkshire Council

[2009] CSOH 114, 2009 SLT 1170, 2009 Case (70) *rev* [2009] CSIH 96, 2010 SC 302, 2010 SLT 57, 2010 SCLR 306, 2009 Case (70) *affd* [2010] UKSC 47, [2011] 1 All ER 175, 2010 Case (52)

Smith v Stuart
2009 GWD 8-140, Sh Ct, 2009 Case (2) *affd* [2010] CSIH 29, 2010 SC 490, 2010 SLT 1249, 2010 Case (10)

Thomson v Mooney
[2012] CSOH 177, 2012 GWD 39-769, 2012 Case (63) *rev* [2013] CSIH 115, 2014 GWD 14-263, 2013 Case (74)

Tuley v Highland Council
2007 SLT (Sh Ct) 97, 2007 Case (24) rev [2009] CSIH 31A, 2009 SC 456, 2009 SLT 616, 2009 Case (48)

Wright v Shoreline Management Ltd
Oct 2008, Arbroath Sheriff Court, 2008 Case (60) *rev* 2009 SLT (Sh Ct) 83, 2009 Case (74)

TABLE OF CASES DIGESTED IN EARLIER VOLUMES BUT REPORTED IN 2014

A number of cases which were digested in *Conveyancing 2013* or earlier volumes but were at that time unreported have been reported in 2014. A number of other cases have been reported in an additional series of reports. For the convenience of those using earlier volumes all the cases in question are listed below, together with a complete list of citations.

Cook v Cadman
2014 SLT (Lands Tr) 13

McIntosh v Castle Rock Edinvar Housing Association Ltd
2014 SLT (Lands Tr) 35, 2013 Hous LR 74

Mackay v Gaylor
2014 SLT (Sh Ct) 131

Mortgages 1 Ltd v Chaudhary
2014 SLT (Sh Ct) 35

Regus (Maxim) Ltd v Bank of Scotland plc
[2013] CSIH 12, 2013 SC 331, 2013 SLT 477, 2014 SCLR 33

Salvesen v Riddell
[2013] UKSC 22, 2013 SC (UKSC) 236, 2013 SLT 863, 2014 SCLR 44

Thomson v Mooney
[2013] CSIH 115, 2014 GWD 14-263