

# **CONVEYANCING 2023**



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Edinburgh Legal Education Trust  
2024

Published by  
Edinburgh Legal Education Trust  
School of Law  
University of Edinburgh  
Old College  
South Bridge  
Edinburgh EH8 9YL

First published 2024

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ISBN 978-1-7399939-5-5

British Library Cataloguing in Publication Data  
A catalogue record for this book is available from the British Library.

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Typeset by Waverley Typesetters, Warham, Norfolk  
Printed and bound by Bell & Bain Ltd, Glasgow

# CONTENTS

Preface	ix
Table of statutes	xi
Table of orders	xv
Table of cases	xix

## PART I: CASES

Tenements, developments and factors	3
Real burdens	5
Development Management Scheme	7
Servitudes	7
Roads and public access rights	14
Electronic Communications Code	16
Variation etc of title conditions by Lands Tribunal	18
Land registration	18
Agricultural leases	20
Commercial leases	21
Residential leases	27
Liferent	45
Standard securities	46
Commission on sale	47
Community right to buy	49
Family property	49
Solicitors	50
Boundaries and positive prescription	51
Miscellaneous	53

## PART II: STATUTORY DEVELOPMENTS

Moveable Transactions (Scotland) Act 2023 (asp 5)	57
Register of Overseas Entities	57
New conservation bodies	58
New rural housing bodies	60
Cost of Living (Tenant Protection) (Scotland) Act 2022: new expiry dates	62
Licensing of short-term lets: a six-month reprieve	62
RCI: extension of the transitional period	62

## PART III: OTHER MATERIAL

Bills in the Scottish Parliament	67
A proposed Land Ownership and Public Interest (Scotland) Bill	72
Land registration	73
Register of Persons Holding a Controlled Interest in Land	74
Rural land market	75
House prices and sale volumes	76
Private-sector tenancies	79
Private residential tenancies: new styles and notes	81
Tenements: heating and repairing	81
Reform of the law of heritable securities	84
Consultation on proposed Land Reform Bill	86
Consultation on reform of small landholdings	89
Rural land use	90
Community ownership of land	90
Green land-investment in rural Scotland	91
Scottish Land Commission and natural capital	92
Scottish Land Commission and the 'good practice' programme	93
Vacant and Derelict Land Survey 2022	95
Overlooking baronies?	96
Books	97
Articles	97

## PART IV: COMMENTARY

Off-register extinction of servitudes	103
The nature of the problem	103
Extinction by confusion	103
Extinction by negative prescription (in part)	108
A claim against the Keeper or the seller?	109
Irritancy notices	110
Introduction	110
The <i>Lujo Properties</i> case	111
Service (1): the 1985 Act	112
Service (2): contractual interpretation	113
Waiver, personal bar and oppression	115
Prescription	116
Introduction	116
The <i>Langskaill</i> case: contradictory descriptive elements	116
The <i>Ardnamurchan Estates</i> case: potentially contradictory descriptive elements	120
The <i>Wallace-Martinez</i> case: possession as owner or as co-owner?	121
The <i>MacNab</i> case: reacquisition of land previously transferred	126
Residential tenant protection	127
Introduction	127

---

The first extension	128
The second extension	130
Rent-adjudication procedures	130
Impact	131
Challenge in the courts	132
Housing (Scotland) Bill	134
Conclusion	137
Making proper liferents real	137
Tenements	140
Liability for repairs to dormer windows	140
Combining flats	144
Maintenance burdens: a ‘quasi-dynamic’ interpretation	141
Servants, not masters: forms and the assignation of standard securities	147
Background	147
Requirements for assignation documents	148
Common property or servitude? – again	151
The West Lothian question	152
The English question	154
Developer control in ongoing developments	155
The issue	155
The golden vote	156
The DMS and the four-corners rule	160
Short-term lets	161
Introduction	161
The requirement for a licence	162
The first Edinburgh challenge: licensing	164
The second Edinburgh challenge: planning	167
Reading and writing real burdens	169
Argyll Chambers, in words and pictures	169
Principles and practice	171
The community right to buy: more bumps in the road	175
Not a good batting average	175
The legislative background	175
The <i>Moorbank</i> litigations	176
Comments	179
End of the road?	179
Extrinsic evidence and Sasine descriptions	179
Introduction	179
Area or plan?	181
The use of extrinsic evidence	183
Moveable Transactions (Scotland) Act 2023	186
Introduction	186
Background	187
Scope	189
Structure and timetable	190
Assignation of claims	190

---

Security over moveable property	194
Statutory pledge	195
Possessory pledge	200
Assessment	201
Land registration and possession of the solum	201
The problem of inconsistent titles	201
The new case	202
Property taxes in Scotland	205
Overview	205
Land and buildings transaction tax	208
Scottish income tax	213
Other Scottish property taxes	215
UK taxes on land	219

**PART VI: TABLES**

Cumulative table of decisions on variation or discharge of title conditions	257
Cumulative table of appeals	258

## PREFACE

This is the twenty-fifth annual update of new developments in the law of conveyancing. As in previous years, it is divided into five parts. There is, first, a brief description of all cases which have been reported, or appeared on the websites of the Scottish Courts <[www.scotcourts.gov.uk](http://www.scotcourts.gov.uk)> or of the Lands Tribunal for Scotland <[www.lands-tribunal-scotland.org.uk/](http://www.lands-tribunal-scotland.org.uk/)>, or have otherwise come to our attention since *Conveyancing 2022*.

The next two parts summarise, respectively, statutory developments during 2023 and other material of interest to conveyancers. The fourth part is a detailed commentary on selected issues arising from the first three parts. Finally, in Part V, there are two tables. A cumulative table of decisions, usually by the Lands Tribunal, on the variation or discharge of title conditions covers all decisions since 2019; an earlier, cumulative table of all cases from 2004 to 2018 can be found at the end of *Conveyancing 2018*. This is followed by a cumulative table of appeals, designed to facilitate moving from one annual volume to the next.

We do not seek to cover agricultural holdings, crofting, public-sector tenancies, compulsory purchase or planning law. Otherwise our coverage is intended to be complete.

We gratefully acknowledge help received from Ross Anderson, Alan Barr, Malcolm Combe, Mark Davenport, Thomas Duncan, Ross McClelland, Rebecca MacLeod, Roddy Paisley and Alasdair Taylor.

*Kenneth G C Reid  
George L Gretton  
Andrew J M Steven  
17 March 2024*



# TABLE OF STATUTES

1862	Transmission of Moveable Property (Scotland) Act . . . . .	188	1979	Sale of Goods Act	
	s 2 . . . . .	192		s 62(4) . . . . .	189
1868	Land Registers (Scotland) Act . . . . .	106	1982	Civic Government (Scotland) Act . . . . .	161
1882	Bills of Exchange Act . . . . .	189		s 7 . . . . .	163
1911	Small Landholders (Scotland) Act . . . . .	89		Civil Aviation Act	
1931	Small Landholders and Agricultural Holdings (Scotland) Act . . . . .	89		s 86 . . . . .	196
1963	Stock Transfer Act . . . . .	189		Supply of Goods and Services Act	
1964	Hire Purchase Act			s 15 . . . . .	48
	s 27 . . . . .	199	1984	Roads (Scotland) Act	
1970	Conveyancing and Feudal Reform (Scotland) Act . . . . .	46, 84, 147, 148		s 151(2) . . . . .	15
	s 9(8)(b) . . . . .	85, 187	1985	Law Reform (Miscellaneous Provisions) (Scotland) Act . . . . .	115
	(c) . . . . .	84		ss 4–7 . . . . .	110
	s 24(5) . . . . .	47		s 4 . . . . .	21, 111
	s 25 . . . . .	107		(4) . . . . .	112–13, 114, 116
	s 53 . . . . .	150		s 8 . . . . .	186
	sch 4 . . . . .	147, 151	1987	Housing (Scotland) Act	
	Taxes Management Act			s 86(1) . . . . .	80
	s 8C(1)(b) . . . . .	219	1988	Housing (Scotland) Act	
1973	Prescription and Limitation (Scotland) Act			s 12 . . . . .	35
	s 1 . . . . .	116, 124, 125, 126		s 32(2)(a) . . . . .	35
	(1) . . . . .	122		(3)(b) . . . . .	36
	s 3(3) . . . . .	14		s 33(1)(e) . . . . .	37
	s 5(1A) . . . . .	125		s 34 . . . . .	33
	ss 8, 9 . . . . .	13		(1) . . . . .	33
1974	Consumer Credit Act . . . . .	195		s 55 . . . . .	37
	ss 114–122 . . . . .	190		sch 5 ground 6 . . . . .	34
	s 114 . . . . .	201	1992	Taxation of Chargeable Gains Act	
	Health and Safety at Work etc Act			s 1K(2) . . . . .	219
	s 33(1)(a) . . . . .	54		s 56 . . . . .	219
1976	Dangerous Wild Animals Act			s 225B . . . . .	219
	sch . . . . .	136		s 226BA . . . . .	219
1977	Patents Act . . . . .	189		ss 248A, 248E . . . . .	219
	Protection from Eviction Act		1995	Merchant Shipping Act	
	s 13(3) . . . . .	28		s 16 . . . . .	196
1978	Interpretation Act			Requirements of Writing (Scotland) Act . . . . .	67
	s 7 . . . . .	112		s 11(3)(a) . . . . .	191
1979	Land Registration (Scotland) Act . . . . .	20, 105	1997	Town and Country Planning (Scotland) Act . . . . .	161
	s 3(1)(a) . . . . .	8, 16		s 26B . . . . .	162, 167
	s 9(3)(a) . . . . .	203		(2) . . . . .	168
			1998	Scotland Act . . . . .	133
				s 8B . . . . .	218

1998	Scotland Act ( <i>cont</i> )		2004	Tenements (Scotland) Act ( <i>cont</i> )	
	s 80M.....	216		r 4.2 .....	172
	s 104.....	196		(a).....	143
	sch 5 pt II Head A4 .....	196		(b).....	144
2000	Abolition of Feudal Tenure etc (Scotland) Act .....	186	2006	Companies Act	
2001	Finance Act			pt 21A (ss 790A–790ZH).....	189
	pt 2 (ss 16–49).....	216		pt 25 (ss 859A–894).....	197
	Housing (Scotland) Act			s 893.....	197
	ss 14, 14A .....	137		schs 1A, 3 .....	189
2003	Agricultural Holdings (Scotland) Act			Housing (Scotland) Act	
	s 88.....	20		s 13(1)(h).....	80
	Communications Act			s 14.....	45
	sch 3A .....	16		(1) .....	80
	Land Reform (Scotland) Act .....	186		(1)(b).....	29
	pt 2 (ss 33–67B) .....	49, 60, 175	2010	Interpretation and Legislative Reform (Scotland) Act	
	s 36.....	175		s 26.....	112
	s 38.....	176	2011	Property Factors (Scotland) Act	
	ss 40, 44.....	175		s 17.....	4
	s 61.....	176, 178, 179		ss 19, 20.....	4
	(7)(c) .....	176	2012	Land Registration etc (Scotland) Act .....	45, 85, 186, 203
	s 62.....	176		ss 1, 2.....	105
	Title Conditions (Scotland) Act.....	186		s 14.....	105
	s 3(5) .....	85		s 16(4) .....	69
	s 4.....	171		s 21.....	140
	s 5.....	160, 173		(4A), (5).....	58
	s 14.....	26		s 23(1)(c).....	173
	s 38.....	58		s 25(1)(b).....	173
	s 43.....	60		s 26(1)(c).....	173
	s 53.....	195		ss 30, 31.....	140
	s 63(4), (5), (7).....	155		s 51.....	140
	s 72.....	156		s 73(2)(e).....	110
	s 90(1)(a)(ii) .....	5, 6, 171		s 82.....	9, 202
	(12) .....	6		s 104.....	105
	s 91.....	158		s 114.....	140
	s 92.....	159		sch 4.....	19
	s 96.....	159		para 17.....	203
	s 100.....	159		para 18.....	19
2004	Antisocial Behaviour etc (Scotland) Act .....	29		para 22.....	203
	pt 8 (ss 82–101).....	43		sch 5 para 18(2) .....	116
	s 83(6) .....	43, 44	2013	Land and Buildings Transaction Tax (Scotland) Act	
	(e) .....	42		sch 2A para 8B .....	212
	s 89.....	39		sch 16D .....	209
	s 92(4).....	39	2014	Housing (Scotland) Act	
	s 101.....	43		s 46.....	42, 44
	(1).....	43		s 48(1), (2).....	44
	Tenements (Scotland) Act .....	69, 70		s 61.....	42
	s 2(3), (4) .....	201		(2)(b).....	43
	(6), (7) .....	205		s 62.....	44
	s 22.....	205		Revenue Scotland and Tax Powers Act .....	217
	sch 1 (TMS)		2015	Community Empowerment (Scotland) Act .....	175, 186
	r 1.2 .....	143		s 36.....	60
	r 1.3(a), (b) .....	144			
	r 1.5 .....	70, 82			
	r 2.5 .....	82			

2015	Community Empowerment (Scotland) Act ( <i>cont</i> )	2022	Economic Crime (Transparency and Enforcement) Act ( <i>cont</i> )
	s 74. . . . .		sch 1 para 8. . . . .
	s 81. . . . .		sch 2 para 6A . . . . .
	Small Business, Enterprise and Employment Act		sch 6. . . . .
	s 81. . . . .		Finance Act
2016	Land Reform (Scotland) Act . . . . .		s 23(2) . . . . .
	Private Housing (Tenancies) (Scotland) Act . . . . .	2023	Economic Crime and Corporate Transparency Act. . . . .
	s 1(1)(b) . . . . .		pt 3 (ss 156–178). . . . .
	s 4. . . . .		s 159. . . . .
	ss 10–13. . . . .		s 167. . . . .
	s 10. . . . .		s 177(2) . . . . .
	s 11(1), (2), (3), (4) . . . . .		sch 6. . . . .
	s 19. . . . .		sch 7. . . . .
	s 21A . . . . .		Electronic Trade Documents Act. . . . .
	s 33(ZA) . . . . .		s 3(4) . . . . .
	s 33B . . . . .		Finance Act. . . . .
	ss 36–43. . . . .		s 8(7) . . . . .
	s 71. . . . .		Finance (No 2) Act
	s 78(3) . . . . .		s 41. . . . .
	sch 3 . . . . .		(3) . . . . .
	ground 1 . . . . .		s 43. . . . .
	ground 14 . . . . .		Moveable Transactions (Scotland) Act . . . . .
	Scotland Act		pt 1 (ss 1–41). . . . .
	s 17. . . . .		pt 2 (ss 42–113). . . . .
2018	Islands (Scotland) Act. . . . .		pt 3 (ss 114–122). . . . .
2019	Finance Act		s 1(1), (2), (3), (4), (5) . . . . .
	sch 2 para 3(1)(b) . . . . .		s 2. . . . .
2020	Coronavirus (Scotland) Act		s 3(1) . . . . .
	sch 4 pt 1. . . . .		(2)(a) . . . . .
	sch 7 paras 6, 7. . . . .		(c), (d). . . . .
	Coronavirus (Scotland) (No 2) Act		(3)(a), (b). . . . .
	sch 4 para 6(3) . . . . .		s 4. . . . .
2022	Building Safety Act. . . . .		s 5(8) . . . . .
	Coronavirus (Recovery and Reform) (Scotland) Act		s 8(1)(a), (b), (3)(a), (b), (c), (5). . . . .
	s 33(2) . . . . .		ss 10–13. . . . .
	Cost of Living (Tenant Protection) (Scotland) Act . . . . .		s 10(1), (2) . . . . .
	pt 1 (ss 1, 2). . . . .		s 15(1), (2) . . . . .
	s 1. . . . .		ss 19, 20, 21 . . . . .
	s 7(3), (5), (6). . . . .		s 23(1), (3) . . . . .
	s 9. . . . .		ss 25, 26. . . . .
	(1)(a), (3). . . . .		s 29. . . . .
	(4) . . . . .		s 30(1), (2) . . . . .
	(6)(a), (b). . . . .		s 33(2) . . . . .
	sch 1		s 41(1) . . . . .
	para 1(5), (17). . . . .		s 42(2)(a), (b). . . . .
	para 2(7) . . . . .		s 43(1)(a). . . . .
	Economic Crime (Transparency and Enforcement) Act		s 44(1)(a), (b), (c) . . . . .
	pt 1 (ss 1–44). . . . .		(d) . . . . .
	ss 22–24) . . . . .		s 45(1), (2)(b), (c) . . . . .
	s 22(1)(c) . . . . .		(3)(b). . . . .
	s 23(2) . . . . .		s 46(1), (2)(a), (b), (3) . . . . .
			s 47(2), (3) . . . . .
			s 48(1), (2) . . . . .

2023	Moveable Transactions (Scotland) Act ( <i>cont</i> )	2023	Moveable Transactions (Scotland) Act ( <i>cont</i> )
	s 48(3) . . . . . 197		s 83(1)(e) . . . . . 197
	s 50 . . . . . 197		s 87 . . . . . 197
	ss 51, 52 . . . . . 196		s 90 . . . . . 197
	s 53 . . . . . 198		s 91 . . . . . 198
	ss 54, 55, 57 . . . . . 199		s 93 . . . . . 199
	s 58(1), (6), (7) . . . . . 198		ss 96, 97, 98, 99 . . . . . 198
	s 59 . . . . . 200		s 101 . . . . . 198
	s 60(1), (2), (3), (4) . . . . . 199		(2) . . . . . 200
	ss 64–77 . . . . . 201		s 102(2) . . . . . 200
	s 64 . . . . . 199		s 107 . . . . . 198
	(4) . . . . . 199		s 113(1) . . . . . 195
	s 65 . . . . . 199, 201		s 120 . . . . . 196
	ss 66, 67, 68 . . . . . 200		(1), (2)(a) . . . . . 191
	ss 70, 71 . . . . . 200		National Insurance Contributions (Reduction in Rates) Act . . . . . 206
	ss 73–76 . . . . . 200	2024	Trusts and Succession (Scotland) Act . . . . . 67
	s 77 . . . . . 200		ss 43, 44, 73, 79 . . . . . 67
	ss 81, 82 . . . . . 197		
	s 83 . . . . . 197		

# TABLE OF ORDERS

2003	Title Conditions (Scotland) Act 2003 (Conservation Bodies) Order, SSI 2003/453 . . . . .	59
	Title Conditions (Scotland) Act 2003 (Conservation Bodies) Amendment Order, SSI/621 . . . . .	59
2004	Building (Scotland) Regulations, SSI 2004/406 . . . . .	68
	Title Conditions (Scotland) Act 2003 (Conservation Bodies) Amendment Order, SSI 2004/400 . . . . .	59
	Title Conditions (Scotland) Act 2003 (Rural Housing Bodies) Order, SSI 2004/477 . . . . .	60
2006	Land Registration (Scotland) Rules r 9 . . . . .	138
	Title Conditions (Scotland) Act 2003 (Conservation Bodies) Amendment Order, SSI 2006/110 . . . . .	59
	Title Conditions (Scotland) Act 2003 (Conservation Bodies) Amendment (No 2) Order, SSI 2006/130 . . . . .	59
	Title Conditions (Scotland) Act 2003 (Rural Housing Bodies) Amendment Order, . . . . .	60
2007	Title Conditions (Scotland) Act 2003 (Conservation Bodies) Amendment Order, SSI 2007/533 . . . . .	59
	Title Conditions (Scotland) Act 2003 (Rural Housing Bodies) Amendment Order, SSI 2007/58 . . . . .	60
	Title Conditions (Scotland) Act 2003 (Rural Housing Bodies) Amendment (No 2) Order, SSI 2007/535 . . . . .	60
2008	Title Conditions (Scotland) Act 2003 (Conservation Bodies) Amendment Order, SSI 2008/217 . . . . .	59
	Title Conditions (Scotland) Act 2003 (Rural Housing Bodies) Amendment Order, SSI 2008/391 . . . . .	60
2009	Provision of Services Regulations, SI 2009/2999 regs 15, 16, 18. . . . .	166
	Title Conditions (Scotland) Act 2003 (Development Management Scheme) Order, SI 2009/729 Pt 2 . . . . .	157
	art 5. . . . .	156
	art 6(1) . . . . .	160
	(2) . . . . .	157
	art 23. . . . .	158
	art 26. . . . .	158
	arts 28, 30. . . . .	159
	sch 1 (DMS) . . . . .	7, 156
	rr 3.5, 4.5, 4.7 . . . . .	157
	r 11.1(b). . . . .	158, 160
	r 11.5 . . . . .	158, 159
	r 26 . . . . .	156
2011	Tenancy Deposit Schemes (Scotland) Regulations, SSI 2011/176 reg 3 . . . . .	32, 40, 41–42
	reg 9 . . . . .	39–40
2012	Title Conditions (Scotland) Act 2003 (Conservation Bodies) Amendment Order, SSI 2012/30 . . . . .	59

2013	Title Conditions (Scotland) Act 2003 (Conservation Bodies) Amendment Order, SSI 2013/289 .....	59
	Title Conditions (Scotland) Act 2003 (Rural Housing Bodies) Amendment Order, SSI 2013/100 .....	60
2014	Land Register Rules etc (Scotland) Regulations, SSI 2014/150 .....	138
	Title Conditions (Scotland) Act 2003 (Rural Housing Bodies) Amendment Order, SSI 2014/130 .....	60
	Title Conditions (Scotland) Act 2003 (Rural Housing Bodies) Amendment (No 2) Order, SSI 2014/220 .....	60
2015	Aircraft Equipment (Cape Town Convention) Regulations, SI 2015/912 .....	196
	Community Right to Buy (Scotland) Regulations, SSI 2015/400 sch 1 pt 1 .....	175
	Historic Environment (Scotland) Act 2014 (Saving, Transitional and Consequential Provisions) Order, SSI 2015/239 .....	59
2016	Letting Agent Code of Practice (Scotland) Regulations, SSI 2016/133 .....	42
	Title Conditions (Scotland) Act 2003 (Conservation Bodies) Amendment Order, SSI 2016/371 .....	59
	Upper Tribunal for Scotland (Rules of Procedure) Regulations, SSI 2016/232 r 18(4)(b) .....	34
2017	First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations, SSI 2017/328 sch 1 para 103 .....	40
	Private Housing (Tenancies) (Scotland) Act 2016 (Commencement No 3, Amendment, Saving Provision and Revocation) Regulations, SSI 2017/346 reg 6(c) .....	36
	Title Conditions (Scotland) Act 2003 (Rural Housing Bodies) Amendment Order, SSI 2017/7 .....	60
	Title Conditions (Scotland) Act 2003 (Rural Housing Bodies) Amendment (No 2) Order, SSI 2017/301 .....	60
2019	Housing (Scotland) Act 2006 (Modification of the Repairing Standard) Regulations, SSI 2019/61 reg 3 .....	80
	Title Conditions (Scotland) Act 2003 (Rural Housing Bodies) Amendment Order, SSI 2019/172 .....	60
2020	Coronavirus (Scotland) Acts (Early Expiry of Provisions) Regulations, SSI 2020/249 regs 1, 3(b)(ii) .....	212
2021	Land Reform (Scotland) Act 2016 (Register of Persons Holding a Controlled Interest in Land) Regulations, SSI 2021/85 reg 10(7), (8) .....	74
	Town and Country Planning (Short-term Let Control Areas) (Scotland) Regulations, SSI 2021/154 .....	161
	regs 4, 7, 8 .....	126
2022	Civic Government (Scotland) Act 1982 (Licensing of Short-term Lets) Order, SSI 2022/32 .....	27, 62, 161
	art 2(1) .....	164
	art 3 .....	43, 164
	art 4(2) .....	128
	art 7 .....	162, 163
	Land and Buildings Transaction Tax (Additional Amount: Transactions Relating to Second Homes etc) (Scotland) Amendment Order, SSI 2022/375 .....	210
2023	Annual Tax on Enveloped Dwellings (Indexation of Annual Chargeable Amounts) Order, SI 2023/107 .....	221
	Building Safety (Responsible Actors Scheme and Prohibited Actions) Regulations, SI 2023/753 .....	71
	Cost of Living (Tenant Protection) (Scotland) Act 2002 (Amendment of Expiry Date) Regulations, SSI 2023/275 .....	62, 130

2023	Cost of Living (Tenant Protection) (Scotland) Act 2002 (Amendment of Expiry Dates and Rent Cap Modification) Regulations, SSI 2023/82 . . . . .	62
	regs 2, 3, 4 . . . . .	129
	Cost of Living (Tenant Protection) (Scotland) Act 2002 (Early Expiry and Suspension of Provisions) Regulations, SSI 2023/8 . . . . .	62, 129
	regs 2, 3 . . . . .	129
	Cost of Living (Tenant Protection) (Scotland) Act 2002 (Incidental Provision) Regulations, SSI 2023/116 . . . . .	62
	Land and Buildings Transaction Tax (Green Freeports Relief) (Scotland) Order, SSI 2023/280 . . . . .	209
	Land Reform (Scotland) Act 2016 (Register of Persons Holding a Controlled Interest in Land) (Amendment) Regulations 2023, SSI 2023/104 . . . . .	62, 74
	Non-Domestic Rate (Scotland) Order, SSI 2023/29 . . . . .	217
	Non-Domestic rates (Levy and Miscellaneous Amendment) (Scotland) Regulations, SSI 2023/30 . . . . .	217
	Non-Domestic Rates (Restriction of Relief) (Scotland) Regulations, SSI 2023/28 . . . . .	217
	Non-Domestic Rates (Transitional Relief) (Scotland) Regulations, SSI 2023/31 . . . . .	217
	Non-Domestic Rates (Transitional Relief) (Scotland) Amendment Regulations, SSI 2023/63 . . . . .	217
	Private Residential Tenancies and Assured Tenancies (Prescribed Notices and Forms) (Temporary Modifications) (Scotland) Regulations, SSI 2023/58 . . . . .	62, 129
	Register of Overseas Entities (Definition of Foreign Limited Partner, Protection and Rectification) Regulations, SI 2023/534 . . . . .	58
	Register of Overseas Entities (Disclosure and Dispositions) Regulations, SI 2023/344 . . . . .	58
	Register of Overseas Entities (Penalties and National Insurance Dispositions) Regulations, SI 2023/696 . . . . .	58
	Register of Overseas Entities (Verification and Exceptions) (Amendment) Regulations, SI 2023/1416 . . . . .	58
	Scottish Landfill Tax (Standard Rate and Lower Rate) Order, SSI 2023/50 . . . . .	215
	Title Conditions (Scotland) Act 2003 (Conservation Bodies and Rural Housing Bodies) (Miscellaneous Amendment) Order, SSI 2023/278 . . . . .	59, 60
	Valuation (Proposals Procedure) (Scotland) Amendment Regulations, SSI 2023/207 . . . . .	217
	Valuation for Rating (Plant and Machinery) (Scotland) Amendment Regulations, SSI 2023/32 . . . . .	217
	Valuation Timetable (Scotland) Amendment Order, SSI 2023/109 . . . . .	217
	Valuation Timetable (Scotland) Amendment (No 2) Order, SSI 2023/109 . . . . .	217
2024	Cost of Living (Tenant Protection) (Scotland) Act 2022 (Expiry of Section 10: Extension) Regulations, SSI 2024/88 . . . . .	130
	Cost of Living (Tenant Protection) (Scotland) Act 2022 (Savings Provisions) Regulations, SSI 2024/19 . . . . .	130
	Non-Domestic Rate (Scotland) Order, SSI 2024/3 . . . . .	217
	Non-Domestic Rates (Levy and Miscellaneous Amendment) (Scotland) Regulations, SSI 2024/4 . . . . .	217
	Non-Domestic Rates (Transitional Relief) (Scotland) Regulations, SSI 2024/5 . . . . .	217



## TABLE OF CASES

Aberdeen College (Board of Management of) v Youngson [2005] CSOH 31, 2005 1 SC 335 .....	145, 181
Aberdeen Varieties Ltd v James F Donald (Aberdeen Cinemas) Ltd 1939 SC 788.....	173
Ahmed v Russell [2023] UT 7, 2023 SLT (Tr) 33.....	40–41
Ardnamurchan Estates Ltd v MacGregor (No 1) [2020] SAC (Civ) 2, 2020 SC (SAC) 1 .	145, 180, 181
Ardnamurchan Estates Ltd v MacGregor (No 2) 8 July 2022, Fort William Sh Ct rev [2023] SAC (Civ) 33, 2024 GWD 8-65 .....	32, 120–21, 122, 179–86
Arnold v Britton [2015] UKSC 36, [2015] AC 1610 .....	26, 31
Ashraf v Lester Dominic Solicitors [2023] EWCA Civ 4, [2023] PNLR 14.....	50–51
Ashtenne Caledonia Ltd v Denny Enterprises Int’l Ltd [2023] CSOH 19, 2023 GWD 9-98 .....	22
Ashtenne Caledonia Ltd v Denny Enterprises Int’l Ltd (No 2) [2023] CSOH 20, 2023 GWD 9-99 .	22
Ashtenne Caledonia Ltd v Saleem [2023] CSOH 18, 2023 Hous LR 37 .....	21–22
Auld v Hay (1880) 7 R 663 .....	119
Averbuch v City of Edinburgh Council [2023] CSOH 35, 2023 SLT 665 .....	27, 164–67
Aytoun v Magistrates of Kirkcaldy (1833) 11 S 676.....	126
BAM TCP Atlantic Square Ltd v British Telecommunications plc [2021] CSIH 44, 2022 SLT 972 .	174
Barton v Gwyn-Jones [2019] EWCA Civ 1999, [2020] 2 All ER (Comm) 652.....	48
Barton v Jones [2018] EWHC 2426 (Ch) .....	48
Barton v Morris [2023] UKSC 3, [2023] AC 684 .....	47–48
Bavaird v Simpson [2023] UT 19, 2024 SLT (Tr) 43 .....	41
Beneficial Bank plc v McConnachie 1996 SC 119.....	150
Bennett v Beneficial Bank plc 1995 SLT 1105 .....	150
Blythswood Investments (Scotland) Ltd v Clydesdale Electrical Stores Ltd (in receivership) 1995 SLT 150 .....	114
Boyle v Ford [2023] UT 4, 2023 Hous LR 21.....	36–38
Bridging Loans Ltd v Hutton [2018] CSIH 63, 2018 Hous LR 83 .....	47
Brown v Glen Settlement Trust [2023] UT 39, 2024 SLT (Tr) 43.....	32–33, 128
Bryson v Salmond [2021] SAC (Civ) 29, 2022 SLT (Sh Ct) 50.....	26
Burns v Keeper of the Registers of Scotland 2024 GWD 1-8 .....	18–19
Cabot Financial UK Ltd v MacLennan [2021] SC ABE 6, 2021 GWD 32-422.....	188
Calthorpe’s 1959 Discretionary Settlement (Trustees of) v G Hamilton (Tullochgribban Mains) Ltd [2012] CSOH 138, 2012 GWD 29-599 .....	119
Carleton, Applicants 2023 SLT (Lands Tr) 91.....	6
Carstairs v Spence 1924 SC 380 .....	11, 109
Chall v Chall [2023] SAC (Civ) 27, 2023 SLT (SAC) 131.....	53
Christie Owen & Davies plc v Campbell [2009] CSIH 26, 2009 SC 436 .....	188
Church of Scotland General Trustees v Clow (1995) <i>Unreported Property Cases from the Sheriff Courts</i> 429 .....	11
Clipper Holdings II SARL v SF and SFX, 18 Jan 2018, Edinburgh Sh Ct.....	148
Clydesdale Bank plc v Davidson 1998 SC(HL) 51.....	105
Colrairie v Bridges [2023] UT 9, 2023 GWD 9-96.....	35–36

Cowie v Strathclyde Regional Council, 8 July 1986, First Division .....	15
Crawfurd v Bethune (1821) 1 S 111 .....	205
Dickson v McCullagh 24 May 2019, First-tier Tribunal for Scotland (Housing and Property Chamber) .....	45–46, 137–38, 139–40
Doolan v Donald [2024] SC LIV 15 .....	10, 152–53
Doran v SC Causewayside Ltd [2023] SAC (Civ) 10, 2023 GWD 12-122 .....	33
Dorchester Studies (Glasgow) Ltd v Stone 1975 SC (HL) 56 .....	112, 115
Drury Street (24) Ltd v Brightcrew (Management) Ltd [2022] SAC (Civ) 34, 2023 SLT (SAC) 28 .....	110
Duffus v Malcolm Allan Housebuilders Ltd 2020 GWD 16-236 .....	173
Duran v Revenue Scotland [2023] FTSTC 2, 2023 GWD 34-284 .....	212
Edinburgh (City of) Council v Hogan [2023] UT 24, 2023 SLT (Tr) 111 .....	15–16
Edinburgh Holiday & Party Lets Ltd v City of Edinburgh Council [2023] UT 16, 2023 SLT (Tr) 47 .....	29–30
EH1 Properties Ltd v Maclean [2024] SC INV 17, [2023] SAC (Civ) 35, 2024 GWD 2-18 .....	12–14
EMC Letting Ltd v Brotherton Estate Ltd 21 Aug 2023, Forfar Sh Ct .....	3, 140–43
Factotum (Scotland) Ltd v Rashid [2023] UT 46, 2024 GWD 1-9 .....	42–44
Farstad Supply A/S v Enviroco Ltd [2011] UKSC 16, [2011] 1 WLR 921 .....	188
Ferguson v Gregors 13 Dec 2021, Falkirk Sh Ct affd [2023] SAC (Civ) 24, 2023 GWD 30-248 .....	10–12, 108
Forbes v Livingstone (1827) 6 S 167 .....	205
Garcia Lopez de la Torre v Aberdeen City Council [2023] UT 29, 2023 Hous LR 92 .....	4–5
Gourlay v Clark [2023] SC DUN 23, 2023 GWD 34-277 .....	49
Graham v Keeper of the Registers of Scotland 16 Nov 2023, Lands Tr .....	20, 202–05
Gray v University of Edinburgh 1962 SC 157 .....	24
Guidi v Clydesdale Bank plc [2021] SC GLW 59, 2021 SLT (Sh Ct) 441 .....	46, 148
Guidi v Clydesdale Bank plc [2023] CSIH 4, 2023 SCLR 417, 2023 Hous LR 2 .....	46–47, 149
Guidi v Promontoria (Chestnut) Ltd [2021] SC GLW 59, 2021 SLT (Sh Ct) 441 .....	148–51
Hamilton v Dumfries and Galloway Council [2006] CSOH 110, 2006 SCLR 839 .....	15
Hamilton v Dumfries and Galloway Council (No 2) [2009] CSIH 13, 2009 SC 277 .....	16
Hamilton v McIntosh Donald Ltd 1994 SLT 794 .....	122
Hamilton v Western Bank (1856) 19 D 152 .....	189
Hancock v Promontoria (Chestnut) Ltd [2020] EWCA Civ 907, [2020] 4 WLR 100 .....	47
Henke v HMRC [2006] STC (SCD) 561 .....	221
Hetherington v Galt (1905) 7 F 706 .....	184
HFD Management Services LLP Family Pension Trust (Trustees of) v Apleona HSG Ltd [2023] CSOH 15, 2023 Hous LR 30 .....	22–23
Higgins v HMRC [2019] EWCA Civ 1860, [2020] 1 WLR 906 .....	221
Houston v Barr 1911 SC 134 .....	125
Johnstone v Finneran 2003 SCLR 157 .....	35
Keefe v Amor [1965] 1 QB 334 .....	154
Kodak Processing Companies Ltd v Shoredale [2009] CSIH 71, 2010 SC 113 .....	112, 115
Koubová v Edinburgh Holiday & Party Lets 2023 SLT (Tr) 67 .....	27–29, 30
Lagan Construction Group Ltd (in administration) v Scots Roads Partnership Project Ltd [2023] CSIH 28, 2023 GWD 29-245 .....	20
Langskail v Black [2023] SAC (Civ) 17, 2023 SLT (SAC) 51 .....	51–52, 116–20, 121, 186
Langskail v Black [2023] SC EDIN 7, 2023 SLT (Sh Ct) 95 .....	51–52, 116–20, 121

Lee and Another v HMRC [2023] UKUT 00242 (TCC) .....	219
Logan v Irons [2023] SAC (Civ) 9, 2023 SLT (SAC) 152 .....	9, 103–08
Lord Advocate v Aslam [2018] CSIH 47, 2019 GWD 15-231 .....	47
Love-Lee v Cameron of Lochiel 1991 SCLR 61 .....	126
Lujo Properties Ltd v Gruve Ltd [2023] SC GLA 3, 2023 SLT (Sh Ct) 31, 2023 SCLR 373 ..	21, 110–15
McCallum v Wright [2023] UT 25, 2023 SLT (Tr) 89, 2023 Hous LR 95 .....	35
McCarter v Revenue Scotland [2023] UKUT 00242 (TCC) .....	213
McGowan v Springfield Properties plc [2023] CSOH 12, 2023 SLT 330 .....	53–54
Mackenzie v Dott (1861) 23 D 1310 .....	114
McLeod v Cedar Holdings Ltd 1989 SLT 620 .....	146
MacNab v Highland Council [2023] CSOH 59, 2023 GWD 35-287 .....	7–9, 14–15, 52–53, 126–27, 170
Macnaughten v Macnaughten’s Trustees 1953 SC 387 .....	7
Mactaggart (J A) & Co v Roemmele 1907 SC 1318 .....	170
Magistrates of Perth v Earl of Kinnoul and the Caledonian Railway (1872) 10 M 874 .....	142
Manson v Turner [2023] UT 38, 2023 GWD 49-410 .....	38
Marks & Spencer plc v Cornerstone Telecommunications Infrastructure Ltd [2023] CSIH 24, 2023 SLT 661 .....	16–17
Marks & Spencer plc v Cornerstone Telecommunications Infrastructure Ltd 2022 SLT (Lands Tr) 25 .....	17
Marshall v Granton Homes Ltd 2023 GWD 44-364 .....	7, 18, 155, 156–60
Mehrabadi v Haugh, 11 Jan 2010, Aberdeen Sh Ct .....	141, 142
Moorbrook Textiles Ltd v The Scottish Ministers 2024 SLT (Sh Ct) 1 .....	49, 175, 176–79
Moorbrook Textiles Ltd v The Scottish Ministers 9 Sept 2020 and 19 May 2022, Selkirk Sh Ct ..	175
Moorgate Capital (Corporate Finance) Ltd v HIG European Capital Partners LLP [2019] EWHC 1421 (Comm) .....	48
Muirhead v City of Edinburgh Council [2023] CSOH 86, 2023 SLT 1351 .....	27, 167–69
Munro v Bowman (1932) 49 Sh Ct Rep 3 .....	104
Munro v Keeper of the Registers of Scotland 2017 GWD 17-277 .....	119, 120
Munro v McLintock 1996 SLT (Sh Ct) 97 .....	154
Nisbet v Hogg 1950 SLT 289 .....	119, 120
NRAM Ltd v Steel [2018] UKSC 13, 2018 SC (UKSC) 141 .....	51
OneSavings Bank plc v Burns [2017] SC BAN 20, 2017 SLT (Sh Ct) 129, 2017 Hous LR 55 ..	147–48
Osman v Natt [2015] 1 WLR 1536 .....	149
Paterson v Airdrie and Coatbridge Water Co (1893) 20 R 370 .....	11
Paterson v Angelline (Scotland) Ltd [2022] CSIH 33, 2022 SC 240 .....	20
PMP Plus Ltd v Keeper of the Registers of Scotland 2009 SLT (Lands Tr) 2 .....	173
Pretoria Energy Co (Chittering) Ltd v Blankney Estates Ltd [2023] EWCA Civ 482, [2023] L & TR 28 .....	23–25
Pretoria Energy Co (Chittering) Ltd v Blankney Estates Ltd [2022] EWHC 1467 (Ch) .....	24
Promontoria (Chestnut) Ltd v The Firm of Ballantyne Property Services [2020] CSOH 56, 2020 GWD 20-273 .....	188
Promontoria (Henrico) Ltd v The Firm of Portico Holdings (Scotland) [2018] SC GRE 5, 2018 GWD 6-87 .....	148
Promontoria (Oak) Ltd v Emanuel [2021] EWCA Civ 1682, [2022] 1 WLR 2004 .....	47
Promontoria (Ram) Ltd v Moore [2017] CSOH 88, 2018 SCLR 299 .....	188
Proudfoot v Hart (1890) 25 QBD 42 .....	21
R v Soneji [2006] 1 AC 340 .....	149
Ramanathan v Patel [2023] UT 8, 2023 SLT (Tr) 1 .....	39–40
Ramsay v Johnson [2023] UT 40, 2023 GWD 49-420 .....	41–42

Rangers Football Club plc, Noters (Joint Administrators) [2012] CSOH 55, 2012 SLT 599 . . . . .	188
Richardson v Residential Management Group Scotland Ltd [2023] UT 18, 2023 GWD 27-228 . . .	3–4
Rivendale v Clark [2015] CSIH 27, 2015 SC 558 . . . . .	182
Robertson v Gamack (1835) 14 S 139 . . . . .	114
Romano v Standard Commercial Property Securities Ltd [2008] CSOH 108, 2008 SLT 859 . . . . .	170
Roxburghe Second Discretionary Trust, Trustees v Batchelor [2023] CSIH 41, 2023 SLT 1378 . . .	20–21
Royal Bank of Scotland plc v Aslam [2023] SAC (Civ) 20, 2023 GWD 20-181 affd [2023] CSIH 42, 2023 GWD 46-380 . . . . .	47
Royal Bank of Scotland v Wilson [2010] UKSC 50, 2010 SC (UKSC) 66 . . . . .	150
Royal London Mutual Insurance Society Ltd v Chisholm Hunter Ltd [2023] CSIH 29, 2024 SC 17, 2023 SLT 935 . . . . .	5–6, 170–75
Royal London Mutual Insurance Society Ltd v Chisholm Hunter Ltd 2022 GWD 30-439 . . . . .	6, 171
Sara & Hossein Asset Holdings Ltd v Blacks Outdoor Retail Ltd [2023] UKSC 2, [2023] 1 WLR 575, [2023] 2 All ER 1063 . . . . .	25–26
Sara & Hossein Asset Holdings Ltd v Blacks Outdoor Retail Ltd [2020] EWCA Civ 1521, [2021] 2 P & CR 18 . . . . .	25
Scottish Association of Landlords v Lord Advocate [2023] CSOH 76, 2023 SLT 1179 . . . . .	27, 132, 133
Serapiglia v McIntyre [2023] UT 10, 2023 GWD 12-121 . . . . .	35
Sharif v Moughal [2023] CSOH 42, 2023 GWD 25-216 . . . . .	38–39
Sharma, Petitioner [2023] CSOH 40, 2023 SLT 801 . . . . .	39
Sharma v Renfrewshire Council [2022] UT 8, 2022 Hous LR 45 . . . . .	39
Shear v Clipper Holding II SARL, 26 May 2017, Outer House . . . . .	148
Sherriff v O'Rourke [2023] SAC (Civ) 18, 2023 SLT (SAC) 89, 2023 SCLR 424 . . . . .	30–32
St Andrews Forest Lodges v Grieve [2017] SC DUN 25, 2017 GWD 14-224 . . . . .	29
Stainthorpe v Carruthers [2023] UT 20, 2023 GWD 30-253 . . . . .	33–34
Stainthorpe v Carruthers (No 2) [2023] UT 41 . . . . .	34
Stewart v Wright (1821) 1 S 213 . . . . .	114
Street v Mountford [1985] AC 809 . . . . .	31
Sun Alliance & London Assurance Co Ltd v Hayman [1975] 1 WLR 177 . . . . .	113
Tan v Van Wyk [2023] UT 11, 2023 GWD 14-141 . . . . .	32
Tavendale v Revenue Scotland [2023] FTSTC 1, 2023 GWD 12-127 . . . . .	211
UK Acorn Finance Ltd v Smith 2014 Hous LR 50 . . . . .	151
UKI (Kingsway) Ltd v Westminster City Council [2018] UKSC 67, [2019] 1 WLR 104 . . . . .	113
Veen v Keeper of the Registers of Scotland 2017 GWD 17-276 . . . . .	182
Waelde v Ulloa [2016] SC EDIN 30, 2016 GWD 11-221 . . . . .	141, 142, 143, 144
Walker v Seymour 4 March 2022, Elgin Sh Ct affd 28 Feb 2023, Sheriff Appeal Court . . . . .	9–10, 154
Walker's Exx v Carr 1973 SLT (Sh Ct) 77 . . . . .	108
Wallace v University of St Andrews (1904) 6 F 1093 . . . . .	126
Wallace-Martinez v Nisbet [2024] SAC (Civ) 4, 2024 SLT (SAC) 41 . . . . .	126, 147
Wallace-Martinez v Nisbet [2023] SC EDIN 9, 2023 GWD 10-105 . . . . .	51, 121, 122–26, 145, 146, 147, 204
Walton Bros v Magistrates of Glasgow (1876) 3 R 1130 . . . . .	104
Wood v Capita Insurance [2017] AC 1173, [2017] UKSC 24 . . . . .	31
Wood v Johnston 2019 GWD 24-382 . . . . .	40
Young v McKellar 1909 SC 1340 . . . . .	184

❖ **PART I** ❖  
**CASES**



# CASES

## TENEMENTS, DEVELOPMENTS AND FACTORS

### (1) **EMC Letting Ltd v Brotherton Estate Ltd** 21 August 2023, Forfar Sheriff Court

In terms of the titles, the owners of each of four flats in a tenement were liable for a quarter share of the expense of repairing and maintaining the roof. In the years since the maintenance burdens were imposed, the original roof had been largely replaced by the construction of dormer windows. A dispute having arisen among the owners of the flats as to liability for maintenance of the dormers, it was held (i) that the dormers were such a major change in the roof that they fell outside the maintenance burdens, but (ii) that, in principle, each owner was liable to contribute to the cost of maintenance by virtue of the Tenement Management Scheme. See **Commentary** p 140.

### (2) **Richardson v Residential Management Group Scotland Ltd** [2023] UT 18, 2023 GWD 27-228

Disputes between property factors and those who own the houses they factor tend to turn on two main topics. One is the money owed or said to be owed by the home-owners to the factors in respect of administration, insurance, repairs and so on. The other is the performance of the factors and whether, in particular, it complies with the standards set out in the statutory Property Factors Code of Conduct. (For the latest version, from 2021, see <[www.gov.scot/publications/code-of-conduct-for-property-factors-2021/](http://www.gov.scot/publications/code-of-conduct-for-property-factors-2021/)>.) Where such disputes spill over into litigation, jurisdiction is divided. An action for payment must be raised in the sheriff court. Questions as to the performance by factors are matters for the First-tier Tribunal. One unhappy result of this jurisdictional divide is that there can be parallel cases running in both forums.

That was the position in *Richardson v Residential Management Group Scotland Ltd*. Property factors sought payment of certain charges said to be due by a group of home-owners in a block of flats which they factored at Clyde Street, Glasgow. That was an action in the sheriff court. At the same time the home-owners were applying to the First-tier Tribunal for a ruling in respect of certain alleged failings by the factors, notably a failure to provide information on year-end deficit charges, a failure to respond to complaints and concerns raised by the owners, and failures in respect of accounting statements.

As part of their application, the home-owners asked the First-tier Tribunal to determine the final amount that they owed to the property factors. This was by way of killing two birds with the one stone: as well as adjudicating on the factors' conduct, the Tribunal was also being asked to settle once and for all how much money was still owed to the factor. Yet however sensible this might have seemed to the home-owners, it was something which, quite plainly, was beyond the power of the First-tier Tribunal. The Tribunal's jurisdiction is delineated and circumscribed by s 17 of the Property Factors (Scotland) Act 2011. It can adjudicate on two matters only. One is whether a factor has failed to carry out the factor's duties in respect of management of the common parts and areas. The other is whether a factor has failed to comply with the Property Factors Code of Conduct. Both matters are concerned with the performance of the factor. They do not touch at all on the question of obligations which might be owed by the home-owners. This narrow focus is reflected in the remedies which, under ss 19 and 20 of the Act, the First-tier Tribunal is able to grant. The Tribunal can order a factor to carry out certain actions (such as providing information or carrying out maintenance). In addition, or instead, it can order the factor to make such payment to the home-owners as the Tribunal considers reasonable. The procedural form for making such an order is known as a 'property factor enforcement order' (a 'PFEO'). There is no power to order payment or other performance on the part of the home-owners.

In the light of these clear jurisdictional rules, the First-tier Tribunal in *Richardson* declined, as it was bound to, to consider the question of how much money was still owed to the factors by the home-owners. The home-owners appealed to the Upper Tribunal, but without success.

In the course of its judgment, at para 15, the Upper Tribunal (Sheriff Tony Kelly) touched on the power of the Tribunal to order a payment to be made by the factor to the home-owners, but would not be drawn on the nature or purpose of such an order:

The power to make an order for payment to the homeowner 'as the First Tier Tribunal considers reasonable' must also be seen in light of the jurisdiction the FTS enjoys in connection with an application such as this. There must exist a nexus between the power to order payment and the matters which may be brought before the FTS for a decision. That is an alleged failure to carry out property factor duties or compliance with the property factor code of conduct. In the course of the hearing, the sum of money to be awarded against the property factor for payment to the homeowner was described as a compensatory payment. It is not described as such in the 2011 Act. Whatever the nature of that payment may be, the power to order payment of a reasonable sum to the homeowner must be related to the subject matter of the application before the FTS.

### **(3) Garcia Lopez de la Torre v Aberdeen City Council [2023] UT 29, 2023 Hous LR 92**

Aberdeen Council factored the appellant's flat. As factors, the Council instructed contractors to replace the roof. The work appears to have been done badly. At

any rate there were leaks which caused extensive damage to the appellant's flat. He telephoned the Council on a few occasions to report the water ingress but these calls were neither recorded nor acted on by Council staff. The appellant applied to the First-tier Tribunal arguing, among other points, that the Council was in breach of s 6.9 of the Property Factors Code of Conduct. This provided, in respect of the property factor, that:

You must pursue the contractor or supplier to remedy the defects in any inadequate work or service provided. If appropriate, you should obtain a collateral warranty from the contractor.

This was the original version of the Code of Conduct, dating from 2012; the equivalent provision in the current Code of Conduct, from 2021, is s 6.12.

The First-tier Tribunal was not persuaded that a breach had occurred. The appellant had failed to establish a sufficient link between the water ingress and the new roof. Nor was the Tribunal satisfied that the Council was aware that the roof might be defective.

The decision was appealed to the Upper Tribunal. In finding for the appellant, Lord Duthie said this (at para 9):

In my opinion, the FTS erred. It was not necessary for the Appellant to demonstrate to any particular standard a causal link between the roofing works and the water ingress to trigger the Council's obligation to contact contractors: in circumstances where the roof had recently been replaced and there was apparently water ingress, it was sufficient that the Appellant simply raise the issue with the Council, which he did. Having accepted that the Appellant raised the issue with the Council, it is not open to the Council to feign ignorance of such potential defects.

## REAL BURDENS

### **(4) Royal London Mutual Insurance Society Ltd v Chisholm Hunter Ltd [2023] CSIH 29, 2024 SC 17, 2023 SLT 935**

This began as an application to the Lands Tribunal under s 90(1)(a)(ii) of the Title Conditions (Scotland) Act 2003 for a determination that maintenance burdens purporting to affect 28 Buchanan Street, Glasgow were invalid and unenforceable as real burdens. The applicant was the owner of the property, and the burdens were imposed in a disposition which had been granted and recorded in 1954. As 28 Buchanan Street was part of a tenement (Argyll Chambers), a finding of invalidity would result in maintenance being governed by the Tenement Management Scheme (set out in schedule 1 to the Tenements (Scotland) Act 2004) and not by the burdens in the titles. That would favour the applicant, whose liability under the real burdens was considerably in excess of its share of the floor area (the basis of liability under the TMS). The application was opposed by the owners of five of the other units in the tenement.

In support of its case that the burdens were invalid, the applicant argued: (i) that the burdened property – being the subjects conveyed by the 1954 disposition – was insufficiently described, (ii) that the burdens were too unclear to be

enforced, and (iii) that the apportionment of liability for repairs, which was by assessed rental, was uncertain and unworkable in respect that the boundaries of the units had changed since 1954 and the valuation roll did not provide a ready answer as to liability.

The application failed: see 2022 GWD 30-439 (*Conveyancing 2022 Case (7)*). The applicant has now appealed to the Inner House but without success. In refusing the appeal, the First Division indicated ‘that, with a burden of repair and maintenance of common parts, the court would be inclined to look more favourably on a construction which was, as this one appears to have been, workable’ (para 28). See **Commentary** p 169.

### **(5) Carleton, Applicants 2023 SLT (Lands Tr) 91**

One of the innovations of the Title Conditions (Scotland) Act 2003 was to give the Lands Tribunal jurisdiction to determine any question as to the validity, applicability or enforceability of real burdens: see s 90(1)(a)(ii). The main idea behind this was to add to the options available to those whose property was subject to real burdens. Such persons could apply for the variation or discharge of burdens, as before. Additionally or alternatively, if they thought that the burdens were invalid or unenforceable, they could apply for a determination to that effect. This explains why applications under s 90(1)(a)(ii) are restricted to those who are affected by real burdens, ie to burdened proprietors. Furthermore, the Lands Tribunal has a discretion, under s 90(12), to decline to give a determination at all. The explanation for this discretion given by the body that devised it, the Scottish Law Commission (*Report No 181 on Real Burdens* (2000) 398), was that:

Applications under paragraph (a)(ii) of subsection (1) (for a ruling on validity etc) will often be accompanied by applications under paragraph (a)(i) (for discharge). Where they do not, the matter could as well be disposed of by the ordinary courts, and the Tribunal is given a discretion ... to decline jurisdiction.

It was this discretion to decline that was tested in the present case. The applicants owned one of a number of houses that were subject to the same use restrictions imposed as real burdens. As the burdens were mutually enforceable, the applicants were both benefited and burdened proprietors. But their interest in the matter was not in their capacity as burdened proprietors – they had no wish to have the burdens varied or discharged – but in their capacity as benefited proprietors. Their real target seemed to be neighbours who were using their house for short-term lets, in breach of the burdens. Accordingly, they sought a determination from the Tribunal, not that the burdens were invalid (as is usually the case with applications under s 90(1)(a)(ii)) but that, on the contrary, they were valid and enforceable.

The Tribunal exercised its discretion to decline jurisdiction. This was partly because it thought that, while the applicants were burdened proprietors (as required by s 90(1)(a)(ii)), they were in substance benefited proprietors so far as

the reasons for the application were concerned. But it was partly too because, in the absence of any indication that validity was disputed by the other proprietors in the development, the question was merely hypothetical, and courts are unwilling to determine hypothetical questions. As Lord Justice-Clerk Thomson said in *Macnaughten v Macnaughten's Trustees* 1953 SC 387 at 392:

Our Courts have consistently acted on the view that it is their function in the ordinary run of contentious litigation to decide only live, practical questions, and that they have no concern with hypothetical, premature or academic questions, nor do they exist to advise litigants as to the policy which they should adopt in the ordering of their affairs. The Courts are neither a debating club nor an advisory bureau.

## DEVELOPMENT MANAGEMENT SCHEME

### **(6) Marshall v Granton Homes Ltd 2023 GWD 44-364, Lands Tribunal**

The default rules of the Development Management Scheme ('DMS') are set out in schedule 1 to the Title Conditions (Scotland) Act 2003 (Development Management Scheme) Order 2009, SI 2009/729. For the most part, these can be added to or varied by the deed (the 'deed of application') by which the DMS is applied to a particular development. DMS rules, whether in their default or varied form, resemble real burdens and are subject to many of the same statutory provisions. At the margins, however, the extent of the resemblance may be unclear. In the present case the Lands Tribunal had to determine whether the four-corners rule – the rule that a real burden must be set out within the four corners of the constitutive deed and that recourse to extrinsic material is impermissible – applied to DMS rules. The Tribunal's conclusion was that it probably did. See **Commentary** p 160.

Another aspect of this case is digested as Case (16) below.

## SERVITUDES

### **(7) MacNab v Highland Council [2023] CSOH 59, 2023 GWD 35-287**

In the 1990s, as part of a programme of upgrading the A862 between Maryburgh and Dingwall, Highland Council made a compulsory purchase order in respect of various areas of land. These included (i) a section of field which formed part of Kildun Farm which belonged to a Mrs MacNab, the mother of the present pursuer, and which, by the time of the litigation, belonged to the pursuer, and (ii) a track which belonged to a third party. Transfer of the field was carried out by a disposition by Mrs MacNab in favour of the Council recorded in the Register of Sasines on 2 August 2000. Transfer of the track was by a general vesting declaration recorded two years later, on 14 October 2002. The track, now upgraded by the Council to a road, provided the means of access from the pursuer's field to the A862. As the road was not made up to the standards

needed for adoption – it had a thin surface, suitable only for light traffic – it remained private.

A dispute arose as to the extent of the pursuer's right to use the access road. No express servitude of way in respect of the road had ever been granted. The pursuer, however, claimed, and the Council accepted, that a servitude of way had been granted by implication. The only dispute was as to its extent. The Council's position was that the servitude was restricted to the type of traffic for which a previous road, which the access road now replaced, had been used, that is to say for agricultural traffic. The pursuer, however, sought declarator of a servitude right of unrestricted pedestrian and vehicular access. The commercial reason underlying the litigation seems to have been the grant of planning permission to the pursuer for a tractor retail and servicing development on his land.

Following a proof, the Lord Ordinary (Lord Harrower) was not satisfied that the evidence supported the position of the pursuer, whether in relation to what the parties were said to have agreed or, using the test for implied servitudes, in relation to what was reasonably necessary for the enjoyment of the pursuer's field. More than that, the Lord Ordinary doubted whether the circumstances were such as to give rise to the implication of a servitude at all (paras 99–105). In that respect he was surely correct. In order for a servitude to be implied, there must necessarily be a split-off conveyance in respect of which the implication can arise. That could only be the disposition by Mrs MacNab to the Council of part of the field. But the possibilities here for implication were limited. It would certainly have been possible, depending on the circumstances, for a servitude to be implied either over the land Mrs MacNab was retaining (servitude by implied grant) or over the land she was disposing (a servitude by implied reservation). What was not possible was an implied servitude over quite different land – and land which, at the relevant time, actually belonged to neither of the parties to the deed. So the argument based on implied servitude was fundamentally flawed.

A different argument advanced by the pursuer was to say that a servitude was conferred by the very act of registering his title to Kildun Farm in the Land Register. The entry on the A (property) section of the title sheet (ROS5963) included a right of 'access to and egress from the farm and lands of Kildun by means of all present accesses including that between the points lettered E and F on the said map'. Plausibly, the lettering referred to the private road to the A862 although the cadastral map did not show the lettering. Assuming that to be the case, said the pursuer, then the very act of registering created the servitude even in the absence of an underlying title. This was because registration took place in 2005 and hence under the Land Registration (Scotland) Act 1979; and by virtue of s 3(1)(a) of that Act there was a 'Midas touch', in terms of which registration validated the right which was being registered. (For this argument as it applied to servitudes, see *Conveyancing 2011* pp 98–102.) In the view of the Lord Ordinary, however, this did nothing to strengthen the argument that the pursuer held an unrestricted servitude as opposed to a servitude limited to agricultural traffic: 'The Land Register should not be interpreted as enlarging the scope of any rights of access that he already had, and I have already held that any servitude right

of access down the access road is not so extensive as to amount to unrestricted right of pedestrian and vehicular access' (para 98).

The pursuer also sought to argue that, back in the 1990s, a right to use the road for all traffic had been agreed with the Council as a matter of contract. That argument failed on the evidence.

Finally, the pursuer asserted that the road was subject to a public right of way. This argument failed as well. It is considered in more detail as Case (13) below.

Yet another aspect of this case is digested as Case (60) below. We understand that the decision has been appealed.

**(8) Logan v Irons**  
**[2023] SAC (Civ) 9, 2023 SLT (SAC) 152**

In 1987 an express servitude of aqueduct was created over a property known as 'Beauty's Land' in favour of another property known as 'The Auld Kirk'. Subsequently, in 1994, the owner of The Auld Kirk acquired Beauty's Land. This combined ownership lasted until 2007, when a loan secured on The Auld Kirk was called up and the property was sold by the heritable creditor. In this action the owner of The Auld Kirk sought declarator that The Auld Kirk had a servitude of aqueduct over Beauty's Land. The action was defended by the owner of Beauty's Land.

After a debate it was held (i) that the original servitude was extinguished by confusion when the two properties came to be owned by the same person, but (ii) that a new servitude of aqueduct was created by implication in 2007 when a disposition was granted of The Auld Kirk and the properties once again returned to separate ownership. See **Commentary** p 103.

**(9) Walker v Seymour**  
**4 March 2022, Elgin Sheriff Court affd 28 February 2023,**  
**Sheriff Appeal Court**

This dispute concerned the means of access to Braemorrison House, Bishopmill, Elgin. The pursuers owned the central and west wings of the house, the defender the east wing. Access to the pursuers' part of the house was by means of an entrance drive leading from Braemorrison Road. Although the drive was owned by the defender, the pursuers held a servitude of access over it. In the present action the pursuers sought, among other craves, to interdict the defender from 'obstructing, restricting, narrowing, impeding or interfering with the pursuers' heritable right of access for both pedestrians and vehicles' in respect of the entrance drive.

A proof was held as a result of which the sheriff (Peter Grant-Hutchison) found that for about a year beginning in November 2017 the defender deposited and left on the entrance drive a substantial pile of stone, sand and top soil as well as logs and branches. These were by-products of work being carried out to the defender's garden. But they obstructed the pursuers' access, the sheriff found, and were meant to do so.

The sheriff noted that a permanent interdict was not something to be granted lightly. But in the present case the past conduct of the defender gave little assurance that, absent an interdict, acts of obstruction would not recur. 'I take no great assurance', the sheriff said, 'from the fact that the defender having received a letter/initial writ on 23 July 2018 that he eventually gave an undertaking to the Court on 3 October 2018 and that thereafter he removed the blockage at the last possible moment.' Interdict was therefore granted as craved.

The pursuers were less successful with their other craves. We mention one – 'to ordain the defender to remove himself (and all of his moveable goods or property) within the store cupboard located wholly within the pursuers' sole heritable property' – only because it is referred to in the sheriff's judgment, twice, as an action 'had fractum praestandum'. We hope that the term will catch on.

An appeal to the Sheriff Appeal Court was dismissed without a judgment being issued, although the Court made a minor alteration to one of the sheriff's findings-in-fact.

#### **(10) Doolan v Donald [2024] SC LIV 15**

The pursuers and defenders were next-door neighbours, owning and living in houses at, respectively, 46 and 44 Whitburn Road, Bathgate. Access to number 46 was by means of a driveway which formed part of number 44 and over which the owners of number 46 held a servitude of way for pedestrians and vehicles. In the present action the pursuers sought to interdict the defenders from parking on the driveway. At debate, the sheriff rejected the pursuers' argument that they had a right of access at all times over all of the driveway and that, accordingly, it was impermissible for the defenders to park there even if they did so in such a way as to leave room for the pursuers' cars to pass. A proof before answer was allowed but the case was subsequently settled. See **Commentary** p 151.

#### **(11) Ferguson v Gregors 13 December 2021, Falkirk Sheriff Court affd [2023] SAC (Civ) 24, 2023 GWD 30-248**

Mr and Mrs Gregors, and latterly Mrs Gregors alone, owned Wesleymount Farm in Falkirk (their title being registered under title number STG56698). Access to the farm from the public road (Church Road) was by a track which, for its first 3.7 metres, ran across land (the 'access area') which did not belong to the Gregors. This was the only access available and had been used for a large number of years by the Gregors and their predecessors. No formal servitude of way, however, had ever been granted.

Beginning in 1993, the Gregors sold off a number of plots from the Farm, the purchasers of which took access in the same way, ie across the access area. Most recently, in 2016, a sale was made to a Mr and Mrs Fowler of a plot of about a third of an acre. The Fowlers lived in the site on a static home. At one stage their daughter and her six children also lived with them although this was no longer

the case. More recently, they obtained planning permission to form a traveller pitch with one static caravan and one touring caravan. This may – we do not know – have been the event which prompted the present litigation.

The pursuers were a Mr and Mrs Ferguson. They were among those who had acquired a plot from the Gregors, in their case in 2004. In addition, they bought the access area in 2019 (their title being registered under title number STG79893). It was in their capacity as owners of the access area that they raised the present action. In that action they sought (i) interdict against Mrs Gregors from traversing and permitting, authorising or encouraging access across the access area except for normal residential or agricultural uses, (ii) interdict against the Fowlers from traversing the access area, and (iii) interdict against all the defenders from allowing particular types of commercial vehicle to cross the access area. Mrs Gregors counterclaimed for declarator that she had a servitude right of pedestrian and vehicular access across the Fergusons' property.

A proof was held after which the sheriff (Keith O'Mahony) granted a limited interdict against the Fowlers, preventing them from traversing the access area for any purpose in connection with their business or commercial interests or with certain types of vehicle (HGVs, flat-bed vehicles, vehicles with digging and/or lifting equipment, panel vans with or without trailers, with the exception of domestic deliveries and any vehicle used in connection with normal residential use). Interdict against Mrs Gregors was refused. The sheriff also upheld the counterclaim, finding that a servitude of way had been constituted by positive prescription. All parties appealed to the Sheriff Appeal Court but without success (except in relation to expenses).

The main issue was the access being taken by the Fowlers, and this in turn raised one of the most difficult questions in the law of servitudes, namely the extent to which increased use of the servient tenement is permissible. In the case of express servitudes, the permitted usage is determined at the time when the servitude is first created and turns on the words used as interpreted in the context of the facts and circumstances surrounding the creation. In the case of prescriptive servitudes, however, the law is less clear. Probably, the scope of a servitude constituted by prescription is determined largely by the very use which led to its constitution: in other words, future use must be broadly in line with past use, although with a certain degree of flexibility. The rule is thus *tantum praescriptum quantum possessum*. See eg *Paterson v Airdrie and Coatbridge Water Co* (1893) 20 R 370, and D J Cusine and R R M Paisley, *Servitudes and Rights of Way* (1998) para 10.04. There is, however, another view, which is that the prescriptive possession merely establishes the *type* of access right (ie pedestrian or vehicular), and imposes no further restriction on future use which, in the case of a vehicular servitude, could thus involve as many vehicles as the dominant proprietor chose to use. The second view is (or may be) supported by a *dictum* of Lord President Clyde in *Carstairs v Spence* 1924 SC 380 at 387, and by a sheriff court decision which applied that *dictum*: *Church of Scotland General Trustees v Clow* (1995) *Unreported Property Cases from the Sheriff Courts* (eds R R M Paisley and D J Cusine) 429.

The decision in *Ferguson v Gregors* does not contribute to this debate. The sheriff accepted that, following the selling off of plots by the Gregors, the owner

of each plot could, in principle, take the benefit of the access servitude (paras 128 and 160). But this was subject to the rule that the burden of the servitude must not be increased. In that respect, the Fowlers were held to have overstepped the mark (wherever the mark lay – an issue not explored). The evidence at proof was that, since the time when the Fowlers moved in, the number of vehicles using the track had increased from four or five a day to 60 or 70. Some of these vehicles were vans, pick-up trucks and lorries, leading to a suspicion (disputed by the Fowlers) that a business was being conducted on the Fowlers' property. The sheriff summarised the evidence as follows (para 159, and see also finding-in-fact 17):

I am satisfied that since the arrival of the Fowlers in 2016 there has been a significant increase in the number and size of the vehicles crossing the disputed area and the track. The number of vehicles using those areas is in excess of that which were being used during the prescriptive period. That increase has been due to vehicles attending the Fowlers' plot of land.

The purpose of the interdict granted by the sheriff was to check this increase in the number and type of vehicles. The sheriff's conclusions on this matter were not disturbed by the Sheriff Appeal Court (paras 58–59).

One other matter of interest was raised by the case. It was argued on behalf of Mr and Mrs Ferguson that, for the 20 years before the arrival of the Fowlers in 2016, the track had ceased to be used for commercial or agricultural traffic. Hence, they said, the servitude had been extinguished by negative prescription to that extent and so could now be used only for residential vehicles (and pedestrians). The Sheriff Appeal Court decided that this alleged period of non-use was not supported by the evidence; but in any event the Court thought that the law did not recognise partial extinction by prescription in the manner argued for by the Fergusons. See **Commentary** p 108.

### **(12) EH1 Properties Ltd v Maclean [2023] SAC (Civ) 35, 2024 GWD 2-18**

When an area of land at Marybank, Ross and Cromarty, was divided in two back in 1998, the split-off disposition of the plot being disposed ('plot A') reserved to the plot being retained ('plot B') –

a heritable and irredeemable servitude right to instal, if necessary, any part of a private drainage system which may be required for any building which may be erected on the said subjects retained by us as may require to be situated outwith the boundaries of the said subjects retained by us together with a heritable and irredeemable servitude right of access thereto for the maintenance, repair and renewal of the same.

The pursuer (and appellant) was now the owner of plot B and the defenders (and respondents) – four in number who held as trustees for the firm of Angus Maclean – were the owners of plot A.

In or around 2015 the appellant obtained planning permission for the erection of six houses on plot B, on the basis that water from the development would be

drained to an existing watercourse by means of pipes to be installed under plot A. A dispute arose between the parties as to whether this fell within the servitude.

An initial question was whether the servitude had been extinguished by long negative prescription by virtue of s 8 of the Prescription and Limitation (Scotland) Act 1973. It was common ground that the servitude had not so far been exercised. It was also common ground that, unless prescription had been interrupted, the servitude would have been extinguished on 29 December 2018, being 20 years after the creation of the servitude by the recording of the split-off disposition.

It was argued for the appellant that prescription had indeed been interrupted by the raising on 16 August 2018 of the present action to vindicate the servitude. Normally, such a clear example of judicial interruption by the making of a 'relevant claim' (as to which see s 9 of the 1973 Act) would indeed have prevented prescription from running. But there was a problem. The action was raised against two only of the four trustees. Worse than that, they were sued, not as trustees, but as individuals. The background here was that the two persons in question had indeed owned plot A as individuals at one time; but the appellant had apparently overlooked the fact that, as long ago as 2010, they had disposed plot A to themselves and two others as trustees. Either of these mistakes, the Sheriff Appeal Court decided, would have been fatal to the defence of judicial interruption. In respect of the second, on which most weight was placed by the respondents, Sheriff Principal N A Ross (giving the Opinion of the Court) said (at paras 27 and 28) that:

This action was raised against the previous owners, in a personal capacity. As it happened, those two individuals were also trustees. The claim was not raised against the trustees of the Firm of Angus MacLean. Two of those trustees did not receive any claim at all. The true owners of the property were readily ascertainable from public records.

A claim under section 8 requires to be made 'to establish the right' or contest any claim. The individuals who received notice were not convened in their capacity as trustees. They were therefore of no assistance to the appellant in establishing a right. They had, as individuals, no locus to contest, or affirm, any right which the appellant might assert. Were they to attempt to enter appearance to resist his claim, any resulting decree would be of no effect against the true owners of the property who were not called. The claim required to be against the owners. No attempt was made to establish any right against the trust itself, or its trustees.

As the wrong party had been sued (later – too late – the instance was amended to correct this), there had been no 'relevant claim' and no interruption of prescription. Hence the servitude was extinguished on 29 December 2018. It was no longer available to support the drainage proposals of the appellant.

With this decision, the appellant's claim fell away. Nonetheless, the Sheriff Appeal Court offered a view on the other main argument between the parties, namely that assuming the servitude to be valid, the use of plot A in the manner proposed by the appellant failed the test of necessity which was imposed by the servitude. This referred back to the opening words of the servitude: 'a heritable and irredeemable servitude right to instal, if necessary, any part of a private

drainage system which may be required for any building ...'. Given its early position in the sentence, there might seem to be room for argument that the phrase 'if necessary' referred to the need for a private drainage system rather than to the necessity for the particular route chosen by the appellant. But it was apparently accepted by both parties that the necessity concerned the route not the servitude. Following a proof, the sheriff at Inverness (Sara Matheson) had found that the route through plot A was not 'necessary' in the required sense and that other routes were possible: see [2024] SC INV 17; and the Sheriff Appeal Court thought that there would have been no grounds for interfering with that finding. The sheriff had also taken the view that the provision of drainage for 'any' building, read in the context of the surrounding circumstances, meant that the drainage could only be for a single building and not for the six houses planned by the appellant.

## ROADS AND PUBLIC ACCESS RIGHTS

### (13) *MacNab v Highland Council* [2023] CSOH 59, 2023 GWD 35-287

A public right of way can be acquired (i) by use by the public for the 20 years of positive prescription, as set out in the Prescription and Limitation (Scotland) Act 1973 s 3(3); (ii) by grant or 'dedication' by the owner of the road; or (iii) by a special statutory provision. See *Hamilton v Dumfries and Galloway Council (No 2)* [2009] CSIH 13, 2009 SC 277 at paras 38–39 and 56. The first method is the standard one, but the second is also sometimes found, especially where the road was constructed by a local authority. *MacNab v Highland Council* is an example of this second mode of creation although, given that more than 20 years had passed since the formation of the road, it could also have been argued on the basis of positive prescription.

In *MacNab* the pursuer sought a declarator that there was a public right of way for pedestrian and vehicular traffic over an access road constructed by Highland Council in the 1990s as part of its work of upgrading the A862 between Maryburgh and Dingwall. The relevant section of the road, which had not been adopted, led from a farm belonging to the pursuer to the A862. As the road had been acquired and constructed by the Council under statutory authority, so, according to the pursuer, it must be taken as having been dedicated to the public passage of both pedestrians and vehicles (para 73). The Council's position was that the road was for pedestrians and cyclists only, as had been the case with a track which the road replaced (para 77).

After a proof, the Lord Ordinary refused the declarator sought (paras 106–112). 'In my judgment, it was clear on the evidence that the access road was designed to replace the top part of the pre-existing track. There was an abundance of evidence establishing a public right of passage for walkers and cyclists over both the pre-existing track and the access road' (para 109). It was true that the road was also subject to a servitude which permitted vehicular access to the owners of neighbouring properties. 'But there was no evidence of members of

the public generally taking vehicular access down the access road, and, as I have already held, it was certainly not designed and built to facilitate routine vehicular access' (para 111). As the Lord Ordinary pointed out, this view was consistent with s 151(2) of the Roads (Scotland) Act 1984 which distinguished between (a) 'footways', 'cycle tracks' and 'carriageways'. 'From the fact that there is a public right of passage by one specific means, it does not follow, therefore, that there is a public right of passage by some other means, or by all means' (para 111).

Other aspects of this case are digested as Case (7) above and Case (60) below. We understand that the decision has been appealed.

**(14) City of Edinburgh Council v Hogan**  
**[2023] UT 24, 2023 SLT (Tr) 111**

Mr Hogan, an employee of Barclay Viewforth Church in the Bruntsfield area of Edinburgh, received a parking ticket for parking in a paved area of land which lay between Glengyle Terrace and the Church itself. The paved area could only be reached by driving over the pavement, taking care all the while to avoid the fixed litter-bin which lay immediately to the right. The paved area was the sole property of the Church. The case for the parking ticket was that (i) parking restrictions operated in the adjacent streets, and (ii) the paved area, regardless of ownership, was part of those streets. That in turn depended on the proposition that the paved area was a 'road' within the meaning of s 151(1) of the Roads (Scotland) Act 1984, that is to say, that it was 'a way (other than a waterway) over which there is a public right of passage'.

Mr Hogan appealed against the parking ticket. The appeal was successful before the First-tier Tribunal but Edinburgh Council appealed in turn to the Upper Tribunal. Before both tribunals the key issue was seen as being whether the paved area was subject to a 'public right of passage' and was hence a 'road' within the Roads (Scotland) Act 1984. The First-tier Tribunal thought that there was no public right of passage. The decision on that point was reversed by the Upper Tribunal on the basis that a public right of passage was different from and imposed less exacting standards than a public right of way. That view was derived from two previous cases: *Cowie v Strathclyde Regional Council*, 8 July 1986, First Division, unreported, and *Hamilton v Dumfries and Galloway Council* [2006] CSOH 110, 2006 SCLR 839. As Sheriff Colin Dunipace (sitting as the Upper Tribunal) explained (paras 18 and 19):

In considering the foregoing it is important to note that the terms of the legislation make reference to a 'public right of passage' and not a 'public right of way', given that the former involves 'less exacting considerations', as stated in the case of *Cowie v Strathclyde Regional Council* 8 July 1986 (Unreported). This definition was further referred to in the case of *Hamilton v Dumfries and Galloway Council* 2006 SCLR 839, wherein it was stated by Lord Kingarth:

'It is clear from *Cowie v Strathclyde Regional Council* that the definition "involves less exacting consideration than those which govern the existence of a public right of way over private land". In that case it was recognised that although there required to be a "way", since it was well known that roads within the meaning of the Act

include cul-de-sacs and that some existed to provide access to and egress to private property, at least two of the ways for the acquisition of a public right of way – use from end to end on a continuous journey and public termini – were not involved.’

Accordingly it is clear that a public right of passage need not run from one public place to another, and it may provide access to and egress from a private property.

Unhappily, the cases relied on by the Upper Tribunal have long since been overtaken by a later iteration of the same litigation between Brian Hamilton and Dumfries and Galloway Council, namely *Hamilton v Dumfries and Galloway Council (No 2)* [2009] CSIH 13, 2009 SC 277, a decision of the Extra Division in which the judgment was given by Lord Reed. Distinguishing *Cowie v Strathclyde Regional Council*, Lord Reed held that, far from being a new public right with more lenient rules of constitution, a public right of passage in the sense used in the Roads (Scotland) Act 1984 was just another name for a public right of way. It was therefore subject to exactly the same rules of constitution, including the requirement that it lead from one public place to another.

Presumably the decision of the Extra Division in *Hamilton* was not brought to the attention of the Upper Tribunal in *City of Edinburgh Council v Hogan*. If that is correct, it is unfortunate. On the other hand, it might not have changed the decision as to whether a public right of passage existed, because the Upper Tribunal seems to have taken the view that the Church was a public place: ‘I do not understand it to be disputed that the church is an area to which the public have access’ (para 19). Although this view seems to have been reached without consideration of any authority, such authority as does exist rather supports the view that a church, at least if it is the established church (ie the Church of Scotland), is a public place: see D J Cusine and R R M Paisley, *Servitudes and Rights of Way* (1998) para 20.12. Barclay Viewforth Church is a congregation of the Church of Scotland, and its website <[www.barclayviewforth.org.uk/](http://www.barclayviewforth.org.uk/)> states in large letters on its landing page that ‘Everyone is welcome at Barclay Viewforth’.

As it happens, the appeal was refused by the Upper Tribunal but for a different reason. All parking tickets issued by Edinburgh Council in the past in respect of the paved area in question had been withdrawn when they were queried. The result, said the First-tier Tribunal, was that Mr Hogan and other employees of the Church had a legitimate expectation that the Council would not enforce any parking ticket that was issued. Although the term was not used, this was in effect an application of the doctrine of personal bar. The Upper Tribunal saw no reason to interfere with that conclusion.

## ELECTRONIC COMMUNICATIONS CODE

### (15) **Marks & Spencer plc v Cornerstone Telecommunications Infrastructure Ltd** [2023] CSIH 24, 2023 SLT 661

This is a decision in respect of an application under the Electronic Communications Code, which is set out in schedule 3A to the Communications Act 2003. The

purpose of the Code is to support telecommunications companies ('operators') in the installation and maintenance of appropriate apparatus. There is provision for entering into voluntary arrangements with the owners or occupiers of land for the conferral, against compensation, of the 'Code rights' set out in para 3 of the Code. Such rights, once conferred, are real rights and run with the land. In the event that agreement cannot be reached, an application may be made by the operator to the sheriff court or Lands Tribunal for the compulsory conferral of Code rights. This was such an application.

The applicant, Cornerstone Telecommunications Infrastructure Ltd, was an infrastructure provider hosting apparatus belonging to others. Although it was an 'operator' in the sense of the Code, it did not itself operate a telecoms network, and instead shared its rights with others who did operate such a network. Cornerstone's 'passive' infrastructure was therefore available for the 'active' equipment of the sharer. At least one sharer was already in the frame: Telefonica, which was a 50% owner of Cornerstone. The application concerned the provision of telecommunications systems in the centre of Edinburgh. Hitherto Telefonica's equipment had been placed on the roof of the Ernst & Young building at 10 George Street. That arrangement having come to an end, Cornerstone and Telefonica had chosen the (flat) roof of Marks & Spencer at 59/60 Princes Street as a suitable new site. The proposal was to place equipment at the rear of the roof so that it would not be visible from Princes Street.

Before an agreement can be imposed on an unwilling party (in this case, Marks & Spencer), two conditions must be met (para 21 of the Code). First, the prejudice caused thereby must be capable of being adequately compensated by money. Secondly, the public benefit must outweigh the prejudice to the affected person (in this case, Marks & Spencer).

In a decision issued on 6 July 2021 the Lands Tribunal granted the application and issued a draft agreement: 2022 SLT (Lands Tr) 25 (*Conveyancing 2021 Case (13)*). A further hearing was held on 13 July 2022 to resolve two outstanding points in relation to the draft. It was only when, having heard submissions, the Tribunal returned to give its decision on these points that counsel for Marks & Spencer raised an additional point. In brief, this concerned the exclusion zones that would exist to limit exposure to electro-magnetic fields created by the telecommunications apparatus. Under rules developed by the International Commission on Non-Ionizing Radiation Protection ('ICNIRP') and adopted by the UK, two separate exclusion zones existed, one for individuals exposed as part of their work ('occupational' exclusion zones) and another, covering a larger area, for the public at large ('public' exclusion zones). The latter would exclude access to the roof at 59/60 Princes Street. And that in turn would mean, counsel argued, that Marks & Spencer staff, being for this purpose members of the public, would be unable to access the roof in order to maintain such of their own equipment as was situated there.

The Tribunal rejected this argument as having been made too late and that ruling has now been confirmed on appeal to the Inner House. As the Lord Justice-Clerk (Lady Dorrian) explained (para 21):

In the whole circumstances we are satisfied that the Tribunal did not err in law and that the appeal must be refused. In its opinion of 6 July 2021 the Tribunal duly decided all of the ICNIRP matters which had been put in issue. It was fully entitled to decline to entertain the new issue which the appellant sought to introduce belatedly. If it had agreed to permit the late raising of the new issue it is likely that the Tribunal would have had to hear further evidence and submissions, which would have delayed the making of an order. That would have been undesirable, firstly because of the Tribunal's obligation to determine applications within 6 months of receipt (Electronic Communications and Wireless Telegraphy Regulations 2011, SI 2011/1210, reg 3(2)), and secondly, because it would have penalised the respondent for the appellant's failure.

## VARIATION ETC OF TITLE CONDITIONS

### (16) **Marshall v Granton Homes Ltd** 2023 GWD 44-364, Lands Tribunal

A residential development in Peebles was governed by the statutory Development Management Scheme, as applied and varied by a deed of conditions. One of the rules added by the deed of conditions gave the developer, Granton Homes Ltd, a 'golden' vote in all decisions made by the owners' association. This was rule 11.5:

#### **11.5 Granton to have over-riding vote**

For so long as Granton owns any Unit in the Development or any part of the Development, the final decision on any matter affecting the Development will remain with Granton.

The development was envisaged as proceeding in two phases, of which the first was completed and the houses sold and disposed. The owners of a number of those houses applied to the Lands Tribunal for the discharge of rule 11.5. The application was refused. See **Commentary** p 155.

Another aspect of this case is digested as Case (6) above.

## LAND REGISTRATION

### (17) **Burns v Keeper of the Registers of Scotland** 2024 GWD 1-8, Lands Tribunal

This is a textbook example of how to unscramble historic inaccuracies on the Land Register. Numbers 77 and 79 Caledonian Road, Stevenston in Ayrshire were neighbouring houses built by Persimmon Homes Ltd in 2009. On either side of the common boundary was a driveway for each of the houses. At the time of first registration in 2009, the Keeper mixed up the deed plans and finished up putting both driveways into the title sheet of number 79 (AYR88193). This does not seem to have caused problems for the first owners of the two houses: notwithstanding the titles, each continued to use his 'own' driveway. But now that the houses had

changed hands, the new owner of number 79 had begun to assert his rights in accordance with his title by parking in the driveway of number 77 and obtaining an interim interdict against the owner of number 77 from parking there herself. This led to the present application to the Lands Tribunal by the owner of number 77 in which she sought a determination under s 82 of the Land Registration etc (Scotland) Act 2012 that the Land Register was inaccurate in showing 'her' driveway as part of the title to number 79. The application was initially opposed by the owner of number 79 but he later withdrew from the proceedings.

Though intricate, the applicable law is straightforward and, it is to be hoped, increasingly familiar. When, back in 2009, the driveway for number 77 was, by mistake, included in the title sheet of number 79, the effect was to confer ownership on the registered owner of number 79. This was due to the Midas touch of the Land Registration (Scotland) Act 1979 s 3(1)(a): everything (or almost everything) that was registered turned into valid. But while ownership thus lay with the owner of number 79, the Register was inaccurate in showing the driveway as part of number 79. In principle, the Register could therefore be rectified; but, by s 9(3)(a) of the 1979 Act, rectification was not normally possible against a proprietor in possession. At first there was some dispute as to who had possessed the driveway, but eventually it appears to have been conceded by the current owner of number 79 that possession had always been with the owner of number 77, as one might expect. This the Lands Tribunal so held.

The legal position changed on 8 December 2014, being the day (the 'designated day') on which the 1979 Act gave way to the 2012 Act. Transitional provisions set out in schedule 4 to the 2012 Act produced a final determination in respect of all inaccuracies on the Register which had existed immediately before the designated day. There were two possibilities. Either the mistake was reversed by schedule 4 (so that the legal position was restored to what it ought to be), or the mistake was made permanent and ceased to be an inaccuracy on the Register. Which possibility applied turned on whether, immediately before the designated day, the Keeper could have rectified the inaccuracy. If rectification would have been possible, then, on the designated day itself, the mistake was reversed as a matter of law (although, for the time being, the inaccuracy would remain on the Register); if rectification would not have been possible, the mistake was made permanent.

Which of these possibilities applied in the present case? That depended on who was in possession on 7 December 2014 – the day on which the question of rectification was to be tested. There is a statutory presumption of possession having been with the registered proprietor, ie in this case with the owner of number 79 (2012 Act sch 4 para 18), but the presumption can be rebutted by contrary evidence. In the present case, as already mentioned, it came to be accepted that possession had been with the owner of number 77. Hence the Register could have been rectified on 7 December 2014. Hence ownership of the driveway was restored to the owner of number 77 on the designated day. Hence, concluded the Lands Tribunal, the Register was inaccurate now in showing the driveway as part of number 79 and so fell to be rectified. The application by the owner of number 77 was therefore granted.

**(18) Graham v Keeper of the Registers of Scotland**  
**16 November 2023, Lands Tribunal**

This raised similar issues to the previous case. The title sheet of a shop in a tenement mistakenly included an exclusive right to the solum whereas the disposition inducing first registration conveyed only a right in common. First registration having occurred under the Land Registration (Scotland) Act 1979, the question of whether the mistake could now be put right by rectification turned on whether, immediately before the designated day, the shop proprietor had been in possession of the solum. It was held that possession of the solum had been shared with (at least) the proprietor of an upper flat and that, accordingly, the entirety of the solum had not been possessed. The title sheet, therefore, remained inaccurate today and so now fell to be rectified. See **Commentary** p 201.

## AGRICULTURAL LEASES

**(19) Roxburghe Second Discretionary Trust, Trustees v Batchelor**  
**[2023] CSIH 41, 2023 SLT 1378**

This was an appeal to the Inner House from the Land Court under s 88 of the Agricultural Holdings (Scotland) Act 2003. While we do not normally cover agricultural holdings, the case is mentioned here because it was decided on ordinary principles of contractual interpretation.

Clause 6 of an agricultural lease provided: ‘The Tenant shall pay the [Landlord] one-half of the cost of maintaining the fences, gates and gateposts ... on the [farm].’ The lease was stated to be subject to the Regulations and Conditions for the Let of Farms on the Roxburghe Estates. Regulation XXXVI of the Regulations and Conditions provided that: ‘The Tenant shall enter into a formal Lease containing the above Conditions and any other Conditions agreed on ...’. Regulation VIII provided that the tenant would be bound to maintain the fixed equipment on the farm.

The landlord sought to remove the tenant for failing to carry out repairs to fences and thus breaching the terms of the Regulations incorporated into the lease. The tenant accepted that some repairs were needed and that he had to pay half the cost, but he disputed that he had to carry out the repairs himself.

The Land Court held that the only tenable interpretation of clause 6 of the lease was that the tenant had to pay half the cost once the repairs were carried out by the landlords. Thus, regulation VIII had to be read subject to clause 6.

The appeal was refused by the Inner House. It held that the lease had to be construed by reference to ‘the well-established rules on the interpretation of contracts’ (para 23). These had been summarised in *Lagan Construction Group Ltd (in administration) v Scots Roads Partnership Project Ltd* [2023] CSIH 28, 2023 GWD 29-245 at para 10 by Lord President Carloway, citing *Paterson v Angeline (Scotland) Ltd* [2022] CSIH 33, 2022 SC 240 at para 32, also by Lord President Carloway and in turn citing other cases, notably *Arnold v Britton* [2015] UKSC 36, [2015] AC 1610 at para 15 per Lord Neuberger. The court should identify what the parties

have agreed, not what it thinks common sense may say. The intention of clause 6 must have been to modify regulation VIII, as allowed by regulation XXXVI. The landlords' interpretation did not make sense as it required the tenant to maintain the fences, gates and gateposts and to pay the landlords half the cost of this.

The Inner House stated that it was not necessary to decide what farming common sense would say here, but could not resist commenting on the matter. The tenant at the time when the lease was agreed was the factor on the estate. It was therefore easier for maintenance work to be done by estate workers and then charge the tenant for his half share of the bill, than to get the tenant to carry out the maintenance himself.

## COMMERCIAL LEASES

### (20) *Lujo Properties Ltd v Gruve Ltd* [2023] SC GLA 3, 2023 SLT (Sh Ct) 31, 2023 SCLR 373

The service of a pre-irritancy notice was held to be (i) effective under s 4 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 but (ii) ineffective under the provisions of the lease. It was further held that to irritate the lease in the circumstances would be oppressive. See **Commentary** p 110.

### (21) *Ashtenne Caledonia Ltd v Saleem* [2023] CSOH 18, 2023 Hous LR 37

This and the next two cases are related dilapidations actions raised by the landlord of warehouses at Nethermains Industrial Estate in Kilwinning. The landlord had made several objections in relation to the surveyor's draft report. At a debate in the Outer House, Lord Harrower repelled all of these, except in so far as agreement had been reached with the tenant in relation to them.

The first objection was that the surveyor had made a mistake by considering two authorities which were not within his remit – *Proudfoot v Hart* (1890) 25 QBD 42 and a mysterious and unnamed Scottish textbook – in relation to deciding a point of law on the interpretation of the repairing obligation, and should have sought directions from the court. Lord Harrower held that the wording of the repairing covenant was typical of that used throughout the UK and that the reporter had been entitled to look at both authorities. On the facts, the reporter was not required to seek directions, and the interpretation which he had applied was in any case consistent with that of the landlord.

The second objection was that the reporter had applied the wrong test and had conflated an obligation to 'keep, maintain and repair, renew, rebuild and reinstate' the premises 'in good and substantial condition and repair' with a 'simple' repairing obligation. Lord Harrower disagreed. It was clear from reading the report that the reporter regarded the tenant as being responsible for dealing with pre-existing disrepair.

The third objection was that the reporter had erred in law in not seeking evidence in relation to a corrugated cement roof-liner being in disrepair. Lord

Harrower noted that the reporter had made his inspection guided by the surveyors for the two parties and received submissions from them. He had to decide matters in dispute on the basis of the information given to him. There had been no error in law.

**(22) Ashtenne Caledonia Ltd v Denny Enterprises Int'l Ltd**  
**[2023] CSOH 19, 2023 GWD 9-98**

This is the second of the three related dilapidations actions. The parties agreed that the issues were identical to the first of the three actions. The case was therefore decided by Lord Harrower on the same basis.

**(23) Ashtenne Caledonia Ltd v Denny Enterprises Int'l Ltd (No 2)**  
**[2023] CSOH 20, 2023 GWD 9-99**

This is the third of the three related dilapidations actions. For the most part the issues were identical to those in the first of the three actions and so decided by Lord Harrower on the same basis. One additional objection by the landlord had to be considered. The landlord argued that if the tenant had complied with the repairing obligation under the lease it would have required to arrange a refurbishment asbestos survey. As the tenant had not done this the landlord had suffered loss which the tenant was liable to compensate.

The reporter had agreed that a survey was needed. He stated, however, that the submission which the landlord had made in relation to asbestos concerned the tenant not managing risks from it on a day-to-day basis, and not refurbishment work at the end of the lease. Lord Harrower agreed with the reporter and repelled the objection.

**(24) HFD Management Services LLP Family Pension Trust,**  
**Trustees v Apleona HSG Ltd**  
**[2023] CSOH 15, 2023 Hous LR 30**

The pursuers were the landlords and the defender the tenant of premises at Hamilton International Park, Blantyre. The lease came to an end on 25 September 2020. This was a dilapidations action. The landlords argued that the tenant had failed to comply with the repairing obligations under the lease, as well as to reinstate the property to the condition it was in before the tenant had made alterations to it.

The action was raised as a commercial action in July 2021. The landlords subsequently carried out some of the work listed in the schedule of dilapidations which had been served. The cost was stated to be £125,605.21 with the cost of the remaining works being said to be £155,637.49 (both sums exclusive of VAT). The landlords sought payment of both sums.

At an early stage in the action the parties agreed that a reporter should consider factual issues arising from the schedule including the extent of the

disrepair as of 25 September 2020 and the costs of putting this right. A surveyor was duly identified to perform this task. The court agreed to the appointment on the basis that this would enable the action to proceed more speedily. It was meantime sisted. In the event, there were considerable delays in instructing the reporter and agreeing his fee. This was described by Lord Braid as ‘regrettable’ given that ‘[c]ommercial actions should proceed quickly and efficiently’ (para 35).

In the words of Lord Braid, receipt of the report ‘fanned the flames of the dispute’ (para 5) as the parties disagreed as to whether the reporter had complied with his remit and whether the case should be remitted back to him for further work. The landlords argued that, instead of finding a larger part of their claim effectively not proved, the reporter should have adopted a more inquisitorial role and sought further evidence. The tenant disagreed.

Lord Braid held that in general terms it was a matter for the reporter to decide whether more evidence was needed in relation to particular issues. Nevertheless, he had failed to exhaust his remit in certain respects. A distinction was to be drawn between (i) where the reporter could not find evidence of a defect at a particular location, and (ii) where the reporter made no comment because he had been unable to discover the location in respect of which the claim was being made.

Sometimes the reporter had confirmed that remedial works were required but not whether the cost claimed was reasonable or what a reasonable cost would be. The reporter had also answered a question in relation to the timescale by saying that he had insufficient information to give a view. In these cases the reporter had not exhausted his remit and the court directed that he deal with these matters, if necessary by seeking further evidence. Lord Braid, however, regarded the parties as bearing some responsibility for the reporter’s mistakes: ‘If parties wish a reporter to be under a duty to make further enquiries, they should say so in the joint remit. If not, it is incumbent upon them to ensure that the reporter is provided with sufficient evidence to prove the facts they must establish’ (para 34).

**(25) Pretoria Energy Co (Chittering) Ltd v Blankney Estates Ltd**  
**[2023] EWCA Civ 482, [2023] L & TR 28**

This English case considered whether a binding agreement to lease land had been created. Blankney Estates Ltd (‘Blankney’) owned a site comprising a former flax factory and adjoining field at Heath Farm, Metheringham Heath, Lincolnshire. Pretoria Energy Co (Chittering) Ltd (‘Pretoria Energy’) was seeking premises to develop an anaerobic digestion plant (that is to say, a facility where plant and animal materials are broken down into a methane-rich gas which can be used as a renewable energy source and also material which can be used as a fertiliser). The Heath Farm site was identified as being suitable.

Following negotiations and several drafts, the parties signed a ‘Heads of Terms of Proposed Agreement’ on 27 November 2013. This set out that the lease would be for 25 years, with a value (ie rent) of £150,000 per annum paid on quarter

days with an annual review based on the retail price index. The final clause of the agreement, which was headed 'Acceptance', stated:

These Heads of Terms of Agreement are agreed and signed on the understanding that the formal agreement will be drawn up within 1 month from planning consent being achieved and subject to the consents and easements being obtained. Furthermore, it is agreed that Blankney Estates and Pretoria Energy recognise that the arrangements being negotiated are exclusive to both parties until the 31<sup>st</sup> July 2014 and thereby agree not to enter into negotiations with third parties to the detriment of the terms contained herein.

On the basis of this clause, the parties accepted that there was a binding contract in respect of what the court called a 'lockout agreement', ie that there had to be no negotiations with others prior to 31 July 2014 which would be adverse to the proposed agreement being completed.

Planning permission was obtained on 11 June 2014 but differences developed between the parties. Blankney failed to grant the lease and, once 31 July 2014 had passed, entered into an arrangement with a third party in relation to the site.

Pretoria Energy raised proceedings against Blankney arguing that the Heads of Terms document included a binding agreement to grant a lease. In the High Court, the action was unsuccessful. Joanne Wicks KC, sitting as a judge of the Business and Property Courts, held that there was no such binding agreement: see [2022] EWHC 1467 (Ch). The principal reason was the incompatibility of this conclusion with the lockout agreement.

The Court of Appeal agreed with this reasoning and the appeal was refused. It held that if there had been a binding agreement for a lease, the lockout agreement would have been unnecessary. Furthermore, the Heads of Terms were silent on many important matters which would be expected to be found in a binding agreement, such as the 'initial construction of the [new] plant, repair, insurance, alienation, use, compliance with planning and environmental controls, alterations and improvements, forfeiture on breach of covenant and so on' (para 37 per Lord Justice Lewison). A draft lease which had been prepared as part of the negotiations by Pretoria Energy's solicitors ran to more than 40 pages. Another important factor was that the time from which the lease was to begin was uncertain. This was 'a very powerful objective indicator that the parties did not intend to be bound' (para 57 per Lord Justice Lewison).

A Scottish court would doubtless have reached the same conclusion as the Court of Appeal that there was no binding agreement to grant a lease. It would also, however, have considered the cardinal elements traditionally required for a lease: parties, property, rent and duration. Without consensus on these it is difficult to show a binding agreement to grant a lease. There is, however, some flexibility here. For example, in the absence of an agreed duration a term of one year will be implied where the tenant has taken up possession: *Gray v University of Edinburgh* 1962 SC 157. In the current case the Heads of Terms had stipulated a duration of 25 years although not a start date (or ish). The failure to do so would

probably not of itself have been fatal to a binding agreement to grant the lease, but the overall facts would.

**(26) Sara & Hossein Asset Holdings Ltd v Blacks Outdoor Retail Ltd**  
**[2023] UKSC 2, [2023] 1 WLR 575, [2023] 2 All ER 1063**

This is a decision of the UK Supreme Court in an English case on interpretation of a commercial lease provision which stated that the landlord's certification of the service charge contribution due was conclusive.

Sara & Hossein Asset Holdings Ltd was a property investment company and the landlord of retail premises in Whitechapel and Liverpool. Blacks Outdoor Retail Ltd was the tenant of shops at both locations. As such, it was liable under the leases for a 'fair and reasonable' proportion of the service charge in relation to each of the developments. The leases provided that:

The landlord shall on each occasion [that the service charge is due] furnish to the tenant as soon as practicable after such total cost and the sum payable by the tenant shall have been ascertained a certificate as to the amount of the total cost and the sum payable by the tenant and in the absence of manifest or mathematical error or fraud such certificate shall be conclusive.

On not being paid the service charges for 2017/18 and 2018/19, the landlord raised proceedings against the tenant. The certificated sums sued for amounted to £407,842.77. The tenant disputed the figure. It contended that certain works whose costs had contributed to it did not fall within the scope of the landlord's covenant to keep the developments in repair, or even if they did, they were unnecessary at the relevant time. Accordingly, the landlord was not entitled to include them within the terms of the service charge as provided for in the leases.

In 2019, the High Court (Deputy Master Bartlett) dismissed an application for summary judgment, but ordered the tenant to make a payment into court of £150,000. A Deputy High Court judge (Kelyn Bacon QC) dismissed an appeal by the landlord against this decision. In 2020, however, the Court of Appeal upheld a further appeal by the landlord: see [2020] EWCA Civ 1521, [2021] 2 P & CR 18.

The tenant then appealed to the Supreme Court. Its position was that, on a correct interpretation of the lease provisions, the certificate was conclusive as to certain purposes but not others. The landlord in contrast argued that the certification provision had to be given its ordinary and natural meaning. It had a commercial purpose and function which reflected the fact that the landlord would wish to recover costs which in all likelihood had already been incurred pursuant to its own obligations under the leases.

By a majority of four to one, the appeal was unsuccessful. Lord Hamblen gave the decision for the majority. Rather than accepting either of the parties' views as to how the conclusive certificate clause should be construed there was an 'alternative interpretation' (para 50) which should be applied. The certificate

was conclusive and the tenant was required to pay (para 51). But this did not preclude the tenant from later disputing the figure by means of legal proceedings (para 52). The burden would then be on the tenant to prove its claim. Lord Briggs dissented. He noted that: ‘Lord Hamblen’s alternative construction neatly avoids both the Scylla and the Charybdis of the parties’ alternative constructions’, describing it as a “‘pay now, argue later” regime’ (para 61). Lord Briggs’s difficulty, however, was that he could ‘discern no warrant for it [the regime] at all in the lease’. Rather, ‘the whole structure of the service charge regime in the lease, as well as the ordinary meaning of the words used, is irreconcilable with that interpretation’ (para 63).

Perhaps unsurprisingly, the innovative approach of the majority has attracted criticism as effectively re-writing a contract. See eg E Bond, ‘Between Scylla and Charybdis in contractual interpretation’ (2023) 82 *Cambridge Law Journal* 220, who notes that the approach is difficult to reconcile with that of Lord Hodge in the leading contractual interpretation case of *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 at para 77 (though Lord Hodge presided over the court in *Sara & Hossein Asset Holdings* and concurred in the judgment of Lord Hamblen). For Lord Hodge’s views on this topic, expressed extrajudicially, see P Hodge, ‘Revisiting Old Law: Judicial Development of the Law of Contract’ in A J M Steven, R G Anderson and J MacLeod (eds), *Nothing so Practical as a Good Theory: Festschrift for George L Gretton* (2017) 63 at 65.

Decisions of the UK Supreme Court on contractual interpretation have strongly influenced the Scottish courts and this one is unlikely to be an exception. Nevertheless, we note that in *Bryson v Salmond* [2021] SAC (Civ) 29, 2022 SLT (Sh Ct) 50 (*Conveyancing* 2021 pp 176 ff), a case involving a real burden rather than a lease provision, the Sheriff Appeal Court held that a conclusive certificate in relation to maintenance costs could be challenged only in the case of ‘manifest error’ as per the wording of the provision. Under reference to s 14 of the Title Conditions (Scotland) Act 2003 and W M Gordon and S Wortley, *Scottish Land Law*, 3rd edn, vol II (2020) para 15 (a passage written by Dr Craig Anderson), the Sheriff Appeal Court held that ‘the words used in the deed should be given their ordinary meaning and interpreted in accordance with the intention of the parties so far as that intention is objectively ascertainable’ (para 15). That approach reflects that of Lord Briggs and not the majority of the Supreme Court.

Some caution, however, has to be exercised when comparing the cases, given that lease provisions are in principle a matter for the law of contract and real burdens are a matter for the law of property. Having regard to the usually perpetual nature of real burdens an objective interpretation is always appropriate: see eg Scottish Law Commission, *Report No 181 on Real Burdens* (2000) para 4.65. In contractual interpretation there is greater scope for alternative approaches. Whether that of Lord Hamblen of ‘pay now, argue later’ establishes itself in relation to conclusive certificates in commercial leases remains to be seen. It will always be open to the parties, of course, to achieve a different result through clear drafting.

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## RESIDENTIAL LEASES

### (27) **Scottish Association of Landlords v Lord Advocate** [2023] CSOH 76, 2023 SLT 1179

A challenge to the Cost of Living (Tenant Protection) (Scotland) Act 2022 on the basis that it breached landlords' human rights was unsuccessful. See **Commentary** p 132.

### (28) **Averbuch v City of Edinburgh Council** [2023] CSOH 35, 2023 SLT 665

The City of Edinburgh Council's licensing policy in respect of the Civic Government (Scotland) Act 1982 (Licensing of Short-term Lets) Order 2022, SSI 2022/32, was held to be unlawful in several respects. See **Commentary** p 164.

### (29) **Muirhead v City of Edinburgh Council** [2023] CSOH 86, 2023 SLT 1351

The City of Edinburgh Council's interpretation of the Town and Country Planning (Scotland) Act 1997 s 26B, as requiring planning permission even for a property which had been used as a short-term let prior to the city becoming a short-term let control area, was held to be erroneous. See **Commentary** p 167.

### (30) **Koubová v Edinburgh Holiday & Party Lets** 2023 SLT (Tr) 67

The First-tier Tribunal has jurisdiction in relation to matters concerning private residential tenancies under s 71 of the Private Housing (Tenancies) (Scotland) Act 2016. This case concerned an application for the return of a deposit. The question for the Tribunal was whether the deposit had been paid in respect of (i) a private residential tenancy or, as the respondent contended, (ii) a licence to occupy a holiday let; in the latter case the Tribunal had no jurisdiction. The case arose out of events in early 2020 but unfortunately there are numerous mistaken references to 2023 in the Tribunal's decision (eg para 26).

Adéla Koubová was an architecture student in Prague. She came to the University of Edinburgh in January 2020 on exchange for the second semester of the academic year. She required local accommodation and replied to an advert on Gumtree by a person called 'Alex'. She said that she needed somewhere to live from January to May 2020. There followed an email exchange between Alex and Ms Koubová. This initially related to a double room in a flat in Gillespie Crescent which would cost £375 per month with a deposit of £275, but she was subsequently informed that this room had been taken. Another double room in the same flat was offered but again withdrawn after having been taken by others. Alex then offered a further room in a flat in Bruntsfield Place on the same price structure. Ms Koubová was shown around the flat by a person calling himself

Alex and was told that an immediate payment of £100 to an account in the name of 'mefortune' was needed to secure the room. She made a bank transfer.

Later that day Ms Koubová sent a text message to a number she had been given for Edinburgh Holiday & Party Lets ('EHPL') asking for confirmation that she could move in the next day. The reply told her to be at the street door for the flat at 2 pm to meet a representative of the business. The sum of £550 would be payable (the £375 month's rent and the £175 balance of the deposit). There would be a one-page contract provided and Ms Koubová would only have five minutes to read and sign it, as the representative had to attend other properties.

The next day came and Ms Koubová went to the address. The document given to her by the representative, a young man, was headed 'EHPL Limited ... HOUSING [SCOTLAND] Act 1988 Schedule 4: Paragraph 8'. That paragraph is the holiday lets exception in the 1988 Act, excluding such lets from being an assured tenancy. But that legislation does not apply to leases granted after 1 December 2017, the date when the Private Housing (Tenancies) (Scotland) Act 2016 came fully into force.

The document gave the property address. It contained the following wording:

On receipt of £375 for the offer of Accommodation at the above property.

The licence period is 9<sup>th</sup> January 2020 – 9<sup>th</sup> February 2020 and you confirm in acceptance the property is not your sole or main residence and you are not entering an assured tenancy. The licence holder agrees and acknowledges that this agreement is an excluded agreement for the purpose of the Protection of Eviction Act 1977.

1 months notice required.

The 1977 Act referred to does not apply in Scotland (see s 13(3)). The document is unimpressive. This was apparently Ms Koubová's view too. She asked to speak to another representative of EHPL on the telephone to see whether the £100 already paid would be returned if she did not sign. He said it would not. She signed as did the representative who was with her.

Ms Koubová moved into the property on 9 January 2020 but was immediately unhappy with it. The next day she gave notice that she wanted to leave on 10 February 2020. In the meantime, she had exclusive possession of her room. She shared the kitchen and bathroom with three others, none of whom was on holiday. She lived in the property as her only dwelling while studying. Ms Koubová left the property on 10 February 2020 and sought return of the £275 from EHPL. It failed to repay the money and gave no reason for retaining it.

Ms Koubová raised proceedings in the First-tier Tribunal to have the deposit returned. She was supported by the tenants' union, Living Rent. At the outset the Tribunal sought to determine who was the lessor under the agreement. The title sheet for the property showed that the flat's owner was Mark Fortune, a director of EHPL. It was also Mr Fortune who represented EHPL at the hearing. On the basis of the document which the parties had signed, the Tribunal concluded that it was EHPL which had leased the flat even although it was not the property's owner. It might be added that Mr Fortune had previously been excluded from

the register of landlords kept under the Antisocial Behaviour etc (Scotland) Act 2004: see “‘Threatening’ landlord’s flats have still been let’, 1 April 2021, BBC News <[www.bbc.co.uk/news/uk-scotland-56567517](http://www.bbc.co.uk/news/uk-scotland-56567517)>.

Under reference to the decision of Sheriff Simon Collins QC in *St Andrews Forest Lodges v Grieve* [2017] SC DUN 25, 2017 GWD 14-224 (see *Conveyancing 2017* pp 155–61), the Tribunal held that the agreement between Ms Koubová and EHPL was not a licence. The traditional cardinal elements for a lease – parties, property, rent, and duration – were present. She also had exclusive possession of the room. Ms Koubová had been clear that she needed accommodation for five months and not just from January to February. The statement in the agreement of ‘1 months notice required’ also showed that the parties intended the agreement to continue beyond 9 February (para 36). The agreement therefore was a lease even although the document described it as a ‘licence’.

The Tribunal further held that the agreement was not a holiday let. This was despite EHPL’s name. Mr Fortune had admitted to the Tribunal that EHPL’s business model included longer-term lets of several years. The facts – including (i) Ms Koubová making it clear in her correspondence with EHPL that she was studying rather than holidaying, (ii) the other occupants of the flat not being holidaymakers, and (iii) one month’s notice being needed to end the agreement – all made it clear that this was no holiday let (paras 43–44).

Ms Koubová had therefore entered into a private residential tenancy, with the result that the Tribunal had jurisdiction to order EHPL to return her deposit. It duly did so. The Tribunal stated that it found Ms Koubová to be ‘credible and reliable’ (para 46). In contrast Mr Fortune’s ‘own position was often contradictory and therefore could not be treated as reliable’. He did not reveal the identity of ‘Alex’.

For further coverage, see A Picken, ‘Tenant urges others to follow after deposit win’, 13 June 2023, BBC News <[www.bbc.co.uk/news/uk-scotland-65855913](http://www.bbc.co.uk/news/uk-scotland-65855913)>, and A Bowen, ‘A fork or a spade?’ 2023 SLT (News) 121.

### **(31) Edinburgh Holiday & Party Lets Ltd v City of Edinburgh Council [2023] UT 16, 2023 SLT (Tr) 47**

This was another case involving Edinburgh Holiday & Party Lets Ltd (‘EHPL’; in the previous case it was not designated as a limited company). The City of Edinburgh Council had applied to the First-tier Tribunal for a repairing standards enforcement order under s 14(1)(b) of the Housing (Scotland) Act 2006 in relation to a property being let by EHPL at Gillespie Crescent, Edinburgh. The order was duly made by the Tribunal on 8 December 2022. In doing so it expressed concern about the lack of co-operation from EHPL and its sole director, Mark Fortune, who had also used abusive language towards the Tribunal. Leave to appeal was refused and was then sought from the Upper Tribunal.

The grounds for appeal were all found to be without merit. First, it was said that the First-tier Tribunal had erred in accepting certain witness statements which were unsigned, uncorroborated and hearsay. The Upper Tribunal (Sheriff Frances McCartney) held that such evidence was still admissible.

Secondly, the First-tier Tribunal was also argued to have erred by treating Mr Fortune and EHPL as one and the same. Here the Upper Tribunal held that some of the confusion had been caused by EHPL's submissions and the First-tier Tribunal had made no error in law in this respect.

Thirdly, the First-tier Tribunal was said to have 'overstepped the mark' (para 23) by commenting on what the standard of cleanliness or decoration of a property should be. The Upper Tribunal disagreed, having considered the First-tier Tribunal's decision.

Fourthly, EHPL alleged that one of the members of the First-tier Tribunal (Helen Forbes) acted out of malice and was biased. Mr Fortune in an email of 26 August 2022 to the First-tier Tribunal had described her as 'corrupt' (para 26). No specification was given as to why and this ground of appeal also failed.

Finally, EHPL argued that the notice given to it by the Council prior to making the application under the 2006 Act was not in the proper form. This had been sent to Mr Fortune rather than EHPL and had the wrong postcode. The Upper Tribunal held that this did not matter. Mr Fortune was the sole director of EHPL and the letter had been hand-delivered by a Council official accompanied by a police officer. The Upper Tribunal also expressed the view in concluding remarks that EHPL had been 'deliberately obstructive' (para 34) in relation to the proceedings before the First-tier Tribunal. Further, it commented that where the representative of a party to proceedings is 'abusive, then the [First-tier Tribunal] should consider making a decision without the benefit of hearing from that party' (para 34).

**(32) Sherriff v O'Rourke**  
**[2023] SAC (Civ) 18, 2023 SLT (SAC) 89, 2023 SCLR 424**

'The penalty for poor drafting is litigation' commented Sheriff Principal N A Ross (at para 33), giving the decision of the Sheriff Appeal Court on the proper interpretation of a contract regulating occupancy of a property. Kirstin Sherriff owned 'a private domestic residence' (para 1) whose nature and address are not given in the decision. James and Louisa O'Rourke lived in the property. There was a written contract regulating this. Ms Sherriff wanted to remove the O'Rourkes. The proceedings concerned whether the contract created (i) a lease and thus a private residential tenancy under the Private Housing (Tenancies) (Scotland) Act 2016 or (ii) a licence to occupy. The question of whether an agreement amounts to a lease or licence is one which the courts have had to consider relatively regularly, as *Koubová v Edinburgh Holiday and Party Lets* (Case (30) above) shows. See also S M Norbash, *Leases and licences in Scots law: an historical-doctrinal analysis* (PhD thesis, University of Edinburgh, 2022 <<https://era.ed.ac.uk/handle/1842/39163>>).

The sheriff had held that the agreement was a licence. It was framed as such, being headed 'Licence to Occupy', and the parties were referred to as 'Licensor' and 'Licensee'. Moreover, some of the cardinal elements of a lease at common law were missing. There was no rent. Rather a licence fee of £5,000 was payable. There was no agreed duration. Further, the O'Rourkes did not have exclusive possession.

In their appeal, Mr and Mrs O'Rourke argued that the sheriff had erred. There was no requirement for a duration because of s 4 of the 2016 Act. The monthly licence fee amounted to rent. The wording used in the documentation was not definitive: *Street v Mountford* [1985] AC 809. Reference was also made to the English work, Chitty, *Contracts* (33rd edn) para 15-080 (para 16). Ms Sherriff in response referred to the Scottish works, R Rennie et al, *Leases* (2015) para 2.15 and P Robson and M M Combe, *Residential Tenancies: Private & Social Renting in Scotland* (4th edn, 2020) p 83, for the proposition that a 'contract amounted to a licence only where the intention of the parties as disclosed in the document was to create a licence rather than a lease, subject to that not being a mere sham or pretence' (para 20). The evidence was that the intention was to create a licence. There was no sham.

The Sheriff Appeal Court refused the appeal. It noted that the terminology of the agreement was of a licence (para 32) but it was a 'poorly drafted' document (para 33). There was nevertheless an express clause that it did not create a private residential tenancy and stating that the property 'is not to be the only or principal home of the Licensee who shall not reside in the Property' (para 35). It would therefore 'require strong conflicting provisions to displace this as a clear objective statement of intention of the parties at the time of contracting' (para 36). The sheriff had found that the parties had not entered into a sham agreement. Mr O'Rourke had accepted in his evidence that he knew that the agreement he was signing was a licence and not a lease.

The O'Rourkes had submitted that some of the provisions of the agreement, notably clauses (i) requiring use of the property 'only as a private residence' and (ii) conferring 'quiet enjoyment' of the property, were inconsistent with the grant of a licence. Sheriff Principal Ross disagreed.

Since the drafting of the agreement showed that the parties wanted to create a licence, it was not necessary to decide whether the payments made by the O'Rourkes amounted to rent and whether they had exclusive possession of the property.

The case was thus decided on the basis of contractual interpretation. In this regard, as our colleagues Laura Macgregor and Lorna Richardson pointed out in their *Contract Law Update 2023* pp 45–46, the Sheriff Appeal Court's approach to the admission of facts and circumstances when interpreting a contract appears not to be wholly consistent. Its suggestion at para 46 that facts and circumstances can be considered only in the case of ambiguity (but compare para 28) is not correct. See *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 and *Wood v Capita Insurance* [2017] AC 1173, [2017] UKSC 24.

The decision raises the issue of avoidance of the protections conferred by the 2016 Act by means of express agreement. While the Sheriff Appeal Court stated that it would have struck down a sham arrangement, the precise facts of this case, including (as noted above) the property address, are not clear. The O'Rourkes had signed up to an agreement stating that the property was not their only or principal home and that they would not reside in it. Yet para 1 of the decision states that they did reside there. As a matter of policy, the result reached by the court would be more clearly justified if it were known that the property was not

the O'Rourkes' home. One piece of background information here is that there were apparently separate court proceedings between the parties in relation to enforcement of missives of sale of the property by Ms Sherriff to the O'Rourkes (para 4). Therein may lie the explanation behind their occupancy.

**(33) Tan v Van Wyk**  
**[2023] UT 11, 2023 GWD 14-141**

This was an appeal to the Upper Tribunal of a decision of the First-tier Tribunal that a leased property was the tenant's only or principal home and a private residential tenancy had been created, with the landlord being found to be in breach of the duty under the Tenancy Deposit Schemes (Scotland) Regulations 2011, SSI 2011/176, reg 3 to pay the deposit into an approved scheme.

Angelo van Wyk had moved to Scotland from South Africa in 2020 with his family for work reasons. He leased a house near Aberdeen from Pei Tan in December of that year and paid her a deposit. Initially, however, there was no written agreement. Ms Tan considered the arrangement to be a holiday let. Mr Van Wyk was granted a residence permit which he showed to Ms Tan in February 2021. They then entered into a written private residential tenancy which gave an entry date of 1 December 2020. Ms Tan lodged the tenant's deposit with an approved scheme in March 2021.

The First-tier Tribunal held that there had been a private residential tenancy since 1 December 2020. A residence permit was not required on the part of a tenant for such a tenancy. The surrounding facts showed that the arrangement was not initially a holiday let. Mr Van Wyk and his family were not there for holiday purposes. Rather, the property had become their only or principal home, a requirement for a private residential tenancy under s 1(1)(b) of the Private Housing (Tenancies) (Scotland) Act 2016.

Ms Tan sought permission from the Upper Tribunal to appeal on the basis that the First-tier Tribunal had erred in finding that a private residential tenancy had commenced on 1 December 2020 (i) because there was insufficient evidence to support the finding, and (ii) because, given Mr Van Wyk's immigration status prior to February 2021, the Tribunal had wrongly concluded that the property was his only or principal home.

The Upper Tribunal (Sheriff Ian Hay Cruickshank) refused permission to appeal. The First-tier Tribunal had been entitled to conclude on the evidence before it that a private residential tenancy had commenced on 1 December 2020. In this regard Mr Van Wyk's immigration status was not a determining fact.

Given that Ms Tan had signed a document stating an entry date of 1 December 2020 it is somewhat surprising that this decision was taken to appeal.

**(34) Brown v Glen Settlement Trust**  
**[2023] UT 39, 2024 SLT (Tr) 43**

Andrew Brown held a short assured tenancy of a property on an estate near Innerleithen owned by the Glen Settlement Trust (or, strictly, its trustees). He

sought an order for determination of rent under s 34(1) of the Housing (Scotland) Act 1988. The First-tier Tribunal decided that the statutory test for such an order was not satisfied. This was because Mr Brown's rent was not significantly higher than rents being charged for similar properties in the area. He appealed to the Upper Tribunal.

Unfortunately for Mr Brown, the Upper Tribunal (Sheriff Derek O'Carroll) noticed a competency issue. The application for a determination had been made on 11 December 2022. But, as of that date, s 34(1) of the 1988 Act was suspended. Schedule 1, para 2(7) of the Cost of Living (Tenant Protection) (Scotland) Act 2022 provides for it to be treated as repealed for as long as the rent cap provisions in the 2022 Act are in force. This was until 31 March 2024: see **Commentary** p 127. The appeal therefore failed. In the words of the Upper Tribunal (para 13):

the emergency legislation introduced to the Scottish Parliament with the ostensible aim of assisting tenants facing financial pressures had the effect, intentionally or otherwise, of removing the right of tenants under [short-assured tenancies] to have a fair market rent fixed under section 34 of the 1988 Act with effect from 28 October 2022, subject to savings for existing applications. The appellant's reference to the FTS having been made after that date, the FTS had no jurisdiction to consider it.

The Explanatory Notes to the 2022 Act (para 57) state that s 34 of the 1988 Act is disapplied because of the modified processes for appealing the decision of a rent officer while the emergency legislation is in force. But the s 34 procedure is not dependent on the decision of such an officer. It is therefore not clear what the policy is behind the suspension.

**(35) Doran v SC Causewayside Ltd**  
**[2023] SAC (Civ) 10, 2023 GWD 12-122**

This was an appeal in a damages action arising from Mark Doran's lease of student accommodation from SC Causewayside Ltd. The original heads of claim related to inconvenience arising out of a high number of room inspections, delays in repairs, loss of shower facilities, delay in return of deposits, and other complaints. Following a case management discussion, these heads were all dismissed apart from that concerning the loss of shower facilities. The sheriff subsequently granted decree of absolvitor whereupon Mr Doran appealed.

There were four grounds of appeal, all concerning alleged errors by the sheriff, including that he had acted unfairly towards Mr Doran and had been wrong in dismissing parts of the case. The Sheriff Appeal Court was unpersuaded by any of these.

**(36) Stainthorpe v Carruthers**  
**[2023] UT 20, 2023 GWD 30-253**

This was an appeal to the Upper Tribunal in respect of the First-tier Tribunal's refusal of an application for an order for possession in respect of a house in

Dumfries where there was an assured tenancy. The landlord, David Stainthorpe, had sought the order against the tenants, Marion Carruthers and Raymond Swan, on the basis of ground 6 in schedule 5 to the Housing (Scotland) Act 1988. This ground applies where a landlord intends to demolish or reconstruct the whole or a substantial part of the property or to carry out substantial works thereto. Further conditions are that the landlord is unable reasonably to carry out the work without the tenant giving up possession of the house, and the tenant is not agreeable to co-operating, for example by accepting a variation in the terms of the tenancy, to allow the work to proceed. As with all the grounds now for awarding a possession order in respect of a private-sector residential lease, the First-tier Tribunal must be satisfied that it is reasonable to do so. Here it considered that it was not reasonable on the circumstances of the case.

In the appeal Mr Stainthorpe argued that the First-tier Tribunal had erred in law. The Upper Tribunal (Sheriff George Jamieson) held that ground 6 required a 'firm and settled' intention on behalf of a landlord to carry out works (para 86). This test will not be satisfied where a landlord intends to transfer ownership of the property immediately on obtaining possession before any works have been done (para 87). It was held that the First-tier Tribunal had made an erroneous finding in relation to Mr Stainthorpe's stepson obtaining mortgage funding to pay for the proposed works and thus speculated wrongly that the property was to be transferred to him before the works were carried out. The First-tier Tribunal had made further errors including not noting a contradiction in the evidence as to whether Ms Carruthers and Mr Swan would become homeless and also in finding that they were elderly. He was 80 but she was only 57. It had also not adequately explained why it found Mr Stainthorpe's oral evidence about his intention to carry out the works 'incredible' (para 61). It had further failed to take into account the substantial rent arrears owed by Ms Carruthers and Mr Swan. The First-tier Tribunal's decision was quashed and the Upper Tribunal sought submissions from the parties on further procedure.

**(37) Stainthorpe v Carruthers (No 2)**  
**[2023] UT 41**

This was the sequel to the previous decision. The Upper Tribunal received submissions from the parties as to whether (i) the case should be remitted to the First-tier Tribunal, or (ii) the Upper Tribunal should remake the decision. The Upper Tribunal for Scotland (Rules of Procedure) Regulations 2016, SSI 2016/232, r 18(4)(b) provides that the Upper Tribunal may consider fresh evidence only where the 'interests of justice justify the evidence being led'. This means that option (ii) is restricted to 'exceptional circumstances' (para 16). It was held, however, that this test was satisfied here for a number of reasons. These included that the First-tier Tribunal had erred in its approach in several significant ways, the case involved an unusual ground of recovery of possession, and that the Upper Tribunal dealing with it would avoid further delay.

**(38) McCallum v Wright**  
**[2023] UT 25, 2023 SLT (Tr) 89, 2023 Hous LR 95**

Philip McCallum had become the tenant of a property in Kirkgunzeon, Dumfries and Galloway around 1993. Roger Wright was the landlord. There was no written lease, but an assured tenancy had been created in terms of s 12 of the Housing (Scotland) Act 1988. In 2006 the then landlord, Mr Wright's aunt, entered into a written lease with Mr McCallum, the lease being stated to be a short assured tenancy. A form AT5 was served on Mr McCallum by the landlord's agent in advance of this, as required in terms of s 32(2)(a) of the 1988 Act. Under a short assured tenancy, the tenant does not have security of tenure, but it has generally ceased to be competent to create a new short assured-tenancy since 1 December 2017, when the Private Housing (Tenancies) (Scotland) Act 2016 came fully into force. The facts here of course pre-dated this.

In 2022 Mr Wright applied to the First-tier Tribunal for an order for eviction on the basis that the lease was a short assured tenancy. The order was duly granted, to have effect on 30 July 2023. Mr McCallum, however, appealed to the Upper Tribunal, arguing that the tenancy was still an assured tenancy and not a short assured tenancy, and that it was not possible for parties to an assured tenancy to contract out of the statutory protections given to such a tenancy. The Upper Tribunal (Sheriff Simon Collins KC) refused the appeal. The parties to an assured tenancy were entitled to bring it to an end and enter into a short assured tenancy. This was not to contract out of statutory protections. The earlier case of *Johnstone v Finneran* 2003 SCLR 157 supported this conclusion.

**(39) Serapiglia v McIntyre**  
**[2023] UT 10, 2023 GWD 12-121**

Enzo Serapiglia appealed a decision of the First-tier Tribunal granting an order for his eviction on the basis of his antisocial behaviour in terms of ground 14 of schedule 3 of the Private Housing (Tenancies) (Scotland) Act 2016. The appeal was successful. The Upper Tribunal (Sheriff Pino Di Emidio) held that the First-Tier Tribunal had failed to make clear findings about the four incidents which were alleged to constitute a course of conduct of antisocial behaviour. Some of these appeared to be prompted by noise from a neighbour. The First-tier Tribunal had not stated what the relevant facts were in determining that it was reasonable for the order to be granted. It had thus misdirected itself and its decision would be quashed and remitted to a fresh hearing with a new panel of Tribunal members.

**(40) Colrairie v Bridges**  
**[2023] UT 9, 2023 GWD 9-96**

Colin and Ann Marie Colrairie were the landlords of a property in Bearsden. Lisa Bridges was the tenant under an assured tenancy. Mr and Mrs Colrairie applied to the First-tier Tribunal for an order for possession of the property, but the Tribunal dismissed the application as frivolous or vexatious. This was on

the basis that the notice to quit was invalid because it did not expire on the ish specified in the lease.

Mr and Mrs Colraine successfully appealed to the Upper Tribunal (Sheriff Derek O'Carroll). It held that the notice to quit was effective to trigger a conventional irritancy in the lease concerning the non-payment of rent. It thus did not matter that the notice did not expire on the ish. Ms Bridges had given no sound reason for the rent arrears and there was no reasonable prospect of these being paid. Mr and Mrs Colraine were suffering financial hardship as a result which they intended to alleviate by occupying the property. They had complied with the pre-action protocols for recovery of possession. It was reasonable in the circumstances for an order for possession to be granted.

**(41) Boyle v Ford**  
**[2023] UT 4, 2023 Hous LR 21**

In 2010, Gerard and Katrine Boyle, a brother and sister, entered into a tenancy of a property in Armadale. The landlord was Hiram Ford. A new agreement was signed each year. In October 2017 the parties entered into a short assured tenancy with an ish of 30 September 2018. Mr Ford died in November 2017 and in April 2018 his widow Lorraine obtained confirmation as executrix-dative. In October 2018 she entered into a new tenancy agreement with the Boyles headed as a short assured tenancy. But by then the Private Housing (Tenancies) (Scotland) Act 2016 was fully in force and it was in general not competent to create such a tenancy. In July 2020, Mrs Ford served a notice on Mr and Miss Boyle under s 50(1)(a) of the 2016 Act on the ground that she intended to sell the property. In April 2021, she applied to the First-tier Tribunal for an eviction order against the siblings, and her solicitor notified the local authority as required by the legislation. In October 2021 the property was disposed to Mrs Ford and she was entered as proprietor in the Land Register.

The First-tier Tribunal found that the lease was a private residential tenancy. It considered in the circumstances that it was reasonable to grant the eviction order despite Mr and Miss Boyle having health issues. Mr Boyle had shown a 'volition to move' and there was a likelihood that he and his sister would be prioritised for rehousing by the local authority.

Mr and Miss Boyle appealed to the Upper Tribunal (Sheriff George Jamieson) on five grounds. The first was that the agreement created a short assured tenancy and not a private residential tenancy, on the basis of s 32(3)(b) of the Housing (Scotland) Act 1988 as saved by the Private Housing (Tenancies) (Scotland) Act 2016 (Commencement No 3, Amendment, Saving Provision and Revocation) Regulations 2017, SSI 2017/346, reg 6(c). These provisions applied to replacement tenancy agreements involving the same landlord and tenant at the same property. The Upper Tribunal upheld this ground of appeal. It did not matter that Mrs Ford had replaced her husband because 'landlord' was to be construed as including someone deriving title from the original landlord. Section 55 of the 2016 Act was to be applied here. The letting agency acting for Mrs Ford had served the necessary AT5 forms in relation to termination of a short assured tenancy.

The second ground of appeal related to the argument made by Mrs Ford to the First-tier Tribunal that, because she only became owner of the property in October 2021, she ‘lacked capacity’ (para 33) to enter into the leasing agreement with Mr and Miss Boyle in October 2018. The Boyles’ counter-argument was that the doctrine of accretion applied to validate the lease retrospectively after Mrs Ford became owner. See K G C Reid, *The Law of Property in Scotland* (1996) para 677, and L Richardson and C Anderson, *McAllister’s Law of Leases* (5th edn, 2021) para 2.38, which were both cited to the court. According to the Upper Tribunal, the First-tier Tribunal did not ‘discuss this concept with sufficient clarity to satisfy the [Upper Tribunal] that the [First-tier Tribunal] had actually considered, accepted and applied this doctrine to the facts of the case’ (para 35). The Upper Tribunal held that accretion applied, the order for possession being granted after Mrs Ford was registered as owner. Moreover, Mrs Ford was entitled to serve the notices to leave on Mr and Miss Boyle although not yet registered as owner because she had been confirmed as executrix of her late husband.

We would make two observations. First, whether a lease can be granted is not strictly a question of capacity. There was no suggestion that Mrs Ford did not have capacity to enter into a legal transaction (or juridical act, to use more academic terminology). Secondly, even if a granter of a lease is not the owner of the property, the lease will be valid at a contractual level between the parties. See P Webster, ‘The Continued Existence of the Contract of Lease’, in A J M Steven, R G Anderson and J MacLeod (eds), *Nothing so Practical as a Good Theory: Festschrift for George L Gretton* (2017) 119–35. The definition of ‘landlord’ in s 55 of the 1988 Act does not exclude this.

The third ground of appeal was that if the later agreement had failed because Mrs Ford was not the owner, the earlier agreement with her late husband had continued by tacit relocation. The Upper Tribunal did not uphold this ground because (i) the later agreement impliedly renounced the earlier agreement, and (ii) the earlier agreement had in any event expressly excluded tacit relocation (paras 40–41). It is not in fact clear under the present law whether tacit relocation can be expressly excluded in this way but the Scottish Law Commission in its *Report No 260 on Aspects of Leases: Termination* (2022) ch 2 recommends in relation to commercial leases that this should be permissible.

The fourth ground of appeal was that the First-tier Tribunal had erred in law in deciding that granting the eviction order was reasonable. The Upper Tribunal agreed, holding that ‘undue weight’ (para 60) had been placed on Mr Boyle’s ‘volition to move’. The First-tier Tribunal had reversed the statutory test under s 33(1)(e) of the 1988 Act by effectively placing the onus on Mr and Miss Boyle to show reasonable grounds for the order not to be granted.

The fifth ground of appeal concerned the First-tier Tribunal’s emphasis on Mr and Miss Boyle being likely to be a priority case for rehousing. The Upper Tribunal held that this was a relevant factor in considering the reasonableness of granting an eviction order but it required to be given appropriate weight. Having allowed the fourth ground of appeal, the Upper Tribunal formally refused this ground, but observed (para 71):

The question for the [First-tier Tribunal] is whether it is reasonable to grant an *order for possession*; it is not *ipso facto* reasonable to do so just because of the existence of local authority duties to rehouse the appellants; nor may the [First-tier Tribunal] give undue weight to any difficulties likely to be experienced by the appellants after an order for possession has been granted, standing the existence of such duties.

**(42) Manson v Turner**  
**[2023] UT 38, 2023 GWD 49-410**

Caroline Manson and David Downie had a private residential tenancy of a property in Dollar. The landlords, Virginie and Iain Turner, sought an order for recovery of possession on the basis of ground 1 of schedule 3 to the Private Housing (Tenancies) (Scotland) Act 2016 which applies when the landlords want to sell the property. The First-tier Tribunal considered on the facts that it was reasonable to grant the order. Ms Manson and Mr Downie appealed to the Upper Tribunal contending that the First-tier Tribunal had erred in law on five grounds: (i) it had failed to give proper reasons for its decision; (ii) it had failed to make sufficient and adequate findings in fact; (iii) it had taken into account irrelevant considerations; (iv) it had failed to have regard to relevant considerations; and (v) it had failed properly to assess and balance the interests of the landlords and the tenants bearing on whether it was reasonable to issue the eviction order.

The Upper Tribunal (Sheriff Simon Collins KC) upheld the appeal in relation to grounds (i) to (iii), but not (iv) and (v). In particular the First-tier Tribunal had failed to give due weight to the likelihood of the tenants becoming homeless. The case was remitted to the First-tier Tribunal for a full rehearing before a freshly constituted panel.

**(43) Sharif v Moughal**  
**[2023] CSOH 42, 2023 GWD 25-216**

This was a judicial review of a decision of the First-tier Tribunal granting an order for eviction of the tenant, Mohammad Sharif, from a property which he leased. Mr Sharif lived there with his wife and family. Mohammed Moughal was the landlord. In seeking to have the Tribunal's order set aside Mr Sharif and his wife offered to prove a number of facts. These included the following.

Mr Sharif had previously owned the house but had been sequestered. He had arranged with his friends and family to put Mr Moughal in funds to purchase the property from the trustee in sequestration. There was a shortfall and Mr Moughal took out a buy-to-let mortgage. He executed a trust deed dated 13 May 2014 acknowledging that he held the property in trust for Mr and Mrs Sharif and would convey it to them when directed to do so. The parties signed a short assured tenancy agreement. The rent was to be used to fund the mortgage repayments. Mr Sharif assigned his interest under the trust to Mrs Sharif and this was intimated to Mr Moughal. The latter then applied to the First-tier Tribunal for an eviction order on the basis that he wanted to sell the property. This was prohibited by the trust deed. But in their submissions to the

Tribunal, Mr and Mrs Sharif (who did not have funds to instruct a solicitor) did not mention the deed. They were also unable to attend the hearing at which the eviction order was granted. Mr Moughal, they said, had misled the Tribunal by not mentioning the trust deed.

Mr Moughal submitted that the decision of the Tribunal was a decree *in foro* and as such could be reduced only in exceptional circumstances necessary to prove substantial injustice or to avoid a miscarriage of justice. Mr and Mrs Sharif's averments failed to meet that test.

Lord Stuart put the case out by order for further procedure. The facts as averred by the pursuers, if proved, could establish a miscarriage of justice had occurred by the granting of the eviction order, and this was the type of case where the equitable remedy of reduction had a role to play.

**(44) Sharma, Petitioner**  
**[2023] CSOH 40, 2023 SLT 801**

This was a judicial review of the decision of the Upper Tribunal in *Sharma v Renfrewshire Council* [2022] UT 8, 2022 Hous LR 45 (*Conveyancing 2022 Case (50)*). In 2019 Anu Sharma had been removed by Renfrewshire Council from its Register of Private Landlords in accordance with s 89 of the Antisocial Behaviour etc (Scotland) Act 2004 on the ground that she was not a 'fit and proper' person. She appealed this decision on the basis that the Council should have considered her likely future conduct in reaching its decision. Both the First-tier Tribunal and the Upper Tribunal dismissed the appeal, holding that the Council had applied the legislation correctly.

The basis of the judicial review petition was twofold. First, Ms Sharma argued once again that the 'fit and proper' person test had a forward-looking element. Lady Carmichael upheld this argument. The decision-making process under the 2004 Act involved determining whether the applicant would be a 'fit and proper' person during the period of the registration (para 33) although it was necessary in this regard to consider the applicant's past behaviour.

Secondly, Ms Sharma submitted that the jurisdiction of the First-tier Tribunal on appeal under s 92(4) of the 2004 Act was by way of rehearing and was not confined to a *Wednesbury* review (that is to say, a more limited review on the basis of error in law). Lady Carmichael also upheld this argument. Unless the First-tier Tribunal was entitled to make a decision in substitution for that of the local authority, rather than just setting the decision of the local authority aside, it could not make a determination as to whether an applicant was a 'fit and proper' person (para 54).

**(45) Ramanathan v Patel**  
**[2023] UT 8, 2023 SLT (Tr) 1**

This was an appeal by Ganesh Ramanathan from a decision of the First-tier Tribunal to reject his application under the Tenancy Deposit Schemes (Scotland) Regulations 2011, SSI 2011/176, reg 9 for an order against his landlord for the

return of a deposit. Such an application requires to be made no later than three months after the tenancy has ended. The application form had been submitted one day late, although supporting material has been lodged timeously by email. The First-tier Tribunal determined that the application was frivolous, misconceived and had no prospect of success as a result of the late submission.

The Upper Tribunal (Sheriff Tony Kelly) upheld the appeal. It was not clear whether the First-tier Tribunal's decision had been based on time bar alone or on the application's substance. In any event, an application under reg 9 did not require to be on the First-tier Tribunal's form. Mr Ramanathan's email with the supporting material had made it clear that he was applying. The First-tier Tribunal had erred in law in not considering whether that communication was sufficient to be regarded as an application (paras 17–19). For an application to comply with the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017, SSI 2017/328, sch 1 para 103, it was also necessary for an application to be signed. In terms of the Coronavirus (Scotland) Act 2020 sch 4 Part 1, which was in force at the relevant time and applicable, a name on an email was sufficient. The application therefore ought to have been accepted and the case was referred back to the First-tier Tribunal.

**(46) Ahmed v Russell**  
**[2023] UT 7, 2023 SLT (Tr) 33**

Iqra and Shahnawaz Ahmed appealed against a decision of the First-tier Tribunal which had ordered them to pay £2,500 to their former tenant, Amy Russell, as a sanction for failure to comply with their duty under the Tenancy Deposit Schemes (Scotland) Regulations 2011 reg 3 to pay the tenancy deposit of £1,250 into an approved scheme within 30 days of the start of the tenancy.

In the First-tier Tribunal the landlords had said that they were unaware of the 2011 Regulations and they were not professional landlords. They only leased the one property. The First-tier Tribunal commented that the 2011 Regulations made no distinction between professional and non-professional landlords. *Ignorantia juris neminem excusat*. As part of the case-management procedure in the First-tier Tribunal the landlords had returned £531.25 of the deposit to the tenant in terms of a proposal made by them. The landlords had previously paid the whole £1,250 into an approved scheme at the termination of the tenancy. The First-tier Tribunal held that the purpose of the 2011 Regulations had therefore not been defeated, albeit the deposit had nonetheless been unprotected while the tenancy subsisted.

The landlords appealed the sanction of £2,500 on the basis that it was neither fair nor proportionate, but excessive and unreasonable. They referred to the Upper Tribunal decision of *Wood v Johnston* 2019 GWD 24-382 as authority for the proposition that it was necessary to differentiate between landlords with numerous properties running a letting business and a landlord with only one property when considering sanctions for breach of the 2011 Regulations.

The Upper Tribunal (Sheriff Ian Hay Cruickshank) upheld the appeal. *Wood v Johnston* was not authority for treating 'amateur' and 'professional' landlords

differently. Nevertheless, the individual circumstances of a case in relation to the landlord's experience may be an aggravating or mitigating factor in relation to the level of sanction. On the facts here the sanction imposed was unreasonable and excessive. The level of award conflicted with the First-tier Tribunal's conclusion that the purpose of the 2011 Regulations had not been defeated. The fact that the deposit was unprotected during the currency of the tenancy was nevertheless a factor which should impact on the level of the sanction. In all the circumstances a figure of £1,500, which was less than twice the deposit, was merited. The Upper Tribunal also observed that the 2011 Regulations had now been in force for some time and that therefore a claim by a landlord of unfamiliarity with these 'may hold less weight in mitigating a penalty than it previously did' (para 33).

**(47) *Bavaird v Simpson***  
**[2023] UT 19, 2024 SLT (Tr) 43**

This case covers similar territory to the previous decision, which it relies upon. Gordon Bavaird appealed against a decision of the First-tier Tribunal. This had ordered him to pay £4,000 to his former tenants, Lisa and David Simpson, as a sanction for failure to comply with his duty under the Tenancy Deposit Schemes (Scotland) Regulations 2011 reg 3 to pay the tenancy deposit of £2,000 into an approved scheme within 30 days of the start of the tenancy. He accepted that he was in breach of the 2011 Regulations but argued that the sanction was excessive considering that he was 71, inexperienced in relation to the deposit scheme, and had returned the deposit to the Simpsons.

The Upper Tribunal (Sheriff George Jamieson) upheld the appeal. Under reference to *Ahmed v Russell* (above), it was held that the First-tier Tribunal had erred in law by imposing a sanction which was not fair or proportionate. Mr Bavaird's age was of not itself a relevant factor in assessing the level of the sanction but might have had some relevance if it had impacted on his health or ability to comply with the 2011 Regulations. Although ignorance of the law was not a mitigating factor, there had been no deliberate intention to disregard it. If there had been, this would have meant a higher level of sanction. On the other hand, the failure to comply with the 2011 Regulations for a period as long as five years was an important aggravating factor. Nevertheless, the fact that the deposit had been repaid immediately following the end of the tenancy with no inconvenience to the tenants should also be given significant weight. An appropriate figure was therefore £2,500.

**(48) *Ramsay v Johnson***  
**[2023] UT 40, 2023 GWD 49-420**

This was another appeal against a decision of the First-tier Tribunal against a landlord ordering him to pay tenants a sum as a sanction for failure to comply with his duty under the Tenancy Deposit Schemes (Scotland) Regulations 2011 reg 3 to pay the tenancy deposit into an approved scheme within 30 days of the start of the tenancy. The issue here, however, was whether the arrangement

between the parties was within the scope of the 2011 Regulations at all. The Regulations apply only to a 'relevant tenancy', which is defined in reg 3 as 'any tenancy or occupancy agreement ... unless the use of the [property] is of a type described in s 83(6) of [the Antisocial Behaviour etc (Scotland) Act 2004]'. Under s 83(6)(e) a property which is 'the only or main residence' of the landlord is excluded.

Michael Ramsay owned a property near Elgin. In 2021, he entered into a written agreement with Lodewyk Johnson giving him permission to occupy a bedroom within the property with shared use of the kitchen, bathroom and other facilities. The rent was £550 per month and Mr Johnson paid a deposit of £1,100. Mr Ramsay did not pay the deposit into an approved deposit scheme. Mr Johnson moved into the property and stayed for a period of almost four months. On his departure, Mr Ramsay refused to return the deposit. Mr Johnson applied to the First-tier Tribunal. Following several case-management hearings, the Tribunal ordered Mr Ramsay to pay Mr Johnson the sum of £2,200 as a sanction for breaching the 2011 Regulations.

Mr Ramsay appealed to the Upper Tribunal on the basis that the property was his main residence (even although he conceded that he was temporarily not living there) and Mr Johnson was a lodger. There was a dispute between the parties as to the extent to which Mr Ramsay kept a room in the property for his own use. Mr Johnson claimed that the room had been let out to someone else. The Upper Tribunal (Sheriff Simon Collins KC) upheld the appeal on the basis that there required to be a 'significant fact finding exercise' (para 17) as to the exact facts. The parties were in dispute in relation to these. The case was remitted to a freshly constituted panel of the First-tier Tribunal.

For a discussion of two other decisions of the First-tier Tribunal in relation to where there must be compliance with the 2011 Regulations, see M Skilling, 'Two landlords who believed they are exempt from tenancy deposit rules ordered to pay tenants for breaches of regulations', *Scottish Legal News*, 18 September 2023.

#### **(49) Factotum (Scotland) Ltd v Rashid [2023] UT 46, 2024 GWD 1-9**

Letting agents are subject to a statutory Code of Practice by virtue of s 46 of the Housing (Scotland) Act 2014, the Code of Practice itself being set out in the Letting Agent Code of Practice (Scotland) Regulations 2016, SSI 2016/133. But when, precisely, does the Code of Practice apply? To find out the answer requires agile reading, moving from statutory provision to statutory provision, and indeed from Act to Act.

The starting point is s 46 of the 2014 Act. This says that the Code of Practice applies to those 'who carry out letting agency work'. What is 'letting agency work'? The beginnings of an answer are to be found in the interpretation section, s 61, of the 2014 Act. The definition given there is two-pronged. It is 'letting agency work' to carry out instructions with a view to a landlord 'entering into, or seeking to enter into a lease or occupancy arrangement by virtue of which

an unconnected person may use the landlord's house as a dwelling'. And it is also 'letting agency work' to manage a house which is subject to such a lease or arrangement. The key words in this definition are 'lease', 'occupancy arrangement', and 'use as a dwelling'. 'Lease' is not defined but, by and large, we probably know what it means. For definitions of the other two terms, s 61(2)(b) directs us to s 101 of a different Act, the Antisocial Behaviour etc (Scotland) Act 2004. This is not just to keep the inquirer alert. It is because Part 8 of the 2004 Act regulates the system of landlord registration, and the idea is evidently to keep the rules for the applicability of the Code of Practice in line with the rules specifying the type of lease or other arrangement for which registration in the register of landlords is required.

So we move, by now a little wearily, from the 2014 Act to the earlier Act of 2004. Uncontroversially enough, s 101(1) of the 2004 Act defines 'occupancy arrangement' as 'any arrangement under which a person having the lawful right to occupy a house permits another, by way of contract or otherwise, to occupy the house or, as the case may be, part of it, but does not include a lease'. So, between them, 'lease' and 'occupancy arrangement' cover virtually all arrangements, formal or informal, by which a person lives by permission in a house of someone else. But this very wide category is made much narrower by the third term, 'use as a dwelling'. For a definition of that term, s 101 directs us elsewhere, this time to s 83(6) of the 2004 Act. That provision amounts to nothing more than a list of exceptions. These include care homes, hospitals, houses which are the only or main residence of the landlord, houses used for holiday purposes, and, in a nod to current developments, houses used for a short-term let as defined in art 3 of the Civic Government (Scotland) Act 1982 (Licensing of Short-Term Lets) Order 2022, SSI 2022/32. (Here it might be interjected that the meaning of 'short-term let' is far from straightforward: for a detailed analysis, see *Conveyancing 2022* pp 129–33). None of these listed exceptions is to count as 'use as a dwelling'; everything else does.

So there we have it. To know when the Letting Agent Code of Practice does (and does not) apply requires patience and determination. But for those with time on their hands, and ready access to the relevant statutory material, an answer can eventually be found. Yet in this quest for an answer it is easy to go wrong. One false turn and the inquirer is lost forever. That, in essence, was the position in which the First-tier Tribunal found itself in the case under discussion. After getting so much right, the Tribunal got one important thing wrong.

The case itself concerned a flat which was apparently in Edinburgh although the address is not given in the judgment. The flat was owned by a Dr Rashid. For the summer months of 2022 Dr Rashid engaged Factotum (Scotland) Ltd to find tenants for her flat. Factotum did as it was asked, and two consecutive leases were entered into, each for only a few weeks. Dissatisfied with the service she had received, Dr Rashid applied to the First-tier Tribunal for an order that Factotum was in breach of the Letting Agent Code of Practice. Factotum's defence was or included that the arrangements made by Factotum in respect of the flat were not of a type that were covered by the Code of Conduct. This

is because, or so it was said, the arrangements were short-term lets or holiday lets and so fell within the exceptions mentioned above and set out in s 83(6) of the 2004 Act.

This defence was rejected by the First-tier Tribunal. The exceptions (as we have seen) were tied into the term ‘use as a dwelling’ and hence, more broadly, into the overarching term ‘letting agency work’. Yet this latter term was missing, as the Tribunal noted, from the crucial part of s 48 of the 2014 Act. Section 48 is concerned with applications to the First-tier Tribunal to enforce the Letting Agent Code of Practice. Subsection (1) says that applications be made in respect of a ‘relevant letting agent’. Subsection (2) says that:

A relevant letting agent is –

- (a) in relation to an application by a tenant, a letting agent appointed by the landlord to carry out letting agency work in relation to the house occupied (or to be occupied) by the tenant,
- (b) in relation to an application by a landlord, a letting agent appointed by the landlord,
- (c) in relation to an application by the Scottish Ministers, any letting agent.

Of the three possibilities listed in subsection (2), it was the second – possibility (b) – which applied in the present case, for this was an application by a landlord (Dr Rashid) and not by a tenant. And while the vital and limiting term ‘letting agency work’ was mentioned in respect of possibility (a) (applications by tenants) it was missing from possibility (b). Hence, said the First-tier Tribunal, the exceptions carried by ‘letting agency work’, including the exceptions for short-term and holiday lets, did not apply to an application to the Tribunal which was made by a landlord. Hence an application was competent.

Even if the statutory language had compelled this conclusion, the conclusion would have been an odd one; for it would mean that Dr Rashid could apply to the First-tier Tribunal for breach of a Code of Practice which, in terms of s 46 of the 2014 and assuming the lets to have been short-term or holiday lets, did not apply to the arrangements entered into by Factotum. But far from the statutory language compelling this conclusion, it actually prevented it. As the Upper Tribunal (Sheriff Frances McCartney) was to point out on appeal, in its scrutiny of s 48 the First-tier Tribunal had failed to notice that the one term which *does* appear under possibility (b) – ‘letting agent’ – is defined in s 62 of the Act in such a way as to bring back in the omitted words (‘letting agency work’); for the definition of ‘letting agent’ is ‘a person who carries out letting agency work’. If, therefore, the arrangements entered into by Factotum were truly short-term or holiday lets, they fell outwith the Code of Conduct (under s 46) and, equally, and logically, an application in respect of them to the First-tier Tribunal (under s 48) was not competent. The Upper Tribunal therefore remitted the case back to the First-tier Tribunal for a fact-finding hearing to determine the nature of the arrangements that had been entered into by Factotum and whether they were short-term or holiday lets, or indeed fell within one of the other exceptions listed in s 83(6) of the 2004 Act.

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## LIFERENT

### (50) *Dickson v McCullagh* 24 May 2019, First-tier Tribunal for Scotland (Housing and Property Chamber)

This curious case, straddling the law of tenancies and the law of liferent, dates from 2019 but has only recently come to our attention.

Elizabeth Dickson, said to be the tenant under a lease, applied to the First-tier Tribunal for a determination as to whether Stephen McCullagh, said to be her landlord, was complying with his upkeep obligations (in terms of s 14 of the Housing (Scotland) Act 2006) as a private-sector residential landlord of a flat at 82 Cardowan Road, Carntyne, Glasgow. Her complaint was that the boiler did not work with the consequence that there was neither heating nor hot water.

After inspecting the flat the Tribunal held a hearing at which Ms Dickson appeared, but Mr McCullagh did not. In sheriff court or Court of Session procedure the result would then typically have been decree for the pursuer without further inquiry. But tribunal procedure is different. The Tribunal took a wee keek at the title sheet for the property: GLA179132. This showed Mr McCullagh as the proprietor. But in the B section appeared the following note:

In terms of Disposition to STEPHEN DAVID MCCULLAGH, registered 01 AUG 2008, a liferent interest in this Title was conveyed to ELIZABETH DICKSON residing at 82 Cardowan Road, Glasgow, G33 2RY. (No application for registration of the liferent interest has been made and no real right in the liferent has been completed.)

(The note appeared in the B section because that was where, in 2008, proper liferents were set forth. Since the Land Registration etc (Scotland) Act 2012 they appear in the D section, being subordinate real rights. But it might help users of the Land Register if the B section were to contain a note referring to the entry in the D section, and indeed we have been told that this does sometimes happen.)

Who granted the disposition? That is not stated, but at all events there was a disposition by X in favour of Ms Dickson in liferent and Mr McCullagh in fee. From her designation it can be seen that she was already living in the property. It should be observed that this was intended as a proper liferent.

Both Ms Dickson and Mr McCullagh informed the Tribunal that they knew nothing about the liferent. (How that can be we have no idea.) The latter added, as summarised by the Tribunal:

Both he and [Ms Dickson] had been represented in the transaction by the same solicitor, a Mr Renfrew of William Renfrew & Co, Glasgow. ... He had contacted the firm but had been unable to obtain further information due to the illness of Mr Renfrew.

The Tribunal dismissed the application on the basis that it had jurisdiction only in cases of tenancies and this was not a tenancy since the applicant was a liferenter. It commented (para 9) that 'whilst ... there has been no application for registration of the liferent interest in the property and no real right in the liferent therefore exists, that does not mean that a personal right liferent ... does not exist'.

The concept of a ‘personal right liferent’ is novel but seems possible. It would mean a contractual relationship between the owner (here Mr McCullagh) and another person (here Ms Dickson) whereby the latter would be treated by the owner *as if* she were the holder of a liferent. Such a contract would seem to be implied in a disposition to Y in liferent and Z in fee, though of course in the normal case (unlike the present case) the liferent will be registered with the result that Y’s rights will simply rest upon the real right of liferent. But whilst the concept of a ‘personal right liferent’ seems possible, that does not necessarily mean that it was applicable in the present case.

If Ms Dickson thought she was a tenant, it seems likely that she was paying rent, though the judgment says nothing about this. If she was in fact paying rent, and if both she and Mr McCullagh thought that their relationship was that of tenant and landlord, then perhaps there was indeed a tenancy, and any ‘personal right liferent’ that she might have had was perhaps trumped by the tenancy. Or one could argue this the other way round: since she had a ‘personal right liferent’, any rent she was paying was paid in error, and could have been demanded back by way of a claim in unjustified enrichment. The Tribunal took the view that Ms Dickson possessed as liferenter rather than as tenant, and perhaps that was the right conclusion, but the judgment does not contain sufficient information for it to be evaluated.

For the question of how a proper liferent is made real – the underlying problem in *Dickson* – see **Commentary** p 137.

## STANDARD SECURITIES

### (51) *Guidi v Clydesdale Bank plc* [2023] CSIH 4, 2023 SCLR 417, 2023 Hous LR 2

An assignation of a standard security was held to comply with the requirements of the Conveyancing and Feudal Reform (Scotland) Act 1970 and was thus valid. This reversed the decision of the sheriff: [2021] SC GLW 59, 2021 SLT (Sh Ct) 441, *Conveyancing 2021* Case (44). See **Commentary** p 147.

In addition, the Inner House considered the question of redacted documents in relation to court proceedings. The assignee creditor had disclosed the whole of the main body of the assignation document, but had made redactions to its schedule and the sale and purchase agreement which preceded it. The debtor, Mr Guidi, argued that the complete documentation needed to be lodged, with confidentiality being achieved by restricting access to his legal team and by requiring them to give non-disclosure undertakings. The Inner House held that it was necessary in a commercial case to lodge only the parts of the documentation needed to prove the case. If the other party considered this unsatisfactory, a commission and diligence could be sought. Mr Guidi knew of this remedy and had enrolled the appropriate motion but without insisting upon it. He had not said how or why the redacted information might make the assignation ineffective. The court approved the guidance on redaction in two

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English decisions: *Hancock v Promontoria (Chestnut) Ltd* [2020] EWCA Civ 907, [2020] 4 WLR 100 and *Promontoria (Oak) Ltd v Emanuel* [2021] EWCA Civ 1682, [2022] 1 WLR 2004.

**(52) Royal Bank of Scotland plc v Aslam**  
**[2023] SAC (Civ) 20, 2023 GWD 20-181 affd [2023] CSIH 42,**  
**2023 GWD 46-380**

Mohammad Aslam applied for permission to appeal against the decision of the Sheriff Appeal Court refusing his appeal against a decree by default pronounced by a sheriff. That decree was in an action raised by Royal Bank of Scotland plc for recovery of possession of Mr Aslam's property in enforcement of a standard security which he had granted in favour of the bank in 2008. Mr Aslam had been sequestered a few months later after which he 'instigated a tsunami of litigation' (para 5) and was declared in 2019 to be a vexatious litigant. See *Lord Advocate v Aslam* [2018] CSIH 47, 2019 GWD 15-231.

There were two grounds of appeal. The first was that the sheriff did not manage the relevant hearing properly and had made untruthful statements about how Mr Aslam had behaved in earlier actions. The sheriff should have recused himself when the motion for decree by default was made. The Inner House disagreed. The sheriff's impartiality would not have been doubted by a fair-minded and impartial observer at the hearing (para 24), and in any event there was no dispute that the Sheriff Appeal Court was impartial.

The second ground of appeal was that the sheriff and Sheriff Appeal Court had erred in law by failing to consider whether it was reasonable in the whole circumstances for decree by default to be granted. Section 24(5) of the Conveyancing and Feudal Reform (Scotland) Act 1970 required such consideration. The Sheriff Appeal Court had followed *Bridging Loans Ltd v Hutton* [2018] CSIH 63, 2018 Hous LR 83 (*Conveyancing 2018* case (72)) too closely. Again, the Inner House disagreed. It was clear that in that earlier case the Inner House, and in the current case the lower courts, were satisfied in all the circumstances that it was reasonable for decree to be granted.

## COMMISSION ON SALE

**(53) Barton v Morris**  
**[2023] UKSC 3, [2023] AC 684**

The facts of this English case, which reached the Supreme Court, are well set out by Lord Burrows (para 198):

An oral contract was made between Mr Barton, who was a property dealer and developer, and Foxpace Ltd ... who owned a property called Nash House [Old Oak Lane, Northolt, London] which it wanted to sell. The only express terms of that oral contract, as found by the trial judge, were that if Mr Barton introduced to Foxpace a prospective purchaser, who then went ahead and concluded a sale of Nash House for

£6.5m, Foxpace would pay Mr Barton £1.2m. That sum of £1.2m represented deposits (and other expenses) that Mr Barton had himself lost on two previous attempts to buy Nash House. The parties did not give any thought to the consequences of a sale under £6.5m. Mr Barton introduced Western UK (Acton) Ltd (Western) to Foxpace. Western went ahead and bought Nash House. The initially agreed price had been £6.5m but, on learning of a potential issue with the high-speed rail-link HS2, the final purchase price was knocked down to £6m. There is no suggestion of any dishonesty by Foxpace in so doing (ie Foxpace did not lower the price to undermine Mr Barton's claim to £1.2m). As the sale price had been lower than £6.5m, Foxpace refused to pay Mr Barton the £1.2m promised and argued that they were not legally liable to pay him any sum for his services in introducing Western to them (although they did offer him £400,000 as a goodwill gesture which he refused).

We remark, in passing, that alleged purely oral agreements for large sums by way of commission crop up surprisingly often. For another recent example, see *Moorgate Capital (Corporate Finance) Ltd v HIG European Capital Partners LLP* [2019] EWHC 1421 (Comm), where a commission of £1m was allegedly agreed at a drinks event. In that case, unlike the present one, the court held that the existence of the oral contract had not been proved.

Mr Barton claimed the whole £1.2m from Foxpace. At first instance the court held that the alleged oral contract had been proved but that, since the eventual price was less than £6.5m, no commission was due: *Barton v Jones* [2018] EWHC 2426 (Ch). Mr Barton appealed, and the Court of Appeal held that he was entitled to £435,000, being a reasonable reward for his services: *Barton v Gwyn-Jones* [2019] EWCA Civ 1999, [2020] 2 All ER (Comm) 652. The judges were unanimous as to the result but differed as to the reason: either (i) an implied term of the contract or (ii) unjust enrichment. There has now been a further appeal to the Supreme Court, which has allowed the appeal, by a 3/2 majority, thus reinstating the first-instance decision: Mr Barton takes nothing. Of the nine judges who sat on the case altogether, five were for him and four against, but of course it is the final match game that is decisive. The majority considered that no term could be implied into the contract to entitle Mr Barton to any payment where the final sale was lower than £6.5m, and furthermore that the fact that there was a contract excluded any resort to the law of unjust enrichment. The decision is important in both those areas of law. (The case also has extensive discussion of s 15 of the Supply of Goods and Services Act 1982. That section does not apply in Scotland.) It is perhaps worth quoting Lady Rose (para 96), with whom Lords Briggs and Stephens concurred:

When parties stipulate in their contract the circumstances that must occur in order to impose a legal obligation on one party to pay, they necessarily exclude any obligation to pay in the absence of those circumstances; both any obligation to pay under the contract and any obligation to pay to avoid an enrichment they have received from the counterparty from being unjust.

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## COMMUNITY RIGHT TO BUY

### (54) *Moorbrook Textiles Ltd v The Scottish Ministers* 2024 SLT (Sh Ct) 1

Under Part 2 of the Land Reform (Scotland) Act 2003 a ‘community body’ can apply to the Scottish Ministers for registration of a ‘community interest’ in identified land, and if the Ministers agree there is then registration in the Register of Community Interests in Land. The effect of registration is to give the community body a pre-emption right.

The March Street Mill in Peebles, owned by Moorbrook Textiles Ltd, closed in 2015. The owner’s plan was to redevelop the site for housing. The Peebles Community Trust applied for a community interest in the site, and the Scottish Ministers agreed. The owner appealed, successfully (9 September 2020, unreported). The Peebles Community Trust then applied a second time to the Scottish Ministers, and once again the application was successful. The owner once again appealed, again with success (this is the case as reported at 2024 SLT (Sh Ct) 1). The decision by the Ministers was struck down on the ground that the housing development proposed by the owner would also have been in the public interest, and that the Ministers had failed to compare the competing public-interest merits of the two proposals. See **Commentary** p 175.

## FAMILY PROPERTY

### (55) *Gourlay v Clark* [2023] SC DUN 23, 2023 GWD 34-277

This was a case that turned on its rather unusual facts. In 2013 Ms Allan bought the house in Brechin that she rented from her landlord. When she died it passed to her daughter, Ms Crawford, who then transferred it to her own daughter Ms Clark, who then transferred it to her children, ie the great-grandchildren of Ms Allan. (Rather a lot of conveyancing activity for just a few years.) Mr Gourlay, who at one stage had been in an ‘on-off’ relationship with Ms Clark, claimed that the purchase price for the house had been advanced by him to Ms Clark who had then used it to enable her grandmother, Ms Allan, to buy the property. He now sought the return of the money from Ms Clark. The basis of the action is unclear but presumably it was that there had been a contract of loan. Establishing whether X has made a large payment to Y is usually not difficult, because of banking records, but it seems that those involved in this case often used physical cash, and it was the position of the pursuer that this was how he had advanced the money. He was unable to prove his case and decree was granted in favour of the defender. A curious fact (para 41) is that he ‘conceded this was the third court case in which he had been involved attempting to recover money paid to another person to fund the purchase of property’, the two previous cases both having failed. The pursuer represented himself: two law firms had successively withdrawn from acting for him (para 2).

## SOLICITORS

### (56) *Ashraf v Lester Dominic Solicitors* [2023] EWCA Civ 4, [2023] PNLR 14

Endlessly prolonged litigation in conveyancing is, as in other areas of law, a serious problem. 'Although ... the proceedings have been running for many years [seven years and counting], procedurally they are still at an early stage', commented Lord Justice Nugee at para 81, and that explains why, after a mere seven years, the facts of this case have yet to be established. What follows is based on what the English Court of Appeal, at this stage of the litigation, was prepared to accept on a provisional basis.

Syed Ul Haq owned (or in English terms held the freehold of) 91 Argyle Road, Ealing, London, subject to a mortgage with Bank of Scotland plc. He agreed to sell the property to Bijan Attarian. The same law firm, FLP, acted for both seller and buyer. The price was £1.25 million. Bijan Attarian obtained a 100% mortgage with Bank of Scotland plc. On 7 March 2008 contracts were exchanged. Bijan Attarian executed a mortgage deed in favour of the bank. Syed Ul Haq signed a TR1 form (the equivalent in England of a disposition) but it was not witnessed and so registration was not possible. The mortgage moneys were remitted by Bank of Scotland plc to FLP whereupon they were stolen by an employee of the firm, Misba Uddin. No registration took place of (i) the deed of transfer or (ii) the discharge of the existing mortgage or (iii) the new mortgage granted by the buyer. But the buyer (Bijan Attarian) received the keys and moved in.

Much of what happened thereafter is unclear. But the bank appointed a law firm, Messrs Rees Page, to see what could be done. Eventually Bijan Attarian produced a TR1 form bearing to have been signed by the seller (Syed Ul Haq), and duly witnessed, and registration of that, and of the mortgage deed by the buyer, went ahead. (What money, if any, was received by Syed Ul Haq, and whether his mortgage was discharged, are points of obscurity.)

The buyer, Bijan Attarian, defaulted on the loan. The bank enforced the mortgage and sold the property to Bavinder Singh Nijjar and Sonia Nijjar. Syed Ul Haq then asserted that the TR1 form in favour of Attarian was a forgery – a claim backed by a report from a handwriting expert. In 2016 Syed Ul Haq launched the present proceedings against a whole array of defendants, including Bijan Attarian, Bavinder Singh Nijjar, Sonia Nijjar, the Land Registrar, and Messrs Rees Page. But his streak of bad luck had not come to an end. Having issued these proceedings he died. The action was continued by his executor, Seema Ashraf.

The present aspect of the litigation was concerned with Messrs Rees Page. It was averred that they had been negligent. The preliminary question was whether they had owed any duties to Syed Ul Haq, given that he had never been their client. If they owed no duties to him then, whether negligent or not, they could not be liable to him.

'Mr Ul Haq was never a client of Rees Page. It is well established that in general solicitors owe their duties to their clients alone, and do not ordinarily

owe any duties of care to those on the other side of the transactions in which they are acting.’ Thus observed Lord Justice Nugee at para 2. ‘But’, he continued, ‘there are exceptional cases where solicitors have been held to owe a duty of care to someone who is not their client. The question raised in this ... appeal is whether the circumstances here are, or may be, one of those exceptional cases.’

The law in this area seems to be the same on both sides of the border, and indeed one of the cases cited by the court was a Scottish appeal to the Supreme Court, *NRAM Ltd v Steel* [2018] UKSC 13, 2018 SC (UKSC) 141 (on which see *Conveyancing 2018* p 155 ff). The Court of Appeal reviewed the authorities on the ‘duties to non-clients?’ question and decided that (to use Scottish terminology) a proof before answer should be allowed.

## BOUNDARIES AND POSITIVE PRESCRIPTION

### (57) *Wallace-Martinez v Nisbet* [2023] SC EDIN 9, 2023 GWD 10-105

Owners (A and B) of the ground-floor flat in a tenement took over the back green and erected a conservatory on it. In terms of the titles to each flat, the back green was the common property of everyone. Years passed. The question then arose as to whether the owners of the ground-floor flat had acquired exclusive ownership of the back green by positive prescription. It was held (i) that a disposition in favour of one of the owners (A) and which included the back green was a sufficient title to found prescription; (ii) that a later disposition in which A and B disposed to A and B both the ground-floor flat and the flat immediately above was inept, being granted by and in favour of the same parties, and so could not found prescription: see **Commentary** p 144; and (iii) that while A and B had possessed the back green for more than 10 years, they did not have the requisite possession for prescription because (a) the possession was not exclusive, and (b) the possession must be regarded as based on the right that A already had (a right of co-ownership in the back green along with the owners of all the other flats) rather than on the right which A sought to acquire (exclusive ownership of the back green): see **Commentary** p 121.

The sheriff’s judgment was affirmed on appeal by the Sheriff Appeal Court on 31 January 2024: see [2024] SAC (Civ) 4, 2024 SLT (SAC) 41. The decision of the appellate court will be discussed in the annual volume for 2024.

### (58) *Langskaill v Black* [2023] SC EDIN 7, 2023 SLT (Sh Ct) 95 affd [2023] SAC (Civ) 17, 2023 SLT (SAC) 51

In 2011 Mr Langskaill disposed to Mrs Langskaill the house which they shared in Edinburgh. One purpose of the conveyance was to upgrade the title so as

to include a private lane which they used and possessed but did not own. The disposition described the subjects as follows:

ALL and WHOLE that area or piece of ground with the dwellinghouse known as Two St Ronan's Terrace, Edinburgh, and other buildings erected thereon being the subjects described in Disposition by Mrs Elizabeth Austin in favour of Mrs Elizabeth Hardie dated Eleventh and recorded in the Division of the General Register of Sasines applicable to the County of Edinburgh (now Midlothian) on Twelfth, both days of May Nineteen Hundred and Twenty two and which subjects are shown delineated in red on the plan annexed and signed as relative hereto ...

Later, the question arose as whether this deed was a sufficient foundation for the prescriptive acquisition of the lane. The difficulty was that, while the plan included the lane, the verbal description, incorporating a bounding description from a deed of 1922, did not. It was held that, despite the contradiction, the disposition constituted a sufficient title for the purposes of prescription. See **Commentary** p 116.

**(59) Ardnamurchan Estates Ltd v MacGregor (No 2)**  
**8 July 2022, Fort William Sheriff Court rev [2023] SAC (Civ) 33,**  
**2024 GWD 8-65**

This was a long-running dispute over the ownership of an area of land on the Ardnamurchan peninsula at Glenborrodale, Acharacle. The issue in the present (and perhaps final) phase of the litigation was whether a disposition of 1992 granted in favour of the defenders and recorded in the Register of Sasines either (i) included the disputed area within the subjects conveyed or (ii) if it did not, nonetheless formed a *habile* title to the area for the purposes of positive prescription. The subjects conveyed were described by reference to (a) a statement of area (464.5 acres or thereby) and (b) a plan showing an area of 462.16 acres and from which the disputed area was excluded. The area was possessed by the defenders.

In respect of (i), it was held that the plan was determinative and that accordingly the disputed area was not conveyed by the 1992 disposition. See **Commentary** p 179.

In respect of (ii), it was held that, as the disputed area lay outside the boundaries as delineated on the plan, the 1992 disposition was not *habile* for the purposes of prescription. See **Commentary** p 120.

**(60) MacNab v Highland Council**  
**[2023] CSOH 59, 2023 GWD 35-287**

Highland Council acquired certain land for the purposes of a road-widening scheme. A compulsory purchase order was used followed by a general vesting declaration. So there was no disposition by the owners of the land, a Mr and Mrs Gilmour. The land was used for the construction of a private access road. But the Gilmours – or so they argued – continued to maintain and thus, in their view, to possess the verge of the road. Consequently, they said, they had reacquired the land after 10 years due to positive prescription.

The Lord Ordinary (Lord Harrower) accepted the argument in principle but found after a proof that there had been insufficient possession by the Gilmours. See **Commentary** p 126.

Other aspects of this case are digested as Case (7) and Case (13) above.

## MISCELLANEOUS

### (61) *Chall v Chall*

[2023] SAC (Civ) 27, 2023 SLT (SAC) 131

There was a deed assuming a new partner, and a conveyance making the new partner a joint trustee for the partnership property. One of those who signed later sought reduction of both deeds on the grounds of misrepresentation and undue influence. A key fact was (para 8) that the person in question 'only speaks Punjabi. She is unable to read English.' She succeeded at first instance. The new partner appealed, arguing that reduction was not competent given that *restitutio in integrum* was not possible. The appeal was dismissed on the grounds that in the circumstances *restitutio in integrum* was not necessary and, furthermore, that in any event it could be effected. The case is mainly of interest as an authority on the relevance of *restitutio in integrum* in actions of reduction.

### (62) *McGowan v Springfield Properties plc*

[2023] CSOH 12, 2023 SLT 330

This is not a conveyancing or property law case, but nevertheless might be of some interest to conveyancers. Mr McGowan controlled several companies that provided services to the defender, Springfield Properties plc, a housebuilding company, in respect of a construction site at Milton of Campsie (in Stirlingshire, though now administratively in East Dunbartonshire). On 1 February 2016 he sent this email to Springfield:

I am writing this letter to inform you that due to the recent developments and charges raised against Springfield Properties regarding the asbestos, crude oil and other hazardous materials which have been either demolished or buried on a number of your current and existing building sites that I have been left with no choice but to inform current home owners, family's and children whom have no knowledge of the hazardous risks which lie in or on the grounds of there new homes. As they have a right to know i will be sending a detailed letter to each and every home owner who have purchased a house from Springfield from Uddingston, Motherwell, West Linton and any potential buyers of Milton of Campsie. To inform them of the potential risks that they have bought into without any transparency from yourself. I will explain to the unfortunate clients that the asbestos riddled building that once stood on the Uddingston site was demolished by an excavator spreading asbestos fibres all over the site. I will provide a map to each client showing exactly where asbestos from another site in question was buried. Including a map to show the whereabouts of the crude oil. I will also provide photo copied proof of all original paper work from the skip company's with the addresses in which the contaminated material arrived from and also how many tons of which have literally been dumped on there door

step. I will also provide phone numbers for SEPA, HSE and local councils in which they can raise their questions to and also my own contact details if they wish for more information. I will also be explaining in the letter that the reason I know and have all said information is that Springfield properties have conducted the same neglect to your safety as they have to several of my own employees. I will state how our employees were sent onto site to demolish old factory's without any knowledge, proper training or proper safety equipment and these men working, eating breathing and returning home to their family's and children where in fact working with potentially lethal asbestos. I will explain that although after months of delegation and investigations Springfield have only now admitted to this wrong doing and are in the process of being charged but still haven't issued any apology to any of the men or family's who they have potentially harmed. The letter will also have an in depth explanation of the hazards that asbestos and contaminated material possesses and what danger it can cause to the lungs. And finally I will be explaining to the home owners how when this was brought to the attention of your own health and safety officer and SEPA it was brushed under the carpet and there were no follow ups to the claim. We therefore had to take it further ourselves and by doing so we have now gained the backing in the Scottish Parliament who have now taken action and a local MP has now requested all paper work not only to the Milton of Campsie development but also Uddingston, Motherwell and West Linton where a fuel tank may have been buried on site under instruction by Springfield Properties. If any of you personally would like to talk about these facts then please don't hesitate to contact myself. For Milton of Campsie is only the begging and the Uddingston site will be persuaded next for which we have paper work proof for misconduct regarding hazardous material also.

The next day, 2 February, he sent another email, confirming what he had said. Springfield reacted with litigation, and on 6 February obtained an interim interdict against the pursuer, banning him from:

Making any statement or publishing, circulating or distributing any document including any digital communication containing false, defamatory and misleading statements relating to and about [Springfield's] business; and, without prejudice to the foregoing generality, ... from making any statement or publishing any document which repeats in whole or in part any of the statements and assertions contained in [Mr McGowan's] emails to [Springfield] of 1 and 2 February 2016 in relation to [Springfield's] developments at Lillyburn Works, Campsie Road, Milton of Campsie, East Dunbartonshire and Oakbank Crescent, off Bellshill Road, Uddingston, South Lanarkshire.

Then 'in October 2020 Springfield pleaded guilty to an offence under ss 3(1) and 33(1)(a) of the Health and Safety at Work etc Act 1974 in respect of risks created for certain of Mr McGowan's employees between 29 April and 3 June 2013 when they were employed in removing material' (para 7). The risks included asbestos.

In 2021 Mr McGowan raised the present action for damages for wrongful interim interdict, offering to prove that what he had said in the email quoted above was substantially true. The opinion by the Lord Ordinary, Lady Carmichael, contains an extensive discussion of the law relating to damages for wrongful interdict. A proof before answer was allowed.

⌘ PART II ⌘  
STATUTORY  
DEVELOPMENTS



# STATUTORY DEVELOPMENTS

## **Moveable Transactions (Scotland) Act 2023 (asp 5)**

This important new Act covers two main areas: (i) assignments of claims (typically rights to be paid money) and (ii) security over moveable property. In relation to (i), provision is made for registration in a new register, the Register of Assignations, as an alternative to intimation to the debtor. In relation to (ii) a new form of security right known as a ‘statutory pledge’ is introduced. A statutory pledge is constituted by registration in another new register, the Register of Statutory Pledges, and so provides an attractive alternative to traditional or ‘possessory’ pledges in the case of corporeal moveables. A detailed account of the legislation is given later in this volume, beginning at p 186. The Act is expected to come into force in the second half of 2024.

## **Register of Overseas Entities**

The Register of Overseas Entities (‘ROE’) was established by Part 1 (ss 1–44) of the Economic Crime (Transparency and Enforcement) Act 2022 and has been in operation since 1 August 2022. Just under 30,000 overseas entities are currently registered on the ROE.

A series of amendments is made to the 2022 Act by the **Economic Crime and Corporate Transparency Act 2023 (c 56)**. Although this Act is mainly concerned with transparency requirements for UK companies and limited partnerships, Part 3 (ss 156–178) and schedules 6 and 7 make a number of changes to the ROE regime. To some extent, the changes were anticipated in our coverage of the ROE in last year’s volume: see *Conveyancing 2022* pp 171–94.

One which was not anticipated was the introduction of a new, sixth, category of ‘beneficial’ owner (for the other five, see *Conveyancing 2022* p 187). Section 163(3)(d) of the 2023 Act adds a new para 6A to schedule 2 of the 2022 Act. This provides that a person is a beneficial owner of an overseas entity where the entity holds land as a nominee for the person or for an entity of which the person is a beneficial owner under one of the other five categories.

Section 167 of the 2023 Act recasts and replaces ss 22–24 of the 2022 Act, making a number of changes along the way. One of those is in relation to the information collected by the ROE about trusts in cases where a registrable beneficial owner of an overseas entity is a trustee. The information required to be collected is substantial (see 2022 Act sch 1 para 8, as now amended by s 159

of the 2023 Act) and includes personal details (name, address, date of birth, and nationality) of each trustee and beneficiary. On the other hand, it is not currently available to the public (2022 Act s 22(1)(c)), a policy which is consistent with the private nature of the register of trusts (ie the Trust Registration Service) operated by HMRC. That is now to change. Under the replacement version of s 23(2), regulations can and, apparently, will soon be made by the Secretary of State allowing members of the public to apply for access to this information, subject to safeguards in particular cases. In addition, the UK Government launched a consultation on 27 December 2023 on whether public access to the information on trusts in the ROE (and also the HMRC register) should be further increased: see *Transparency of land ownership involving trusts* <[www.gov.uk/government/consultations/transparency-of-land-ownership-involving-trusts-consultation](http://www.gov.uk/government/consultations/transparency-of-land-ownership-involving-trusts-consultation)>. The consultation closed on 21 February 2024.

Section 177(2) of the 2023 Act corrects an error made by the 2022 Act which had inserted a subsection (5) into s 21 of the Land Registration etc (Scotland) Act 2012 at much the same time that a subsection (5) had also been inserted by the Coronavirus (Recovery and Reform) (Scotland) Act 2022 s 33(2). The first of these subsections (5) is now renumbered as subsection (4A).

Schedule 7 of the 2023 Act inserts a new schedule 6 into the 2022 Act, requiring overseas entities to deliver to the registrar further information about events occurring during the period beginning on 28 February 2022 and ending on 31 January 2023.

The following statutory instruments were made under the 2022 Act in the course of 2023: (i) **Register of Overseas Entities (Disclosure and Dispositions) Regulations 2023, SI 2023/344** (regulating the circumstances under which the registrar of companies can disclose to the public bodies listed in the schedule (which include the Scottish Ministers) information on the ROE which is otherwise protected and not available for public inspection); (ii) **Register of Overseas Entities (Definition of Foreign Limited Partner, Protection and Rectification) Regulations 2023, SI 2023/534** (making further provision for the rectification of the ROE by removal of material that is invalid or inaccurate); (iii) **Register of Overseas Entities (Penalties and Northern Ireland Dispositions) Regulations 2023, SI 2023/696** (enabling the ROE registrar to impose a financial penalty on a person if the registrar is satisfied, beyond reasonable doubt, that the person has engaged in conduct amounting to an offence under Part 1 of the 2022 Act); and (iv) **Register of Overseas Entities (Verification and Exceptions) (Amendment) Regulations 2023, SI 2023/1416** (exempting pension schemes from certain information disclosure requirements).

### New conservation bodies

Conservation bodies are bodies which are able to create and hold conservation burdens under s 38 of the Title Conditions (Scotland) Act 2003. A conservation burden is a personal real burden which preserves or protects the natural or built environment for the benefit of the public. The first list of conservation bodies, prescribed by the Title Conditions (Scotland) Act 2003 (Conservation Bodies)

Order 2003, SSI 2003/453, was subsequently amended (in order to add new conservation bodies) by (i) the Title Conditions (Scotland) Act 2003 (Conservation Bodies) Amendment Order 2004, SSI 2003/621, (ii) the Title Conditions (Scotland) Act 2003 (Conservation Bodies) Amendment Order 2004, SSI 2004/400, (iii) the Title Conditions (Scotland) Act 2003 (Conservation Bodies) Amendment Order 2006, SSI 2006/110, (iv) the Title Conditions (Scotland) Act 2003 (Conservation Bodies) Amendment (No 2) Order 2006, SSI 2006/130, (v) the Title Conditions (Scotland) Act 2003 (Conservation Bodies) Amendment Order 2007, SSI 2007/533, (vi) the Title Conditions (Scotland) Act 2003 (Conservation Bodies) Amendment Order 2008, SSI 2008/217, (vii) the Title Conditions (Scotland) Act 2003 (Conservation Bodies) Amendment Order 2012, SSI 2012/30, (viii) the Title Conditions (Scotland) Act 2003 (Conservation Bodies) Amendment Order 2013, SSI 2013/289, (ix) the Historic Environment (Scotland) Act 2014 (Saving, Transitional and Consequential Provisions) Order 2015, SSI 2015/239, and (x) the Title Conditions (Scotland) Act 2003 (Conservation Bodies) Amendment Order 2016, SSI 2016/371. The **Title Conditions (Scotland) Act 2003 (Conservation Bodies and Rural Housing Bodies) (Miscellaneous Amendment) Order 2023, SSI 2023/278**, further amends the list of conservation bodies by adding The Lifescape Project Limited.

The complete list of conservation bodies is now:

- All local authorities
- Aberdeen City Heritage Trust
- Alba Conservation Trust
- Castles of Scotland Preservation Trust
- Chapelton Community Interest Company
- Dundee Historic Environment Trust
- Edinburgh World Heritage Trust
- Glasgow Building Preservation Trust
- Glasgow City Heritage Trust
- Highlands Buildings Preservation Trust
- Historic Environment Scotland
- Inverness City Heritage Trust
- New Lanark Trust
- Perth and Kinross Heritage Trust
- Plantlife – The Wild-Plant Conservation Charity
- Scottish Natural Heritage (now known as NatureScot)
- Sir Henry Wade’s Pilmuir Trust
- Solway Heritage
- St Vincent Crescent Preservation Trust
- Stirling City Heritage Trust
- Strathclyde Building Preservation Trust
- Tayside Building Preservation Trust
- The John Muir Trust
- The Lifescape Project Limited

The National Trust for Scotland for Places of Historic Interest or Natural Beauty  
The Royal Society for the Protection of Birds  
The Scottish Wildlife Trust  
The Trustees of the Landmark Trust  
The Woodland Trust  
Tornagrain Conservation Trust  
United Kingdom Historic Building Preservation Trust

### **New rural housing bodies**

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

The first list of rural housing bodies was prescribed by the Title Conditions (Scotland) Act 2003 (Rural Housing Bodies) Order 2004, SSI 2004/477. More names were added by (i) the Title Conditions (Scotland) Act 2003 (Rural Housing Bodies) Amendment Order 2006, SSI 2006/108, (ii) the Title Conditions (Scotland) Act 2003 (Rural Housing Bodies) Amendment Order 2007, SSI 2007/58, (iii) the Title Conditions (Scotland) Act 2003 (Rural Housing Bodies) Amendment (No 2) Order 2007, SSI 2007/535, (iv) the Title Conditions (Scotland) Act 2003 (Rural Housing Bodies) Amendment Order 2008, SSI 2008/391, (v) the Title Conditions (Scotland) Act 2003 (Rural Housing Bodies) Amendment Order 2013, SSI 2013/100, (vi) the Title Conditions (Scotland) Act 2003 (Rural Housing Bodies) Amendment Order 2014, SSI 2014/130, (vii) the Title Conditions (Scotland) Act 2003 (Rural Housing Bodies) Amendment (No 2) Order 2014, SSI 2014/220, (viii) the Title Conditions (Scotland) Act 2003 (Rural Housing Bodies) Amendment Order 2017, SSI 2017/7, (ix) the Title Conditions (Scotland) Act 2003 (Rural Housing Bodies) Amendment (No 2) Order 2017, SSI 2017/301, and (x) the Title Conditions (Scotland) Act 2003 (Rural Housing Bodies) Amendment Order 2019, SSI 2019/172. The **Title Conditions (Scotland) Act 2003 (Conservation Bodies and Rural Housing Bodies) (Miscellaneous Amendment) Order 2023, SSI 2023/278**, now adds to the list Argyll and Bute Council, Hebridean Housing Partnership Limited, and Urras Oighreachd Ghabhsainn.

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

Albyn Housing Society Limited  
Argyll and Bute Council  
Argyll Community Housing Association  
Arran Development Trust

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

This official list is, however, likely to be out of date, due to mergers or bodies ceasing to be active.

### **Cost of Living (Tenant Protection) (Scotland) Act 2022: new expiry dates**

As originally enacted, Part 1 of the Cost of Living (Tenant Protection) (Scotland) Act 2022 (which imposes a rent cap and eviction moratorium on residential tenancies) was due to expire on 31 March 2023: see s 7 and, for discussion, *Conveyancing 2022* pp 197–99. But it has since been extended twice in relation to the private-residential sector: to 30 September 2023 by the **Cost of Living (Tenant Protection) (Scotland) Act 2022 (Amendment of Expiry Dates and Rent Cap Modification) Regulations 2023, SSI 2023/82**, and then to 31 March 2024 by the **Cost of Living (Tenant Protection) (Scotland) Act 2022 (Amendment of Expiry Date) Regulations 2023, SSI 2023/275**. Specially adapted notices and forms in relation to rent increases apply to private residential tenancies and assured tenancies for the whole of this extended period by virtue of the **Private Residential Tenancies and Assured Tenancies (Prescribed Notices and Forms) (Temporary Modifications) (Scotland) Regulations 2023, SSI 2023/58**.

In contrast, the expiry of the rent cap in relation to tenancies in the social-housing sector was fixed for 26 February 2023 by the **Cost of Living (Tenant Protection) (Scotland) Act 2022 (Early Expiry and Suspension of Provisions) Regulations 2023, SSI 2023/8**. For the background, see *Conveyancing 2022* pp 200–01. The Regulations also suspended the rent cap for student residential tenancies with effect from 30 March 2023.

Minor amendments are made to the Act by the **Cost of Living (Tenant Protection) (Scotland) Act 2022 (Incidental Provision) Regulations 2023, SSI 2023/116**, in respect of a provision (now numbered as s 33ZA) inserted into the Private Housing (Tenancies) (Scotland) Act 2016.

For these and other developments in respect of this Act during 2023, see p 127 below.

### **Licensing of short-term lets: a six-month reprieve**

Under the timetable originally envisaged by the Civic Government (Scotland) Act 1982 (Licensing of Short-term Lets) Order 2022, SSI 2022/32, those already in the business of short-term lets were required to apply for a licence by 1 April 2023. See *Conveyancing 2022* pp 128–29. That date, however, was pushed back to 1 October 2023 by the **Civic Government (Scotland) Act 1982 (Licensing of Short-term Lets) (Amendment) Order 2023, SSI 2023/73**.

For further developments in respect of short-term lets during 2023, see p 161 below.

### **RCI: extension of the transitional period**

The transitional period for registration in the Register of Persons Holding a Controlled Interest in Land, which had been due to expire on 1 April 2023, was extended for a further year, to 1 April 2024, by the **Land Reform (Scotland) Act 2016 (Register of Persons Holding a Controlled Interest in Land) Amendment Regulations 2023, SSI 2023/104**. The significance of the transitional period is that the penalties for failure to register in the RCI do not apply: see *Conveyancing*

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2021 p 214. In effect, the change allows an additional year in which to register in the RCI. See also p 74 below.



‡ PART III ‡  
OTHER MATERIAL



# OTHER MATERIAL

## Bills in the Scottish Parliament

Below are listed those Bills currently before the Scottish Parliament which are likely to be of interest to conveyancers.

### Judicial Factors (Scotland) Bill

This Government Bill, which was introduced to the Scottish Parliament on 5 December 2023, consolidates and modernises the law on judicial factors along the lines recommended by the Scottish Law Commission in its *Report No 233 on Judicial Factors* (2013). Of particular interest to conveyancers are s 7, which vests the estate in question in the judicial factor, as a separate patrimony, on the date when the appointing interlocutor is pronounced (but leaving to the judicial factor the decision as to whether to complete title to land by registration: s 13(2)), and s 20, which puts in place certain protections for those taking title to property in good faith from a judicial factor.

### Trusts and Succession (Scotland) Bill

This Bill, which completed all of its Parliamentary stages on 20 December 2023, received Royal Assent on 30 January 2024. Although the latter lay just outside the year covered by the present volume, the Bill can properly be referred to as the Trusts and Succession (Scotland) Act 2024 (asp 2). Detailed consideration of the conveyancing aspects of the Act will be given in next year's volume.

Despite the name, the Act is almost entirely about trusts. It implements the Scottish Law Commission's *Report No 239 on Trust Law* (2014) and will replace the Trusts (Scotland) Act 1921. But as well as covering the ground familiar from that Act, there are important innovations such as private purpose trusts and protectors. Not much of this bears directly on conveyancing but note should be taken of provisions on (i) the protection of those purchasing from trustees (s 43), (ii) the execution of deeds by trustees (ss 44 and 79, the latter amending the Requirements of Writing (Scotland) Act 1995), and (iii) completion of title by beneficiaries where a trustee or executor has died or become incapable (s 73). For discussion of various aspects of the Bill, see the contributions by Joshua Getzler, Yvonne Evans, Alexandra Braun and Daniel Carr published in (2023) *27 Edinburgh Law Review* 382–408.

### **Wildlife Management and Muirburn (Scotland) Bill**

In brief, this Government Bill (i) bans the use and purchase of glue traps; (ii) introduces licensing and training requirements for certain types of wildlife traps; (iii) introduces a licensing regime for land used for the shooting of red grouse; and (iv) extends a licensing requirement for all muirburn, regardless of the time of year that it is undertaken. The Bill was introduced to the Scottish Parliament on 21 March 2023 and is currently at Stage 2 of the Parliamentary proceedings.

### **Aggregates Tax and Devolved Taxes Administration (Scotland) Bill**

This Bill, which was introduced to the Scottish Parliament on 14 November 2023, provides for a devolved version of the UK aggregates levy. See **Commentary** p 216.

### **Housing (Cladding Remediation) (Scotland) Bill**

This Government Bill was introduced to the Scottish Parliament on 1 November 2023 and is currently at Stage 1 of the Parliamentary proceedings.

#### *Background*

The Grenfell Tower fire in London in June 2017 exposed the risk to life from the high combustibility of certain cladding materials used on the external walls of medium and high-rise buildings. Both the UK and devolved governments have been working on measures to address the danger. These have included the Building Safety Act 2022 and amendments to the Building (Scotland) Regulations 2004, SSI 2004/406 (see *Conveyancing 2022* pp 100–03). As well as the danger to life itself, the owners of buildings with defective cladding have encountered significant difficulties obtaining insurance and selling or remortgaging.

For conveyancers acting in relation to potentially affected properties, the ESW1 form, whereby an appropriately qualified professional assesses the cladding on a building, is now familiar (see *Conveyancing 2021* pp 95–98). Where this certifies that external wall materials are unlikely to support combustion or that the fire risk is sufficiently low that no remediation works are required, then lenders will be willing to provide mortgage finance which may be crucial for a transaction to proceed. If this is not the case, appropriate works will need to take place, something which may be both costly and slow.

An ESW1 form can only be issued to individual owners. In Scotland, unlike England, a flatted building typically has multiple owners. This means that north of the border the form normally covers a single flat rather than the whole building. In 2021 a working group appointed by the Scottish Government recommended as a new approach a single-building assessment ('SBA'). The clear advantage of this would be that ESW1 forms would not have to be issued time and time again, when individual flats were being sold. The Scottish Government accepted the recommendation. In November 2023 the Housing (Cladding Remediation) (Scotland) Bill was introduced to the Scottish Parliament to implement this

policy and to make further provision in relation to making buildings safe from dangerous cladding.

The Bill runs to 32 sections and one schedule. Part 1 (ss 1–2) sets up the new Cladding Assurance Register in which SBAs are to be registered. Part 2 (ss 3–17) gives the Scottish Ministers a battery of new powers to remediate cladding and creates numerous new criminal offences. Part 3 (ss 18–19) makes further provision in relation to the offences. Part 4 (ss 20–24) sets up a responsible developers scheme. Part 5 (ss 25–32) has the interpretation and final provisions. The schedule provides for a warrant to eject from evacuated premises. The Bill is currently at Stage 1. The lead committee is the Local Government, Housing and Planning Committee. Its call for evidence closed on 8 December 2023.

#### *Single-building assessment*

Section 25 has a lengthy definition for an SBA which can be divided into (a) relevant buildings, (b) what the assessment is to do, and (c) who is to carry it out and to what standards.

In relation to (a) there are five criteria. First, the building must be ‘a flatted building as defined in section 16(4) of the Land Registration etc (Scotland) Act 2012’. The provision in the 2012 Act covers tenements within the meaning of the Tenements (Scotland) Act 2004 and other sub-divided buildings where the division is vertical rather than horizontal. Secondly, the building must contain ‘at least one flat that is used, or intended to be used as a dwelling’. Wholly commercial buildings are therefore excluded. Thirdly, the building must have ‘an external wall cladding system’. Fourthly, the building requires to have a height of 11 metres or above. There are 780 buildings over 18 metres in Scotland with the figure for buildings between 11 and 18 metres being estimated at 5,000 (see *Housing (Cladding Remediation) (Scotland) Bill Policy Memorandum* paras 14–15). Fifthly, the building must have been constructed, or otherwise developed, between 1 June 1992 and 1 June 2022. This 30-year window is relatively limited but is the period during which highly combustible cladding materials were being used.

As regards (b), the SBA must report on ‘any risk to human life that is (directly or indirectly) created or exacerbated by the building’s external cladding system, and ... what work (if any) is needed to eliminate or mitigate any risk of that kind which is identified’. In relation to (c) the Scottish Ministers are given power to authorise who can provide an SBA and what standards are required.

#### *Cladding Assurance Register*

Once an SBA is carried out it is to be registered in a new Cladding Assurance Register. This will be maintained by the Scottish Ministers (s 1(1)). An entry in the Register is to be made either (i) after an SBA has been undertaken and concludes that no remediation work is required, or (ii) after an SBA has been undertaken which concludes that remediation work is needed and that work is then completed (s 1(2)). The entry is to include (a) the time when the SBA was carried out, (b) what relevant work (if any) was identified as needing to be done,

and (c) the date when the Scottish Ministers were satisfied that the work was completed. It may include any other information which the Scottish Ministers consider appropriate (s 1(3)). There may be a charge for accessing the Register (s 1(5)), a potential outlay for sellers as purchasers will want to see this to provide the assurance that the flat they are purchasing is safe. Those working on the next edition of the Scottish Standard Clauses will doubtless consider whether any revision is required once the Register has been established.

*Powers of Scottish Ministers (1): to arrange a single-building assessment*

As flatted buildings are typically in multiple ownership, it is usually challenging to obtain agreement from all the owners as to (i) the carrying out of an expert survey in relation to cladding remediation, and (ii) what work is to be done. This has affected the Scottish Government's Cladding Remediation Programme which is already underway and has 105 buildings in its pilot phase. The *Policy Memorandum* for the Bill notes, at para 45, that:

In one building concern from a resident has delayed progress in developing remediation plans for some months; in another building difficulties in contacting non-resident owners has significantly delayed the installation of an integrated alarm system.

It is a matter of debate whether a majority of owners is sufficient to proceed with an SBA under the Tenements (Scotland) Act 2004. This depends on whether cladding remediation is 'maintenance' within the meaning of the Tenement Management Scheme rule 1.5. The Bill does not alter this definition. Of course, even achieving majority agreement may be difficult in a large building. The Bill's solution is to give the Scottish Ministers direct power to arrange an SBA, subject to 7 days' written notice to the owners (s 3). There is further power to require from any person information which is reasonably required to carry out an SBA or to maintain the Cladding Assurance Register (s 4).

A person appointed to carry out an SBA is given a number of powers, including (i) to enter the property subject to certain conditions, (ii) to take other persons and equipment on to the premises, and (iii) to carry out reasonable tests (s 11). The Scottish Ministers can apply for a judicial warrant authorising a person to enter premises using reasonable force to carry out an SBA (s 12).

*Powers of Scottish Ministers (2): to arrange work and order evacuation*

Assuming there has been an SBA which identifies that relevant remediation work is required, the Scottish Ministers can instruct that the work is carried out (s 6). Unless all the owners have already agreed to the work taking place, 21 days' notice must be given to them. They have a right to appeal to the sheriff against the work taking place (s 10). If the SBA identifies that the risk to human life caused by the cladding is so immediate that it would not be appropriate to delay it for the 21 days of the notice period, then the Scottish Ministers can arrange for the work to be carried out straight away with only such notice as the circumstances permit (s 7). There is also a power to require evacuation

where the cladding ‘in the Scottish Ministers’ opinion [presents] a substantial risk to the occupants’ lives’, this risk having been identified in the SBA or the preparation of it (s 8).

### *Offences*

The Bill provides for a number of offences: (i) supplying false or misleading information to the Scottish Ministers or the person carrying out the SBA which is likely to lead to a material inaccuracy in the Register or there wrongly being no entry created in the Register (s 2); (ii) not complying with requests for information from the Scottish Ministers to enable the carrying out of an SBA or for the maintenance of the Cladding Assurance Register (s 5); (iii) occupying evacuated premises (s 9); (iv) obstructing a person carrying out an SBA (s 13); and (v) failing to assist or provide information to a person carrying out an SBA (s 14). The sanctions are typically to be fines, but someone occupying a building which the Scottish Ministers have ordered to be evacuated can be imprisoned for up to six months. The sanctions regime has been criticised as ‘severe’: see G Horsman ‘New cladding safety measures set to reshape Scottish property sector’, *Scottish Legal News*, 24 November 2023.

### *Responsible developers scheme*

The Scottish Ministers are given power by regulations to establish one or more responsible developers schemes (s 20(1)). The purpose is to allow those developers, who constructed buildings which are wholly or partly residential with cladding which creates or worsens risks to human life, to address or contribute to the costs of addressing these risks (s 20(2)). The regulation-making power is set out in some detail and includes making provision about who is to operate a scheme (s 20(3), (4)).

Eligibility for membership of a scheme is also to be determined by regulations (s 21), as are conditions for membership (s 22). In relation to the latter, the conditions may include (a) carrying out SBAs and the work identified by them, (b) contributing to the costs of SBAs and work identified by them, (c) providing information, and (d) adhering to agreements. Regulations are further to provide for an appeals process where a developer is not admitted to a scheme or has its membership terminated by the person operating the scheme on the ground of not meeting the conditions laid down for membership (s 23(3)).

Regulations are also to make provision for scheme operators to publish a list of developers who are eligible but are not scheme members. This is to be known as ‘a prohibited developers list’ (s 24(2)). The consequence of being on such a list is effectively that such a developer will be prohibited from constructing further buildings or at least buildings of a certain type (s 24(3)). To proceed to do so will be an offence and, where there is conviction on indictment, may be the subject of an unlimited fine (s 24(6), (7)).

The Building Safety Act 2022 and the Building Safety (Responsible Actors Scheme and Prohibitions) Regulations 2023, SI 2023/753, make broadly equivalent provision in England. As of December 2023, 42 developers had joined the

English scheme, a number of whom also build in Scotland. See <[www.gov.uk/government/publications/responsible-actors-scheme/responsible-actors-scheme-members-list](http://www.gov.uk/government/publications/responsible-actors-scheme/responsible-actors-scheme-members-list)>.

#### *Paying for cladding remediation*

The Cladding Remediation Programme as of the end of June 2023 had spent just over £3.6 million of public money: see *Housing (Cladding Remediation) (Scotland) Bill Financial Memorandum* para 19. The Scottish Government is also committed to spend all the consequential funding provided to it by the UK Government for cladding remediation, estimated at £400 million: see *Financial Memorandum* para 24.

The responsible developers scheme will encourage, if not compel, developers to meet at least some of the costs of SBAs and remediation works. Of course, some developers who were responsible for unsafe cladding may now be insolvent or no longer exist. In such cases, public funding is to be used to carry out the necessary work.

The Building Safety Act 2022 makes provision for a 'Building Safety Levy' for England with the objective of meeting the costs of sorting historic building-safety defects. The UK Government has consulted on how the levy would work, who would pay it, how it would be enforced, and who would collect it. The intention is that £3 billion will be raised from the levy. The Scottish Parliament currently does not have power to introduce a similar levy for Scotland but the Scottish Government has announced its intention to seek devolution of the power to introduce this: see *Policy Memorandum* paras 12–13. It has been reported, however, that in England the prospect of making developers meet the costs of cladding remediation through the Responsible Actors Scheme and the Building Safety Levy is contributing to a collapse in private-sector house building: see K Andrews, "'Cladding Tax' will slow housebuilding", *The Times*, 8 December 2023.

#### **A proposed Land Ownership and Public Interest (Scotland) Bill**

A consultation was launched on 7 June 2023 by a Labour MSP, Mercedes Villalba, on a proposal for a Bill to address the concentrated pattern of land ownership in Scotland: see <[www.parliament.scot/-/media/files/legislation/proposed-members-bills/land-ownership-consultation.pdf](http://www.parliament.scot/-/media/files/legislation/proposed-members-bills/land-ownership-consultation.pdf)>. Among other provisions, this would introduce a presumed limit of 500 hectares on individual sales or transfers of land and on the aggregate amount of land any one person could own. Land transfers over the 500-hectare limit would be subject to a public-interest test. The consultation closed on 12 September 2023. For the Bill to meet the threshold needed for introduction to the Scottish Parliament, it will have to attract the support of at least 18 other MSPs from at least half of the political parties, and in addition the Scottish Government will have to indicate that it does not intend to legislate in the area in question. The latter seems unlikely, given the apparent imminence of a Land Reform Bill.

## Land registration

### Completion of the Land Register

As has been clear for a long time now, the target of completion of the Land Register by the end of 2024 will not be met. Instead, Registers of Scotland are focused on two alternative strategies. One is to achieve functional completion, by which is meant the migration to the Land Register of all land which is likely to transact regularly. Essentially, this is all land other than social housing and large landed estates. By this measure, 87.1% of properties were on the Land Register or in the process of being registered by November 2023. (For these and other figures in this section, see <[www.ros.gov.uk/performance/land-register-completion](http://www.ros.gov.uk/performance/land-register-completion)>.) To a large extent, this target is of course self-fulfilling because, as and when Sasine land transacts, the transaction induces first registration.

The other strategy is to ‘unlock Sasines’ by linking Sasine search sheets to a map so that, by means of the map, the appropriate search sheet or sheets can be identified. Some information as to how this is done can be found at <<https://insideros.blog/2023/05/30/unlocking-sasines-helps-deliver-the-benefits-of-a-completed-land-register/>>. The latest available figure, for November 2023, shows that, by this measure, land-mass coverage has reached 94.5%. This comprises 52.6% already on the Land Register, 6.4% casework in progress, and a massive 35.5% made accessible as unlocked from Sasines.

### Registration backlog

90.5% of applications for registration received in 2022/23 were processed within the target date of 35 working days (according to p 21 of RoS’s *Annual Report and Accounts 2022–23*); and only 0.3% of applications received after 1 January 2021, 2,984 in all, took more than 2 years to process: see <[www.ros.gov.uk/about/publications/freedom-of-information-releases/2023/foi-release-number-of-land-applications-on-or-after-jan-2021-that-took-over-2-years-to-process](http://www.ros.gov.uk/about/publications/freedom-of-information-releases/2023/foi-release-number-of-land-applications-on-or-after-jan-2021-that-took-over-2-years-to-process)>. Substantial arrears from earlier years remain a source of concern for the legal profession: see eg *Conveyancing 2022* pp 76–78. The position is, however, continuing to improve. The most recently available figures on the number of still-open cases from 2021 and earlier, available at <[www.ros.gov.uk/performance/open-casework/total-number-of-open-cases](http://www.ros.gov.uk/performance/open-casework/total-number-of-open-cases)>, are as follows. The table shows the number of open cases as at November 2022 and the (smaller) number as at November 2023.

Year	November 2022	November 2023	% change
2021	33,428	23,228	–31%
2020	23,772	17,182	–28%
2019	22,321	17,640	–21%
2018	17,196	9,352	–46%
<b>Total</b>	96,717	67,402	–30%

Not everyone will be satisfied. Commenting on the registration arrears and on the problems they potentially create, the Scottish Law Agents Society has recently expressed the view (see (2023) 91 *Scottish Law Gazette* 68) that: 'It would be preferable for the Keeper to devote the resources available to her to reduce the arrears rather than "Unlocking the Sasine" which is little more than window dressing to try to satisfy an artificial and unachievable politically set target' [ie completion of the Land Register by the end of 2024].

### **Title Inaccuracy Enquiries service**

Since 17 July 2023, misgivings as to the accuracy of an entry in the Land Register must be communicated by means of the new Title Inaccuracy Enquiries ('TIE') online services portal. The official line is that, where someone considers that there may be an inaccuracy in a Land Register title, the position must be fully investigated before contacting the Keeper via the TIE. Fuller details on the TIE service, and on rectification of inaccuracies more generally, can be found at <https://kb.ros.gov.uk/land-and-property-registration/inaccuracies-and-compensation/inaccuracy-and-rectification>.

## **Register of Persons Holding a Controlled Interest in Land**

### **Deadline for registration: 1 April 2024**

Originally set for 1 April 2023, the deadline for registration in the RCI was extended by a year to 1 April 2024, a Monday, by the Land Reform (Scotland) Act 2016 (Register of Persons Holding a Controlled Interest in Land) Amendment Regulations 2023, SSI 2023/104. A failure to register in time attracts criminal penalties, with a potential fine of up to level 5 on the standard scale (currently £5,000): see the Land Reform (Scotland) Act 2016 (Register of Persons Holding a Controlled Interest in Land) Regulations 2021, SSI 2021/85, reg 10(8).

The deadline of 1 April 2024 applies only to cases where RCI registration is *already* needed. In the future, where new circumstances arise which create an obligation to register, the 2021 Regulations reg 10(7) allows 60 days to do so. So if the need to register first arose on, say, 4 March 2023 (because of the acquisition of an 'associate' within one of the cases listed in schedule 1 of the 2021 Regulations), registration must take place not later than 1 April 2024. But if the need to register first arose a year later, on 4 March 2024, the relevant deadline is 60 days, ie 19 April 2024.

### **The position of churches**

The Church of Scotland, among other churches, has complained of the massive burden which RCI registration imposes: see *Conveyancing 2022* p 80. In oral evidence to the Net Zero, Energy and Transport Committee of the Scottish Parliament on 21 February 2023, Màiri McAllan MSP, Minister for Environment and Land Reform, explained that she has had 'intense engagement over recent months [...], principally with religious stakeholders', but that she was in no doubt that 'the concerns are spread right across the charitable and third sector'.

The Minister explained that the administrative burden arises principally where there is a significant volume of titles, and where there is a complex ownership structure. However, the 'register actually exists to try and shed light on and to provide transparency' on these very issues. She stated:

There are significant reasons why retaining the Church of Scotland and other religious denominations within the scope of this RCI are really important. I think the Church of Scotland own something like 6000 titles in Scotland which makes them probably one of the largest landowners by title parcel numbers. A lot of their land still is registered in the Register of Sasines which dates from the 1600s, and even experienced solicitors can struggle to note title on, so for all these reasons it's very important that they are part of the Register.

I considered all of the options that the Church of Scotland and other denominations put to me, some of them were a full exemption from the Register itself, some of them were an amendment to Schedule 2 of the RCI, which would have created a special treatment for, I think as they put it, the main Scottish churches, which in itself is a vague term. But there were other reasons why that wasn't acceptable, including the fact that that would immediately raise the concerns of other stakeholders who were being treated differently [...]. So, I considered all of the suggestions of Church of Scotland and I continue to liaise with them on that.

### Rural land market

A report published by the Scottish Land Commission – *Rural Land Market Report: Analysis of land sales data 2020–2022* <[www.landcommission.gov.scot/resources](http://www.landcommission.gov.scot/resources)> – assembles sales data for rural land based on a cleaned-up and filtered version of data on sales from Registers of Scotland. Its main findings on numbers of sales are set out in the table below:

Category	2020	2021	2022	Total
Estate	25	23	25	73
Farmland	126	154	157	437
Forestry	93	83	54	230
Total	244	266	236	740

The trend was for a rise in sales of farms but a decline in the sales of landed estates and forestry, although the report warns that the figure for landed estates is likely to be inaccurate because of the limitations of RoS data (eg estates is not a recognised category, and the actual price is not always shown). The increase in farm sales is particularly marked when measured by area – from a total of 12,838 hectares in 2020 to 19,136 hectares in 2022. As well as the sharp fall in the number of sales for forestry, there was also a fall in the average price per hectare.

The vast majority of rural land sales in all categories involved land of less than 500 hectares; and only 1.1% of sales were of land of over 3,000 hectares. Eastern

Scotland (including the Borders) had the highest total number of sales over the three-year period, followed closely by south-west Scotland.

A second report, commissioned for the Scottish Land Commission, *Rural Land Market Insights Report 2023*, gives a qualitative gloss on these figures in respect of calendar year 2022, based on interviews with 21 representative land agents. The report opens with a summary of the rural land market (p ii):

The rural land market in Scotland is relatively small, with very little land transacted every year. Strutt and Parker estimated that only 1.12% of Scotland's total farmland and estates (excluding forestry) was transacted in 2022. Despite regular reports of natural capital payments being a significant purchase motivation, these new types of buyers are a sub-set of the market who are competing with more traditional buyers. This demand for the small amount of available land underpins land values achieved.

Nonetheless, in 2022 the land market slowed, mainly due to the global economic situation. So whereas the estate market in 2021 was characterised by excessive demand, supply and demand were beginning to level out in 2022 although it remained a sellers' market. As to motivation for purchases (p iii):

Agents highlighted a wide variety of estate buyer motives during 2022. The most noted theme was that environmental, social, and governance (ESG) motivations had become drivers for estate acquisition. Whilst amenity purchases continued to be a motivator for smaller estates, it was suggested that demand from lifestyle buyers was less significant through 2022 compared to previous years. Sporting potential was perceived to be a weakening motive for estate buyers in 2022, although many estates continued to be heavily managed for sporting interests.

Special mention can be made of the effect of natural capital on the market (p iv):

Natural capital payments were considered one of the key drivers in the estates and upland farmland markets in 2022. It was reported that large institutional or corporate 'carbon offset/inset' buyers became more obviously differentiated from commercial foresters during 2022. Changes to Woodland Carbon Code rules, particularly to the additionality test, were reported to have had a 'cooling effect' on institutional demand for land for planting in 2022. Overall, peatland restoration was not as prominent as a main driver in the 2022 market compared to afforestation. Whilst biodiversity potential was considered an important factor for buyers, rewilding type projects were not reported as a strong driver of land prices in 2022. Although reported as an important driver of land sales and land value in previous years, demand for renewable energy infrastructure projects remained relatively consistent (or slightly slowed) throughout 2022.

### **House prices and sale volumes**

A broad range of house-price statistics compiled by Registers of Scotland is available at <[www.ros.gov.uk/data-and-statistics/house-price-statistics](http://www.ros.gov.uk/data-and-statistics/house-price-statistics)>. This includes the detailed and valuable *Property Market Report 2022–23*; its main findings are summarised in the Report as follows:

**Residential market, sales from £20,000 to £1 million**

In 2022–23:

- the total number of residential property sales registered with RoS was 101,055, a decrease of 7.9% when compared with 2021–22;
- the average price of a residential property in Scotland was £216,337, an increase of 7.1% when compared with 2021–22;
- the total value of the residential sales market in Scotland was £21.9 billion, a decrease of 1.4% when compared with 2021–22.

**House type and price band**

In 2022–23:

- detached properties had the highest average price of all house types, £330,917, and the largest share of the residential sales market, 29%, with a sales value of £6.3 billion;
- flats had the lowest average price, £158,241, and the second largest share of the residential sales market, 27%, with a sales value of £5.8 billion;
- 69% of residential sales had a price between £20,000 and £250,000.

**New build residential market**

In 2022–23:

- there were 12,356 new build residential property sales in Scotland, 7.2% more than in 2021–22; 12% of residential property sales in Scotland were new builds.
- the average price for a new build residential property in Scotland was £308,158, 8.0% higher than 2021–22; in the last 10 years the average price for a new build residential property has increased by 47% compared with 40% for all residential properties;
- the value of the new build residential property market in Scotland was £3.8 billion.

**High value residential market, sale price of more than £1 million**

In 2022–23:

- there were 427 high value sales in Scotland, an increase of 9.2% when compared with 2021–22;
- of the properties that sold for over £1 million, 92% of the sales were under £2 million and 73% were under £1.5 million;
- the market value was £607.7 million, a new high and an increase of 11% when compared with 2021–22.

**City residential market**

In 2022–23:

- 31% of all residential properties sold in Scotland were located within one of Scotland's eight cities; Dunfermline was awarded city status in 2022;
- the average price paid for a residential property within one of Scotland's cities was £226,599;
- the market value for residential sales in all eight cities was £7.1 billion, compared with £22 billion across the whole of Scotland.

### **Residential property sales by urban/rural classification**

In 2022–23:

- 80% of residential property sales in Scotland were in urban areas and 20% in rural areas;
- the average price in urban areas of Scotland was £202,588 compared with £271,436 in rural areas; this may reflect differences in the mix of house types sold;
- for the last two years combined, 2021–2023, City of Edinburgh had the highest residential average price in urban areas of Scotland, £302,565, and Inverclyde had the lowest, £127,817;
- East Renfrewshire had the highest residential average price in rural areas, £387,127, and Na h-Eileanan Siar had the lowest, £148,182.

### **Mortgage market**

In 2022–23:

- the volume of residential sales with a mortgage was 66,125, accounting for 65% of the residential market;
- the volume of residential cash sales was 34,930, accounting for 35% of the residential market and the highest proportion of cash sales recorded in the 20-year time series;
- the volume of all mortgage securities registered by RoS across all property types, including both mortgage sales and remortgage/additional borrowing, was 110,628, a decrease of 6.7% from 118,581 mortgage securities in 2021–22.

### **Non-residential overview**

In 2022–23:

- non-residential sales had a total market value of £3.8 billion; of this total:
  - » 74% were commercial sales
  - » 14% related to sales of land
  - » 7% were agricultural sales
  - » 5% were forestry sales
- there were 4,223 commercial sales, a decrease of 3.5% from the previous year;
- there were 848 commercial leases, a slight decrease of 0.6% from the previous year.

### **Median overview**

The section overviews above have used the arithmetic mean (excluding sales below £20,000 and above £1 million) as the measure of average house price. However, medians are another useful measure of average house prices and the analysis of medians and the distribution of prices will be developed further in future reports.

In 2022–23:

- the median house price in Scotland was £185,000, an increase of 8.2% from 2021–22;
- the majority of residential sales (60% of sales) were between £105,000 and £310,000; five years ago, in 2017–18, the majority of residential sales were between £83,500 and £245,000.

### Private-sector tenancies

#### Numbers of registered landlords

In September 2023 the total number of private-sector landlords with active registrations in the local authority register was 240,852: see <<https://www.gov.scot/publications/foi-202300373592/>>. Naturally, most were in the cities: for example, Aberdeen (20,046), Edinburgh (42,327), Dundee (9,294), and Glasgow (40,348). Of that total, 29,471 (12.24%) landlords had two properties for let, and 27,795 (11.54%) had three or more properties.

#### Numbers and value of deposits under the tenancy deposit protection scheme

According to an FOI response <[www.gov.scot/publications/landlord-register-and-tenancy-deposit-protection-foi-release/](http://www.gov.scot/publications/landlord-register-and-tenancy-deposit-protection-foi-release/)>, the total number and value of deposits held under the tenancy deposit scheme on 31 March 2022 was as follows:

	Letting Protection Service Scotland	my/deposits Scotland	SafeDeposits Scotland	Total
Number and value of deposits	29,759 £27,264,616	61,708 £29,474,484	156,739 £122,690,088	248,129 £179,350,220

There were 115,158 new deposits in 2021/22. In the same year, the number of disputes adjudicated by the scheme was 369 by Letting Protection Service Scotland, 849 by my/deposits Scotland, and 3,588 by SafeDeposits Scotland.

#### Rent statistics

*Private sector rent statistics: 2010-2023* <[www.gov.scot/publications/private-sector-rent-statistics-scotland-2010-to-2023/](http://www.gov.scot/publications/private-sector-rent-statistics-scotland-2010-to-2023/)>, published on 28 November 2023, gives both all-Scotland figures and figures by area. In respect of the year from 1 October 2022 to 30 September 2023:

- Average rents for 2-bedroom properties, the most common size of property in the private rented sector, increased at a Scotland level by 14.3% in the year to end September 2023, to reach an average of £841 per month, up £105 per month compared with the previous year.
- Average 2-bedroom rents increased in all 18 Broad Rental Market Areas of Scotland compared with the previous year. Increases in 11 of these areas were above the average 12-month UK CPI inflation rate of 9.0%, ranging from 9.6% (or £59 per month) for South Lanarkshire up to 22.3% (or £191 per month) in Greater Glasgow. The lowest increases were seen in Dumfries and Galloway (1.5% or £7 per month), West Lothian (2.3% or £16 per month), Perth and Kinross (2.8% or £18 per month) and Highland and Islands (3.0% or £19 per month).

- In the latest year to end September 2023, Lothian had the highest average monthly 2-bedroom rent (£1,192), with Dumfries and Galloway having the lowest (£487).
- Average rents increased at a Scotland level in the latest year across all property size categories, with increases of 11.7%, 14.3%, 13.3%, 13.4%, and 15.1% for 1 to 4 bedroom and 1-bedroom shared properties respectively.

Taking the 13-year period from 2010 to 2022:

- Lothian and Greater Glasgow have seen increases in average rents above the rate of inflation between 2010 and 2023 across all property sizes.
- Dundee and Angus, East Dunbartonshire, Fife and Forth Valley have seen increases in average rents above the rate of inflation for all property sizes except 1-bedroom properties.
- Argyll and Bute, the Ayrshires and Dumfries and Galloway have seen increases in average rents of less than the rate of inflation across all property sizes between 2010 and 2023.

### Repairing standard

Section 14(1) of the Housing (Scotland) Act 2006 places private-sector landlords under a duty to ensure that the house meets the repairing standard both at the start of and throughout the tenancy. Included as part of the 'repairing standard' is the 'tolerable standard' (s 13(1)(h)), the definition of which is found in s 86(1) of the Housing (Scotland) Act 1987. A number of changes made to the repairing standard by the Housing (Scotland) Act 2006 (Modification of the Repairing Standard) Regulations 2019, SSI 2019/61, reg 3 have been coming into force in stages. All of the changes were in force as of 1 March 2024, the final tranche including requirements that:

- any common parts pertaining to the house can be safely accessed and used,
- the house has satisfactory provision for, and safe access to, a food storage area and a food preparation space, and
- where the house is in a tenement, common doors are secure and fitted with satisfactory emergency exit locks.

In anticipation of the changes coming fully into force, the Scottish Government, on 1 March 2023, published a helpful guide for landlords as to the rules as of 1 March 2024: *Repairing standard: statutory guidance for landlords* <[www.gov.scot/publications/repairing-standard-statutory-guidance-landlords/](http://www.gov.scot/publications/repairing-standard-statutory-guidance-landlords/)>.

### Reform

A further reform of private-sector tenancies was heralded by the publication by the Scottish Government, at the end of 2021, of *A New Deal for Tenants*. See *Conveyancing 2021* pp 101–04. This was notably light on detail, but further consultations were promised and some at least of the reforms were expected to be included in a Housing Bill in 2023. In the event, the timetable seems to have

slipped, there was no Housing Bill and, until now, no further consultation. A consultation document was finally published on 29 September 2023, *A New Deal for Tenants: Rented Sector Reform – Current Proposals* <[www.gov.scot/publications/new-deal-tenants-rented-sector-reform-current-proposals/](http://www.gov.scot/publications/new-deal-tenants-rented-sector-reform-current-proposals/)>, although only a month was allowed for responses. This document provides some of the detail which was lacking back in 2021. Reform is proposed in five main areas: rent control; ending joint tenancies; greater flexibility to personalise a home; unclaimed tenancy deposits; and judicial discretion to delay eviction. For details, see p 134 below.

### **Private residential tenancies: new styles and notes**

Landlords in private residential tenancies must provide their tenants with a written tenancy agreement and certain other information: see Private Housing (Tenancies) (Scotland) Act 2016 ss 10–13. To assist with this, there is a model tenancy agreement prepared by the Scottish Government. On 5 April 2023 a revised version was published to take account of the rent cap and the moratorium on evictions contained in the Cost of Living (Tenant Protection) (Scotland) Act 2022: see <[www.gov.scot/publications/scottish-government-model-private-residential-tenancy-agreement/](http://www.gov.scot/publications/scottish-government-model-private-residential-tenancy-agreement/)>. Corresponding revisions have also been made to the ‘easy-read’ notes on the model agreement, <[www.gov.scot/publications/easy-read-notes-scottish-government-model-private-residential-tenancy-agreement/](http://www.gov.scot/publications/easy-read-notes-scottish-government-model-private-residential-tenancy-agreement/)>, as well as to notes on the statutory terms which form its core, <[www.gov.scot/publications/private-residential-tenancy-statutory-terms-supporting-notes-essential-housing-information/](http://www.gov.scot/publications/private-residential-tenancy-statutory-terms-supporting-notes-essential-housing-information/)>.

### **Tenements: heating and repairing**

#### **Energy efficiency and zero-emissions heating**

In October 2021, the Scottish Government published its Heat in Buildings Strategy, <[www.gov.scot/publications/heat-buildings-strategy-achieving-net-zero-emissions-scotlands-buildings/](http://www.gov.scot/publications/heat-buildings-strategy-achieving-net-zero-emissions-scotlands-buildings/)>, setting out its plans to decarbonise Scotland’s homes and workplaces. In it, the Scottish Government committed itself to introduce regulations requiring all buildings to reach good energy-efficiency standards by 2033 (equivalent to EPC Band C) with private rented properties having to meet these by 2028. All homes will also have to use zero direct emissions heating systems by 2045. To these targets, tenements – especially older stone buildings which comprise 27% of all tenements – present an obvious obstacle. A Tenements Short Life Working Group was therefore established by the Scottish Government to consider issues of energy efficiency and zero emissions heating. Its report, <[www.gov.scot/publications/tenements-short-life-working-group-energy-efficiency-zero-emissions-heating-final-report/](http://www.gov.scot/publications/tenements-short-life-working-group-energy-efficiency-zero-emissions-heating-final-report/)>, published on 28 November 2023, recommends taking a phased approach:

A phased approach to regulating tenements could, at phase 1, see individual flats within tenement buildings required to meet new energy efficiency standards, where

this is feasible and cost-effective, alongside the rest of the housing stock. Depending on their suitability for individual zero direct emissions heating systems, certain types of tenements may initially not be asked to replace their existing fossil fuel systems until more suitable options could be offered to them, for example through development of a heat network or an assessment of communal heating options for the building being carried out. At phase 2, all individual flats could be required to meet both new energy efficiency standards and use a zero direct emissions heating system.

In addition:

The SLWG recommends that a methodology be developed for a Whole Building Assessment (WBA) for energy efficiency and zero direct emissions heat. Such an assessment should provide information and recommendations to owners on both the energy efficiency measures and zero direct emissions heat systems which are most appropriate for their building as a whole and for their individual dwellings ... Crucially, this assessment would highlight communal zero direct emissions heating options for the whole building, which otherwise and individually, each owner alone would be unlikely to consider. The Group is aware of other current and proposed assessment procedures which may be required on some tenement properties, for example the Single Building Assessment on fire safety [mentioned at p 68 above] and five-yearly maintenance reports recommended by the Scottish Parliamentary Working Group on Tenement Maintenance ... While the Scottish Law Commission undertakes its law review work examining compulsory owners' associations [as to which see *Conveyancing 2022* p 86], it is important that the Scottish Government simultaneously takes forward work on the five-yearly building inspections, and building reserve funds that were also recommended by the Scottish Parliamentary Working Group on Tenement Maintenance [as to which see *Conveyancing 2019* pp 101-02)].

The report also suggests the amendment of the Tenement Management Scheme (in schedule 1 to the Tenements (Scotland) Act 2004) in two respects: (i) the definition of 'maintenance' in rule 1.5, which already includes 'the installation of insulation', should be expanded to include, for example, the installation of communal zero emissions heating systems, and the use of common areas for siting of equipment necessary for individual zero direct emissions heating systems, and (ii) rule 2.5, which provides for decisions by a majority, should be amended so that a tied vote is treated as a vote in favour of carrying out works.

### **Repairs: the case for 'building reserve funds'**

Following on from the work of the Tenement Working Group (as to which see *Conveyancing 2019* pp 101-02), the Scottish Government commissioned research from the Diffley Partnership in relation to the possible introduction of compulsory sinking funds, or 'building reserve funds' ('BRFs') in the new terminology. More precisely, the purpose of the research was to 'allow the Scottish Government to make a determination of the required level(s) of monetary commitment from tenants/ landlords in relation to BRF.' The intended outcome was 'a points-based model that can be used to calculate how much people should contribute' together

with the development of ‘a model to calculate a BRF for a range of building types, assuming they are starting in a reasonable condition’.

The resulting report was published on 2 February 2023: *Provision of Building Reserve Funds (BRF) for Tenement Dwellings*, <[www.gov.scot/publications/provision-building-reserve-funds-brf-tenement-dwellings/](http://www.gov.scot/publications/provision-building-reserve-funds-brf-tenement-dwellings/)>. It may not have been quite what the Scottish Government was hoping for. As well as making use of responses previously received by the Tenement Working Group, the authors also carried out their own research in the form of an online survey which generated 2,150 responses, and also four focus groups, comprising 13 people in all (who all, we are told at p 7, ‘were thanked for their time with Love to Shop vouchers to the value of £30 and redeemable in many high street shops’). None of this, however, provided sufficient material to answer the Scottish Government’s questions. Indeed it may be that the questions are unanswerable. On this the report’s conclusion (p 53) was that:

Devising a points system for a BRF which would be regarded as both clear and fair was not seen as practical since:

- Tenements incorporate a mix of number of units, configurations, and ages,
- Buildings are in different existing conditions,
- The construction market and costs of material and labour fluctuates over geography and time,
- People and organisations owning tenements have a host of different circumstances.

In respect of carrying out tenement repairs, the report describes a number of obstacles that will be wearily familiar to many of those who live in a tenement or who have had to advise professionally on repairs: for example (pp 20–21), lack of knowledge on the part of owners; lack of care; ever-changing ownership of flats; affordability; negative cost-benefit analysis; failure of flat-owners to communicate with each other, especially in the light of the decline in owner-occupation; and cultural attitudes. Reasonably enough, the report emphasises that a building reserve fund could only be one part of a solution, and that many other measures would also be required. Listed as part of the report’s conclusions (pp 3–4), the suggested measures have a certain scatter-gun quality and – understandably, given the narrow remit of the inquiry – they are not always vouched for by argument in the report itself or by an analysis of how they might work in practice:

- Mandatory buildings insurance which covers common areas of tenements.
- Mandatory factoring for tenements – either by professional factors or self-factoring by established Owners Associations.
- Extending the application of Tenement Management Scheme’s definitions of scheme property, scheme decisions and shared costs to all tenements, not only those with gaps in title deeds.
- Mandatory maintenance accounts to utilise for maintenance, including repairs and replacements for environmental reasons.
- Clear communication and checks of the above at point of sale by conveyancing solicitors.

- Prioritisation of outstanding repairs determined by regular professional surveys.
- Transparency on projected and actual spend on common maintenance and repair by factors.
- Supporting sources of guidance and new technology to empower groups of owners and Owners Associations to make and follow through TMS scheme decisions.
- Incentives to encourage regular, high quality maintenance supply and demand.

### Reform of the law of heritable securities

#### General

The Scottish Law Commission published a further discussion paper on heritable securities on 29 June 2023. This was *Discussion Paper No 175 on Heritable Securities: Non-monetary securities and sub-securities*, the third in the Scottish Law Commission's review of heritable securities. The first, *Discussion Paper No 168 on Heritable Securities: Pre-default*, appeared in June 2019 and the second, *Discussion Paper No 173 on Heritable Securities: Default and Post-Default*, was published in December 2021. The Commission intends to publish a single report and draft Bill in 2025. The intention is to replace the Conveyancing and Feudal Reform (Scotland) Act 1970. A webinar by the Commission on the third discussion paper can be accessed at <[www.youtube.com/watch?v=zQYoU3Laczo](https://www.youtube.com/watch?v=zQYoU3Laczo)>. The closing date for comments was 29 September 2023.

#### Standard securities and non-monetary obligations

The paper deals with two thorny and specialist issues. First, it considers standard securities for non-monetary obligations. The 1970 Act s 9(8)(c) enables an obligation *ad factum praestandum* (that is to say, an obligation to do something) to be secured. In practice this is seen most often in relation to option agreements to acquire land, in order to protect the option-holder in the event of the landowner transferring ownership to another person or becoming insolvent. The usual remedy for enforcing a standard security is sale of the land with the proceeds being put towards the secured debt. And where a standard security secures the performance of a non-monetary obligation, what in fact it (probably) secures is damages for non-performance. The Law Commission wisely proposes that new legislation should bring clarity on this.

Of course, in option agreements, for example in a site assembly, what the option-holder wants is the land and not damages in lieu. That said, the registration of the standard security will bring the existence of the option to the attention of anyone seeking to acquire the land. And the effect of that knowledge means that the so-called 'offside goals' rule can, in principle, be invoked by the option-holder to reduce a transfer to such a person in breach of the option. Nevertheless, the parameters of that rule are notoriously unclear, not least in relation to options.

The Commission's proposed solution is therefore to introduce a new type of advance notice, provisionally termed a 'conditional' advance notice. Like existing

advance notices, regulated by the Land Registration etc (Scotland) Act 2012, conditional advance notices would be registered against the relevant land in the Land Register or Register of Sasines as applicable. The effect of so doing would be that the obligation narrated in the notice would still be enforceable despite ownership of the land being transferred. Clearly a 35-day period of effectiveness (as for existing advance notices) would be too short. The discussion paper asks consultees how long the period should be with the tentative suggestion of five years being made, as for inhibitions.

There are significant issues of policy here. Enabling rights to acquire under option agreements to bind third parties is tantamount to making these real rights. The Title Conditions (Scotland) Act 2003 s 3(5) moved the law in the opposite direction by allowing only pre-emption rights and no other types of option to be praedial real burdens. Such burdens also require a neighbouring benefited property. The wider enforceability of option agreements and the like against third parties could potentially lead to land sterilisation. The Commission recognises this risk. The finite period for enforceability of a conditional advance notice is a way in which this is addressed. Furthermore, the Commission is of the provisional view that, unlike ordinary advance notices, conditional advance notices would only be effective against competing deeds. They would not provide protection in the event of the landowner being inhibited or becoming insolvent. The Commission, however, recognises that if this becomes the law, the use of standard securities to secure non-monetary obligations will continue in practice because, as a real right, a standard security is effective against other creditors, albeit what is recoverable may only be damages. If this were to be the result of the reform it would be unfortunate as the current position would not be simplified. It remains to be seen what the Commission's final view will be following the consultation on the discussion paper. See more generally M Upton, 'Opting for reality', *Scottish Legal News*, 14 July 2023.

### **Sub-securities**

As a result of s 9(8)(b) of the 1970 Act, which defines 'real right in land', a standard security may be granted over a standard security. Further, the effect of s 9(3) is that this is the only way of granting security in respect of a standard security. Such 'sub-securities' are used in certain complex commercial transactions, principally securitisations.

By itself, however, a standard security is of no value. It is accessory to the debt (or more strictly the claim to payment of debt) which it secures. Thus, the idea of enforcing a standard security over a standard security by selling the latter as a freestanding asset makes little sense. The better approach is that, where a claim to payment is assigned in security, any standard security securing the claim is assigned along with it. The discussion paper therefore asks consultees whether the grant of a standard security over a standard security should cease to be competent. It further asks whether it should be possible to assign in security a standard security and, if so, what the consequences of this should be.

### Consultation on proposed Land Reform Bill

One of the more important Scottish Government publications of 2022 was a discussion paper on proposals to be included in a new Land Reform Bill – *Land Reform in a Net Zero Nation* <[www.gov.scot/publications/land-reform-net-zero-nation-consultation-paper/](http://www.gov.scot/publications/land-reform-net-zero-nation-consultation-paper/)>; for details, see *Conveyancing 2022* pp 91–95. The consultation closed on 30 October 2022, and a 221-page analysis of the responses, from 537 persons or bodies, was published on 2 June 2023: <[www.gov.scot/publications/land-reform-net-zero-nation-analysis-responses-consultation-exercise/](http://www.gov.scot/publications/land-reform-net-zero-nation-analysis-responses-consultation-exercise/)>. Some of the main points are mentioned below. A Land Reform Bill did not materialise in 2023, as had been expected, but will presumably be introduced to the Scottish Parliament in the course of 2024; it was promised as part of the *Programme for Government 2023 to 2024* which was published by the Scottish Government on 5 September 2023: <[www.gov.scot/programme-for-government/](http://www.gov.scot/programme-for-government/)>.

#### General approach

There was support among consultees for the general approach taken by the proposals, although some thought that they did not go sufficiently far. There was also opposition, emphasising that there was little or no evidence that land-ownership at scale has negative outcomes for communities or the environment. From the perspective of landowners, further administrative burdens were seen as unwelcome and diverting attention from other, often valuable, activities. A recurring theme of the responses was that the proposals were too vague and undeveloped for informed comments on them to be made.

#### A public-interest test for land transfers

For conveyancers, the most important of the Scottish Government’s proposals was the suggestion that certain land transfers should be subject to a public interest test (‘PIT’). This might lead to the transfer being blocked or only allowed to proceed subject to conditions such as that the land is sold in lots or offered to local community bodies. Most land, of course, would be unaffected: only ‘large-scale landholdings’ are targeted. The proposal was that landholdings should be classified as ‘large-scale’ if they satisfied one of the following criteria:

- land of 3,000 hectares or more;
- land that accounts for more than a fixed – but as yet unspecified – percentage of a data zone (or adjacent data zones) or local authority ward(s) designated as an Accessible Rural Area or Remote Rural Area, through the Scottish Government’s six-fold urban/rural classification scheme (as for which see <[www.gov.scot/publications/scottish-government-urban-rural-classification-2016/pages/2/](http://www.gov.scot/publications/scottish-government-urban-rural-classification-2016/pages/2/)>); or
- land that accounts for more than a specified minimum proportion of a permanently inhabited island.

A majority of consultees were unhappy with the figure of 3,000 hectares. Many thought it was too large, and suggested a lower figure, such as 1,000 hectares. In this connection it might be pointed out that only 1.1% of rural land sales in the last three years were of land of over 3,000 hectares: see p 75 above. Others questioned the value of a fixed figure, unless it also took account of matters such as the type of land, its location, and its particular impact on the local community. There was some uncertainty as to whether the figure applied to a single landholding (however defined), or whether it also took account of land elsewhere that was owned by the same person.

Some details of the proposed PIT system were set out in part 7 (pp 18–25) of the original paper. ‘The purpose of the test would be to assess whether, at the point of transfer of a large-scale landholding, a risk would arise from the creation or continuation of a situation in which excessive power acts against the public interest.’ All types of transfer would be affected – sales, donations, transfers on death, indirect transfers by means of the transfer of shares in a company formed to hold land. The PIT would be applied not only to those proposing to acquire the land, as the Scottish Land Commission had originally suggested, but also to those proposing to dispose of it.

In response to a question as to the advantages and disadvantages of a PIT, the advantages were seen to lie in the opportunity to diversify land-ownership, increase transparency, and provide further support for community ownership; the main disadvantages were said to be possible non-compliance with the ECHR, and an adverse effect on the market for large-scale landholdings. On the test itself, some consultees had misgivings about the potential subjectivity and uncertainty created by a PIT, and the risk that the test might change if there were changes in government. There was also the potential for conflict between local and national interests.

The idea that the PIT should apply to sellers as well as buyers was controversial. Those in favour – a clear majority – saw in it an opportunity to assess the existing public-interest value of a landholding and to highlight any concerns around whether it was being managed in the public interest. Examples of where the PIT might be useful were said to be (i) sales by public bodies which would result in land being lost to public use, and (ii) sales where (for reasons not explored) the seller ought not to benefit from the sale price or where it would be appropriate for the profits to be shared with the community. Those opposed to the idea pointed out that, if the underlying policy was diversification in land-ownership, it was hard to see why a decision to sell should not always be in the public interest. And if the point of an investigation into the seller was to judge the seller’s suitability as a landowner, then a negative conclusion was a reason for supporting, rather than preventing, a sale.

### **Legal obligation on large-scale landowners to comply with the LRRS**

Another proposal in respect of the owners of large-scale landholdings (however defined) was to impose a legal duty of compliance with the (currently voluntary) Land Rights and Responsibilities Statement (see *Conveyancing 2022* pp 88–90 for

the current text of the LRRS). In acknowledgement of its highly general nature, the LRRS would be underpinned by statutory codes of practice or protocols on particular issues. Non-compliance would be reportable, although not by ordinary members of the public. Following an investigation this could result in a recommendation for mediation, in guidance as to compliance, or in a direction to implement changes to operational or management practices. There might also be financial penalties including ‘cross-compliance’ penalties which would prevent the defaulting owner from accessing Scottish Government land-based subsidies.

On consultation, there was support (75% of those answering) for placing a duty on large-scale landowners to comply with the LRRS and its associated protocols. A majority (69% of those answering) also thought this would benefit local communities. However, some respondents argued that the current voluntary, guidance-led, approach is working for both landowners and communities, and also that, being intended only as guidance, the LRRS is too broad and too loosely expressed to be legally enforceable.

### **Compulsory land management plans**

Another proposal was to impose an obligation on the owners of large-scale landholdings to prepare and publish a management plan. This would, for example, have to:

- demonstrate how the owner will implement the principles set out in the LRRS;
- demonstrate how land will be used and managed so as to meet requirements (to be set out in LRRS codes/protocols) for sustainable management, contributing to net zero, and nature restoration goals;
- set out plans for engagement with local communities in line with the Scottish Government’s *Guidance on Engaging Communities in Decisions Relating to Land*;
- set out how the owner’s objectives and operations connect with local priorities, opportunities, and public policy; and
- demonstrate how the use and management of the land will contribute to carbon-emission reduction.

Enforcement would be by ‘a range of cross compliance mechanisms’.

This proposal was generally welcomed, although there were some quibbles about the proposed content due, for example, to issues of commercial confidentiality or data protection. In terms of how often management plans should be published, the most frequent suggestion was every five years.

### **Public funding to be subject to conditions**

A proposal that land must be registered in the Land Register to be eligible for public funding was broadly supported, as was a suggested requirement that the owners of large-scale holdings must demonstrate compliance with the LRRS and have an up-to-date land management plan in place.

### Consultation on reform of small landholdings

Small landholdings in Scotland have a fascinating history which was investigated back in 2018 by Dr Annie Tindley, a historian at Newcastle University, with legal input from Malcolm Combe of Strathclyde University: see *Small Landholdings Landownership & Registration: Project Report* <[www2.gov.scot/Publications/2018/11/3809](http://www2.gov.scot/Publications/2018/11/3809)>. Further useful material can be found in Sir Crispin Agnew of Lochnaw KC's *Small Landholdings Legislation: A guide to the law in Scotland* <[www.gov.scot/publications/small-landholdings-legislation-guide-law-scotland/](http://www.gov.scot/publications/small-landholdings-legislation-guide-law-scotland/)>. The principal legislation is the Small Landholders (Scotland) Act 1911 and the most recent is the Small Landholders and Agricultural Holdings (Scotland) Act 1931.

Small landholdings were conceived of as a crofting-like tenure for the non-crofting counties. The Board of Agriculture in Scotland was charged with matching demand for this type of tenure to supply by negotiating with landowners to provide suitable land. Once a farm was identified, and innumerable legal and administrative hurdles surmounted, the farm would be divided into, say, half a dozen small landholdings. As with crofting, there was security of tenure and controlled rent. Landowners were paid compensation although, oddly, only where they objected to the scheme. In time this came to be fixed at 25 years' worth of rental value, ie of the difference between the previous rent and the new 'fair' rent set by the Scottish Land Court. Once a small landholding was established, the maintenance of the scheme became the responsibility of the landowner who had, for example, to find a replacement tenant if the original tenant died or gave up the tenancy.

After a slow start, the number of small landholdings grew in the 1920s, partly to provide a livelihood for men returning from the war. At its peak in the 1930s there were around 476 such holdings. Today there are thought to be only 59, accounting for 5,360 acres of land in all. Factors contributing to this decline were rural depopulation and also the capital cost of mechanisation which could often hardly be justified for a small agricultural holding.

On 22 October 2022 the Scottish Government published a consultation paper on *Small Landholdings Modernisation* <[www.gov.scot/publications/small-landholdings-modernisation-consultation/](http://www.gov.scot/publications/small-landholdings-modernisation-consultation/)>. The main proposal was that small landholders should have an absolute right to buy their house and a pre-emptive right to buy the remainder of the landholding. But if, having bought, they resold quickly, a further payment would be due to the former landlord. Other proposals included a right to diversify activities on the landholding, and a widening of the right of inheritance and the right to assign. The consultation closed on 14 January 2023.

A summary of the views of the 41 people and organisations who responded to the consultation was published on 2 June 2023: <[www.gov.scot/publications/small-landholdings-modernisation-consultation-report/](http://www.gov.scot/publications/small-landholdings-modernisation-consultation-report/)>. For the most part, the proposals in the original paper were welcomed and supported. The majority of respondents (73%), for example, agreed that providing small landholders with the absolute right to buy the land under their homes and gardens could give

them greater security and allow them to invest into their small landholding and business with confidence. A smaller majority (68%) agreed that this could also be beneficial in reducing rural depopulation for communities with small landholdings in them.

### **Rural land use**

Some helpful data on land use is given in *Just transition in land use and agriculture: a discussion paper*, which was published by the Scottish Government on 20 June 2023 at <[www.gov.scot/publications/transition-land-use-agriculture-discussion-paper/](http://www.gov.scot/publications/transition-land-use-agriculture-discussion-paper/)>. Scotland's land mass of 8 million hectares (7.8 million hectares if bodies of water are excluded) can be broadly classified as follows:

- 8% is land available for arable agriculture (land capable of producing a wide range of crops);
- 18% is improved grassland (land limited to grass production due to circumstance such as slope);
- 20% is land available for mixed agriculture (land able to produce a moderate range of crops including cereals (primarily barley), forage crops and grass);
- 51% is rough grazing (land with very severe limitations that prevent improvement by mechanical means).

Currently, around 18% of Scotland's land mass (1.4 million hectares) comprises forest and woodland. Of this, around one-third is owned by the state as part of the National Forest Estate, and over 975,000 hectares are owned by individuals, private companies, charities, local authorities, and communities. These forests consist of different woodland types and tree species, ranging from the highly productive forests of the Galloway and Tay Forest Parks to traditional mixed Highland estates; and from urban forests in and around the cities to the Atlantic oakwoods in Argyll and the native Caledonian pinewoods in the Highlands.

### **Community ownership of land**

#### **Extent of community ownership**

The latest figures on community ownership of land in Scotland, published on 3 October 2023 <<https://www.gov.scot/publications/community-ownership-in-scotland-2022/>>, show that the number of 'assets' in community ownership in Scotland has increased from 738 in 2021 to 754 as at the end of 2022. This continues the trend of recent years, with over half of all assets having been acquired since 2010. The 754 assets are owned by 505 different community bodies. Judged by land area, the assets are overwhelmingly in Na h-Eileanan Siar (153,630 hectares, 72% of the total). Of the 754 assets, only 26 are not either land or buildings. These include a ferry, a small boat, a pontoon for berthing watercraft, a single car transporter, and salmon fishing rights for a river.

### **Model documentation for companies limited by guarantee and SCIOs**

One of the many obstacles facing communities wishing to register an interest in, or to exercise, a right to buy land is the formation of a suitable body for the purpose. Helpfully, the Scottish Government provides model articles of association for a company limited by guarantee which are suitable for a community body. These were updated in July 2023: see <[www.gov.scot/publications/forming-a-company-limited-by-guarantee-template-and-guidance/](http://www.gov.scot/publications/forming-a-company-limited-by-guarantee-template-and-guidance/)>. A different version is provided in respect of the crofting community right to buy: <[www.gov.scot/publications/crofting-community-right-to-buy-company-limited-by-guarantee-clbg-model-template/](http://www.gov.scot/publications/crofting-community-right-to-buy-company-limited-by-guarantee-clbg-model-template/)>. An alternative to a company limited by guarantee is a Scottish Charitable Incorporated Organisation ('SCIO'), and, again, updated model documentation is provided: <[www.gov.scot/publications/communities-forming-a-scottish-charitable-incorporated-organisation-template-guidance/](http://www.gov.scot/publications/communities-forming-a-scottish-charitable-incorporated-organisation-template-guidance/)>.

### **Underspend by the Scottish Land Fund**

Community buyouts are often assisted by the Scottish Land Fund. But, as a response to an FOI request, published on 12 December 2023 <[www.gov.scot/publications/scottish-land-fund-eir-release/](http://www.gov.scot/publications/scottish-land-fund-eir-release/)>, shows, there was an underspend of the annual £10 million budget of the Scottish Land Fund amounting to £2,341,118 in 2021/22, and £2,813,568 in 2022/23.

### **Green land-investment in rural Scotland**

Qualitative research conducted by the James Hutton Institute on behalf of the Scottish Government on the topic of green land-investment was published on 14 December 2023 as *The Social and Economic Impacts of Green Land Investment in Rural Scotland*, available at <[www.gov.scot/publications/social-economic-impacts-green-land-investment-rural-scotland/](http://www.gov.scot/publications/social-economic-impacts-green-land-investment-rural-scotland/)>. For the purposes of the research, green land-investment was defined as:

The purchase of, or investment in (directly through shareholding or changing focus of owner investment, or indirectly through intermediary companies) land to undertake nature restoration, regenerative land management or approaches that maintain or enhance natural capital, and/or sequester carbon emissions, differentiated from traditional ownership by the green motivations as a driver rather than a secondary outcome.

On the basis of six case-studies, the research identified both positive and negative consequences, often seemingly contradictory, of green investment. Examples of the former were: increased accessibility, transparency, and community engagement with estate activities; investor-owner support for community initiatives and housing provision; and increased tourism activity and employment. Examples of the latter were: loss of employment and effects on local service provision; decrease of housing availability due to conversion and increased market prices; a perceived increase in risks such as fire due to land management changes; and a lack of community involvement in decision-making. In relation to loss of employment, the research noted (p viii) that:

Green land investment activities mean that traditional rural jobs are shifting, with implications for the just transition. Across several of the case studies estate employees have been made redundant or reassigned to new roles. Agricultural production and numbers of tenants have declined. These groups expressed a need for long-term stability, for example through security of tenure or support for livelihoods.

In conclusion, a number of recommendations were made (p x):

*Policy makers* should:

1. Consider greater regulation of the natural capital market and to remove barriers to participation by tenant farmers and crofters.
2. Consider ensuring that a proportion of green land investment profits are shared with communities of places that are affected by investment activities, in particular, establishing minimum community benefit payments by windfarm developers.
3. Consider how best to support farming and gamekeeping communities in the just transition.

*Green land investors/owners* should:

1. Ensure transparency and accountability in land management plans and ownership objectives, and share these with communities.
2. Ensure that landownership, land management and land use changes consider the long-term consequences to rural community sustainability and the just transition.
3. Create opportunities to include community voices on decision-making boards or management committees, and ensure adherence to good practice community engagement.

*Rural communities* should:

1. Seek opportunities and be supported to engage and work with landowners (both new green land investor-owners, and existing private and public landowners), for example, through inviting investor-owners to regular community meetings.
2. Support landowners to overcome perceived barriers regarding communication and community representation.

### **Scottish Land Commission and natural capital**

In June 2022 the Scottish Land Commission gave formal advice to the Scottish Ministers on natural capital by the publication of *Natural Capital and Land: Recommendations for a Just Transition*. For details, see *Conveyancing 2022* pp 96–98. This, like all papers from the Scottish Land Commission, is available at <[www.landcommission.gov.scot/resources](http://www.landcommission.gov.scot/resources)>.

The paper included a number of proposals for reform, including the following. (i) There should be a mandatory requirement for prior notification of land sales above a certain size threshold, thus giving an opportunity for interested individuals or community bodies to make an approach. (ii) Early consideration should be given to the regulation of the carbon and other natural capital markets. This might help to avoid current problems with: poor environmental outcomes as a result of insufficiently rigorous accreditation or unverified

buyers; decision-making and benefit becoming detached from the underlying land asset; and inequitable distribution of benefits. (iii) The award of publicly-funded grants should be accompanied by more in the way of conditions, such as a requirement of community engagement and benefit or a clawback of a share in eventual profits. A year later, in June 2023, the Scottish Land Commission issued supplementary advice in the form of a short paper on *Natural Capital and Land Reform: Next Steps for a Just Transition*, <[www.landcommission.gov.scot/resources](http://www.landcommission.gov.scot/resources)>. This adds some further proposals for reform, including the following. (iv) The Scottish and UK governments should build the expectation for direct social and economic benefits to communities into conditionality for carbon and natural market participation and for receipt of public finance. (v) The Scottish Government and public bodies should strengthen the support available to enable communities to have agency in natural capital and land use change. (vi) The Scottish Government should consider a surcharge on LBTT for high-value transactions, with receipts reinvested to support community land ownership and capacity, as well as improving land information. In the long run, consideration should be given to capital taxation based on land value.

More is said about local communities in another Land Commission paper, *Community benefits from investment in natural capital: a discussion paper*. Emphasising the potential long-term impact of natural capital projects (such as carbon sequestration by growing trees), this urges those involved in such projects to engage at the earliest possible stage (even pre-purchase) with local communities and to share the benefits with them. 'Used effectively and designed and delivered in conjunction with the community, there is a clear opportunity for investment in natural capital to support the economic and social development of local communities while increasing the attractiveness of a project to investors who seek added value including alignment with their corporate social responsibility strategies' (p 3). Suggested examples of benefits include 'local jobs, improved infrastructure, or funding for local groups or projects' (p 3) as well as 'allocating surplus land to local housing, procuring services locally, and creating new jobs' (p 4). Responses to the paper were invited by 20 March 2023.

### **Scottish Land Commission and the 'good practice' programme**

#### **Introduction**

On 3 December 2019 the Scottish Land Commission launched a programme to promote good practice in relation to land rights and responsibilities. This was and is intended to encourage and enable those with an interest in land to recognise and fulfil their rights and responsibilities in practical ways, and 'to help drive the cultural change needed to make more of Scotland's land'. The idea is founded 'on promoting fair and reasonable behaviour rather than policing compliance'. More precisely, the aim is to provide guidance on the practical implementation of the Scottish Government's Land Rights and Responsibilities Statement (as to which see *Conveyancing 2022* pp 88–90). The intention is to produce documents which will be 'short, clear, practical and fair to all parties'. In this project the Land Commission works with an advisory group which includes representatives from

Community Land Scotland, Development Trusts Association Scotland, National Farmers Union, Scottish Land and Estates, the Scottish Property Federation, and Scottish Environment Link.

As well as brief 'protocols', the Scottish Land Commission also produces longer documents in the form of 'guidance'. Both are mentioned again below. All papers from the Scottish Land Commission are available at <[www.landcommission.gov.scot/resources](http://www.landcommission.gov.scot/resources)>. In addition, the Commission has conducted five webinars on the protocols (381 attendees), and run 11 workshops for stakeholders (293 attendees).

### Guidance

In 2023 the Commission published guidance on *Delivering Community Benefits from Land*. Although prompted in particular by the new interest in natural capital (see above), the guidance is intended to inform and persuade landowners of all kinds. Community benefits, in the sense covered by the guidance, 'consist of meaningful social and economic benefits that promote the sustainable development of communities' (p 9). They are of local benefit rather than benefit for the wider public (such as clean air, biodiversity, and carbon sequestration), and are intentionally conferred in the light of local engagement (which might or might not include a formal agreement). Community benefits can take various forms, 'such as provision of land for affordable housing or crofts, supporting local businesses, offering training and education opportunities, recreational and community facilities, offering land for community use, increasing fair work opportunities, and contributing to climate change adaptation' (p 10). The guidance is illustrated throughout by reference to real-life examples of community benefit.

Relatedly, another paper from 2023 offers *Guidance on Sharing Information about Land Ownership and Management*. The starting point is the Scottish Land Commission's recommendation, in its protocol on transparency of land ownership and land use decision-making (mentioned below), that landowners prepare a summary of land use and management which should be made available to the local community. The new guidance explains how this can best be done, and offers extensive examples of the kind of thing that the Commission has in mind (pp 6–12). As the paper explains (p 6):

Your summary may be a very short, one-page communications statement or a more complex document, depending on the type and nature of your business or project and your local context. It is important that your summary is *proportionate* to the type and scale of your landholding; and to the *impact* that the way you propose to manage it has on local communities and on the land itself. It should be short enough to be accessible and easy to read but contain enough relevant detail to help people understand who owns the land and how it is being managed.

From all of this there are said to be benefits both to landowners and to the community in which the land is situated (p 4):

Preparing this information creates an opportunity to connect the way land is owned and managed with local priorities. It also offers a chance to consider

how land management aligns with LRRS principles and protocol expectations. Many landowners have seen the benefits that working towards the LRRS principles can bring and that being transparent about their ownership and management can have, both for their business and for delivering positive outcomes for communities.

### **Protocols**

Protocols are intended as brief, approachable and practical guides to various aspects of the Land Rights and Responsibilities Statement. There are nine protocols in all, most originally published in 2019 and 2020 but reissued in March 2023. They cover the following topics: common good land; community engagement in decisions relating to land; diversification of ownership and tenure; good stewardship of land; land ownership by charities; land ownership by private trusts; negotiating transfer of land to communities; responsible natural capital and carbon management; and transparency of ownership and land use in decision-making.

### **Evaluation**

An *Evaluation of the Good Practice Programme* was prepared for the Scottish Land Commission at the end of 2022 by Axiom Research & Consultancy. This comprised an online survey of people who have accessed the programme in one form or another (53), case studies of four participants, and in-depth discussions with five stakeholder organisations.

The research showed that the most common way in which the ‘good practice’ programme was accessed was by downloading protocols. Of those, the most widely accessed was the protocol on community engagement, followed by those on transparency of ownership, land use decision making, good stewardship of land, and negotiating transfer of land to communities. The programme was generally well received by those who chose to use it.

A different question is the extent to which the ‘good practice’ programme is making a difference on the ground. A survey on community engagement conducted in 2022 drew responses from 65 landowners and 111 communities or community bodies: see *Community Engagement Survey Results 2022*. A comparison with a baseline survey which was conducted in 2019 was inconclusive. Two-thirds of community respondents reported that they knew who the local landowners were and how to contact them, but 63% felt that their views had little influence on decisions made about significant aspects of the way in which land or buildings are used or managed. Only 8% had made use of the Land Commission’s protocol on community engagement (as compared to 25% of landowner respondents) although a further 40% (48% for landowners) claimed to have heard of it.

### **Vacant and Derelict Land Survey 2022**

The Scottish Government conducts an annual survey of vacant and derelict land based on returns from local authorities. ‘Vacant’ land is land which is unused for the purposes for which it is held and is viewed as an appropriate

site for development; the land must either have had prior development on it or preparatory work must have taken place in anticipation of future development. 'Derelict' land (and buildings) is land which has been so damaged by development that it is incapable of development for beneficial use without rehabilitation. The annual surveys are being watched with greater attention following the introduction of a community right to buy abandoned, neglected or detrimental land by s 74 of the Community Empowerment (Scotland) Act 2015, which came into force on 27 June 2018, and also in the light of the work of the Scottish Land Commission on this topic (for which see *Conveyancing 2020* pp 117–18). Furthermore, as the 2022 survey (published on 10 May 2023: <[www.gov.scot/publications/scottish-vacant-derelict-land-survey-2022/](http://www.gov.scot/publications/scottish-vacant-derelict-land-survey-2022/)>) explains:

The statistics are used by the Scottish Government to help allocate and monitor the impact of the Vacant and Derelict Land Fund (VDLF). The fund aims to tackle long-term vacant and derelict land in Scotland. Its objectives are to stimulate economic growth, create jobs, promote environmental justice and improved quality of life, and to support communities to flourish and tackle inequalities. For 2022 to 2023, five local authorities received a share of £7.605 million reflecting the extent of vacant and derelict land in these areas and levels of deprivation.

The statistics will also be used in future years to monitor the impact of the low carbon Vacant and Derelict Land Investment Programme. This is a £50 million capital programme scheduled over five years to help with tackling persistent vacant and derelict land, supporting place based approaches to delivering regeneration and sustainable inclusive growth, as part of a 'just transition' to net-zero.

Key findings from the 2022 survey are:

- The amount of derelict and urban vacant land fell by 3% in 2022. This continued the downward trend. The amount has fallen by more than a quarter (27%) since 2016.
- *Sites reused for housing*: more sites were brought back into use for residential (including housing) purposes than any other use (140 of the 262 reused sites).
- *Living within 500 metres of derelict land*: in Scotland 27% of the population were estimated to live within 500 metres of a derelict site, though there are regional differences. In Na h-Eileanan Siar none of the population lives within 500 metres of a derelict site whilst this is 69% in North Lanarkshire.
- *Funding sources for land reuse*: 374 hectares of derelict or urban vacant land was brought back into use in 2022. Where the funding source was known 11% used public-sector funding only, 50% used private-sector funding only and 21% involved a mix of public and private funding. The Scottish Government's Vacant and Derelict Land Fund made either a partial or full contribution to the removal of 14 hectares.

### Overlooking baronies?

In the annual report of the Scottish Barony Register for 2022, issued on 5 January 2023, <<https://scottishbaronyregister.org/>>, Alastair K Shepherd, the custodian of the Register, warns of the dangers of overlooking baronies when dealing with land:

At least two registrations this year involved Eiks to Confirmation; in other words the barony interest was ignored/forgotten in the initial application for Confirmation. As practitioners familiar with the feudal system retire, it is likely that this will become more common. The danger of barony interests being overlooked in this way is probably higher with baronies that have stayed in the same family for a few generations. As more and more land is registered the barony interest is more and more likely to be overlooked. Given the price of baronies on the open market, my concern is that solicitors are likely to be claimed against. Please think of the barony interest when applying for Confirmation of, or registering, a substantial area of land.

### Books

- Kevin Clancy, *A Practical Guide to the Short-Term Lets Licensing Scheme in Scotland* (Law Brief Publishing, 2023; ISBN 9781914608759; £69.99)
- María Paz Gatica, *Fault-based and Strict Liability in the Law of Neighbours* (Edinburgh Legal Education Trust, Studies in Scots Law vol 13, 2023; ISBN 9781999611897; £30)
- Kenneth G C Reid, George L Gretton and Andrew J M Steven, *Conveyancing 2022* (Edinburgh Legal Education Trust 2023; ISBN 9781739993924; £30)
- Greg Sanders, *A Practical Guide to the Right to Roam in Scotland* (Law Brief Publishing, 2023; ISBN 1914608674; £49.99)

### Articles

- Craig Anderson, 'Inspire Scotland CC Ltd v Wilson' 2023 SLT (News) 40 (considering *Inspire Scotland CC Ltd v Wilson* 2023 SLT (Lands Tr) 15, *Conveyancing 2022* Case (15))
- Craig Anderson, 'Toal v Keeper of the Registers of Scotland' 2023 SLT (News) 10 (considering *Toal v Keeper of the Registers of Scotland* 2023 SLT (Lands Tr) 1, *Conveyancing 2022* Case (30))
- James Ashworth, 'Reservoirs: in on the Act' (2023) 68 *Journal of the Law Society of Scotland* Aug/30 (considering the regulation of reservoirs by the Reservoirs (Scotland) Act 2011)
- Jana Berger, 'Qualified electronic signatures in a post-Covid world' (2023) 182 *Greens Property Law Bulletin* 5
- Jana Berger and Stewart Brymer, 'QES in a post-Covid world' (2023) 68 *Journal of the Law Society of Scotland* Feb/36 (considering the LSS smartcard and possible alternatives)
- Mike Blair, 'Halliday's confusion' (2023) 183 *Greens Property Law Bulletin* 5 and 184 *Greens Property Law Bulletin* 2 (considering the doctrine of confusion as it applies to leases)
- Andrew Bowen, 'A fork or a spade?' 2023 SLT (News) 121 (considering *Koubová v Edinburgh Holiday and Party Lets* 2023 SLT (Lands Tr) 67, *Conveyancing 2023* Case (30), and *Sherriff v O'Rourke* [2023] SAC (Civ) 18, 2023 SLT (SAC) 89, *Conveyancing 2023* Case (32))

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- Stewart Brymer, 'Conveyancing: the future is in our hands' (2023) 185 *Greens Property Law Bulletin* 1
- Stewart Brymer, 'Digital ID: the benefits of an efficient orchestration service' (2023) 187 *Greens Property Law Bulletin* 1
- Stewart Brymer, 'Due diligence: what are clients entitled to expect?' (2023) 186 *Greens Property Law Bulletin* 1
- Stewart Brymer, 'Joining the dots in the home moving process' (2023) 182 *Greens Property Law Bulletin* 2
- Stewart Brymer, 'The holy grail of digital property transactions' (2023) 184 *Greens Property Law Bulletin* 1
- Stewart Brymer, 'Where is my boundary?' (2023) 183 *Greens Property Law Bulletin* 1
- Stewart Brymer, 'Why property investment schemes are best avoided' (2023) 68 *Journal of the Law Society of Scotland* March/Online
- Kieran Buxton, '2023: year in review' (2023) 187 *Greens Property Law Bulletin* 7
- Ross Caldwell, Jonathan Seddon and Sally Anthony, 'Transparency, human rights and the registers' (2023) 68 *Journal of the Law Society of Scotland* Jan/35 (considering *WM and Sovim SA v Luxembourg Business Registers*, CJEU, Case C-601/20)
- Malcolm M Combe, 'An analysis of Part 2 of the Land Reform (Scotland) Act 2003 using case law relating to the community right to buy', <<https://strathprints.strath.ac.uk/87147/>>
- Malcolm M Combe, 'Core Path Plan Amendment under the Land Reform (Scotland) Act 2003 revisited' (2023) 215 *Scottish Planning & Environmental Law* 17 (considering *Gartmore House v Loch Lomond and The Trossachs National Park Authority* [2022] CSIH 56, 2023 GWD 2-18, *Conveyancing 2022 Case* (21))
- Malcolm M Combe and Peter W G Robson, 'Rents and security of tenure - the circular progress of Scotland's private rented sector?' 2023 *Juridical Review* 177
- Iain Doran, 'LBTT and messy lease events' (2023) 184 *Greens Property Law Bulletin* 5
- Anna Forsyth, 'Register of Overseas Entities: an update' (2023) 68 *Journal of the Law Society of Scotland* Nov/46
- Ken Gerber, 'Insured and uninsured risks in commercial leases – what really matters' (2023) 186 *Greens Property Law Bulletin* 6
- Jonny Hardman, 'Moveable transactions: reform at last' (2023) 68 *Journal of the Law Society of Scotland* July/24 (considering the Moveable Transactions (Scotland) Act 2023)
- Stephanie Hepburn, 'Unlocking the potential of wind power in Scotland's crofting counties' (2023) 185 *Greens Property Law Bulletin* 4
- James Hotchkis, 'A pragmatic view on the desirability or otherwise of Survivorship Destinations' (2023) 91 *Scottish Law Gazette* 13
- Graeme Imrie and Michael McQuade, 'Green leases – here to stay' (2023) 68 *Journal of the Law Society of Scotland* June/Online
- David Laird, 'A Scottish building safety levy' (2023) 186 *Greens Property Law Bulletin* 5

- David Laird, 'Using AI in drafting conveyancing documents: a case study' (2023) 185 *Greens Property Law Bulletin* 3
- Mike McColl, 'Register of Overseas Entities in Scotland' (2023) 183 *Greens Property Law Bulletin* 3
- Megan McDonald, 'Solar leases in Scotland: sun? Scotland? solar-ious!' (2023) 182 *Greens Property Law Bulletin* 3
- Hector L. MacQueen, '*Restitutio in integrum* and Unjustified Enrichment' (2023) 27 *Edinburgh Law Review* 192 (considering *Lindsay's Exr v Outlook Finance Ltd* [2021] CSOH 82, 2021 GWD 26-349, *Conveyancing 2021 Case* (47))
- Laura Oliver and Ameeta Panesar, 'Leased in translation: cross-border differences explained' (2023) 2344 *Estates Gazette* 38 (explaining the main differences between leases in England and Scotland)
- H Patrick and A Kinnes, 'Moveable transactions: Scotland v England: Round 1 – assigning receivables' (2023) 38 *Butterworths Journal of International Banking and Financial Law* 602
- H Patrick and A Kinnes, 'Moveable transactions: Scotland v England: Round 2 – taking security over chattels' (2023) 38 *Butterworths Journal of International Banking and Financial Law* 675
- Hamish Patrick, Rod MacLeod, and Andrew Kinnes, 'Moveables reform: funds and the limited partnership' (2023) 68 *Journal of the Law Society of Scotland* July/Online (considering the impact of the Moveable Transactions (Scotland) Act 2023 on fund-finance transactions involving Scottish limited partnerships)
- Valentin Pyataev and Frankie McCarthy, 'Security reform: the final piece' (2023) 68 *Journal of the Law Society of Scotland* July/14 (introducing the Scottish Law Commission's Discussion Paper No 175 on *Heritable Securities: Non-monetary securities and sub-securities* (2023))
- Ashley Swanson, 'Modern Liferents – A Solution with its Own Problems' (2023) 91 *Scottish Law Gazette* 75
- Ken Swinton, 'Flooding risk and missives' (2023) 91 *Scottish Law Gazette* 27
- Ken Swinton, 'Radon and missives' (2023) 91 *Scottish Law Gazette* 54
- Ken Swinton, 'Unjustified Enrichment: *King v Adam*' (2023) 91 *Scottish Law Gazette* 5 (considering *King v Adam* [2022] SC KIL 43, 2023 SLT (Sh Ct) 101, *Conveyancing 2022 Case* (51))
- Ken Swinton, 'Who owns the ground to the rear of the tenement?' (2023) 91 *Scottish Law Gazette* 18 (considering *Wallace-Martinez v Nisbet* [2023] SC EDIN 9, 2023 GWD 10-105, *Conveyancing 2023 Case* (57))
- Claire Thornber and Patrick Campbell Corcoran, 'Nothing worthwhile is easy – getting notices right' (2023) 2308 *Estates Gazette* 42 (considering *Hingston v Craigellen Assets Ltd* [2022] SC STO 35, 2022 GWD 37-542, *Conveyancing 2022 Case* (36), *Lujo Properties Ltd v Gruve Ltd* [2023] SC GLA 3, 2023 GWD 1-9, *Conveyancing 2023 Case* (20), and *Ventgrove Ltd v Kuehne + Nagel Ltd* [2022] CSIH 40, 2022 SLT 1037, *Conveyancing 2022 Case* (34))

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- Andrew Todd, 'Title conditions: what's in a name?' (2023) 68 *Journal of the Law Society of Scotland* Feb/34 (considering *Castle Street (Dunbarton) Developments Ltd v Lidl Great Britain Ltd* 2023 GWD 3-37, *Conveyancing* 2022 Case (6))
- Andy Todd, 'Lessons from the first decision of the New Homes Ombudsman' (2023) 186 *Greens Property Law Bulletin* 3
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- Euan West, '*King v Adam* – Clarifying the Law on Unjustified Enrichment, Cohabitation and Prescription' (2023) 27 *Edinburgh Law Review* 185 (considering *King v Adam* [2022] SC KIL 43, 2023 SLT (Sh Ct) 101, *Conveyancing* 2022 Case (51))
- Andy Wightman, 'ScotLIS 3 – a critical tool for Scotland. Scotland's land information service: what is it and why it matters' (February 2023; <[https://static1.squarespace.com/static/59b82ed532601e01a494df34/t/64075b6d50ab33464b4bfbf6/1678203757948/SCOTLIS+Report+by+Andy+Wightman+March+2023.pdf?mc\\_cid=11b9c681d4&mc\\_eid=a4c500cc94](https://static1.squarespace.com/static/59b82ed532601e01a494df34/t/64075b6d50ab33464b4bfbf6/1678203757948/SCOTLIS+Report+by+Andy+Wightman+March+2023.pdf?mc_cid=11b9c681d4&mc_eid=a4c500cc94)>
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⌘ PART IV ⌘  
COMMENTARY



# COMMENTARY

## OFF-REGISTER EXTINCTION OF SERVITUDES<sup>1</sup>

### The nature of the problem

You are acting in a purchase of property. You look at the title sheet. It shows, in clear and unmistakable terms, that the property has the benefit of a servitude – for access, say, or drainage. The servitude is essential for your clients. But you are reassured. The Keeper knows best. If the Land Register says there is a servitude then, of course, there *is* a servitude.

In most cases, that is a reasonable assumption. But not always. A servitude which existed when first entered on the Land Register may have come to be extinguished by some off-register event.<sup>2</sup> If so, the Land Register is likely to be slow to catch up. Often indeed it will never catch up. On the one hand, the Register continues to show the servitude. On the other hand, the servitude has ceased to exist. No doubt your clients are in good faith. They trust in the Register. They *think* they have a servitude. So do you. But all the good faith in the world will not revive a servitude which has been extinguished by an off-register event.

What, then, are the events which might lead to this calamitous result? There are two main examples.<sup>3</sup> One is confusion. The other is negative prescription. Neither, unhappily, is readily detectable by a person seeking to buy the property. For purchasers, they are a trap.

In 2023 there were important cases on both of those topics.

### Extinction by confusion

#### Identifying the rules

The facts of *Logan v Irons*<sup>4</sup> were a textbook example of when confusion might operate to extinguish a servitude. In 1987 an express servitude of aqueduct was created over a property in Dunbog, Fife known as ‘Beauty’s Land’ in favour of a neighbouring property known as ‘The Auld Kirk’. Subsequently, in 1994, the owner of The Auld Kirk acquired Beauty’s Land. This combined ownership

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<sup>1</sup> This section is by Kenneth Reid.

<sup>2</sup> Or of course the servitude, despite being entered on the Register, may in reality never have existed at all. But that is a different subject.

<sup>3</sup> A third is extinction of servitudes by abandonment.

<sup>4</sup> [2023] SAC (Civ) 9, 2023 SLT (SAC) 152. The Opinion of the Court was given by Appeal Sheriff Wendy A Sheehan and the other members of the court were Sheriff Principal D C W Pyle and Sheriff Principal S Murphy KC.

lasted until 2007, when a loan secured on The Auld Kirk was called up and the property was sold by heritable creditors. Since then the properties have been in separate ownership. But for a period of 13 years they were owned by the same person. With what result? Was the servitude extinguished by confusion when, in 1994, the dominant and servient tenements came to be owned together (albeit on separate titles)? Or was this one of those cases where confusion did not operate?

The issue came to a head following the purchase of The Auld Kirk by Mr Logan in 2017, unaware presumably – for how could he tell? – of the fact that, a decade previously, the properties had belonged to the same person. In the present action Mr Logan sought declarator that The Auld Kirk benefited from a servitude of aqueduct over Beauty’s Land.

The relevant rules to be applied to facts such as these have long been the subject of dispute. On one view, associated with the institutional writer, Erskine, a servitude is always extinguished by confusion if the dominant and servient tenements come to be owned by the same person.<sup>1</sup> On another view, associated with the institutional writer, George Joseph Bell, confusion does not operate in circumstances where a later ‘separation or disunion may be anticipated’; instead the servitude is merely suspended and revives on the subsequent separation.<sup>2</sup> A more commodious version of Bell’s view, put forward by Lord President Inglis in *Walton Bros v Magistrates of Glasgow*,<sup>3</sup> comes close to saying that the effect of the two properties coming into single ownership is always suspensive rather than extinctive.

Insofar as there has been an agreed position among textbook writers, it is closer to Erskine than to Bell. Cusine and Paisley’s treatment may be taken as representative:<sup>4</sup>

The conclusion therefore seems to be that once the ownership of the dominant and the servient tenements come into the hands of one person, in the same capacity, the servitude is extinguished *confusione* but extinction does not take place when the ownership passes into the hands of the same person, but in different capacities.

An example of ‘different capacities’ would be where a person holds one property as a trustee and the other as an individual.<sup>5</sup> That, however, was not the situation here.

1 John Erskine, *An Institute of the Law of Scotland* (1773, reprinted by the Edinburgh Legal Education Trust as Old Studies in Scots Law vol 5, 2014) II.9.37.

2 George Joseph Bell, *Principles of the Law of Scotland* (4th edn, 1839, reprinted by the Edinburgh Legal Education Trust as Old Studies in Scots Law vol 1, 2010) § 997.

3 (1876) 3 R 1130 at 1133.

4 D J Cusine and R R M Paisley, *Servitudes and Rights of Way* (1998) para 17.25. To similar effect is W M Gordon and S Wortley, *Scottish Land Law*, 3rd edn, vol II (2020) paras 25-104 and 25-105. There is support for the view given by Lord President Inglis in R G Anderson, ‘A Whimsical Subject: *Confusio*’, in A J M Steven, R G Anderson and J MacLeod (eds), *Nothing so Practical as a Good Theory: Festschrift for George L Gretton* (2017) 31 at 40–42.

5 Another exception is sometimes said to cover the case where the owner of one of the properties is no more than a co-owner of the other. In that connection we are grateful to Professor Roderick Paisley for referring us to *Munro v Bowman* (1932) 49 Sh Ct Rep 3, where confusion was said not to operate where a flat-owner holding a right of servitude over the back green of a tenement also held ‘a mutual right in common ... to the use of the back green’; whether the latter right amounted to a right of common property is not, however, clear. In response to the decision in

In *Logan v Irons* the Sheriff Appeal Court was placed in the position of having to choose between the different views. Naturally enough, the arguments presented for the servient owner took a broad view of the operation of confusion while those presented for the dominant owner took a restrictive view. Having reviewed the authorities, the court adopted the view taken by Cusine and Paisley, among others. On that basis, it followed that, 'in the circumstances of this case the ordinary operation of confusion applies'.<sup>1</sup> The Court continued:

The express right of servitude was extinguished by confusion when the two properties came into the same ownership on 6 May 1994. Accordingly, the pursuer's ground of appeal that the sheriff ought to have concluded that the servitude contained in the 1987 deed of servitude was not extinguished by confusion in 1994 (when the pursuer's and the defender's properties came into the same ownership) but revived without constitution de novo upon the re-division of the properties in 2007 must fail.

### Uncovering confusion

Could Mr Logan have found out about the extinction of the servitude by confusion at the time when, in 2017, he bought The Auld Kirk? The answer is: not easily. The title of The Auld Kirk was entirely separate from the title to Beauty's Land, the servient property. By 2017 the two properties had long since ceased to belong to the same person. The only way in which the period of combined ownership – and hence the operation of confusion – could have been discovered would have been by examining the title not merely of The Auld Kirk, the property being acquired, but also of Beauty's Land, the putative servient tenement. And that, as the Sheriff Appeal Court noted, would not have been 'current practice'.<sup>2</sup> Furthermore, the exercise would have required a systematic examination of the history of both titles so as to determine whether, at any point in time, the owner of the two properties had been the same. And this would have to cover the period from the creation of the servitude – which in the present case was 1987 but will often be much earlier – right up to the present day. At best such an investigation would have been arduous, at worst impossible, due to the ahistorical nature of title sheets (which show only the present position and not the position in the past)<sup>3</sup> and the practical

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*Clydesdale Bank plc v Davidson* 1998 SC(HL) 51 (holding that owners in common cannot grant a real right of lease to one of their own number), Professor Paisley, founding on Bankton, *An Institute of the Laws of Scotland* IV.45.43, suggests that the decision is restricted to the *constitution* of subordinate real rights and does not apply to their *extinction*.

1 Paragraph 28.

2 Paragraph 27. See also Cusine and Paisley, *Servitudes and Rights of Way* para 17.25: 'In our experience, it does not yet appear to be the practice of even a minority of the profession to examine the titles of both servient and dominant tenements. We do not wish to encourage the growth of such a practice.'

3 Under the Land Registration (Scotland) Act 1979 the Keeper was not obliged to keep copies of the underlying deeds – dispositions and so on – nor, if copies were kept, as sometimes happened, to allow access to them. (There were minor exceptions.) The approach of the Land Registration etc (Scotland) Act 2012 is different. The Keeper is obliged to keep copies and to allow access, and, if asked, to provide extracts. See s 1 (with its key word 'public') read with ss 2 and 14, and, for extracts, s 104. Section 104 also gives a limited right to obtain copies of previous states of a title sheet. For discussion, see K G C Reid and G L Gretton, *Land Registration* (2017) para 3.12.

difficulty of identifying relevant historical material and then extracting it from Registers of Scotland.<sup>1</sup>

In the light of this unpromising background, Gordon and Wortley have made the suggestion that confusion should operate only where the two tenements are held on a single title, with the result that the fact of combined ownership would be more readily discoverable by the potential purchaser of one of them.<sup>2</sup> But there is no sign of the courts being willing to recognise such a rule.

### Recreating the servitude on separation

To all of these difficulties there is a possible way out. If the act of combining the two properties has the effect of extinguishing the servitude by confusion, so the act of separating them again may result in the servitude being recreated. Importantly, this is not the revival of the previous servitude but the creation of a new servitude albeit on identical terms. In a well-ordered transaction, this will be done by express provision in the split-off disposition. But even where the need for a servitude is overlooked, as in the present case,<sup>3</sup> the law may be willing to imply the necessary servitude.

Broadly speaking, a servitude is implied into a split-off disposition in circumstances where (i) the use to which the servitude would give right was already being exercised by the single owner prior to the act of separation (what is sometimes called a 'quasi-servitude'), and (ii) the servitude is reasonably necessary for the comfortable enjoyment of the property.<sup>4</sup> Cusine and Paisley have gone so far as to argue that, given the difficulty referred to above in uncovering combined ownership in the past, the courts should be especially generous in finding that the servitude has been recreated when the properties come to be separated.<sup>5</sup> On the other hand, the prospects for recreation may be affected by the way in which the separation comes about. Thus, if separation is caused by the splitting-off of the *dominant* tenement, then the chances of a servitude being implied are reasonably good as this would be a servitude of implied grant (ie a servitude in favour of the grantee of the disposition). But if it is the *servient* tenement which is being split-off this would be a servitude of implied reservation (ie a servitude in favour of the grantor of the disposition), and courts have traditionally been reluctant to recognise such implied servitudes<sup>6</sup>.

On the facts of *Logan v Irons*, the eventual separation of the properties, when it occurred in 2007, was carried out by a disposition of the *dominant* tenement (ie of The Auld Kirk). Hence, the Sheriff Appeal Court, having held that the servitude was extinguished when the two properties were united in the same

1 In the General Register of Sasines, deeds began to be indexed by property with the introduction of search sheets only in 1871. Earlier deeds are thus challenging to locate. A further obstacle to accurate searching is the existence, and widespread use, of local ('Particular') Registers of Sasines, prior to their abolition by the Land Registers (Scotland) Act 1868.

2 Gordon and Wortley, *Scottish Land Law*, 3rd edn, vol I (2009) para 25-106.

3 No doubt because the split-off was conducted by a heritable creditor.

4 Cusine and Paisley, *Servitudes and Rights of Way* para 8.09; Gordon and Wortley, *Scottish Land Law*, 3rd edn, vol I, para 25-41.

5 Cusine and Paisley, *Servitudes and Rights of Way* para 17.25.

6 See eg W M Gordon and S Wortley, *Scottish Land Law*, 3rd edn, vol II (2020) para 25-48.

ownership in 1994, further held that a servitude was created when the properties were later separated in 2007. The original express servitude of aqueduct which had attached to The Auld Kirk was thus replaced, from 2007 onwards, by an implied servitude of aqueduct. Hence Mr Logan was entitled to his declarator that a servitude existed. As the Sheriff Appeal Court explained:<sup>1</sup>

A servitude is created by implication when two properties are owned by the same owner and where one part is used in a way that is necessary for the convenient and comfortable enjoyment of the other. On division, a servitude will be created by implication if the twin requirements of use and necessity are met: *ASA International v Kashmiri Properties (Ireland)*,<sup>2</sup> per Lord Drummond Young at paragraphs 19–20. In the present case, the servitude was expressly granted and was in use when the properties were split on 16 October 2007 . . . The servitude itself is one which is plainly necessary for the convenient and comfortable enjoyment of the pursuer's property. The defender pleads no contrary case which would require a proof before answer. The twin requirements set out in *ASA International* are met in the circumstances of this case. The pursuer's second plea in law is well founded.

### The role of the heritable creditor

As it happens, there was an unexpected obstacle to the decision reached by the court. As already mentioned, the split-off disposition of 2007 was granted, not by the owners of the combined properties, but by their heritable creditor. This in turn raised the question as to whether, in selling property in order to repay a loan, a heritable creditor is empowered to grant servitudes. The Sheriff Appeal Court thought that the answer to this novel question must be yes:<sup>3</sup>

The contractual right conferred on the heritable creditor in terms of the standard security is the right to convey to a purchaser the property with parts and pertinents. The heritable creditor's obligation (in terms of section 25<sup>4</sup>) was to expose the property for sale and to enter into a private bargain whilst taking all reasonable steps to ensure that the subjects are sold at the best price which could reasonably be obtained. It follows, in our opinion, that the sale of the subjects for the best price, conveyed with the parts and pertinents, may in the right circumstances, involve the heritable creditor disposing an implied right of servitude over the defender's retained subjects.

This answer may readily be accepted if the standard security in question had extended over *both* properties. But if, as appears, it applied to The Auld Kirk alone, it is more difficult to see how this gave the heritable creditor a power to grant a servitude over land (Beauty's Land) with which it had no connection. Admittedly, absent such a power, the heritable creditor might have struggled to find a buyer.<sup>5</sup> Furthermore, if the sale had been conducted by the debtors (and

<sup>1</sup> Paragraph 31.

<sup>2</sup> [2016] CSIH 70, 2017 SC 107.

<sup>3</sup> Paragraph 30.

<sup>4</sup> Of the Conveyancing and Feudal Reform (Scotland) Act 1970.

<sup>5</sup> The problem might have been avoided by attempting to recreate the servitude expressly as part of the granting of the standard security, on the basis that the servitude would become live in the event that The Auld Kirk was disposed separately from Beauty's Land. But this would have

owners) and not by the heritable creditor, a servitude would undoubtedly have been created. So the Sheriff Appeal Court seems to have taken the practical view that that which could and would have been done by the owners must be taken to be something which could also be done by the heritable creditor. In selling the property, the latter was doing no more than exercising the powers of the former, and those powers included the power to grant a servitude over a neighbouring property. Not everyone will find this line of reasoning convincing.

### Extinction by negative prescription (in part)

Extinction by negative prescription may be as invisible to a potential purchaser of the dominant tenement as extinction by confusion. It is simply one of the risks that purchasers have to take. Normally, extinction by prescription means extinction of the entire servitude. But in certain rather unusual circumstances there may be the possibility of extinction in part.

Take the following case. Alexander, as owner of Whitemains, has a servitude of way over a private road in Blackmains, which belongs to Bella. The servitude is expressed as being for both vehicular and pedestrian traffic. To protect the environment – or perhaps just to protect his car, the road being in a state of disrepair – Alexander refuses to drive on the road and goes instead on foot. Nor does anyone else to drive to Whitemains along the road. After 21 years Alexander sells Whitemains to Charlie. Charlie owns three cars and proceeds to use them to drive, frequently, over the private road at Blackmains. Bella objects. She says that the right to drive vehicles over her property has been lost by negative prescription. Charlie tells her she is talking nonsense and carries on driving.

What is the law here? Is Bella right – or Charlie? Can a servitude be lost only *in part*, so that it survives for one means of crossing land but not for another? The answer appears to be: sometimes. Until now, the only case on the point was a decision of Sheriff J S Mowat in Cupar Sheriff Court back in 1972: *Walker's Exx v Carr*.<sup>1</sup> In that case, as with Alexander in our example, a right of way was used for many years only for pedestrian access. It was held that the servitude was extinguished insofar as it concerned vehicles but remained good for the passage of pedestrians. The decision is accepted as correct in Gordon and Wortley's *Scottish Land Law*.<sup>2</sup> It is also accepted as correct in the new case of *Ferguson v Gregors*, a decision of the Sheriff Appeal Court.<sup>3</sup> Importantly, however, the new case discusses the rule in *Walker's Exx v Carr* and imposes limitations on it.

In *Ferguson v Gregors* the issue arose in the following way.<sup>4</sup> The defenders had a servitude right of way over a track on land belonging to the pursuers. This

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encountered doubts as to whether a servitude can be created in a standard security, as to which see Scottish Law Commission, *Discussion Paper No 168 on Heritable Securities: Pre-default* (2019) paras 6.54–6.56.

1 1973 SLT (Sh Ct) 77.

2 Gordon and Wortley, *Scottish Land Law*, 3rd edn, vol II, para 25-108.

3 *Ferguson v Gregors* [2023] SAC (Civ) 24, 2023 GWD 30-248. The Opinion of the Court was delivered by Appeal Sheriff A M Cubie, the other members of the court being Sheriff Principal S F Murphy KC and Appeal Sheriff T McCartney. The relevant passage is at paras 47–49.

4 For other aspects of this case, see p 10 above.

had been created by positive prescription, and extended to vehicles as well as to pedestrians. But, said the pursuers, although the track had continued to be used by ordinary 'residential' vehicles (in effect, cars), it had not been used by 'agricultural' or 'commercial' vehicles for more than 20 years. Hence, said the pursuers, the servitude had been extinguished by negative prescription *in part*. It remained live so far as cars and pedestrians were concerned but it could no longer be used by agricultural or commercial vehicles.

This argument was firmly rejected by the Sheriff Appeal Court.<sup>1</sup> Partly this was because of the difficulty in distinguishing between the supposed separate classes of vehicle – residential, agricultural and commercial.<sup>2</sup> But it was mainly because the First Division 100 years ago, in the leading case of *Carstairs v Spence*,<sup>3</sup> had established 'the indivisibility of the vehicular access'.<sup>4</sup>

It is possible to question the reliance placed by the Sheriff Appeal Court on *Carstairs v Spence*. The question before the court in that case was not about restricting access servitudes by reference to the *type* of vehicle but rather to the *purpose* for which the vehicle (of whatever type) was being used. Be that as it may, however, it is hard to disagree with the decision reached by the Sheriff Appeal Court. Partial extinction by prescription might be justified when applied to the accepted three categories of access servitudes: 'footways, horse roads, and carriage-ways'<sup>5</sup> (ie pedestrians, horses, and vehicles). On one view, these are even three distinct servitudes, albeit that they are typically combined. But there seems no place for partial extinction in respect of arbitrary categories of vehicle.

As it happened, the evidence led at proof was not judged to support the position of the pursuers. So even if the principle of partial extinction had been accepted, it would not have been applied to the facts of *Ferguson v Gregors*. As the Sheriff Appeal Court noted:<sup>6</sup>

But if we have misunderstood the effect of *Carstairs*, and if it was possible and competent to tease out a separate and discrete servitude right of access for vehicular commercial traffic, there was no evidence from the material before the sheriff or before us which would have allowed, far less bound, the sheriff to reach the conclusion that such a discrete servitude right of access had been extinguished. We consider that, even if such a remedy was open to them, the *Fergusons*<sup>7</sup> have failed to establish by evidence that the commercial vehicular aspect had been extinguished. Absence of evidence of use is not evidence of absence of use.

### A claim against the Keeper or the seller?

One final matter falls to be considered. When a person buys land which, according to the title sheet, has the benefit of a servitude, does the person have a claim against the Keeper if the servitude turns out to have been extinguished

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1 Paragraphs 45–59.

2 Paragraph 50.

3 1924 SC 380.

4 Paragraph 51.

5 To quote Lord President Clyde in *Carstairs v Spence* 1924 SC 380 at 385.

6 Paragraph 55.

7 Ie the pursuers.

by an off-register event such as confusion or negative prescription? Does, in other words, the Keeper's warranty cover off-register extinction? The answer is a very clear 'no'. Among the cases which the Keeper does not warrant is that 'a pertinent appearing on the title sheet and of a kind extinguishable or variable without registration against the title of the benefited property has not been extinguished, or varied, without registration'.<sup>1</sup>

What about a claim against the seller? In some cases, and depending on their terms, a disappointed purchaser might have a remedy against the seller on the basis of the missives, assuming the missives are still in force. Otherwise it is the purchaser alone who must bear the loss. Where the Scottish Standard Clauses are used, clause 15.5, a notably capacious provision, would often found a claim, if it has not been qualified or excluded from the contract:

15.5. The Property has the benefit of all such servitudes and wayleaves as are required for its proper and existing use (including but not limited to vehicular access, any private water supply or the Drainage System).

## IRRITANCY NOTICES<sup>2</sup>

### Introduction

Notices are an important part of the legal infrastructure in relation to leases. They are the formal mechanism for communication between parties. Notices to quit bringing a lease to an end at its ish are perhaps the most obvious example. But notices are used in multiple other situations. In commercial leases, notices in relation to irritancy have frequently been the subject of litigation.<sup>3</sup> Like notices to quit,<sup>4</sup> but unlike many other types of notice,<sup>5</sup> these are regulated by a statutory scheme. This is found in sections 4 to 7 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985.

A lease itself will typically have provisions as to how and when notices are to be served. This means that the landlord will need to satisfy the requirements of both (i) the 1985 Act and (ii) the lease itself, in order to irritate. In a new sheriff court case, *Lujo Properties Ltd v Gruve Ltd*,<sup>6</sup> it was held that the landlord had been successful in relation to (i) but not (ii). Further, the sheriff decided that, even if the notice requirements had been met, irritancy could still not proceed. This

<sup>1</sup> Land Registration etc (Scotland) Act 2012 s 73(2)(e).

<sup>2</sup> This section is by Andrew Steven.

<sup>3</sup> See eg 24 *Drury Street Ltd v Brightcrew (Management) Ltd* [2022] SAC (Civ) 34, 2023 SLT (SAC) 28.

<sup>4</sup> The statutory framework for notices to quit is complex and unsatisfactory. For recommendations for reform, see Scottish Law Commission, *Report No 260 on Aspects of Leases: Termination* (2022). The Scottish Government announced in 2023 that it intends to implement this report in the current Parliamentary session: see letter from the Minister for Victims and Community Safety to the Chair of the Scottish Law Commission of 5 September 2023, <[www.scotlawcom.gov.uk/files/3916/9720/0227/Correspondence\\_from\\_the\\_Minister\\_for\\_Victims\\_and\\_Community\\_Safety\\_to\\_Lady\\_Paton\\_-\\_5\\_September\\_2023.pdf](http://www.scotlawcom.gov.uk/files/3916/9720/0227/Correspondence_from_the_Minister_for_Victims_and_Community_Safety_to_Lady_Paton_-_5_September_2023.pdf)>.

<sup>5</sup> For example, notices in relation to break clauses.

<sup>6</sup> [2023] SC GLA 3, 2023 SLT (Sh Ct) 31, 2023 SCLR 373. For discussion, see '*Lujo Properties Ltd v Gruve Ltd*' (2023) 169 *Civil Practice Bulletin* 1.

was on the basis of the common law doctrine of oppression, a doctrine which previously had been all but forgotten. The decision has caused some disquiet among commercial property practitioners.<sup>1</sup>

### *The Lujo Properties case*

Lujo Properties Ltd was the landlord of a commercial property at 404 Sauchiehall Street, Glasgow. Gruve Ltd was the tenant. The lease provided for an annual rent of £21,000 (exclusive of VAT). It also required the tenant to pay money into a deposit fund held by the landlord. This gave the landlord financial protection if the tenant failed to meet monetary obligations under the lease. In the event of that occurring, the landlord could withdraw money as appropriate from the fund, after which the tenant was required to top up the fund. When, however, in June 2020 the landlord applied some of the money to meet rent and service charge arrears, the tenant failed to replenish the fund. The lease provided that this was a ground for irritancy.

On 27 July 2020 the landlord's solicitors sent a letter to the tenant requiring it to make good its monetary obligations within 14 weeks, failing which the lease would be terminated. The sum sought was almost £6,000. The 14-week period was the period stipulated in s 4 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, as varied by the Coronavirus (Scotland) Act 2020 schedule 7 paras 6 and 7. The letter was thus a pre-irritancy notice. It was sent by first-class recorded-delivery post, but on 30 July 2020 it was returned, undelivered, to the landlord's solicitors. The landlord and tenant were in regular email contact over the summer of 2020, but the landlord's intention to irritate was not discussed. During that time a number of payments were made by the tenant to the landlord towards the sum owed. The 14-week period expired on 4 November 2020. On 16 November 2020 the landlord's solicitors notified the tenant that the lease was now terminated in terms of the irritancy power. The tenant was told to vacate the property and return the keys. This did not happen. The tenant made further payments to the landlord although was still overall in arrears.

The landlord raised proceedings in Glasgow Sheriff Court seeking (i) declarator that the lease had been validly terminated, (ii) an order for removal of the tenant, (iii) an order for payment of arrears, and (iv) decree for payment of damages for violent profits. The tenant defended the action on the basis that the pre-irritancy notice had not been validly served either in terms of s 4 of the 1985 Act or the lease's provisions. It also argued that the landlord had lost the right to irritate on the basis of waiver, personal bar and oppression. This was by reference to the email correspondence between the parties. The landlord, however, argued that the emails were privileged and inadmissible.

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<sup>1</sup> See eg G Hale and S Airth, 'Signed, sealed, undelivered: when is a pre-irritancy warning notice treated as served?', 19 January 2023, <<https://brodies.com/insights/real-estate-litigation/signed-sealed-undelivered-when-is-a-pre-irritancy-warning-notice-treated-as-served/>>; K Carruthers and S Anthony, 'Scottish property law cases – the best of 2023 (so far!)', 7 August 2023, <[www.morton-fraser.com/insights/scottish-property-law-cases-best-2023-so-far](http://www.morton-fraser.com/insights/scottish-property-law-cases-best-2023-so-far)>.

### Service (1): the 1985 Act

The requirements for service of a pre-irritancy notice under the 1985 Act, in cases where the irritancy relates to a monetary breach of the lease, are set out in s 4(4):

Any notice served under subsection (2) above shall be sent by recorded delivery and shall be sufficiently served if it is sent to the tenant's last business or residential address in the United Kingdom known to the landlord or to the last address in the United Kingdom provided to the landlord by the tenant for the purpose of such service.

The letter of 27 July 2020 to the tenant had been sent by recorded delivery, but it was returned undelivered. The tenant argued that this made service ineffective. Its argument was that s 4(4) merely created a rebuttable presumption of delivery which was duly rebutted by the letter being returned. In this regard, s 4(4) did not oust s 7 of the Interpretation Act 1978<sup>1</sup> which provides:

Where an Act authorises or requires any document to be served by post (whether the expression 'serve' or the expression 'give' or 'send' or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

The contrary had clearly been proved in the present case by the return of the letter.

The sheriff (Stuart Reid) was unpersuaded by the tenant's argument. He considered, first, that s 4(4) of the 1985 Act 'prescribes a single, exclusive and mandatory method by which service is to be effected'.<sup>2</sup> As the case of *Kodak Processing Companies Ltd v Shoredale*<sup>3</sup> demonstrated, service by other methods was not permissible. The sheriff continued: 'that mandatory method is a game-changer because the recorded delivery, for all its other merits, cannot guarantee delivery'.<sup>4</sup> Secondly, in his view the wording of s 4(4) created an 'irrebuttable presumption of delivery'.<sup>5</sup> Doubtless, this could 'lead to hardship in particular cases. Notices can go astray ... many a notice may have been eaten by a dog'.<sup>6</sup> The sheriff noted that the irritancy provisions in the 1985 Act were based on a Scottish Law Commission report<sup>7</sup> which addressed the 'perceived harshness to tenants'<sup>8</sup> of the common law in relation to conventional irritancies exemplified by the case of *Dorchester Studies (Glasgow) Ltd v Stone*.<sup>9</sup> Furthermore:<sup>10</sup>

<sup>1</sup> For Acts of the Scottish Parliament, the equivalent provision is s 26 of the Interpretation and Legislative Reform (Scotland) Act 2010.

<sup>2</sup> Paragraph 54.

<sup>3</sup> [2009] CSIH 71, 2010 SC 113.

<sup>4</sup> Paragraph 54.

<sup>5</sup> Paragraph 58.

<sup>6</sup> Paragraph 59.

<sup>7</sup> *Report No 75 on Irritancies in Leases* (1983).

<sup>8</sup> Paragraph 62.

<sup>9</sup> 1975 SC (HL) 56.

<sup>10</sup> Paragraph 62.

Commentators have come to regard the legislative intervention, while welcome, as relatively modest. The tenant is not afforded the *right* to be warned of an impending irritancy, but merely the *chance* to be warned by means of a duly addressed notice posted by the recorded delivery service.

Unfortunately, the ‘commentators’ referred to are not named. The relevant paragraph of the Scottish Law Commission report in relation to what is now s 4(4) is short and inconclusive as to whether the notice must reach the tenant.<sup>1</sup> There have been two subsequent Law Commission reports dealing with irritancy but not (yet) implemented. In the first, from 2004, the following policy objective is stated:<sup>2</sup>

It is clearly important that the tenant should receive the notice and appreciate that it is an important document. On the other hand, we do not think that the landlord should have to go to inordinate lengths to ensure that a notice has in fact been received by the tenant.

The report also states that a landlord should not be prevented from serving an irritancy notice where the location of the tenant is not known.<sup>3</sup> The relevant draft Bill provision in the report uses the same wording (‘sufficiently served’)<sup>4</sup> as s 4(4) of the 1985 Act. In the second relevant report by the Law Commission, of 2022, the matter of whether the notice must reach the tenant is not addressed.<sup>5</sup>

The sheriff’s conclusion on how s 4(4) should be interpreted would seem correct, applying the ordinary meaning of the words. But having cleared the first hurdle in serving an effective notice, the landlord was to fall at the next.

### **Service (2): contractual interpretation**

The tenant argued that, even if the pre-irritancy notice satisfied the statutory requirements, it did not comply with the notice provisions in the lease. There were two key provisions in this regard. The first, clause (S), provided that the lease could not be irritated ‘unless the landlords shall have first given written notice to the Tenants ... specifying the breach complained of’. The sheriff held that the effect of the word ‘given’ was that the notice must reach the tenant. This was on the basis of the ‘plain reading’<sup>6</sup> of the word. He had previously set out the common law rule on serving notices which requires receipt of the notice by the addressee.<sup>7</sup> In an English appeal, *Sun Alliance & London Assurance Co Ltd v Hayman*,<sup>8</sup> Lord Salmon stated that: ‘According to the ordinary and natural use

<sup>1</sup> *Report No 75 on Irritancies in Leases* para 4.3.

<sup>2</sup> Scottish Law Commission, *Report No 191 on Irritancy in Leases of Land* (2003) para 3.70.

<sup>3</sup> Paragraph 3.71.

<sup>4</sup> Draft Leases (Scotland) Bill s 12(3).

<sup>5</sup> *Report No 260 on Aspects of Leases: Termination* (2022) ch 5.

<sup>6</sup> Paragraph 73.

<sup>7</sup> Paragraph 49.

<sup>8</sup> [1975] 1 WLR 177 at 185, approved in *UKI (Kingsway) Ltd v Westminster City Council* [2018] UKSC 67, [2019] 1 WLR 104 at para 15 per Lord Carnwath.

of English words, giving a notice means causing a notice to be received'. The pre-irritancy notice had therefore not been 'given' to the tenant because the recorded delivery failed.

The landlord, however, founded heavily on another provision in the lease, clause (X). The relevant part of this provided:

Any notice ... under this Lease shall be in writing. Any notice to the Tenants shall be sufficiently served if sent by Recorded Delivery Post (if the Tenants shall be a body incorporated in the United Kingdom) to their last known registered office and to the premises ... Any notice sent by Recorded Delivery Post shall be deemed to have been duly served at the expiry of 3 days after the day of posting. In proving service it shall be sufficient to prove that the envelope containing the notice was duly addressed to the Tenants ... and posted to the address to which it was addressed.

On an initial reading this is similar to s 4(4) of the 1985 Act. The magic words 'sufficiently served' make an appearance. The sheriff, however, placed considerable emphasis on a difference between the wording of statute and lease.<sup>1</sup> Under s 4(4) recorded delivery was the *only* permissible method of service. Under clauses (S) and (X) there was no such monopoly. Therefore the effect of clause (X) was to create a *rebuttable* presumption of delivery. This reflected the common law position that proof of posting of a letter creates such a presumption and then puts the onus on the addressee to disprove it.<sup>2</sup> Here of course the non-delivery was easily provable by the return of the pre-irritancy notice to the landlord's solicitors.

The sheriff was of the view that, if there was to be an irrebuttable presumption of delivery, clearer wording would be needed. Further, clause (X) had to be viewed as ancillary in function to clause (S). Since other methods of notice being 'given' to the tenant under clause (S) would require actual receipt in terms of the meaning of that word, it would be 'illogical'<sup>3</sup> for this not to be required where the notice was posted by recorded delivery.

This conclusion is not entirely convincing. There seems to be no compelling reason why particular forms of delivery mentioned in the lease should not be given special effects. In the Outer House case of *Blythswood Investments (Scotland) Ltd v Clydesdale Electrical Stores Ltd (in receivership)*,<sup>4</sup> cited by the sheriff in relation to clause (X) being permissive, Lord Cullen commented that a similarly worded clause on service by recorded delivery 'merely provides for a method by which the sufficiency of service can be *put beyond question*' (our emphasis).<sup>5</sup> It may be wondered also whether the drafting of clause (X) was influenced by s 4(4), given the broad similarity, although this is perhaps to speculate unduly as clause (X) is not restricted to irritancy.

The result reached by the sheriff, that service succeeded under statute but not under the lease provisions, is an unhappy one for the landlord. Those drafting

1 Paragraph 74.

2 The authorities cited by the sheriff were *Chaplin v Caledonian Land Properties Ltd* 1997 SLT 384; W G Dickson, *A Treatise on the Law of Evidence in Scotland*, 3rd edn, vol 1 (1887) 28; *Stewart v Wright* (1821) 1 S 213; *Robertson v Gamack* (1835) 14 S 139; and *Mackenzie v Dott* (1861) 23 D 1310.

3 Paragraph 76.

4 1995 SLT 150.

5 At 153.

commercial leases will doubtless be reflecting on avoiding such a pitfall in the future.<sup>1</sup>

### Waiver, personal bar and oppression

Before deciding on further pleas of the tenant, the sheriff had to rule on whether some of the email communications between the parties were privileged and thus inadmissible as evidence. He concluded that 'without prejudice' privilege attached to three of the emails and therefore the onus fell on the tenant to establish that an exception to the privilege applied.<sup>2</sup> On the facts it was held that this onus had not been discharged.

The sheriff dealt with the pleas of waiver and personal bar only briefly.<sup>3</sup> On the facts, it was held that the email communications did not show the landlord as waiving its right to replenishment of the deposit fund and therefore losing the right to irritate. Similarly, the communications could not establish a case for personal bar.

The position, however, as to oppression was different. The landlord's solicitors knew that the pre-irritancy notice had not reached the tenant because it was returned to them. The email communications in the summer of 2020 gave the landlord a 'ready and effective means'<sup>4</sup> of advising the tenant that steps towards irritancy had commenced but at no time did the landlord 'clearly disclose to the [tenant] that the statutory Notice had been posted, still less did it disclose the terms and import of that Notice'.<sup>5</sup> The landlord had therefore acted in a manner that meant that the common law plea of oppression was satisfied.<sup>6</sup> Irritancy was therefore debarred on this ground too.<sup>7</sup>

Modern authority on oppression in the context of irritancy is limited. As noted earlier, the 1985 Act gives tenants protection from the harshness of the common law rules. But prior to its enactment it was very difficult to show oppression, as the *Dorchester Studios Ltd* case itself shows. The Scottish Law Commission in its aforementioned 2003 Report predicted: 'This [common law] power [to grant relief from oppression] is so narrowly construed by the courts that it is difficult to envisage circumstances in modern practice where it would be invoked successfully.'<sup>8</sup> It may be wondered following *Lujo Properties* whether there is to be a revival in this area. The potential for a successful oppression plea takes away

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1 The Property Standardisation Group's style leases based on the Model Commercial Lease, <<https://modelcommerciallease.co.uk/>>, in contrast to the lease in *Lujo Properties*, have the permitted methods of service of formal notices (clause 6.5.1) all subject to deeming provisions as to when service takes place (clause 6.5.3): see <<https://psglegal.co.uk/leases-based-on-the-model-commercial-lease-mcl/>>.

2 Paragraph 97.

3 Paragraphs 98–101.

4 Paragraph 108.

5 Paragraph 108.

6 The sheriff drew some support for this conclusion from *dicta* in *Kodak Processing Companies Ltd v Shoredale* [2009] CSIH 71, 2010 SC 113 but the issue was not fully canvassed in that case.

7 The invalidity of the irritancy therefore made the claim for violent profits irrelevant.

8 *Report No 191 on Irritancy in Leases of Land* para 3.11. This Report recommended abolition of the rule. The 2022 Report is silent on the matter.

from the irrebuttable presumption in s 4(4) of the 1985 Act because knowledge of the failure of delivery and non-disclosure of this to the tenant may mean that irritancy cannot proceed after all.

We understand that the sheriff's decision is not to be appealed. Whether it is followed in future case law will be awaited with interest.

## PRESCRIPTION<sup>1</sup>

### Introduction

Leaving aside the special case of servitudes, positive prescription has traditionally been used for three main purposes. One is to limit how far back the enquiry needs to go, when buying property, in the examination of a title still held on the Register of Sasines. Another is to determine the ownership of an area of land where the ownership is not obvious or is disputed. The third is to settle the outcome of boundary disputes. The first of these is, today, of much diminished significance. But the other two remain as important as ever – an importance which has only increased with the move, in the Land Registration etc (Scotland) Act 2012, to restore the full gamut of positive prescription to titles registered in the Land Register.<sup>2</sup> In 2023 there were no fewer than four new cases on positive prescription. All are of interest. The first two concerned the nature of the title which is needed to found prescriptive possession, and in particular on whether a title is *habile* for prescription if the property that is being targeted falls within one of the elements in the description of the subjects but is excluded from another. The third case concerned the possession which must follow on from the title in order for prescription to run. The final case was a rare example of a little-known quirk in the law of prescription which can sometimes allow a person to re-acquire land which was previously transferred to someone else.

### The *Langskaill* case: contradictory descriptive elements

#### The facts

The essential facts of *Langskaill v Black*<sup>3</sup> were as follows.<sup>4</sup> From 1962 onwards, Mr and Mrs Langskaill lived in a house at 2 St Ronan's Terrace in the Morningside area of Edinburgh. Title was in the name of Mr Langskaill alone. St Ronan's Terrace lies on a north-south axis, running ultimately into Morningside Drive on the south; the latter lies on an east-west axis. Number 2 St Ronan's Terrace is the last house on the eastern side of the street before reaching Morningside

<sup>1</sup> This section is by Kenneth Reid.

<sup>2</sup> This was achieved by amending s 1 of the Prescription and Limitation (Scotland) Act 1973: see Land Registration etc (Scotland) Act 2012 sch 5 para 18(2). The previous rule had been that prescription was available only in cases where, most unusually, the Keeper had excluded indemnity.

<sup>3</sup> [2023] SC EDIN 7, 2023 SLT (Sh Ct) 95 affd [2023] SAC (Civ) 17, 2023 SLT (SAC) 51.

<sup>4</sup> The facts are taken from the parties' pleadings, as narrated in the judgments. So far as is known, no proof has taken place.

Drive. Unlike the other houses, it is set some distance back from the street and is reached by a private lane. It is the ownership of this lane with which the dispute was concerned.

Ever since 1962 the Langskaills had been in possession of the lane and had treated it as their own. That, however, turned out to be a misapprehension. The title to 2 St Ronan's Terrace rested on a split-off disposition of 1922 in which the property was described as being 'bounded by' the lane. Hence, in accordance with the normal rule that a bounding feature is excluded from the property that it bounds,<sup>1</sup> the lane was not part of 2 St Ronan's Terrace. When all of this came to light, as it did in 2010 or 2011, the decision was taken to put a title to the lane on the Register of Sasines with a view to acquiring the lane by positive prescription. An obvious way of doing this would have been to take an *a non domino* disposition of the lane but this may have been thought to be too blatant and to carry the risk of rejection by the Keeper. So instead Mr Langskaill granted in favour of Mrs Langskaill a disposition of the whole property, but with the addition of the lane as a sort of (*a non domino*) title upgrade. This was recorded in the Register of Sasines in 2011.<sup>2</sup> Meanwhile, possession of the lane continued as before.

But there was a problem. The dispositive clause of the new disposition was in the following terms:

ALL and WHOLE that area or piece of ground with the dwellinghouse known as Two St Ronan's Terrace, Edinburgh, and other buildings erected thereon being the subjects described in Disposition by Mrs Elizabeth Austin in favour of Mrs Elizabeth Hardie dated Eleventh and recorded in the Division of the General Register of Sasines applicable to the County of Edinburgh (now Midlothian) on Twelfth, both days of May Nineteen Hundred and Twenty two and which subjects are shown delineated in red on the plan annexed and signed as relative hereto ...

The plan showed the full extent of the property, including the lane. But the verbal description incorporated by reference the very split-off disposition of 1922 from which (as mentioned above) the lane was excluded.<sup>3</sup> According to one descriptive element (the plan), therefore, the lane was part of the subjects conveyed. According to the other (the verbal description) it was nothing of the kind.

None of this might have come to light had a disagreement not arisen with the owner of one of the houses in Morningside Drive which backed on to the lane. This prompted a questioning of Mrs Langskaill's title to the lane as well as an assertion of a servitude right over it. In time this led to the present litigation, in which Mrs Langskaill, acknowledging the contradiction in the dispositive

<sup>1</sup> G L Gretton and K G C Reid *Conveyancing* (5th edn, 2018) para 12-21.

<sup>2</sup> As a gratuitous deed, this still fell to be registered in the Sasine rather than the Land Register. The following year Mrs Langskaill disposed a one-half share to her husband, but this reverted to her following her husband's death in 2015. Nothing further need be said about this here except to note that the choice of proceeding in this way may have been connected with a desire to put the house into joint names.

<sup>3</sup> The reason for incorporating the 1922 description is unknown. One possibility is oversight. Another is that a failure to refer to the 1922 deed might have drawn unwelcome attention to the disposition and even led to its rejection by the Keeper.

clause just mentioned, sought declarator that the disposition granted to her by her husband in 2011 was nevertheless *habile* to include the lane for the purposes of prescription.<sup>1</sup> Mrs Langskail was successful before the sheriff<sup>2</sup> and now, following an appeal by the neighbour, has been successful again before the Sheriff Appeal Court.<sup>3</sup>

Two main issues occupied the attention of the court.

### **The first issue: must the plan give way to the verbal description?**

The first issue was of a preliminary nature. It is a familiar rule of interpretation, well vouched-for in the textbooks,<sup>4</sup> that where there is a discrepancy between the boundaries as set out in a plan and the boundaries as described verbally in the deed, it is the latter which are usually to prevail. From this rule it followed, argued the neighbour and defender in the action, (i) that, in view of the discrepancy between the plan and the verbal description in the 2011 disposition respecting the lane, the former must give way to the latter, and (ii) that if the measure of the subjects conveyed in 2011 was thus the verbal description (from which the lane was excluded), the disposition was not capable of founding prescription in respect of the lane.

This argument was based on a misunderstanding. Rules of interpretation seek to answer the question, ‘what was conveyed by the deed?’ They are no guide to the quite different question as to whether the deed – whatever its proper interpretation might be – is *habile* for the purposes of prescription. Be that as it may, however, the Sheriff Appeal Court rejected the idea of a fixed and immutable rule.<sup>5</sup>

It is not a rule of law that in the event of discrepancy a verbal description prevails over a plan. Properly understood, the various textbook references on which the defender relies do not set out strict rules of law in respect of construction. Rather they set out what has been gleaned from various decided cases in respect of disputed boundaries as to what are the most reliable indicators of the true boundaries. Thus in older authorities a description by reference to fixed physical boundaries has been found to provide more reliable definition of a boundary than a plan the accuracy and quality of which could vary. There have developed certain broad presumptions as to what is the more reliable description of a boundary, but they are not rigid rules of law.

This is a measured and accurate assessment of what is, after all, no more than a rule of interpretation.

1 She also sought a declarator that any servitude of access held by the neighbour had been extinguished by prescription, and interdict against the neighbour from using the lane.

2 [2023] SC EDIN 7, 2023 SLT (Sh Ct) 95. The sheriff was Sheriff John K Mundy.

3 [2023] SAC (Civ) 17, 2023 SLT (SAC) 51. The Opinion of the Court was delivered by Appeal Sheriff T McCartney, the other judges being Sheriff Principal S Murray and Appeal Sheriff H K Small.

4 The defender cited J M Halliday, *Conveyancing Law and Practice in Scotland*, 2nd edn, vol 2 (1997) paras 33-11 to 33-13; W M Gordon, *Scottish Land Law* (2nd edn, 1999) para 4-08 (apparently overlooking the current, 3rd edition of 2009, co-authored with Scott Wortley, where the relevant paragraph is para 3-08); G L Gretton and K G C Reid *Conveyancing* (5th edn, 2018) paras 8.29 and 12.22. See [2023] SAC (Civ) 17 at para 16.

5 [2023] SAC (Civ) 17 at para 30.

### The second issue: is prescription excluded by contradictory descriptive elements?

The real issue in the case was, however, a different one. Prescription is concerned, not with what the deed relied on really means but with whether, *on any plausible interpretation*, the words used can be read as including the target area. A deed is thus *habile* for the purposes of prescription if it is capable of being read as including the area which it is sought to acquire, even if that is not the natural reading of the deed having regard to standard interpretative rules. How that well-settled principle was to be applied to the disposition of 2011 was not, however, straightforward. Of the two descriptive elements found in the deed, one (the plan) included the target property (the lane) while the other (the verbal description) just as plainly excluded it. Furthermore, there was nothing to indicate (for example by a declaration that the plan was taxative) that, in the event of conflict, one was to be preferred to the other. What was the result? Was it possible to cherry-pick – to say that, if *one* descriptive element included the target property, then that was enough to allow prescription to run, even if the other descriptive element or elements excluded it? Or, conversely, was the conflict fatal to the use of the deed for prescription? Did, in other words, the exclusion negate the inclusion, resulting in a deed that was not *habile* for the purposes of prescription?

There was some prior authority on this point but, like the descriptive elements in the deed, it too was contradictory.<sup>1</sup> In *Nisbet v Hogg*<sup>2</sup> the Inner House, by a majority, supported the idea that a single descriptive element, even if contradicted by another, was sufficient to found prescription. By contrast, the Lord Ordinary in *Trustees of Calthorpe's 1959 Discretionary Settlement v G Hamilton (Tullochgribban Mains) Ltd*<sup>3</sup> came to the opposite conclusion. The discussion in neither case is satisfactory, however, and the new case, *Langskaill v Black*, is the first in which the issue is brought into proper focus and presented as a matter on which a decision requires to be reached. In the event, the discussion in the case is brief and the legal analysis slender. But the decision has at any rate the merit of clarity.

The court's starting-point was with a well-known passage from the leading case on prescriptive titles, the seven-judge decision of the First Division in *Auld v Hay* in 1880:<sup>4</sup>

Whether the title founded on be one on which possession for forty years<sup>5</sup> can establish a right of property depends solely on the terms of the written charter or disposition itself, and neither on extrinsic evidence nor on possession. A *habile* title does not mean a charter followed by sasine, which bears to convey the property in dispute, but one which is conceived in terms capable of being so construed. The terms of the grant may be ambiguous, or indefinite, or general, so that it may remain doubtful

<sup>1</sup> For a review, see *Conveyancing 2012* pp 151–55.

<sup>2</sup> 1950 SLT 289.

<sup>3</sup> [2012] CSOH 138, 2012 GWD 29-599. And see also *Munro v Keeper of the Registers of Scotland 2017* GWD 17-277, which is mentioned again below.

<sup>4</sup> *Auld v Hay* (1880) 7 R 663 at 668 per Lord Justice-Clerk Moncreiff.

<sup>5</sup> Now of course 10 years.

whether the particular subject is or is not conveyed, or, if conveyed, what is the extent of it. But if the instrument be conceived in terms consistent with and susceptible of a construction which would embrace such a conveyance, that is enough, and forty years' possession following on it will constitute the right to the extent possessed.

Having quoted this passage, the Sheriff Appeal Court said simply this:<sup>1</sup>

Applying that to the present case, we conclude that notwithstanding doubt arising from the inconsistency between the verbal description and plan as to whether the lane is or is not conveyed, the 2011 disposition is susceptible of a construction which would embrace a conveyance of the lane.

Beyond noting that this view was 'consistent with the decision of the First Division of the Inner House in *Nisbet v Hogg*' (which it is),<sup>2</sup> that was the end of the discussion.<sup>3</sup> Nonetheless, this is an important decision on a matter on which the law has previously been uncertain.

#### **The *Ardnamurchan Estates* case: potentially contradictory descriptive elements**

Surprisingly, a similar issue arose in a second new case, *Ardnamurchan Estates Ltd v MacGregor (No 2)*.<sup>4</sup> But whereas in *Langskaill v Black* the conflict between the descriptive elements was explicit and direct, in *Ardnamurchan Estates* it was, at best, implicit and indirect. Indeed, on one view there was no conflict on the face of the deed at all. The difference turned out to be decisive.

The facts of *Ardnamurchan Estates Ltd v MacGregor (No 2)* are set out in detail elsewhere in this volume.<sup>5</sup> For present purposes it is only necessary to say that in the deed being relied on for prescription, a disposition of 1992, the subjects conveyed (which were on the Ardnamurchan peninsula at Glenborrodale, Acharacle) were described (i) by area (464.5 acres) and also (ii) by a plan which was declared to be demonstrative. The property which was being targeted for acquisition by prescription, a plot of land of 1.517 acres, was excluded by the plan. But it might *possibly* be included within the other descriptive element (the area), especially as the area stated in the deed was greater by 2.34 acres than the area (as it turned out) that was delineated in the plan.

This precise issue had been litigated once before, in *Munro v Keeper of the Registers of Scotland*,<sup>6</sup> a decision of the Lands Tribunal from 2017. In the view of the Tribunal, a statement as to area did nothing to disturb the primacy of a plan, and as the target property was excluded from the plan, so the disposition

<sup>1</sup> [2023] SAC (Civ) 17 at para 29.

<sup>2</sup> [2023] SAC (Civ) 17 at paras 37 and 38.

<sup>3</sup> The Sheriff Appeal Court upheld the decision of the sheriff to allow a proof before answer.

<sup>4</sup> 8 July 2022, Fort William Sheriff Court, unreported, rev [2023] SAC (Civ) 33, 2024 GWD 8-65. The sheriff was Sheriff Eilidh Macdonald, and the Sheriff Appeal Court comprised Sheriff Principal D C W Pyle, Appeal Sheriff Fiona Tait, and Appeal Sheriff Derek J Hamilton.

<sup>5</sup> See p 179 below.

<sup>6</sup> 2017 GWD 17-277. The Tribunal comprised Lord Minginish and A Oswald FRICS. For discussion, see *Conveyancing 2017* pp 179–82.

could not be regarded as *habile* for the purposes of acquiring the target property by prescription:<sup>1</sup>

What we have in the present case is a statement of approximate area, a plan without measurements and the foresaid reference to a fence having been erected. But, of those, only the plan purports to show where the boundaries are. The statement of area tells us nothing about where the boundaries are ... Accordingly, we are satisfied that the 1982 disposition contains a bounding description.

In *Ardnamurchan Estates Ltd v MacGregor (No 2)* the conclusion of the Sheriff Appeal Court (departing from the view taken by the sheriff at first instance) was the same. The description in the 1992 disposition was:

ALL and WHOLE those areas or pieces of ground extending in total to Four hundred and sixty four acres and five decimal or one tenth parts of an acre or thereby lying in the Parish of Ardnamurchan and County of Argyll shown outlined in red on the demonstrative plan annexed and executed as relative hereto ...

If the deed had contained only the verbal description and there was no reference to a plan, then it can hardly be doubted that this would have been a sufficient basis for acquiring by prescription the target area (being an area of 1.517 acres lying in the Parish of Ardnamurchan and County of Argyll). The difficulty, however, was that not only did the plan exclude the target area but (unlike in *Langskaill v Black*, discussed above) it was the only descriptive element which specified the boundaries.<sup>2</sup> And that specification being unchallenged on the face of the deed, it prevented the disposition from being *habile* in respect of land which lay outside those boundaries. Sheriff Principal Pyle explained matters as follows:<sup>3</sup>

It is important to emphasise that the prescriptive right of possession based upon a *habile* title is quite separate from the rules which apply to the construction of deeds to determine title. The right is a statutory one, albeit its historical derivation is within the common law. It is based upon the terms of the deed itself, without regard to the progress of titles and extrinsic evidence. Otherwise there would be possession 'contrary to the written title' (*North British Railway Company v Hutton* (1896) 23 R 522, per Lord McLaren at p 525). A bounding title is an example of that (*ibid*). On that basis, it is obvious in this case that the boundaries are specified and identifiable. The error in the acreage is irrelevant. Accordingly, prescription cannot arise.

### **The Wallace-Martinez case: possession as owner or as co-owner?**

#### **How much possession?**

We will come to the *Wallace-Martinez* case in a moment. But first, a preliminary question should be considered. In order for positive prescription to run, the land

<sup>1</sup> 2017 GWD 17-277 at para 28.

<sup>2</sup> As Sheriff Principal Pyle noted at para 69, in criticism of the position adopted by the sheriff, 'The difficulty with that is the acreage measurement does not of itself assist in the determination of the boundaries.'

<sup>3</sup> Paragraph 68.

in question must (in the words of the legislation) be possessed ‘for a continuous period of ten years openly, peaceably and without any judicial interruption’.<sup>1</sup> This formula says nothing as to the *volume* of possession needed. Plainly, for possession to count as ‘continuous’ it is not necessary for a person to sit on the land for ten years, solemnly and patiently and without once ever getting up. Regular, or it may be even irregular, possessory acts will do so long, at least, as there is no counter-possession by someone else. How many such acts will suffice, and their nature, depends on the nature of the land in question – a point emphasised by the Second Division in the leading case of *Hamilton v McIntosh Donald Ltd.*<sup>2</sup>

The *Ardnamurchan Estates* case,<sup>3</sup> discussed above, provides a characteristic example. There the land sought to be acquired comprised some one-and-a-half acres in Argyll which was ‘covered with rough scrub and trees and in some places ... rocky and steeply sloping’.<sup>4</sup> The only evidence of possession was described by the sheriff as follows:<sup>5</sup>

The evidence from the defenders’ witnesses shows that after the granting of the 1992 Disposition the defenders used the disputed subjects as part of their land, Glenmore farm, in the way that any wild, rural piece of land in the Highlands is used by occupiers, namely: occasional physical occupation by them; crossing the land for access to other adjacent areas; the occasional grazing of livestock; and maintaining the fences which enclose the land. Eventually the defenders also used part of the disputed subjects as accessible garden ground for their home Otter Lodge which was built in 1995 immediately adjacent to the disputed subjects.

This, held the sheriff, was perfectly sufficient for the purposes of prescriptive acquisition.

### **Wallace-Martinez: the facts**

We turn now to *Wallace-Martinez v Nisbet*.<sup>6</sup> It concerned a stone tenement building in Barony Street in the eastern edge of the Edinburgh New Town. The building faced north at the front and south at the back. Immediately behind the tenement was the usual back green, which was enclosed on all sides by a stone wall. On two sides the wall backed directly on to lanes – to Albany Lane on the west and to Albany Street Lane on the south. The tenement comprised three main-door flats (2 Albany Lane, 25–27 Barony Street, and 31 Barony Street) and several floors of flats above which were accessed by the common passage and stair 29 Barony Street. As one might expect, the titles conferred on each flat a right of common property to the back green. As one might not expect, there was no direct access

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1 Prescription and Limitation (Scotland) Act 1973 s 1(1).

2 1994 SLT 794 at 796F per Lord Justice-Clerk Ross: ‘Whether particular acts constitute possession for the purposes of prescription depends upon the nature of the subjects claimed.’

3 *Ardnamurchan Estates Ltd v MacGregor (No 2)*, 8 July 2022, Fort William Sheriff Court, unreported.

4 Sheriff’s Note para 1.

5 Sheriff’s Note para 28.

6 [2023] SC EDIN 9, 2023 GWD 10-105.

from the building to the back green. Instead, flat-owners wishing to enjoy the southern sun, or wash their windows, had to leave the building from the front, turn left along Barony Street, turn left along Albany Lane, and turn left again along Albany Street Lane before reaching a door in the wall which gave access to the back green. Given the obvious inconvenience, it is reasonable to suppose that the back green was not much used.

Whether for that reason or for another, the owners of one of the main-door flats, 2 Albany Lane, built a conservatory on the back green and sought to take over the rest of it as a private garden. On completion of these and other renovations, the only access to the flat was from the conservatory, and the conservatory was reached from the back green which was itself accessed by a door from Albany Lane. These developments appear to have occurred in the 1980s. At any rate the new arrangements were in place by the time when, in 1990, Mrs Wallace-Martinez<sup>1</sup> bought the flat. The disposition in her favour conveyed, in the first place, the flat itself, and in the second place, the back green or, as the disposition would have it, the *former* back green. The description of the latter was:

ALL and WHOLE that area or piece of ground lying directly to the rear and to the south of the subjects (IN THE FIRST PLACE) hereby disposed and which subjects form the former back green of the tenement of which the subjects (IN THE FIRST PLACE) hereby disposed form part and all lying within the City of Edinburgh and County of Midlothian and are bounded generally on or towards the west by Albany Lane, aforesaid, generally on or towards the south by the mews lane known as Albany Street Lane and generally on or towards the east by the garden ground belonging to the adjoining property lying to the east of the subjects (IN THE FIRST PLACE) hereby disposed ...

Of course, no immediate title to the back green could be conferred on Mrs Wallace-Martinez by the disposition. The only right in the back green then attaching to the flat was, as with any other flat, a right of common property.<sup>2</sup> So on the recording of the disposition in the Register of Sasines, Mrs Wallace-Martinez became an owner in common of the back green along with everyone else. But the disposition held out the promise of something more; for the purported conveyance of the back green, although invalid as granted *a non domino*, was a title which was capable of founding prescriptive acquisition. In order for that to occur it would be necessary for Mrs Wallace-Martinez to possess the back green openly, peaceably and without judicial interruption for a continuous period of ten years. Whether she had done so was the main issue to be determined by the court.<sup>3</sup>

<sup>1</sup> At that time known as Ms Wallace.

<sup>2</sup> A complication with which we need not concern ourselves here is that in 1994 the ground-floor flat was combined with the flat immediately above (which had previously been accessed by the common passage and stair) in order to form a single flat.

<sup>3</sup> In the action the main crave for the pursuers, Mrs Wallace-Martinez and Mr Martinez, was for declarator that they had 'a real right of exclusive ownership in the whole of the garden ground to the rear of the tenement ... and that real right is, through the operation of prescription under section 1(1) of the Prescription and Limitation (Scotland) Act 1973, exempt from challenge'.

### But was there sufficient possession?

Following a three-day proof, the sheriff<sup>1</sup> made the following findings-of-fact in relation to possession of the back green by the pursuers, Mrs Wallace-Martinez and Mr Martinez, her husband:<sup>2</sup>

From about spring 1991 the pursuers have looked after the back green, weeding, replacing plants, pruning and cutting the grass as the previous owners of 2 Albany Street had done. The pursuers paid to have the walls surrounding the back green whitewashed every four or five years.

The pursuers and their children all used the back green. They used it every time they left 2 Albany Lane because that was the only access to the street. They played in it, built snowmen in it, had picnics, parties and barbecues in it. They put a trampoline and a swing in the garden. They hung washing in it. They exercised their dog in it.

They did not involve the other proprietors in the decision-making or in carrying out the works in the back green. There were no objections by other proprietors to what they were doing.

From this idyllic account of snowmen and barbecues, of picnics and parties, the decision in the case might have seemed a foregone conclusion. Yet, despite all the evidence of possession on the part of the pursuers, the court went on to hold that they had failed to prove the possession needed for the purposes of prescriptive possession. For this, two reasons were given and both, but particularly the second, are important.<sup>3</sup>

The first reason was that the possession was not exclusive. Although usually used only by the pursuers, the back green was also used on an occasional basis by the owners of other flats in the building, typically to wash windows or carry out repairs. Until 2014, when it was blocked up by the pursuers, access could in theory be taken by the door from Albany Street Lane although the door, awkwardly, was bolted from the inside. Otherwise the flat-owners took access either by climbing over the wall or by using a window in one of the ground-floor flats which provided a convenient means of reaching the garden. None of this amounted to very much, of course; yet it was hardly the type of access that an owner would allow, unchallenged, in respect of a private garden.

It was the second reason, however, that was decisive against the position of the pursuers. Not all types of possession qualify for the purposes of prescriptive acquisition. In order for possession to qualify it must (as the legislation puts it) have been 'founded on' the registered deed which purports to encompass the target property.<sup>4</sup> But if a person *already* holds a lesser right to the property in

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1 Sheriff Alison Stirling.

2 Findings-in-fact 13–16.

3 A third reason was also given by the sheriff albeit in an undeveloped form: see Sheriff's Note para 199. This was that, as and when flats in the building changed hands, the pursuers 'should have done something to let new owners know they were claiming exclusive ownership rather than common ownership. By not doing so they cannot claim that their possession was open.' But this seems less an argument about open possession than a reformulation of the second reason (discussed below), namely that acts which were consistent with the pursuers' co-ownership could not be used to support the acquisition of exclusive ownership.

4 Prescription and Limitation (Scotland) Act 1973 s 1.

question, such as a lease, any possession will be attributed to the lesser right and not to the new right which the person is seeking to acquire. Upgrades are not allowed. 'The explanation', as David Johnston KC has written, 'is obvious: where the acts are referable just as easily to a lease as to an assertion of ownership, there is no reason why the landlord should attempt to defend his own interests, since he has no ground to suspect that they are being challenged'.<sup>1</sup>

So far as leases are concerned, this rule is well established: a person already possessing as a tenant cannot, by registering a disposition and continuing the existing possession, acquire ownership by prescription.<sup>2</sup> But what is true of leases must also be true of other lesser rights such as co-ownership. From the moment she acquired her flat Mrs Wallace-Martinez also acquired co-ownership in the back green. Consequently, any subsequent acts of possession would be attributed to the right she already had (co-ownership), not to the right she was seeking to acquire (exclusive ownership). They would therefore not count for the purposes of prescription.<sup>3</sup> Admittedly, that would not be true of acts which were consistent only with exclusive ownership and not with co-ownership. In this respect this second ground of decision is closely linked with the first. But the only act of which that unequivocally could be said – the blocking-up of the door from Albany Street Lane, being the access relied on by the other flat-owners – did not take place until 2014.<sup>4</sup> And if that act was sufficient, finally, to start the prescriptive clock running, it also came too late, for the prescriptive period thus started had now suffered the judicial interruption of the present litigation.

In the action, the pursuers had sought declarator that they had 'a real right of exclusive ownership in the whole of the garden ground to the rear of the tenement'. Their lack of success<sup>5</sup> means that the back green is, and has never ceased to be, the common property of the owners of all of the flats in the tenement. In principle, what is true of the back green is also true of that which is built on the back green and has become part of it by accession. Nonetheless, it seems likely that the conservatory will escape that fate. It at least appears to

<sup>1</sup> D Johnston, *Prescription and Limitation* (2nd edn, 2012) para 18.25.

<sup>2</sup> *Houston v Barr* 1911 SC 134.

<sup>3</sup> Sheriff's Note paras 159 and 165.

<sup>4</sup> The flat-owners do not seem to have realised at the time what was happening, from which the sheriff concluded that the act was disqualified as being 'not done openly': see Sheriff's Note para 168. That conclusion can, however, be questioned. There was no attempt by the pursuers to hide what they were doing; and the blocking-up of the door must presumably have been visible at least from the higher flats in the building. On the meaning of open possession, see A Peterson, *Prescriptive Servitudes* (Studies in Scots Law vol 7, 2020) ch 11.

<sup>5</sup> An additional ground was given by the sheriff for the pursuers' lack of success. According to para 198 of the Sheriff's Note: 'The pursuers' title to the back green was not a good title, and it depended on possession for 10 years before it would become good. During that 10 year period the pursuers' title was vulnerable inter alia to the recording of a good title by someone owning the back green either exclusively or in common. If that owner possessed the back green at all, then that title would be a good title prior to the pursuers' obtaining good title. It would not simply interrupt prescription, but it would make it impossible for the pursuers to use that disposition as a basis for prescription.' This argument (which had been made by the defenders) is not easy to understand. Had Mrs Wallace-Martinez been able to achieve prescriptive possession for 10 years, she would have become owner on an unchallengeable title, regardless of what deeds had been granted during that 10-year period: see Prescription and Limitation (Scotland) Act 1973 s 1, read with s 5(1A).

have been in the exclusive possession of the pursuers; if so, exclusive ownership would have been acquired by prescription.<sup>1</sup>

The pursuers appealed against the decision of the sheriff, but without success. The decision of the Sheriff Appeal Court, which was given on 31 January 2024,<sup>2</sup> will be considered in our annual volume for 2024.

### The *MacNab* case: reacquisition of land previously transferred

Anne disposes land to Bill. Bill registers the disposition in the Land Register. But nothing changes on the ground. As Bill does not trouble to take up possession, Anne carries on possessing exactly as before. Ten years pass. Due to prescription Anne may have reacquired ownership.<sup>3</sup> Why? Prescriptive acquisition requires both (i) a registered title and (ii) possession following on from that title.<sup>4</sup> The necessary title Anne already has because she was previously the owner, and the disposition that made Anne owner can be redeployed to form the basis of a future prescriptive acquisition. And having possessed for 10 years since Anne disposed to Bill, Anne also has the necessary period of possession.<sup>5</sup> Admittedly, prescriptive reacquisition will not always occur. That will depend on the nature and the quality of Anne's possession. If Anne possesses only by agreement with Bill (whether express or tacit), then Anne's possession will be regarded as being on Bill's account and cannot set up a right of ownership against Bill. Furthermore, the possession must be sufficient in other respects to qualify for prescription. In particular, it must be sufficiently ample to alert Bill, should he choose to look, that a right is being asserted against him.

The Anne–Bill story shows the maximum extent of the doctrine. But much more typically, all that happens is that, when Charlie disposes part of his land to Debbie, the boundary fence is (unbeknownst to both parties) put in the wrong place and Charlie incorporates into his garden a strip of ground which now belongs to Debbie. After 10 years, the effect of prescription is for the occupational boundary to become the legal boundary, and so for Charlie to regain ownership of some of the land he had previously disposed to Debbie.

In only three reported cases has this rather neglected doctrine been previously considered.<sup>6</sup> With the new case of *MacNab v Highland Council*<sup>7</sup> there is now a fourth. But whereas in the earlier cases the doctrine was actually applied, in *MacNab* its application was rejected due to shortcomings in the possession taken.

<sup>1</sup> The sheriff's view, however, seems to have been otherwise: see Sheriff's Note para 184.

<sup>2</sup> [2024] SAC (Civ) 4, 2024 SLT (SAC) 41.

<sup>3</sup> If Anne does, Bill may have a claim in warrandice against Anne, because absolute warrandice includes a warranty that the title will not be undermined by future voluntary acts on the part of the granter.

<sup>4</sup> Prescription and Limitation (Scotland) Act 1973 s 1.

<sup>5</sup> See G L Gretton and K G C Reid *Conveyancing* (5th edn, 2018) para 8-33.

<sup>6</sup> *Aytoun v Magistrates of Kirkcaldy* (1833) 11 S 676; *Wallace v University of St Andrews* (1904) 6 F 1093; *Love-Lee v Cameron of Lochiel* 1991 SCLR 61. All three concerned the grant of a feu (as opposed to a disposition). Whether that was seen as important to the decisions is unclear. When a feu was granted, the granter remained infeft in the lands, albeit on a title which had been reduced to one of *dominium directum*.

<sup>7</sup> [2023] CSOH 59, 2023 GWD 35-287.

So far as relevant, the facts of *MacNab* were these. Highland Council acquired certain land (among others) for the purposes of a road-widening scheme. A compulsory purchase order was used followed by a general vesting declaration. So there was no disposition by the owners of the land, a Mr and Mrs Gilmour. This particular land was used by the Council for the construction of a private access road. But the Gilmours – or so they argued – continued to maintain and hence, in their view, to possess the verge of the road. Hence, they said, they had reacquired it by prescription.

After a proof as to possession, this argument as to prescriptive reacquisition was rejected by the Lord Ordinary (Lord Harrower):<sup>1</sup>

I also reject the Gilmours' argument based on prescriptive re-acquisition. Neither the pursuer<sup>2</sup> nor the Council disputed that ownership could be 'reacquired' in this way, at least in principle (Gretton & Reid, *Conveyancing*, 5th ed, para 8-33). However, they described it as highly unusual in practice, and requiring clear evidence of possession. Such possession must be overt. Occasional or intermittent acts of cutting the grass, sweeping, weeding and clearing verges would be insufficient ... The photographs referred to in evidence demonstrated that little, if any, maintenance had been carried out on the side of the access road nearest Field 3, other than within that area of land that was indisputably within the Gilmours' ownership. The clearing of ditches, as well as being very occasional, extended down the whole length of the pre-existing track, the greater part of which was in the Gilmours' ownership ...

I accept the Council's submission that it possessed the whole of that part of the access road within its ownership not only by making it available for its intended purpose to those with rights of access over it, but also through the continual exercise of such rights by those to whom the access road was made available. There was no evidence that the Council had refused to clear the ditch when asked to do so or to repair any defect in any part of the access road within their ownership. The repairs to pot-holes referred to in evidence all occurred on that part of the access road within the Gilmours' ownership.

In the absence of sufficient possession, therefore, there could be no question as to prescriptive reacquisition by Mr and Mrs Gilmour.

## RESIDENTIAL TENANT PROTECTION<sup>3</sup>

### Introduction

The adverse impact of a period of high inflation on those who rent their homes led to the Scottish Parliament passing the Cost of Living (Tenant Protection) (Scotland) Act in 2022. This was emergency legislation, brought forward by the Scottish Government. It introduced three principal protective measures: (i) rent capping; (ii) a moratorium on eviction; and (iii) rent-adjudication procedures. The 2022 Act covered both private-sector and social housing tenancies, including

<sup>1</sup> Paragraphs 86 and 88.

<sup>2</sup> Mr and Mrs Gilmour were not the pursuers but the second defenders.

<sup>3</sup> This section is by Andrew Steven.

'student residential tenancies'.<sup>1</sup> We discussed the legislation in some detail in last year's volume.<sup>2</sup>

As emergency legislation, the 2022 Act is time-limited. The original expiry date for (i) rent capping and (ii) the moratorium on eviction was to be 31 March 2023. But power was given to the Scottish Ministers to put back this date or to bring it forward in respect of individual protections.<sup>3</sup> During 2023, expiry was put back in respect of many of these. As regards (iii) the rent-adjudication procedures, the original expiry date was 31 March 2024, but the Scottish Ministers have signalled their intention to use their power to extend these for a further period. The past year also saw a challenge to the 2022 Act by some landlords on the basis that it breached their human rights. Furthermore, the Scottish Government's legislative programme for 2023/24 announced a new Housing (Scotland) Bill which will make further provision on rent controls.

### The first extension

The legislative scheme allowed the expiry of the 2022 Act to be postponed in relation to rent capping and the moratorium on eviction until 30 September 2023, with the option of a further but final extension until 31 March 2024.<sup>4</sup> Both extensions were activated. The regulations to do this were subject to the affirmative procedure<sup>5</sup> and a statement of the reasons as to why the Scottish Ministers were extending the duration of the legislation had to be laid before the Scottish Parliament.<sup>6</sup>

The 2022 Act imposed periodic reporting requirements on the Scottish Ministers.<sup>7</sup> The first period ended on 31 December 2022.<sup>8</sup> Reports were required every three months thereafter up to 31 December 2023.<sup>9</sup> Their purpose was to review the operation of the legislation to consider whether it remained 'necessary and proportionate in connection with the cost of living'.<sup>10</sup> The Scottish Ministers were required to consult with stakeholders before issuing a report.<sup>11</sup> These included persons representing landlords' and tenants' interests, as well as local

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- 1 Broadly speaking, student-lets by educational institutions, or institutional providers of purpose-built or converted accommodation for students.
  - 2 See *Conveyancing 2022* pp 194–208. See now also *Brown v Glen Settlement Trust* [2023] UT 39, 2023 GWD 47-394 (p 32 above) on an unforeseen consequence of the legislation in relation to the holder of a short-assured tenancy obtaining a rent determination.
  - 3 Including making different provision for different types of lease.
  - 4 Cost of Living (Tenant Protection) (Scotland) Act 2022 s 7(3).
  - 5 CL(TP)(S)A 2022 s 7(5).
  - 6 CL(TP)(S)A 2022 s 7(6).
  - 7 CL(TP)(S)A 2022 s 9.
  - 8 CL(TP)(S)A 2022 s 9(6)(a).
  - 9 CL(TP)(S)A 2022 s 9(6)(b). But a report is not needed if during the reporting period the Scottish Ministers are required under s 7(6) to lay before the Scottish Parliament a statement of reasons why the legislation should be extended. Hence no report was issued for the periods January to March, and April to June, 2023. The final report covering the period October to December 2023 is available at: <[www.gov.scot/publications/cost-living-tenant-protection-scotland-act-2022-report-scottish-parliament-covering-period-1-october-31-december-2023/](http://www.gov.scot/publications/cost-living-tenant-protection-scotland-act-2022-report-scottish-parliament-covering-period-1-october-31-december-2023/)>.
  - 10 CL(TP)(S)A 2022 s 9(1)(a).
  - 11 CL(TP)(S)A 2022 s 9(3).

authorities. A report had to include a summary of how these parties' views were taken into account in finalising it.<sup>1</sup>

The first report was published on 12 January 2023.<sup>2</sup> It concluded that the cost-of-living crisis was ongoing and continuing to affect tenants adversely. The Scottish Ministers thereafter decided to extend most of the 2022 Act until 30 September 2023, issuing the statement of reasons required by the legislation.<sup>3</sup> Two of the protections, however, were to be withdrawn early, a decision given effect by the Cost of Living (Tenant Protection) (Scotland) Act 2022 (Early Expiry and Suspension of Provisions) Regulations 2023,<sup>4</sup> which were promulgated in January 2023. The first was the rent cap for Scottish secure tenancies and short Scottish secure tenancies, both in the social-housing sector. This expired on 26 February 2023.<sup>5</sup> The decision to end this cap was taken following agreement in December 2022 between the Scottish Federation of Housing Associations and the Scottish Government on expected rent increases from 1 April 2023.<sup>6</sup> The second protection which ceased was the rent cap in respect of student residential tenancies. This took effect from 17 January 2023.<sup>7</sup> But the protection here was suspended rather than permanently ended.

The postponement of expiry for the remainder of the protections was achieved by the Cost of Living (Tenant Protection) (Scotland) Act 2022 (Amendment of Expiry Dates and Rent Cap Modification) Regulations 2023,<sup>8</sup> which were promulgated in March 2023 having been approved by the Scottish Parliament.

The 2022 Act bars rent increases above a 'permitted rate', although it has a separate rule for increases in respect of 'prescribed property costs' which require the approval of a rent officer.<sup>9</sup> For private-sector leases, the 'permitted rate' was originally 0%, but this was increased by regulations to 3% with effect from 1 April 2023.<sup>10</sup> In respect of increases as a result of 'prescribed

1 CL(TP)(S)A 2022 s 9(4).

2 See <[www.gov.scot/publications/cost-living-tenant-protection-scotland-act-2022-first-report-scottish-parliament/](http://www.gov.scot/publications/cost-living-tenant-protection-scotland-act-2022-first-report-scottish-parliament/)>. See also C Miller, 'Cost of Living (Tenant Protection) (Scotland) Act 2022: where are we now?' 2023 *Housing Law Monitor*, April Supplement (Social Housing Bulletin) v–vii.

3 See Scottish Government, *Proposed Extension of the Cost of Living (Tenant Protection) (Scotland) Act 2022: Statement of Reasons* (January 2023), <[www.gov.scot/publications/proposed-extension-cost-living-tenant-protection-scotland-act-2022-statement-reasons/](http://www.gov.scot/publications/proposed-extension-cost-living-tenant-protection-scotland-act-2022-statement-reasons/)>.

4 SSI 2023/8.

5 Cost of Living (Tenant Protection) (Scotland) Act 2022 (Early Expiry and Suspension of Provisions) Regulations 2023, SSI 2023/8, reg 2.

6 See <[www.sfha.co.uk/news/news-category/news-article/sfha-and-scottish-government-reach-agreement-on-rent](http://www.sfha.co.uk/news/news-category/news-article/sfha-and-scottish-government-reach-agreement-on-rent)>.

7 Cost of Living (Tenant Protection) (Scotland) Act 2022 (Early Expiry and Suspension of Provisions) Regulations 2023 reg 3.

8 Cost of Living (Tenant Protection) (Scotland) Act 2022 (Amendment of Expiry Dates and Rent Cap Modification) Regulations 2023, SSI 2023/82, reg 2.

9 Private Housing (Tenancies) (Scotland) Act 2016 s 21A (inserted by CL(TP)(S)A 2022 s 1 and sch 1 para 1(5)) and s 33B (inserted by CL(TP)(S)A 2022 s 1 and sch 1 para 1(17)). The same rates were applied to earlier forms of private-sector leases.

10 Cost of Living (Tenant Protection) (Scotland) Act 2022 (Amendment of Expiry Dates and Rent Cap Modification) Regulations 2023 regs 3 and 4. See also the Private Residential Tenancies and Assured Tenancies (Prescribed Notices and Forms) (Temporary Modifications) (Scotland) Regulations 2023, SSI 2023/58.

property costs', the original figure of 3% was increased to 6% with effect from the same date.

### The second extension

In June 2023 the Scottish Government issued a statement of reasons as to why the rent cap and eviction moratorium provisions of the 2022 Act remaining in force should be further extended to 31 March 2024.<sup>1</sup> This referred to economic data, in particular showing that inflation remained high and that there was still significant financial pressure on households, including in relation to fuel. The extension was given effect by the Cost of Living (Tenant Protection) (Scotland) Act 2022 (Amendment of Expiry Date) Regulations 2023<sup>2</sup> and approved by the Scottish Parliament.<sup>3</sup>

### Rent-adjudication procedures

Schedule 3 to the 2022 Act gives the Scottish Ministers power by regulations to modify the rent-adjudication procedures for private residential tenancies and assured tenancies on or in anticipation of the rent-cap provisions expiring.<sup>4</sup> The aim is to prevent large hikes in rent at that time. During 2023, a set of regulations was used to correct a drafting error in these provisions.<sup>5</sup>

The power to modify the procedures was originally to expire on 31 March 2024,<sup>6</sup> but this may be extended for a period of no longer than a year.<sup>7</sup> Further extensions for the same maximum period are permissible.<sup>8</sup> The regulation-making power is subject to the affirmative procedure.<sup>9</sup> Following the rent-cap provisions being extended until 31 March 2024, the Scottish Ministers have activated an extension of the rent-adjudication procedure powers.<sup>10</sup> These powers enable the Scottish Ministers to set out criteria which must be applied by a rent officer or the Upper Tribunal in determining a rent where a landlord proposes an increase. It was reported in January 2024 that the Scottish Ministers intended to make provision that the rent would require to be set at the lowest of three

1 See Scottish Government, *Second Proposed Extension of the Cost of Living (Tenant Protection) (Scotland) Act 2022: Statement of Reasons* (June 2023), <[www.gov.scot/publications/cost-living-tenant-protection-scotland-act-2022-2nd-proposed-extension-statement-reasons/](http://www.gov.scot/publications/cost-living-tenant-protection-scotland-act-2022-2nd-proposed-extension-statement-reasons/)>.

2 SSI 2023/275.

3 There is a very limited extension beyond 31 March 2024 where certain processes, for example eviction proceedings, have commenced before that date: see the Cost of Living (Tenant Protection) (Scotland) Act 2022 (Savings Provisions) Regulations 2024, SSI 2024/19.

4 CL(TP)(S)A 2022 s 10 and sch 3.

5 Cost of Living (Tenant Protection) (Scotland) Act 2022 (Incidental Provision) Regulations 2023, SSI 2023/116.

6 CL(TP)(S)A 2022 s 11(1).

7 CL(TP)(S)A 2022 s 11(2).

8 CL(TP)(S)A 2022 s 11(3).

9 CL(TP)(S)A 2022 s 11(4).

10 Cost of Living (Tenant Protection) (Scotland) Act 2022 (Expiry of Section 10: Extension) Regulations 2024, SSI 2024/88. See also Scottish Government, *Proposed Extension of Section 10 of the Cost of Living (Tenant Protection) (Scotland) Act 2022: Statement of Reasons* (January 2024), <[www.gov.scot/publications/proposed-extension-section-10-cost-living-tenant-protection-scotland-act-2022-statement-reasons/](http://www.gov.scot/publications/proposed-extension-section-10-cost-living-tenant-protection-scotland-act-2022-statement-reasons/)>.

figures: (i) the open-market rent; (ii) the new rent proposed by the landlord; and (iii) a 'reasonable increase' based on a tapering system comparing the rent with that for similar properties. These proposals were criticised, particularly on the basis that determining 'similar properties' was too uncertain. The Scottish Government subsequently published draft regulations<sup>1</sup> which changed the figure at (iii) to a comparator figure based on the difference between the open-market rent and the current rent. Determining the comparator figure requires the use of mathematical formulae and has been described by the tenants' union, Living Rent, as 'incomprehensible'.<sup>2</sup> There seems force in this criticism as the Scottish Government has felt it necessary to publish a series of worked examples.<sup>3</sup> Whether the draft regulations will be enacted in their present form remains to be seen.

### Impact

Rent controls are a perpetually controversial issue.<sup>4</sup> Critics argue that their effect is for landlords to withdraw rental properties from the market, making it more difficult for individuals to find a property to rent.<sup>5</sup> It was reported in January 2024 that the number of private-sector rental properties on the Scottish Landlord Register stood at 340,000 compared with 370,000 in 2016.<sup>6</sup> While the 2022 Act caps rents on existing leases, it does not introduce any controls on the rent being demanded by landlords for new leases.<sup>7</sup> Perhaps unsurprisingly, these have been raised. It is also possible for landlords to increase rents where there are multiple tenants and one leaves being replaced by someone else.<sup>8</sup>

- 1 Draft Rent Adjudication (Temporary Modification) (Scotland) Regulations 2024. See also the updated guidance at <[www.gov.scot/publications/cost-of-living-rent-and-eviction/](http://www.gov.scot/publications/cost-of-living-rent-and-eviction/)>, and M Combe, 'Some thoughts on the proposed continuing rent protections for private tenants, and an observation about the return of rent pressure zones', 27 January 2024, <<https://basedrones.wordpress.com/>>.
- 2 See M Kendix, 'New rent cap control for tenants is "unworkable" and "dimly thought out"', *The Times*, 25 January 2024.
- 3 See <[www.gov.scot/news/continuing-rent-protection-for-private-tenants/](http://www.gov.scot/news/continuing-rent-protection-for-private-tenants/)>.
- 4 One columnist has tartly commented: 'The rent cap [in the 2022 Act] should be viewed as an experiment. Its success will depend on who you ask. Just make sure it is not a landlord or a tenant.' See G Bennett, *The Sunday Times*, 20 August 2023. Contrast the view of Living Rent, which is a strong advocate of rent controls: see L Brooks, "'It actually feels like my place": Scotland's rent cap helps tenants but loopholes remain', *The Guardian*, 16 November 2023. See also <<https://www.economicsobservatory.com/does-rent-control-work>>.
- 5 See eg M Linklater, 'War on property owners will make housing crisis worse', *The Times*, 7 November 2023.
- 6 See J Watson, 'End of rent-rise cap deepens housing crisis fears', *The Times*, 8 January 2024.
- 7 See R Booth, 'Loophole in Scotland's rent controls sees new tenants facing largest rises in UK', *The Guardian*, 14 September 2023.
- 8 This is because the 'tenant' within the meaning of the Private Housing (Tenancies) (Scotland) Act 2016 s 78(3) has changed: see M Combe, 'The joint-tenancy trap – ending PRT flat sharing arrangements, and rent increase implications', 13 October 2023, <<https://basedrones.wordpress.com/2023/10/13/the-joint-tenancy-trap-ending-prt-flat-sharing-arrangements-and-rent-increase-implications/>>; M Skilling and D Bain, 'Choose your friends wisely, choose your cotenants very carefully: joint tenants and the private residential tenancy', 6 September 2018, <[www.abdn.ac.uk/law/blog/choose-your-friends-wisely-choose-your-cotenants-very-carefully-joint-tenants-and-the-private-residential-tenancy/](http://www.abdn.ac.uk/law/blog/choose-your-friends-wisely-choose-your-cotenants-very-carefully-joint-tenants-and-the-private-residential-tenancy/)>. See also 'My landlord wanted to put up the rent 35% despite cap', BBC News, 9 October 2023, <[www.bbc.co.uk/news/uk-scotland-67018446](http://www.bbc.co.uk/news/uk-scotland-67018446)>.

In November 2023 the Scottish Government published figures on rents in the private sector in the year ending September 2023.<sup>1</sup> The 2022 Act has been in force for most of that period. The statistics show that rents for two-bedroom properties increased by an average of 14.3%. This ranged from 9.6% in South Lanarkshire to 22.3% in Greater Glasgow. For one-bedroom properties the average increase was 11.7%, with the figure for three-bedroom properties being 13.3%. Statistics published by other organisations showed similar trends.<sup>2</sup>

The same month saw the City of Edinburgh Council declare a housing emergency. The housing convener, Councillor Jane Meagher, stated: ‘Edinburgh may be a wealthy city on the surface, but we are seeing demand for homes far outstrip supply. Close to 5,000 households including many children will need to live in temporary accommodation this Christmas, because of this housing shortage.’<sup>3</sup> It is reported that the city has the highest rental-inflation rate in the UK at 13.7%.<sup>4</sup> Some have placed the blame for this increase at the door of the 2022 Act.<sup>5</sup> Its advocates, however, would dispute that.

The other key objective of the 2022 Act is to reduce the number of evictions by means of a moratorium, albeit one that is subject to exceptions.<sup>6</sup> In March 2023, however, it was reported that the number of eviction hearings for the previous month was more than double the monthly figure before the 2022 Act came into force. It was suggested that a reason for the increase was because landlords were deciding to sell up, which is one of the statutory grounds for removing tenants.<sup>7</sup>

### Challenge in the courts

We noted in last year’s volume that a petition for judicial review of the 2022 Act had been lodged at the Court of Session.<sup>8</sup> The action was brought by the Scottish Association of Landlords, Propertymark Ltd, and Scottish Land and Estates Ltd. It resulted in a decision in the Outer House in November 2023 given by Lord Harrower.<sup>9</sup>

The petitioners contended that the legislation was outwith the competence of the Scottish Parliament on the basis that it breached the rights of private-sector landlords under the European Convention on Human Rights. First, this was said

1 See <[www.gov.scot/publications/private-sector-rent-statistics-scotland-2010-to-2023/](http://www.gov.scot/publications/private-sector-rent-statistics-scotland-2010-to-2023/)>. See also p 79 above.

2 Eg a rental market report by Zoopla published in September 2023 said that, with an average annual rental growth of 12.7%, Scotland had overtaken London: see <[www.zoopla.co.uk/discover/property-news/rental-market-report/](http://www.zoopla.co.uk/discover/property-news/rental-market-report/)>.

3 See <[www.edinburgh.gov.uk/news/article/13844/edinburgh-declares-a-housing-emergency](http://www.edinburgh.gov.uk/news/article/13844/edinburgh-declares-a-housing-emergency)>. Housing emergencies have also been declared by Argyll and Bute Council and by Glasgow City Council.

4 See ‘City of Edinburgh Council declares housing emergency’, BBC News, 2 November 2023, <[www.bbc.co.uk/news/uk-scotland-edinburgh-east-fife-67289581](http://www.bbc.co.uk/news/uk-scotland-edinburgh-east-fife-67289581)>.

5 E Nolsoe, ‘Edinburgh declares housing emergency as SNP’s rental controls backfire’, *The Daily Telegraph*, 2 November 2023.

6 See *Conveyancing 2022* pp 203–05.

7 See D Alexander, ‘Inevitable increase in evictions shows need for a new approach’, *The Scotsman*, 16 March 2023.

8 See *Conveyancing 2022* p 206.

9 *Scottish Association of Landlords v Lord Advocate* [2023] CSOH 76, 2023 SLT 1179.

to be because it amounted to a disproportionate interference with the right to possessions under Article 1 protocol 1 of the ECHR. Secondly, because in early 2023, as outlined above, the rent cap was ended for social-housing tenancies and suspended for student residential tenancies, the petitioners argued that its continuation in respect of private-sector tenancies amounted to unlawful discrimination under Article 14 of the ECHR.

Since the judicial review was brought by organisations representing landlords, it was therefore an *ab ante* or abstract challenge to the 2022 Act. It could be contrasted with a challenge by reference to the individual circumstances of a landlord, alleging 'victim' status under s 100 of the Scotland Act 1998. For an abstract challenge to succeed it would need to 'demonstrate that the operation of the Act would give rise to a disproportionate interference with Convention rights in all or almost all cases'.<sup>1</sup> The challenge was to prove unsuccessful.

In relation to Article 1 protocol 1, the petitioners contended that the Scottish Ministers could have taken different measures to pursue the objective of supporting tenants during the cost-of-living crisis. Reference was made to a number of cases where the European Court of Human Rights had found rent controls to be a disproportionate interference with Article 1 protocol 1.<sup>2</sup> The petitioners disputed that emergency legislation was needed to protect tenants in 2022. They argued that the 'true objective of the Act was to respond to the effect of an increase in energy prices, and to a lesser extent, consumer goods prices, on tenants, irrespective of those tenants' economic circumstances'.<sup>3</sup> Less intrusive measures, such as making payments to the financially vulnerable, controlling energy prices, using existing rental-control measures in a particular local authority area, or controlling mortgage costs should have been pursued to meet that objective. In reply the Scottish Ministers focused on the fact that the 2022 Act was temporary. Furthermore, the rent cap and eviction moratorium were not absolute. It would have been 'unworkable'<sup>4</sup> to have a regime dependent on individual financial vulnerability of particular tenants.

Lord Harrower accepted the Scottish Ministers' arguments. He found that they were entitled to make a political judgment that emergency legislation was needed. A court should not interfere with that conclusion unless it was 'shown to be manifestly without reasonable foundation'.<sup>5</sup> In relation to possible less intrusive measures, a number of these had been considered and rejected by the Scottish Ministers on the basis that they would have been ineffective or unworkable. In summary, 'this court has not been provided with any basis on which to judge that a less intrusive measure could have been used without unacceptably compromising achievement of the legislature's objectives'.<sup>6</sup> Other arguments made by the petitioners, including that its application to all landlords

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1 *Scottish Association of Landlords* at para 5.

2 Paragraph 17.

3 Paragraph 18.

4 Paragraph 26.

5 Paragraph 42.

6 Paragraph 56.

regardless of means was disproportionate, were also found by Lord Harrower to be unpersuasive. He concluded that the challenge as a whole ‘[fell] far short of what is required in order *ab ante* to demonstrate that the Act disproportionately interferes with the [Article 1 protocol 1] rights of landlords’.<sup>1</sup>

In relation to Article 14, Lord Harrower found that the Scottish Ministers had acted lawfully. There were differences between the private-residential and the social-housing sectors. The latter had a small number of landlord bodies operating on a not-for-profit basis and it had been possible to reach agreement with them as to rent increases. The average for these would be around 6%. Given that rents in the social-housing sector were generally much lower than those in the private-residential sector, the 3% permitted increase in the latter from 1 April 2023 meant ‘a broad parity of treatment’.<sup>2</sup>

It is understood that the decision is not to be appealed.<sup>3</sup> Its outcome shows the difficulties in successfully challenging legislation on human rights grounds on an *ab ante* basis. The courts are generally unwilling to interfere with political judgments as to how to address economic hardship. Given that most of the 2022 Act is to expire on 31 March 2024, a challenge by an individual landlord seems unlikely. The expiry, however, will be followed by new housing legislation.

### Housing (Scotland) Bill

The Scottish Government’s legislative programme for 2023/24 announced a new Housing (Scotland) Bill.<sup>4</sup> The summary given was as follows:<sup>5</sup>

The Bill will help to deliver our New Deal for Tenants and some other aspects of Housing to 2040 by creating powers for the introduction of longer-term rent controls. The Bill will also create new tenants’ rights and introduce new duties aimed at the prevention of homelessness.

*A New Deal For Tenants* was a consultation paper published in 2021.<sup>6</sup> Without providing much in the way of detail it proposed that, by the end of 2025, there would be a national system of rent controls with ‘an appropriate mechanism to allow local authorities to introduce local measures’.<sup>7</sup> The consultation paper also sought views on: a new housing standard; a new housing regulator; a new right for a co-tenant to terminate a private residential tenancy; the right to personalise a rented home, including the right to keep a pet; and what should be done with

1 Paragraph 64.

2 Paragraph 69.

3 See M Combe, ‘Court of Session judgment in the judicial review of the rent and eviction controls of the Cost of Living (Tenant Protection) (Scotland) Act 2022’, 21 December 2023, <<https://basedrones.wordpress.com/>>.

4 Scottish Government, *Equality, Opportunity, Community: Our Programme for Government* (2023), <[www.gov.scot/programme-for-government/](http://www.gov.scot/programme-for-government/)> pp 10, 33, and 53.

5 At p 57.

6 Scottish Government, *A New Deal for Tenants: Draft Strategy Consultation Paper* (2021), <[www.gov.scot/publications/new-deal-tenants-draft-strategy-consultation-paper/documents/](http://www.gov.scot/publications/new-deal-tenants-draft-strategy-consultation-paper/documents/)>. See *Conveyancing 2021* pp 101–04.

7 *A New Deal for Tenants* p 82.

unclaimed rent deposits. Consultation closed in March 2022 and an analysis of responses was published in August 2022.<sup>1</sup> Over 8,000 responses were received, the vast bulk of these being ‘campaign-type’ submissions.<sup>2</sup> Unsurprisingly, the views of respondents were mixed, typically influenced by whether they had a landlord or tenant perspective.

In September 2023, the Scottish Government published its *A New Deal for Tenants: Rented Sector Reform – Current Proposals*.<sup>3</sup> These proposals are likely to form the basis of the new Bill. As regards rent control, the Scottish Government believes that is a matter best determined by local authorities who would be able to make recommendations for these to be imposed in part or all of their area.<sup>4</sup> The Scottish Ministers, however, would be the ultimate decision-maker with the relevant regulations having to be approved by the Scottish Parliament. Designation as a rent-control area would be for a fixed period of time, with a review being needed before the designation could be continued. These proposals appear broadly similar to the rent pressure zone provisions in the Private Housing (Tenancies) (Scotland) Act 2016<sup>5</sup> and which have not been used. Importantly, however:<sup>6</sup>

It is proposed that rent controls would apply to increases in rent that take place both during a tenancy and where the rent is set for a new tenant. This could help to stabilise rents in areas where market rents are increasing particularly quickly.

Further, it is proposed that rent cannot generally be increased in the first year of a private residential tenancy (in contrast to the current position where it can be increased once a year).<sup>7</sup> But:<sup>8</sup>

[W]e are also proposing that rent increases in areas where rent controls are in place would be limited to one increase per property in any 12 month period, even if the tenant changes within that time. If the let property in a new tenancy is substantially the same as the let property in the preceding tenancy, the rent for that property could only be increased once in any 12 month period regardless of how many different tenancies are entered into in that period. Increasing the rent for a property once every 12 months may result in the rent being increased early in a tenancy depending on when the earliest date of increase arises.

These proposals, if implemented, will have a significant impact on landlords and the Scottish Government accepts that certain safeguards will be needed

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1 Scottish Government, *A New Deal for Tenants: Consultation Analysis* (2022), <[www.gov.scot/publications/new-deal-tenants-analysis-report-responses-consultation-exercise/](http://www.gov.scot/publications/new-deal-tenants-analysis-report-responses-consultation-exercise/)>.

2 There were 6,118 responses endorsing the response by Living Rent and 1,390 endorsing a Cats Protection campaign.

3 Scottish Government, *A New Deal for Tenants: Rented Sector Reform – Current Proposals* (2023), <[www.gov.scot/publications/new-deal-tenants-rented-sector-reform-current-proposals/documents/](http://www.gov.scot/publications/new-deal-tenants-rented-sector-reform-current-proposals/documents/)>.

4 Paragraph 7.

5 Private Housing (Tenancies) (Scotland) Act 2016 ss 35–43.

6 *A New Deal for Tenants: Rented Sector Reform – Current Proposals* para 12.

7 Private Housing (Tenancies) (Scotland) Act 2016 s 19.

8 *A New Deal for Tenants: Rented Sector Reform – Current Proposals* para 14.

to protect landlords' interests, for example allowing a rent increase where improvement work has been carried out.<sup>1</sup> It also proposes exceptions to the rent-control provisions for certain 'new-to-the-market' properties.<sup>2</sup>

Aside from rent control, the Scottish Government proposes other legislative changes based on its 2021 consultation paper. First, there would be a new right of a co-tenant to bring a private residential tenancy to an end on giving reasonable notice to the co-tenants.<sup>3</sup>

Secondly, there would be greater flexibility to personalise a home.<sup>4</sup> There would be two categories of change. Category 1 – minor changes such as putting pictures and posters on walls – would not need landlord consent. Category 2 – more significant changes, to be specified in regulations but likely to include, for example, painting walls a different colour – would need landlord consent but this could not be unreasonably refused (although it could be made subject to conditions). Where a change caused damage<sup>5</sup> the landlord would be entitled to make a claim on the tenancy deposit.

Thirdly, there would be greater flexibility to keep a pet.<sup>6</sup> Both private-sector and social-housing tenants would be able to make a written request to their landlord who could refuse this only if it were reasonable to do so. Reasons would have to be given for refusal. An example of a reasonable ground for refusing given by the paper is that the species which the tenant wishes to bring in is listed in the schedule to the Dangerous Wild Animals Act 1976.<sup>7</sup> Landlords would be able to increase the tenancy deposit by a reasonable amount to cover the cost of possible damage to the property by the animal.

Fourthly, there would be new rules on unclaimed tenancy deposits.<sup>8</sup> The Scottish Government is considering making tenants provide alternative contact details which are given to the tenancy deposit scheme by the landlord. The idea is that this would improve the chances of the tenant getting the money back. Where, however, a deposit had been unclaimed for a certain period – the provisional suggestion is five years from the date the landlord applies for the deposit to be repaid, reasonable efforts having been made to find the tenant – it would be transferred to the Scottish Government and used for prescribed purposes to benefit private-sector tenants, such as providing advice and assistance.

Fifthly, courts and tribunals would be given new powers to delay an eviction because of the individual circumstances.<sup>9</sup> This would in particular take account of seasonal pressures, such as the potentially greater hardship arising from winter evictions. The proposals lack detail here.

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1 Paragraph 17.

2 Paragraphs 20–23.

3 Paragraphs 24–28.

4 Paragraphs 29–40.

5 Marks left by blu tack from putting up posters?

6 Paragraphs 41–56.

7 It would thus be reasonable to refuse a request to keep a bear, lion, rhinoceros, elephant, wild ass or scorpion.

8 Paragraphs 57–67.

9 Paragraphs 68–75.

Finally, in relation to the pre-action requirements for eviction in respect of a social-housing tenancy,<sup>1</sup> the landlord would have to consider the effect that domestic abuse suffered by the tenant contributed to there being rent arrears.<sup>2</sup>

### Conclusion

Although 2024 will see the final expiry of most of the Cost of Living (Tenant Protection) (Scotland) Act 2022, its principal policies of rent control and making evictions more difficult can be expected to be continued by new housing legislation.<sup>3</sup> In the meantime, the powers in relation to rent-adjudication procedures are to be extended. The effect of such measures on the availability of homes to rent will be of great personal interest to many people in Scotland. It is an area in which legislators will doubtless remain active.<sup>4</sup>

## MAKING PROPER LIFERENTS REAL<sup>5</sup>

How is a liferent created? This was the underlying problem in *Dickson v McCullagh*.<sup>6</sup> Liferents are either 'proper' or 'improper'. An improper liferent is simply a beneficial interest under a trust, and thus the 'how do you create?' question belongs to trust law. For instance, if Euphemia sets up a *mortis causa* trust, leaving her house in fee to Frieda, her only child (by her first marriage), and in liferent to her second husband, Giovanni, then the only conveyancing issue is for the trustees of the trust to complete title.<sup>7</sup> The rights of Frieda and her stepfather are simply beneficial interests in the trust. As such they will not appear in the Land Register (though as and when Giovanni pops his clogs a disposition will be needed from the trustees). Improper liferents are not real rights.

Proper liferents, though functionally like improper liferents, are in property law terms very different. In a proper liferent there are two actors, the liferenter and the fiar.<sup>8</sup> In an improper liferent there are three, the liferenter, the fiar and the trustees.<sup>9</sup> But whilst, in an improper liferent, there are more *actors*, there

1 Housing (Scotland) Act 2001 ss 14 and 14A.

2 Paragraphs 76–82.

3 Uncertainty as to the exact nature of the further reform is said to be deterring investors. See S Dick, 'Let the dust settle on rent caps', *The Estates Gazette*, 29 July 2023, and M Kendix, 'Edinburgh developers buy up student housing after SNP rent controls', *The Times*, 20 January 2024.

4 See M M Combe and P W G Robson, 'Rents and security of tenure – the circular progress of Scotland's private rented sector?' 2023 *Juridical Review* 177.

5 This section is by George Gretton.

6 First-tier Tribunal for Scotland (Housing and Property Chamber), 24 May 2019. For details, see p 45 above.

7 There seems to have been a resurgence, in recent years, in the use of liferents, and one driver has been this type of case: the *mortis causa* liferent where there is a 'blended family'. So if Cassandra co-owns a house with her second husband Darius, she might decide to leave her half-share to Darius in liferent, and in fee to her children from her first marriage.

8 That is the position in principle, but there can be complications, such as where a liferent is vested in X and Y and the survivor of them.

9 The previous footnote applies here too.

are fewer *real-right holders*. In a proper liferent two parties have real rights: both the liferenter (the real right of liferent) and the fiar (the real right of ownership). In an improper liferent there is just one real right, that of the trustees (the real right of ownership).

How does a proper liferenter obtain a real right, and what went wrong in *Dickson*? In that case there was a disposition of a flat at 82 Cardowan Road, Carntyne, Glasgow granted in 2008 to Elizabeth Dickson in liferent and Stephen David McCullagh in fee. Mr McCullagh applied for registration in the Land Register and was duly registered as owner on 1 August 2008 under title number GLA179132. So what went wrong? The short answer is that a person who desires registration must apply for registration. This was spelt out by rule 9 of the Land Registration (Scotland) Rules 2006,<sup>1</sup> in force at the time of the disposition in question: 'Any application for registration shall be made by the person in whose favour a real right will be created or affected by registration.' That means that where there is a disposition by X to Y in liferent and Z in fee, both Y and Z must apply for registration. Seemingly, what happened in *Dickson* was that Mr McCullagh applied but Ms Dickson did not. Why? We have no idea,<sup>2</sup> but the result was that, whilst Mr McCullagh thus acquired the real right of ownership, Ms Dickson's right under the disposition was no more than personal.<sup>3</sup>

The current Land Register Rules<sup>4</sup> have no specific provision matching the provision in the 2006 Rules just quoted, but the Keeper's practice remains the same. In the situation just described, two separate applications for registration are not required: a single joint application (ie by both fiar and liferenter) is acceptable.

This 'if you want a proper liferent you must apply for it' approach makes sense in itself, but it also has deep roots. Those old enough to remember warrants of registration in the Register of Sasines are a dwindling but distinguished band. Some will recall that if in those golden oldie days there was a disposition by X to Y in liferent and Z in fee, the warrant had to be in favour of *both Y and Z*.<sup>5</sup> But the story goes back further still. The rules about warrants of registration simply tracked yet older rules. Before the conveyancing reforms of the middle of the 19th century, if there was a disposition by X to Y in liferent and Z in fee, there had to be separate instruments of sasine for Y and Z, and each had to be recorded in the Register of Sasines.<sup>6</sup>

To that rule there was an exception, namely where a liferent was created not *by grant* but *by reservation*. Suppose that 200 years ago, in 1824, Janet disposed to Dugald, reserving to herself a liferent. Dugald had to record an instrument

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1 SSI 2006/485.

2 It is all the more puzzling given that the same law agent acted for both Ms Dickson and Mr McCullagh. Incidentally, if Ms Dickson in fact knew nothing of the liferent, it could be argued that the grant to her was invalid for lack of an intention to acquire (*animus acquirendi*).

3 Thus the following note appeared on the B (proprietary) section of the title sheet: 'No application for registration of the liferent interest has been made and no real right in the liferent has been completed.'

4 Land Register Rules etc (Scotland) Regulations 2014, SSI 2014/150.

5 See eg J M Halliday, *Conveyancing Law and Practice in Scotland*, 2nd edn, vol 2 (1997) para 39-19.

6 Dispositions were not then registrable.

of sasine, but Janet needed to do nothing.<sup>1</sup> As Erskine put it: ‘A liferent by reservation is that right of liferent which a proprietor reserves to himself, in the same deed by which he conveys the fee or property of the subject to another. This sort of liferenter needs no seisin to perfect his right.’<sup>2</sup>

The issue did not arise in *Dickson*, for that involved a liferent by grant, not a liferent by reservation. But, today at least, liferents by reservation are far more common than those by grant: in the period of just over eight years from 8 December 2014 to 22 January 2023, there were 9,263 applications for registration of liferents by reservation and only 543 for liferents by grant.<sup>3</sup> Is the rule stated by Erskine for liferents by reservation still good law? In modern terms, if Janet owns land and disposes to Dugald, reserving a liferent to herself, and Dugald applies for registration, but Janet does not, what happens? Does the old rule still apply, so that the Keeper must enter Janet into the title sheet as liferentrix even though she has not applied? Our understanding is that the Keeper does not adhere to the old rule and accordingly Janet must apply as well as Dugald – though the application can be a joint one. Is the Keeper’s practice here sound? Or should she be adhering, in a modernised form, to the old rule laid down by Erskine and other authorities? In theory a stateable challenge could probably be mounted. But it is unlikely that such a challenge would ever happen. It is much simpler just to apply.

Going back to *Dickson v McCullagh*, could Ms Dickson simply apply for registration now? Arguably not, because the disponer was divested when Mr McCullagh was registered as owner, so that it would now be too late.<sup>4</sup> (This argument would not be possible if what had happened had been the other way round – that Ms Dickson had been registered but not Mr McCullagh. In that case the right of ownership would still be vested in the disponer.) But on balance we incline to think that this argument is not correct. Mr McCullagh, by having accepted the disposition, has already consented that Ms Dickson should be registered as liferenter; or, a variant on this line of thought, Ms Dickson could require Mr McCullagh to grant her a liferent, on the basis that she holds a ‘personal liferent’ – to use the Tribunal’s terminology – which is to say a personal right against him to recognise her as having the rights of a liferenter. Of course such a deed would be at her expense.

By way of comparison, take another type of case where a disposition is granted to two persons, namely the everyday case where there are co-disponees, such as a disposition to Mr and Mrs Macdonald, spouses. Mr Macdonald applies for registration but (admittedly improbably) Mrs Macdonald does not. What

1 It is assumed that she was already validly infeft.

2 John Erskine, *An Institute of the Law of Scotland* (1773, reprinted by the Edinburgh Legal Education Trust as *Old Studies in Scots Law* vol 5, 2014) II.9.42.

3 See <[www.ros.gov.uk/about/publications/freedom-of-information-releases/2023/foi-release-registration-statistics-for-dispositions-reserving-liferent-interest-and-liferent](http://www.ros.gov.uk/about/publications/freedom-of-information-releases/2023/foi-release-registration-statistics-for-dispositions-reserving-liferent-interest-and-liferent)>.

4 The test in such cases is the date on which the application for registration is made. If Olivia (owner) delivers a disposition to Peter on 1 March, and he applies for registration on 1 August, but on 1 July Quentin was registered as owner on the basis of a separate disposition by Olivia, the Keeper should reject Peter’s application, because although Olivia was owner when the Olivia/Peter deed was delivered, she was no longer the owner on 1 August.

should the Keeper do? Presumably exactly what the Keeper did in *Dickson v McCullagh*: register Mr Macdonald but not Mrs Macdonald, so that ownership would be held in common – a half share in Mr Macdonald and the other half share still vested in the disponer. Mrs Macdonald could make a later application.

Finally, it might be asked whether there is anything in the Land Registration etc (Scotland) Act 2012 that would be of particular significance if the facts of *Dickson v McCullagh* were to happen today.<sup>1</sup> We do not think that the result today would be any different from the result in 2008.

## TENEMENTS<sup>2</sup>

### Liability for repairs to dormer windows

#### The nature of the problem

The decision in *EMC Letting Ltd v Brotherton Estate Ltd*<sup>3</sup> tells a familiar tale. A two-storey tenement is built. The flats, four in all, are sold off one by one. In the split-off dispositions, the owner of each flat is taken bound to pay ‘a one-fourth share of the expense of repairing and maintaining the roof of the building’. The roof is to be the common property of the owners of the two top-floor flats (only). Later, the owners of each of the top-floor flats extend into the roof space and construct a dormer window. So extensive are these dormers that they take up 90% of what had been the original roof.

The sun shines. The rain pours down. The wind howls. And after a few years the roof of one of the dormers leaks and requires urgent repairs. Each owner in the building accepts the need for repairs. They are carried out at the cost of £18,200. But how much should each owner pay?

This was the point at which the problems began in *EMC Letting Ltd*. The owners of the two flats on the ground floor agreed to contribute one-sixth of the cost<sup>4</sup> but refused to pay more. Yet their liability under the titles was for a one-fourth share. The result was litigation. In a case which was heard in the sheriff court under the simple procedure rules, the owner of the top flat with the defective dormer sought to recover from the owners of the two ground-floor flats the difference between the one-sixth share they had paid and the one-quarter share which, according to the claimant, was due under the real burden, amounting to £1,516.<sup>5</sup>

At first sight the claim may have seemed irresistible. A quarter of the cost of the repairs was due in terms of a real burden which was reproduced in the title

1 The registration of proper liferents is dealt with in s 51 of the 2012 Act (which must be read in conjunction with ss 21, 30, 31 and 114).

2 This section is by Kenneth Reid.

3 Forfar Sheriff Court, 21 August 2023, unreported.

4 Why a one-sixth share? Perhaps because the effect of adding the dormers was to change a two-storey building into a three-storey building, meaning that each of the ground-floor proprietors owned roughly one-sixth of the total floor area of the building. As we will see, floor area is likely to be relevant for apportionment of liability under the Tenement Management Scheme.

5 The claimant had paid for one-third of the cost of the repair rather than the one-quarter stipulated by the titles, and the sum sued for was the difference between these two figures.

sheets of each of the respondents. Only part of that quarter-share had been paid. The unpaid part was plainly due. But there was a problem.

### **Maintenance burdens: a ‘quasi-dynamic’ interpretation**

At the time when the maintenance burdens were imposed, the roof was a conventional pitched roof. Since then, however, 90% of the roof had been replaced by two large dormer windows, each with a flat roof which was more vulnerable to weathering and rain penetration than the pitched roof that it replaced. Was a real burden a blank cheque? Once imposed, did it mean that the roof must be maintained regardless of future changes? Or did such changes, of themselves, have the effect of extinguishing the real burden, at least in respect of that part of the roof that was altered? In other words, were maintenance burdens to be interpreted ‘dynamically’ or merely ‘statically’? The question is framed here in respect of tenement roofs, but the same issue potentially arises in respect of any maintenance real burden, regardless of the nature of the thing which is to be maintained.

There was a small amount of modern authority, although only at first-instance level and only in the sheriff court. In one case, *Mehrabadi v Haugh*,<sup>1</sup> it was decided that where (as in the present case) dormer windows had been added to a roof, the original maintenance burden did not extend to the dormers. This was a narrowly static interpretation.

A more nuanced approach was taken by the sheriff<sup>2</sup> in the subsequent case of *Waelde v Ulloa*.<sup>3</sup> Not all changes to a thing would invalidate a real burden to maintain it. On the contrary, the starting-point was very much the other way around.<sup>4</sup>

For my own part, I do not see why a maintenance burden should be so restricted, at least in relation to burdened co-proprietors who have or are to be taken to have acquiesced in the alteration concerned. A hypothetical example would be a tenement building which, when first erected, had (i) a flat roof and (ii) a title burden imposing a shared maintenance obligation on the co-proprietors. As a result of the costs of repeat repairs to the flat roof, the proprietors agree to it being replaced by a pitched slate roof. Later, repairs are needed to the slate roof following storm damage. It seems counter-intuitive to suggest that the co-proprietors should not be liable for their share of those costs in accordance with the maintenance burden.

Even so, not all cases would be covered by the burden:<sup>5</sup>

I accept that there may be more difficult cases involving issues about what constitutes acquiescence and/or alterations which change the character of the part of the

<sup>1</sup> June 2009, Aberdeen Sheriff Court, unreported but noted in *Conveyancing 2009* pp 10–11. The sheriff’s decision on this point was not challenged in a subsequent appeal to the sheriff principal: see *Mehrabadi v Haugh*, 11 January 2010, Aberdeen Sheriff Court, unreported but discussed in *Conveyancing 2010* pp 93–96.

<sup>2</sup> Sheriff Kenneth J McGowan.

<sup>3</sup> [2016] SC EDIN 30, 2016 GWD 11-221; for discussion, see *Conveyancing 2016* pp 169–72.

<sup>4</sup> Paragraph 28.

<sup>5</sup> Paragraphs 29 and 30.

building in question, such as a dormer which may, depending on the precise design, itself consist of a 'roof' part; vertical 'walls'; and a glazed 'front'. Nevertheless, I am attracted by the idea that a 'roof' (or other strategic part of a building) should be taken to include parts added thereto which are of the same character; and that an obligation to contribute to the cost of maintaining it created by the type of burden in the present case should be treated as extending to the cost of maintaining same.

On this approach, changes which were of the same character as the original roof (or other thing) would still be covered by the maintenance burden, provided at least that those who were liable for the maintenance had either agreed to the changes or, by buying their flat after the changes had already taken place, must be taken to have acquiesced in them. But changes which were of a different character were excluded. Such an interpretative approach might be called 'quasi-dynamic'.<sup>1</sup>

As far as is known, *EMC Letting Ltd v Brotherton Estate Ltd* is the first case on the subject since the two cases just mentioned. Would it follow the quasi-dynamic approach adopted in *Waelde v Ulloa*? Or would it revert to the essentially static interpretative approach of *Mehrabadi v Haugh*? Both decisions were cited and discussed by the court in the course of a careful judgment. In the event, however, the sheriff<sup>2</sup> reached a result which avoided a direct choice. As in *Mehrabadi*, she found that dormer windows subsequently erected did not fall within the maintenance burden; but in reaching this view, she was plainly attracted by the reasoning in *Waelde*.<sup>3</sup> As she explained:<sup>4</sup>

The dormers were in existence when the proprietors took title to the properties but they had not been in existence at the time of the creation of the burden. The properties they bought had titles that were burdened with a  $\frac{1}{4}$  share responsibility for repair and maintenance of the original roof. The roof had changed beyond recognition as a result of the addition of the dormers. The title burden did not survive such a change ... I considered a hypothetical situation where a new storey, or storeys were added to a building, the effect of which was to remove and replace an entire roof. I cannot accept that any title burden regulating the share of maintenance of the original roof would survive such an alteration. If it did the effect might be that only the original proprietors of a 2 storey building with 4 flats would share the maintenance of a roof that, as a result of alterations, served 4 storeys and 8 flats.

1 Other approaches may also be possible. Professor Roderick Paisley has reminded us of *Magistrates of Perth v Earl of Kinnoul and the Caledonian Railway* (1872) 10 M 874 where a real burden to repair three roads in Perth was commuted into a monetary payment because the roads, and the amount of traffic that they bore, had changed beyond all recognition since the burden was imposed in 1459. For discussion, see K G C Reid, *The Law of Property in Scotland* (1996) para 434; R R M Paisley, *Rights Ancillary to Servitudes* (2022) vol II, para 19-154. As is clear from the judgment of Lord President Inglis, at 888, this approach was seen as a 'middle course' between enforcing the burden to the letter and disregarding it altogether. So far as we have been able to discover, no subsequent case has taken the same approach, and, if it has a future at all, it may be restricted to cases where the thing which is to be maintained is still recognisably a thing of the same kind as when the real burden was first imposed.

2 Sheriff Krista Johnston.

3 Although the actual result was different from that reached in *EMC Letting Ltd*; in *Waelde v Ulloa* a section of roof which had been made subject to a relatively minor alteration was held to fall within the original maintenance burden.

4 Paragraph 38.

As the 'roof had changed beyond recognition' due to the dormers, it could no longer be said to fall under the original maintenance burden. On that ground the facts of the present case could be distinguished from those in *Waelde v Ulloa*.<sup>1</sup>

### The TMS: a 'dynamic' interpretation

If this had been non-tenemental property, the sheriff's finding on the applicability of the maintenance burden would have been the end of the matter. To the extent of the alterations, the burden was extinguished.<sup>2</sup> Hence there was no liability to contribute to the cost of maintenance of the dormer window. Tenements, however, are different. The owners of the flats share the same building, and the proper maintenance of that building is in the strong interests of everybody. Hence, if maintenance burdens fail, or if there were none in the first place, a default law steps in to make sure that at least the key parts of the building are sufficiently maintained. Until 20 years ago that default law was the common law of the tenement. Today it is the law set out in the Tenements (Scotland) Act 2004 and in particular in schedule 1 of that Act which contains a default management scheme, the Tenement Management Scheme ('TMS'). Now that the maintenance burdens were found to have failed, the question was therefore whether the costs of maintenance could be recovered by the claimant under the TMS.

On that question there was no room for doubt. The roof is a key part of a tenement building. Hence it is included among the 'scheme property' which, under the TMS, falls to be commonly maintained.<sup>3</sup> By 'roof' is meant, not the roof as it was when the Tenements Act was first passed and brought into force back in 2004, but the roof as it is today. In other words, 'roof' is to be given a 'dynamic' interpretation. Were it otherwise, the provisions of the TMS would not readily apply to buildings erected after 2004. Nor, to use a different type of argument, would it achieve its policy objective of keeping the building wind and watertight.

<sup>1</sup> Paragraph 37.

<sup>2</sup> Conversely, to the extent that the original roof survived – and around one-tenth of it did survive – the maintenance burden remained live and enforceable: see para 29.

<sup>3</sup> Three types of 'scheme property' are identified by TMS r 1.2, namely (a) 'any part of the tenement that is common property of two or more of the owners', (b) any part that is to be commonly maintained by a virtue of a real burden, and (c) certain key parts of the building among which is included the roof. Each category excludes items which fall within an earlier category, so that type (c) scheme property cannot include anything which falls within types (a) or (b). Although the point was not raised, this hierarchical structure might have been relevant in the present case. As the roof was, in terms of the titles, the common property of the owners of the two upper flats, so it might appear to have been scheme property of type (a). If that was correct, the cost of maintenance fell to be met exclusively by the co-owners (TMS r 4.2(a)), and so the respondents (as owners of the two lower flats) would escape liability. Probably, however, it is not correct. If the word 'roof' for the purpose of the maintenance obligations must be read as excluding the dormers, so also it must exclude the dormers for the purposes of conferring common property. The only path towards overcoming that conclusion would be to say that the dormers, once built, must be taken to have acceded to what was left of the roof and so become common property in turn. But that argument is far from clear-cut: see *Conveyancing 2010* pp 94–95.

With the exception of the window and window-frame,<sup>1</sup> a dormer is part of the roof.<sup>2</sup> Hence, under the TMS it falls to be maintained by everyone.<sup>3</sup> In cases like this the TMS offers two possible bases of liability. In the normal case, the owner of each flat must contribute equally; but where the floor area of one of the flats is more than one-and-a-half times that of any other flat, the cost of maintenance is apportioned by relative floor area.<sup>4</sup> As the move into the roof-space had the effect of doubling the floor areas of each of the top-floor flats, this was likely to be a case where liability was by floor area.

None of this was of direct assistance to the claimant. As already mentioned, the claimant sought payment of the difference between the one-sixth share of the repair costs which the respondents had paid and the one-quarter share which, the claimant said, was due under the maintenance burden. But the maintenance burden, the court found, had fallen; and, while the TMS provided an alternative basis of recovery, no relevant averments had been made in the claimant's pleadings. As the sheriff explained:<sup>5</sup>

In the absence of any title burden I consider that the Act 2004 is engaged ... [But] in the absence of details of floor area I am not in a position to determine whether the respondents are responsible for an equal share, namely  $\frac{1}{4}$ , or less due to their respective floor share. I can however determine that the respondents' liability for  $\frac{1}{4}$  share under the title burden, as claimed, is not due.

Hence the claim fell to be dismissed.

### Combining flats

Jack owns a ground-floor flat in a Victorian stone tenement (call it 'flat A'). Jill owns the flat immediately above (call it 'flat B'). They bond over washing the common stair. In due course they marry. Reluctant to sell either flat, the scenes of their courtship, they decide to combine the two. The necessary planning and building consents are obtained. The building work is carried out. An internal staircase is added. The door from flat B to the common stair is blocked off. They live happily ever after.

But there is still conveyancing to be attended to. Jack and Jill consult you. Instead of Jack owning flat A and Jill owning flat B, what they want is to own the combined flat A-and-B, companionably, together. How is this to be achieved? Three methods seem to be available. One is for Jack to grant a disposition conveying a one-half *pro indiviso* share in flat A to Jill and for Jill to grant a mirror disposition conveying a one-half *pro indiviso* share to Jack. A second option is to

<sup>1</sup> These are excluded from type (c) scheme property by TMS r 1.3(b).

<sup>2</sup> See Scottish Law Commission, *Report No 162 on the Law of the Tenement* (1998) para 5.8. It might be added that a dormer is not excluded by TMS r 1.3(a) ('any extension which forms part of only one flat') because, unlike the single-storey extension for which that exclusion is intended, a dormer is an integral part of the building.

<sup>3</sup> Broadly the same reasoning had been applied in *Waelde v Ulloa* [2016] SC EDIN 30, 2016 GWD 11-221 in respect of a skylight.

<sup>4</sup> TMS r 4.2(b).

<sup>5</sup> Paragraph 39.

combine the double conveyance into a single deed – in effect, an excambion – in which, again, each disposes a half share in the respective flat to the other. A third option is for Jack and Jill to grant to Jack and Jill a disposition of the two flats.

Which method should be chosen? Each, one might suppose, will do the job efficiently. An advantage of the last, however, is that it produces, overtly, a combined title to the flats, thus mirroring in legal terms what has already taken place in physical terms. And instead of two title sheets on the Land Register, one for each (no-longer-existing) flat, there will (one hopes) be a single title sheet for the combined flats. Method 3, therefore, is tempting, and it tempted the parties in *Wallace-Martinez v Nisbet*.<sup>1</sup> The result? Disaster. According to the sheriff, such a disposition ‘transfers nothing’.<sup>2</sup> At the end of the transaction – after signing and registering the disposition, after paying the registration dues and the solicitors’ fees, after receiving a PDF of a nice new title sheet to the combined flat from the Keeper – Jack and Jill are in exactly the same position as when they started. In the opinion of the sheriff, Jack continues to own flat A, and Jill continues to own flat B.

Why? The answer, according to the sheriff, goes back to the well-known case of *Aberdeen College v Youngson*<sup>3</sup> in 2005. In that case it was held in the Outer House that an A–A disposition – a disposition in which the granter and the grantee were one and the same person – was not normally a sufficient title to found positive prescription.<sup>4</sup> The reason was because such a disposition has no legal effect. If A, already owning property X, purports to disposes property X to herself, the disposition achieves nothing, because A already owns property X.

But the rule established in *Aberdeen College v Youngson* is not an absolute one. As the Lord Ordinary in that case, Lord Menzies, explained:<sup>5</sup>

Transfer of property is essential for an effective conveyance of land. A person cannot disposes a piece of land from himself to himself in exactly the same status or category, because no transfer will have resulted. It may be different if the interest in land which is being disposed is different from that which is received, or where the capacity of the individual changes – for example, a person may disposes land to trustees of whose number he is one, or he may disposes land to a partnership of which he is a partner. In these examples the fact that the disponent’s name appears both as disponent and amongst the disponees is neither here nor there, because his capacity is different and (at least in the example of the partnership) there is a separate legal persona involved.

Furthermore, the exceptions mentioned by Lord Menzies were not intended to be exhaustive. There might be others. The important point is simply that not all dispositions in which the granter and grantee are the same person are ineffective. That depends on the substance of the transaction embodied by the

1 [2023] SC EDIN 9, 2023 GWD 10-105.

2 Sheriff’s Note para 110.

3 [2005] CSOH 31, 2005 1 SC 335, discussed in *Conveyancing 2005* pp 63–65. The decision was followed in *Ardnamurchan Estates Ltd v MacGregor (No 1)* [2020] SAC (Civ) 2, 2020 SC (SAC) 1, discussed in *Conveyancing 2020* pp 167–69.

4 For the use of such dispositions to evacuate special destinations, see G L Gretton and K G C Reid, *Conveyancing* (5th edn, 2018) para 27-20.

5 At para 10.

disposition. And in determining the substance it is important not to be misled by mere matters of form.

Now look again at the disposition by Jack and Jill. *In form* this was a disposition by Jack and Jill to Jack and Jill of flats A and B. But *in substance* it was nothing of the sort. As the disposition will no doubt have disclosed,<sup>1</sup> only Jack owned flat A and only Jill owned flat B. So, while each purported to dispoise both flats to each other, what was actually happening was that Jack was disposing a half share in flat A to Jill and Jill was disposing a half share in flat B to Jack – each, in other words, was disposing to the other a half share in the flat that each owned. Admittedly, and perhaps in hindsight incautiously, the disposition promised more. Jack also purported to convey a half share in flat B (which he did not own) to Jill (who already owned the flat), and likewise Jill also purported to convey a half share in flat A to Jack. But that does not detract from the validity of the disposition. Such a deed is effective to the extent that the granters have title to grant, even if they do not have title to grant everything.<sup>2</sup>

Behind this lies a broader point. An A–A disposition fails where all that A is doing is to transfer to herself a property that she already owns. But that was not the position for Jack and Jill. Jack owned flat A but not flat B. Jill owned flat B but not flat A. The disposition was no sham but had real substance, and that substance was to transfer a half share in flat A to Jill and a half share in flat B to Jack.

Some of these points were made by counsel for the pursuers in *Wallace-Martinez v Nisbet*:<sup>3</sup>

Counsel for the pursuers submitted that although both pursuers were both granters and grantees, what they gave and what they received were different. The first pursuer conveyed away ownership of the ground floor flat, the second pursuer conveyed away ownership of the first floor flat and they both obtained a one half *pro indiviso* share of the combined property. A whole new property was being created.

But the sheriff was not to be persuaded:<sup>4</sup>

I do not accept this. The terms of the dispositive clause are clear: it is a purported transfer of ‘the unified flat’ by the pursuers to themselves. The narrative clause narrates that the ‘consideration’ for the conveyance is that the properties have been altered so as to form one self-contained property and the pursuers resolved that the title to the united property should be taken in their favour jointly without any consideration being paid. This is not the creation of a new property. It is simply a desire to tidy up the title deeds and to give the two flats the same name.

The sheriff’s reasoning is not entirely easy to follow but it seems to privilege form over substance. For reasons already mentioned, that cannot be accepted as the correct approach. There is nothing wrong with a disposition of the two flats by

1 As did the disposition in *Wallace-Martinez v Nisbet*. The terms of the disposition are reproduced in para 102 of the Sheriff’s Note.

2 *McLeod v Cedar Holdings Ltd* 1989 SLT 620.

3 Sheriff’s Note para 107.

4 Sheriff’s Note para 108.

Jack and Jill to Jack and Jill. Insofar as it rejects that position, *Wallace-Martinez v Nisbet* must be regarded as wrongly decided.<sup>1</sup> Nonetheless the decision of the sheriff was upheld by the Sheriff Appeal Court on 31 January 2024.<sup>2</sup> The appellate decision will be considered further in our annual volume for 2024.

## SERVANTS, NOT MASTERS: FORMS AND THE ASSIGNATION OF STANDARD SECURITIES<sup>3</sup>

### Background

Nowadays it is relatively common for standard securities to be transferred as part of commercial transactions. For example, one bank may sell its mortgage portfolio to another bank. There may be a securitisation transaction.<sup>4</sup> And so on. The legislation governing standard securities, the Conveyancing and Feudal Reform (Scotland) Act 1970, dates from a time when assignation by the security-holder was much less common. It is showing its age and is currently the subject of a major review by the Scottish Law Commission.<sup>5</sup>

The assignation provisions have been the focus of a number of cases in recent years. Their common theme has been how closely documentation needs to comply with the statutory forms for assignation of a standard security set out in schedule 4 to the 1970 Act. In *OneSavings Bank plc v Burns*,<sup>6</sup> decided at Banff Sheriff Court back in 2017, it was argued that using the same document to assign multiple standard securities was not competent, though the argument failed. But a challenge to the validity of the assignation won in that case on another ground: failure to comply with note 2 in schedule 4. This states:

In an assignation, discharge or deed of restriction, (1) a standard security in respect of an uncertain amount may be described by specifying shortly the nature of the debt or obligation (eg, all sums due or to become due) for which the security was granted, adding in the case of an assignation, *to the extent of £ being the amount now due thereunder* and (2) a standard security in respect of a personal obligation constituted in an instrument or instruments other than the standard security itself may be described by specifying shortly the nature of the debt or obligation and referring to the other instrument or instruments by which it is constituted in such manner as will be sufficient identification thereof.

The words in italics indicate that where the standard security being assigned has been granted for all sums due or to become due (as almost all standard securities are), the amount due under the secured obligation as at the time of

<sup>1</sup> The overall decision in the case, however, is irreproachable: see pp 121–26 above.

<sup>2</sup> [2024] SAC (Civ) 4, 2024 SLT (SAC) 41.

<sup>3</sup> This section is by Andrew Steven.

<sup>4</sup> See eg C J Emedosi, *The Transfer of Security Rights in Securitisations in Scotland, England and France: A Law and Economics Analysis*, PhD thesis, University of Aberdeen (2021).

<sup>5</sup> Three discussion papers have been published by the Scottish Law Commission: (1) *No 168 on Heritable Securities: Pre-default* (2019); (2) *No 173 on Heritable Securities: Default and Post-Default* (2021); *No 175 on Heritable Securities: Non-monetary securities and sub-securities* (2023). On (3) see p 84 above. The Commission is now working on a final report and draft Bill.

<sup>6</sup> *OneSavings Bank plc v Burns* [2017] SC BAN 20, 2017 SLT (Sh Ct) 129, 2017 Hous LR 55. For discussion of this and related cases, see *Conveyancing 2017* pp 120–27.

assignment has to be stated. In the *Burns* case it had not and the sheriff held that the assignment was thus invalid. This decision left many banking lawyers aghast. In an assignment of dozens of standard securities it would be a cumbersome task to find out the exact sums due by each individual borrower as at the time of assignment. Several subsequent decisions rejected the approach in *Burns*.<sup>1</sup> Only, however, in 2023 has the Inner House finally addressed the matter. It did so on an appeal from the sheriff court in *Guidi v Clydesdale Bank plc*.<sup>2</sup>

### Requirements for assignment documents

#### The *Guidi* case: introduction

Giovanni Guidi was a businessman. He set up a company called Fieldoak Ltd. Much of its finance was provided by the Clydesdale Bank. In order to obtain this Mr Guidi had granted a personal guarantee to the bank for a maximum of £450,000 and a standard security over his house in Bothwell. In 2015 the Bank sold a large tranche of loans and securities to the Promontoria group of companies. Its rights in relation to Fieldoak were transferred to Promontoria (Chestnut) Ltd ('Chestnut') with intimation to Mr Guidi by means of a letter.

When Fieldoak defaulted on its repayment obligations in 2016, Chestnut took enforcement steps resulting, in 2017, in Mr Guidi's sequestration. He in turn raised two actions in Hamilton Sheriff Court. One, for recall of the sequestration, was sisted. The other related to the enforcement of the standard security. Mr Guidi's position was that the assignment to Chestnut was invalid for failure to conform with the requirements of the 1970 Act. In particular it did not state the sum owed as at the time of the assignment.

#### The first-instance decision

The sheriff at Hamilton transferred the case to Glasgow Sheriff Court where it came for debate before the commercial sheriff (Stuart Reid). In 2021 he issued a judgment running to 137 pages, the latter part of which dealt with the rules on lodging redacted documents.<sup>3</sup> He held that the elements of the assignment of a standard security as set down by the 1970 Act can be divided into (i) those which are material, and (ii) those which are immaterial. Within (i) came the structural form of the deed, as well as the identification of the parties and the security/ies being assigned. In his opinion, it was a requirement of structure that the deed was unilateral, unconditional and only assigned a standard security/ies. Within (ii) came among other things whether the security was for all sums and the amount of debt due. It followed that the failure to state the current sum owed in

<sup>1</sup> See *Shear v Clipper Holding II SARL*, 26 May 2017, Court of Session Outer House, <[www.addleshawgoddard.com/globalassets/insights/litigation/shear-v-clipper.pdf](http://www.addleshawgoddard.com/globalassets/insights/litigation/shear-v-clipper.pdf)>; *Promontoria (Henrico) Ltd v The Firm of Portico Holdings (Scotland)* [2018] SC GRE 5, 2018 GWD 6-87; *Clipper Holdings II SARL v SF and SFX*, 18 January 2018, Edinburgh Sh Ct, unreported; *Guidi v Promontoria (Chestnut) Ltd* [2021] SC GLW 59, 2021 SLT (Sh Ct) 441. The appeal from the last of these decisions is the subject of the present commentary.

<sup>2</sup> [2023] CSIH 4, 2023 SCLR 417, 2023 Hous LR 2.

<sup>3</sup> [2021] SC GLW 59, 2021 SLT (Sh Ct) 441. For discussion, see *Conveyancing 2021* pp 49–50 and 155–68.

the document in favour of Chestnut did not invalidate the assignation. It failed, however, for other reasons. It was not unilateral, unconditional or confined to the assignation of standard securities.<sup>1</sup>

### The Inner House decision

Chestnut marked an appeal to the Sheriff Appeal Court, which remitted it to the Inner House on the basis that it raised issues of principle and that there had been a number of previous cases both in Scotland and England in relation to assignations to the Promontoria group.<sup>2</sup> The appeal was unanimously upheld. The sheriff having taken 137 pages to deal with the issues, Lord Woolman, giving the Opinion of the Court,<sup>3</sup> did the same in eight. He began a discussion of the legal framework by noting that the 1970 Act 'does not demand strict adherence to the statutory wording'.<sup>4</sup> This was shown by s 53 of the legislation which allows documents to conform 'as closely as may be' to the statutory forms. Case law indicated that failure to comply with statutory wording did not necessarily mean that a document was invalid. What mattered was the intention of Parliament.<sup>5</sup> Where there was deviation the question that had to be asked was whether this was of 'critical importance in the context of the legislative scheme'.<sup>6</sup> Lord Woolman continued: 'The underlying theme of flexibility coincides with the interests of justice. Forms should be servants, not masters.'<sup>7</sup>

The sheriff's decision that it was unnecessary to state the current sum owed at the time of the assignation was upheld. Lord Woolman noted the practical difficulties of determining the figure. In the court's opinion, this was 'not of critical importance. It is certainly of no moment to the assignee'.<sup>8</sup> The earlier cases to the same effect were approved. *Burns* was overruled.

The court then turned to the sheriff's conclusion that an assignation document in relation to a standard security must be unilateral, unconditional and assign only standard securities. It disagreed in relation to the last of these. Assigning other rights too was permissible: '[i]t would run counter to common and commercial sense to require a multiplicity of documents'.<sup>9</sup> In contrast to the sheriff, the court held that the assignation document here was only conditional on the purchase price for the sale being paid, which the evidence clearly showed it had been. Finally, the court offered 'another perspective'.<sup>10</sup> Were the assignation

1 *Guidi v Promontoria (Chestnut) Ltd* [2021] SC GLW 59 at paras 222–226. The sheriff noted at para 225 that the document assigned 'a mixed bag of multiple [other rights]'.

2 *Guidi v Clydesdale Bank Plc* [2023] CSIH 4 at para 9.

3 The other judges were Lord President Carloway and Lord Pentland.

4 Paragraph 11.

5 Paragraph 12, citing *R v Soneji* [2006] 1 AC 340, a case also reviewed by the sheriff.

6 Paragraph 12, citing *Osman v Natt* [2015] 1 WLR 1536 at para 33 per Sir Terence Etherton, a case also considered by the sheriff.

7 Paragraph 13.

8 Paragraph 15.

9 Paragraph 17.

10 Paragraph 19.

to be ineffective, the Clydesdale Bank would still be the creditor and the debt would still be due. The Bank, however, denied that any debt was still due to it. In the view of the court:<sup>1</sup>

It would be odd if the debt is held by [Chestnut], but the security by the Bank. The words of the assignment are unequivocal. [Chestnut] acquired the Bank's whole right, title and interest to the Fieldoak facility agreement, the personal guarantee and the standard security. There is no merit in Mr Guidi's arguments.

In August 2023 the UK Supreme Court refused Mr Guidi permission to appeal on the basis that his application did not raise an arguable point of law.<sup>2</sup>

### Analysis

The Inner House's decision will be welcomed by practising lawyers for its flexible approach.<sup>3</sup> It should result in less fretting over how closely the sometimes over-fussy forms in the 1970 Act need to be followed. Section 53, with its allowance for 'as close as may be' deviations, is to be interpreted liberally. It is difficult not to compare this with the literal approach to reading the 1970 Act which the UK Supreme Court took in *Royal Bank of Scotland v Wilson*.<sup>4</sup> Although the two decisions can be distinguished on the basis that *Wilson* was about interpreting the wording of an enforcement provision rather than compliance with a statutory form, so that s 53 was thus irrelevant, there seems some dissonance. Assuming that the current proposal of the Scottish Law Commission for there to be no statutory form for the assignment of a standard security is implemented,<sup>5</sup> the matter of how much leeway s 53 gives will in due course cease to matter.

While the sheriff's decision of 137 pages might be considered by some as being on the lengthy side, the Inner House decision at only eight might be regarded as somewhat brief. Its conclusion that stating the current sum owed is unnecessary is reached swiftly, as we have seen, noting that the amount due is of 'no moment to the assignee'. There are, however, difficult questions here. Professor J M Halliday, the architect of the 1970 Act, was of the view that standard securities for an uncertain sum could 'only be assigned to the extent of the sum outstanding

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<sup>1</sup> Paragraphs 19–20.

<sup>2</sup> UKSC 2023/0072. The panel was Lord Hodge DPSC, Lord Kitchin and Lady Rose. Even if Mr Guidi had successfully appealed and the assignment was held to be invalid, the standard security could then have been enforced by the Clydesdale Bank rather than by Chestnut. Thus, success on this issue alone would not of itself have prevented enforcement.

<sup>3</sup> See L Walker, 'Court clarity and commercial reality' (2023) 68 *Journal of the Law Society of Scotland* Feb/24.

<sup>4</sup> [2010] UKSC 50, 2010 SC (UKSC) 66; see *Conveyancing 2010* pp 129–49. See also *Bennett v Beneficial Bank plc* 1995 SLT 1105 and *Beneficial Bank plc v McConnachie* 1996 SC 119, where the Court of Session held that the requirement in a deed granting a standard security for there to be a particular description of the property as set out in note 1 to sch 2 to the 1970 Act was mandatory. The effect of these decisions was reversed by the Abolition of Feudal Tenure etc (Scotland) Act 2000 s 76(1) and sch 12 para 30(23)(a).

<sup>5</sup> Scottish Law Commission, *Discussion Paper No 168 on Heritable Securities: Pre-default* (2019) paras 10–35 to 10.38.

at the time of the assignation'.<sup>1</sup> This was the background to note 2 of schedule 4. The standard security would need to be varied to cover sums advanced by the assignee. The 'freezing' of the standard security in this way is protective of the debtor in limiting the secured debt. The Inner House's more flexible approach is consistent with the conclusion that post-assignation debts are secured although this is not expressly acknowledged. In any event, this is a policy issue which the Scottish Law Commission is considering as part of its work.<sup>2</sup>

There are also times at which the Inner House seems to be reviewing a different document from the sheriff.<sup>3</sup> As mentioned above, the sheriff held that the document failed because it (i) was not unilateral, (ii) was not unconditional, and (iii) assigned additional rights. As regards (iii), the sheriff was overruled, in our view rightly.<sup>4</sup> The Inner House, however, did not review the sheriff's conclusion on (i). Further, while in relation to (ii) the sheriff found that the document suffered from 'labyrinthine conditionality',<sup>5</sup> the Inner House said that the only conditionality related to payment for the purchase of the rights by Chestnut and that it was clear payment had been made.<sup>6</sup> It is difficult to know what to make of this difference.

Finally, although it might be 'odd' for the debt and security to be separated, this is by no means impossible.<sup>7</sup> The fact that the Clydesdale Bank denied that any debt was due to it cannot, therefore, be regarded as definitive as to whether the assignation of the standard security was effective.

## COMMON PROPERTY OR SERVITUDE? – AGAIN<sup>8</sup>

In last year's volume we wrote the following passage:<sup>9</sup>

A driveway is to serve two separate properties (A and B). You are charged with doing the conveyancing. How should matters be arranged? Should the owner of each property be given (i) common property, (ii) a servitude of access, or (iii) both?<sup>10</sup>

In a competition between (i) and (ii), common property will usually be the better solution. The trouble with servitude is that the proprietor of one of the

1 J M Halliday, *The Conveyancing and Feudal Reform (Scotland) Act 1970* (2nd edn, 1977) para 9-03. See also G L Gretton, 'Assignment of All-Sums Standard Securities' 1994 SLT (News) 207. Compare R G Anderson, 'Assignment of All Sums Securities', in F McCarthy, J Chalmers and S Bogle (eds), *Essays in Conveyancing and Property Law in Honour of Professor Robert Rennie* (2015) 73–95.

2 *Discussion Paper No 168 on Heritable Securities: Pre-default* paras 10–39 to 10–72.

3 It is not beyond possibility that it was: see *Conveyancing 2021* p 50.

4 See *Conveyancing 2021* p 163.

5 [2021] SC GLW 59 at para 224.

6 For further discussion of whether the assignation of a standard security can be conditional, see *Conveyancing 2021* p 163.

7 *UK Acorn Finance Ltd v Smith* 2014 Hous LR 50, discussed in *Conveyancing 2014* pp 177–82.

8 This section is by Kenneth Reid.

9 *Conveyancing 2022* pp 168–69.

10 Depending on the width of the driveway there may also be a third possibility, namely splitting ownership lengthways, perhaps with the addition of a servitude of access over the part that is not owned.

properties must be given the upper hand. After all, someone has to own the driveway. Yet, to give ownership, say, to the proprietor of property A and a servitude to the owner of property B is to disadvantage the latter. Proprietor B has only a servitude and is restricted to whatever rights that servitude may be found to encompass. Proprietor A has a right to the driveway which is unlimited save for the servitude. The scope for dispute is obvious. Does, for example, the servitude extend to vehicles? If so, are there limits as to the number of vehicles that can use it? What about parking?

Of course, there may sometimes be good reasons for arranging matters in that way. For example, the driveway may be used predominantly for property A and hardly at all for property B. And common property is not necessarily immune from disagreement: it was not for nothing that the Romans referred to it as *mater rixarum*. Nonetheless, in most cases, most of the time, common property is a better arrangement than servitude.

We claim no particular powers of prophecy, but since that passage was written there has been a new case which neatly illustrates the difficulties involved where the driveway belongs to one party and the other has merely a servitude of access.

### The West Lothian question

In *Doolan v Donald*<sup>1</sup> the pursuers and defenders were next-door neighbours, owning and living in houses at, respectively, 46 and 44 Whitburn Road, Bathgate, West Lothian.<sup>2</sup> Access to the pursuers' property from the main road was by means of a driveway which belonged to the defenders and in respect of which the pursuers had a servitude right. The servitude was described in the pursuers' title sheet as:

A Servitude Right of access to and egress from the Benefitted property at all times and for all purposes over and across the Servitude Area.

As can be seen, the right was broadly expressed. In due course a dispute arose as to its exercise.

According to the pursuers, the defenders and others visiting the defenders' house frequently parked on the driveway, making it awkward, and sometimes impossible, for the pursuers' cars to get past. Matters were made worse by the fact (denied by the defenders) that the defenders were operating from their house what was described as 'an outdoor personal training services studio' and that their clients too parked on the driveway. More generally, the pursuers averred that 'the defenders have shown a total disregard for the pursuers' servitude right of access. The Servitude Area is blocked by the defenders on almost a daily basis.'<sup>3</sup> The pursuers sought a number of remedies including, in particular:

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<sup>1</sup> [2024] SC LIV 15.

<sup>2</sup> Title to the former was registered under WLN43757; the latter was still on the Sasine Register.

<sup>3</sup> We understand that the obstruction was said to be caused mainly by parking by the defenders' clients.

to interdict the defenders by themselves, himself or herself and by their or his and her servants and all others acting under their or his or her orders or at their or his or her direction or on their or his or her behalf from parking vehicles on the Servitude Area as defined in Title Sheet WLN43757 and to interdict the allowing of or causing or permitting the parking or overhanging of vehicles, or any part of a vehicle, on any part of the Servitude Area for a period exceeding 10 minutes.

An interim interdict had previously been granted.

The absolute nature of the interdict being sought will be noted. Although it seems that a parked vehicle would not usually, of itself, prevent the pursuers from accessing their house by car, the pursuers' position was that, given the existence of their servitude, the defenders were no longer in a position to use their driveway at all other than for minor or transitory purposes. The sheriff<sup>1</sup> was not to be persuaded. He rejected what he described as a 'zero tolerance interpretation' of the servitude.<sup>2</sup> In his view, with which we would agree:<sup>3</sup>

Provided access is not blocked or substantially impeded, there is nothing in the Servitude Right which deprives the owners of the burdened property (the servient tenement) – ie the defenders, from using that access road in the way which is consistent with their ownership rights. In the context of this case therefore, I do not read the grant of servitude as preventing parking on the route tinted brown on the plan for access/egress on the driveway provided that parking does not obstruct or materially diminish the right of access and egress, including for vehicles for the pursuers.

The rights of the parties, after all, were not equal. The defenders owned the driveway. All that the pursuers had was a right of servitude. The mistake of the pursuers, the sheriff thought, was to see themselves as virtually co-owners of the driveway. That was not the case. The allocation of rights in the driveway was arranged by servitude and not by common property:<sup>4</sup>

The pursuers' approach to the present dispute does create the impression – which I accept may be ill founded and forms no part of my decision – that they think of their Servitude Right as being something akin to the creation of joint ownership of the access driveway. If that is part of their thinking, then it is quite wrong. They do not share ownership. What they have is a permission to use the road which rests on land owned by the defenders. Situations like this call for mutual respect, recognition and understanding of the needs of the other party to the arrangement and although I have heard no evidence and have no view on the background circumstances, there are clear suggestions in the allegations, denials and counter allegations that there has been an absence of mutual understanding and an absence of mutual respect. That is very regrettable.

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1 Sheriff Peter Anderson.

2 Paragraph 34. A proof before answer was, however, allowed on the question as to whether actions of the defenders amounted to a material obstruction of the servitude.

3 Paragraph 40.

4 Paragraph 46.

### The English question

As there was little Scottish authority directly in point,<sup>1</sup> and some of it doubtful,<sup>2</sup> the law agent for the defenders cited a number of cases from England. Particular reliance was placed on *Keefe v Amor*<sup>3</sup> and on a *dictum* of Russell LJ in that case:<sup>4</sup>

I would remark that it is sometimes thought that the grant of a right of way in respect of every part of a defined area involves the proposition that the grantee can object to anything on any part of the area which would obstruct passage over that part. This is a wrong understanding of the law. Assuming a right of way of a particular quality over an area of land, it will extend to every part of that area, as a matter, at least, of theory. But a right of way is not a right absolutely to restrict user of the area by the owner thereof. The grantee of the right could only object to such activities of the owner of the land, including retention of obstruction, as substantially interfered with the use of the land in such exercise of the defined right as for the time being is reasonably required.

Counsel for the pursuers objected to the use of English cases on a matter concerning the Scottish law of servitudes on the basis that they ‘derived from the English concept of private rights of way whereas the Scots law on servitude rights is derived from Roman law’.<sup>5</sup> The sheriff, however, took a more pragmatic view:<sup>6</sup>

The cases referred to do in my judgment confirm that although from very different roots, the legal system of Scotland and that of England and Wales have largely coincided in their treatment of servitude rights – easements and right of way as they are known in England. Pausing to consider briefly the decision in *Keefe v Amor* it seems to me that the passage relied upon by the defenders ... does tend to confirm the English law position as being the equivalent of that which I take to be the position of the law of Scotland ... It does not seem to me there was validity or justification for the submission from the pursuers that the English cases should be dismissed simply because they were English. But they are not fundamental to my decision.

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1 The case law on obstructing a servitude right of way is reviewed in paras 12.94 ff of D J Cusine and R R M Paisley, *Servitudes and Rights of Way* (1998). Another case on obstruction from 2023 is *Walker v Seymour*, 4 March 2022, Elgin Sheriff Court affd 28 February 2023, Sheriff Appeal Court: see p 9 above. But none of the cases deals with the precise issue that was raised in *Doolan v Donald*.

2 Notably *Munro v McLintock* 1996 SLT (Sh Ct) 97, a case which on one reading might seem to assert the principle that a servitude-holder can use every square centimetre of an access area and so is entitled to prevent any significant use of that area by its owner. In fact, the case was concerned with the erection of part of a building on the access area and hence with its reduction on a permanent basis. The authorities relied on were on the topic of a change of route. For a sceptical discussion, see Cusine and Paisley, *Servitudes and Rights of Way* pp 412–13. The decision was dismissed by the sheriff in *Doolan v Donald* as turning on its own particular facts: see para 41.

3 [1965] 1 QB 334.

4 *Keefe v Amor* [1965] 1 QB 334 at 347.

5 Paragraph 21.

6 Paragraph 43.

To this sensible and balanced view we would merely add that English law in this area also has strong Roman roots albeit mediated through French law in the early-19th century.<sup>1</sup>

## DEVELOPER CONTROL IN ONGOING DEVELOPMENTS<sup>2</sup>

### The issue

A site is to be developed in two phases for housing. The first phase is progressing well and the houses will soon be put up for sale. But first it is necessary to have in place a deed of conditions to regulate the position of the home-owners once the development is completed as well as to safeguard the position of the developer as it moves on from phase 1 to phase 2. At present the plans for phase 2 are vague and subject to change.

Two main mechanisms are available for ensuring developer control in the deed of conditions. One is retaining for the developer the right to manage the development. That is allowed, by means of what is called, rather grandly, a 'manager burden'. But this is subject to a time-limit, expiring five years after the registration of the deed of conditions, or earlier if the developer ceases to own any unit in the development.<sup>3</sup>

Manager burdens have other limitations as well. Managers are not despots. Their powers depend on what the deed of conditions says. And what it typically does say is that managers are subject to directions given by the home-owners acting by majority (or equivalent) vote. Of course, for as long as more than half of the units are unsold, the developer has a majority and retains control. But once the developer's holding subsides into a minority of units, control is lost unless special provision is made in the deed of conditions. At this point it is necessary to introduce a second and different mechanism for developer control, the so-called 'golden' vote. The idea was explained by the Scottish Law Commission in the course of drawing up its proposals for what became the Title Conditions (Scotland) Act 2003:<sup>4</sup>

Developers wishing to retain control beyond this point could make special provision in the deed of conditions. For example a 'golden' vote might be conferred on a particular unit, or on all the units still owned by the developers, so that no decision could be taken against the developers' wishes. Whether such an arrangement would be attractive to purchasers is a matter for developers to decide.

We do not know how common golden votes are. At any rate they do not seem to have been the subject of litigation – until now. In the 2023 case of *Marshall v Granton Homes Ltd*<sup>5</sup> the golden vote was at the very centre of the dispute between the parties.

<sup>1</sup> C Seebo, *Servitus und Easement: Die Rezeption des römischen Servitutenrechts in England* (2005).

<sup>2</sup> This section is by Kenneth Reid.

<sup>3</sup> Title Conditions (Scotland) Act 2003 s 63(4), (5), (7). In the case of a sheltered or retirement housing development, the permitted period is only three years.

<sup>4</sup> Scottish Law Commission, *Report No 181 on Real Burdens* (2000) para 7.30.

<sup>5</sup> 2023 GWD 44-364, Lands Tribunal. The Tribunal comprised R A Smith KC and C C Marwick FRICS.

## The golden vote

### The facts

So far as relevant, the facts of *Marshall v Granton Homes Ltd* were these. Granton Homes embarked on the development of a site in Peebles on the south bank of the River Tweed.<sup>1</sup> At its centre was Kingsmeadow House, a B-listed mansion dating from 1795.<sup>2</sup> As part of the development the house was divided into 12 flats, and these and a separate lodge house were sold in the years 2016–2018. That was phase 1 of the development. A deed of conditions in respect of the development was registered in 2016. Among other things, this applied the Development Management Scheme ('DMS'), with certain variations, to the development. It was with two of these variations that the case was concerned.

The DMS is an off-the-peg management scheme designed for large developments.<sup>3</sup> It has a set of model rules, most of which can be varied.<sup>4</sup> Further rules can be added. Management is in the hands of a manager who is answerable to the home-owners as represented by an owners' association. The latter is a body corporate (though not a company) and so can hold property in its own name, including amenity ground. Although the rules of the DMS are not real burdens, they closely resemble real burdens and, for the most part, are governed by the same provisions, whether directly, by applying provisions of the Title Conditions (Scotland) Act 2003,<sup>5</sup> or indirectly, by replicating those provisions in the Development Management Scheme Order 2009.<sup>6</sup> For the purposes of *Marshall v Granton Homes Ltd*, therefore, nothing turned on the fact that the conditions being considered were DMS rules rather than real burdens, and the decision of the Lands Tribunal can be treated as applicable to both.

So far as is relevant, rule 26 of the DMS, as it applied to the Kingsmeadow development, read as follows:

#### **Rule 26 – Restrictions to Preserve Amenity**

**26.6** No refuse or waste matter of any description is to be left in or upon any of the Scheme Property.

**26.10** No buildings shall be erected on the Gardens.

**26.11** No trees or shrubs will be cut down, lopped, damaged or removed from any part of the Development unless on the authority and under the instruction of the Manager.

<sup>1</sup> The development was registered under title number PBL5914.

<sup>2</sup> <<https://britishlistedbuildings.co.uk/200394739-kingsmeadows-house-kingsmeadows-road-peebles-peebles>>.

<sup>3</sup> For details, see G L Gretton and K G C Reid *Conveyancing* (5th edn, 2018) paras 16-08 ff.

<sup>4</sup> The DMS is set out in sch 1 to the Title Conditions (Scotland) Act 2003 (Development Management Scheme) Order 2009, SI 2009/729.

<sup>5</sup> Title Conditions (Scotland) Act 2003 s 72; Development Management Scheme Order 2009 art 5.

<sup>6</sup> More correctly, the Title Conditions (Scotland) Act 2003 (Development Management Scheme) Order 2009.

As with all DMS rules, the right to enforce rule 26 lay with the owners' association, in practice acting through the manager.<sup>1</sup> But the manager was not a free agent in this regard and had to 'comply with any direction given by the association at a general meeting'.<sup>2</sup> So in the end it was up to the home-owners to decide what was or was not to be done in respect of the DMS rules.

At the time of selling the flats in phase 1 of the development, the developer, Granton Homes, was still uncertain as to what precisely was to happen in a proposed second phase, although it had obtained planning permission in principle for the construction of a three-storey block of flats ('the New House') to the rear of the main house. But because phase 2 might breach rule 26 – and no doubt for other reasons as well – Granton Homes reserved to itself a golden vote. This was done by varying the default version of rule 11 (the rule providing for voting at general meetings of the owners' association). As so varied, rule 11 read:

### **Rule 11 - General Meetings: Voting**

#### **11.1 Allocation and exercise of votes**

For the purpose of voting on any proposal at a general meeting:

- (a) one vote is allocated to each Unit; and any right to vote is exercisable by the Owner of that Unit or by someone (not being the Manager) nominated in writing by the Owner to vote;
- (b) Granton will have one vote for each Unit (whether completed or not) in the Development for which there is planning permission, for so long as Granton has title to such Unit.

#### **11.2 Exercise of vote where two or more persons own Unit**

If a Unit is owned by two or more persons the vote allocated to that Unit may be exercised by either (or any) of them; but if those persons disagree as to how the vote should be cast then no vote is counted for that Unit.

#### **11.3 Decision by majority**

Except where this Development Management Scheme otherwise provides, a decision is made by the Association at a general meeting by majority vote of all the votes cast

#### **11.4 Method of voting**

Voting on any proposal is by show of hands; but the convener may determine that voting on a particular proposal is to be by ballot.

#### **11.5 Granton to have over-riding vote**

For so long as Granton owns any Unit in the Development or any part of the Development, the final decision on any matter affecting the Development will remain with Granton.

The golden vote was contained in rule 11.5, but also of relevance was rule 11.1(b) in terms of which 'Granton will have one vote for each Unit (whether completed

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<sup>1</sup> DMS rr 3.5, 4.5. These rules, like the other rules in Part 2 of the DMS, cannot be varied: see Development Management Scheme Order 2009 art 6(2).

<sup>2</sup> DMS r 4.7.

or not) in the Development for which there is planning permission, for so long as Granton has title to such Unit’.

Unnerved by a series of applications for planning permission by Granton Homes in respect of phase 2, none of which prospered, a number of the home-owners from phase 1 applied to the Lands Tribunal for the discharge of rule 11.1(b) and, especially, rule 11.5. They were able to do so under a handy provision, available for both real burdens and DMS rules, which allows the owners of one-quarter of the units in a development to apply for the variation and discharge of the burdens or DMS rules as they apply to the whole development.<sup>1</sup> If successful, the application would allow the owners to excise the golden vote and so to wrest back control of the development from Granton Homes. Naturally enough, the application was opposed by Granton Homes.

### **A preliminary question: did Granton Homes own a unit?**

A preliminary question was whether Granton Homes could be said to own any unit in the development, as required by both of the rules under challenge. The difficulty, of course, was that as phase 2 had yet to begin, there were, strictly speaking, no units which Granton Homes could be said to own. On this point, however, the Lands Tribunal was disposed to be helpful. The deed of conditions defined ‘unit’ as including ‘(d) any other property which is designed to be in separate ownership’ – wording which, the Tribunal said, ‘suggests property where there is a future intention to sell it off separately’.<sup>2</sup> The Tribunal continued:

The New House site is intended to be developed and sold off as flats or otherwise, which intention is reflected in the deed. In this sense it is designed to be held in separate ownership. The (d) part of the definition does not depend upon ‘built’ units as expressed in para (b).<sup>3</sup> Given that part of the purpose of the deed is to deal with the development phase of the project, we think there is a very arguable interpretation for the words as meaning that the New House site constitutes a unit prior to the coming into existence of the specific flats or other separate properties for sale. So, if that is right ... the respondents would own at least one unit.<sup>4</sup>

### **The main question: could the golden vote be removed?**

That conclusion opened the way to the main question. This was whether the home-owners should succeed in their application to have rule 11.5 – the golden-share rule – discharged. The stakes were high. If the golden vote was removed,

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1 Title Conditions (Scotland) Act 2003 s 91 (real burdens); Development Management Scheme Order 2009 art 23 (DMS rules).

2 Paragraph 80.

3 Paragraph (b) of the definition was ‘any other dwellinghouses (flatted or otherwise) built within the Development, including those in the New House’.

4 A secondary reason advanced by the Tribunal in para 80 was that, unless Granton Homes owned a unit, they could not be a member of the owners’ association which, in turn, would mean that they were not entitled to make representations in opposition to the application (see Development Management Scheme Order 2009 art 26). ‘In these circumstances it is difficult to see how an application which failed to convene the interested parties could be competent under Art 23(1).’

the power to control the development would pass from Granton Homes to the home-owners. This 'would very much turn the tables on the parties' relationship'.<sup>1</sup> So far as the home-owners were concerned it would provide the means to limit or even prevent what they saw as the over-development involved in phase 2. But for Granton Homes – indeed for future developers in general – a decision to discharge rule 11.5 would go far to undermine the value of a golden vote. Why bother providing for a golden vote if it could be so readily set aside by an application to the Lands Tribunal by the home-owners? Admittedly, developers usually include a provision in the deed of conditions which prevents applications to the Tribunal for the first five years, something which the legislation allows.<sup>2</sup> And if phase 2 follows hard in the heels of phase 1, such a provision removes the problem. But for a more prolonged development cycle, the risk from a Tribunal application remains.

In the present application, as in all applications for the variation and discharge of title conditions, the Tribunal's task was to decide whether it was reasonable to grant the application having regard to a series of statutory factors.<sup>3</sup> And, as is so often the case, the decision largely turned on the proper balance to be struck between factor (b) (the extent to which the condition conferred a benefit on the benefited property or unit) and factor (c) (the extent to which the rule impeded the enjoyment of the burdened property or unit). There could be no doubt that rule 11.5 impeded the enjoyment of the home-owners by removing from them the power to control the owners' association and hence the development itself. But at the same time it conferred 'a substantial benefit' on Granton Homes. Without rule 11.5, Granton Homes would be severely hampered in completing the development. In the Tribunal's view, nothing in the consideration of the statutory factors 'reasonably justifies such a dramatic step as to remove the right of veto from the hands of the respondents'.<sup>4</sup> No doubt 'there may be circumstances where there would be some force in an argument that a golden vote clause should not last indefinitely'.<sup>5</sup> As the Tribunal explained:<sup>6</sup>

One could figure circumstances where a developer's actions might amount to a derogation of grant – say by changing plans set out in a deed in a radical way, and using the golden vote to avoid challenge while continuing a development indefinitely. But we do not think we are in this sort of territory. The respondents have explained the real and time-consuming difficulties they have faced in pursuing the development, which explanations we have generally found coherent. The site is sensitive and difficult issues have emerged in terms of safeguarding trees at the same time as finding a satisfactory access, and finding a suitable means of drainage. Clearly some of the respondents' choices have been unfortunate in terms of maintaining relations with the applicants. But the respondents themselves wish to complete the development and move on, or as they put it, to cut their losses.

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1 Paragraph 93.

2 Title Conditions (Scotland) Act 2003 s 92.

3 For title conditions, the relevant provisions are TC(S)A 2003 ss 98 and 100. The equivalent provisions for DMS rules are Development Management Scheme Order 2009 arts 28 and 30.

4 Paragraph 95.

5 Paragraph 91.

6 Paragraph 91.

The application for discharge was therefore refused, both in respect of rule 11.5 and also rule 11.1(b).<sup>1</sup>

The decision is a notable victory for golden-vote provisions but also a qualified one. In a standard development (such as this one) the developer is likely to be given the benefit of the doubt, and the golden vote to survive a challenge. But in cases where the golden vote is, or is likely to be, abused, or perhaps even just where it has lasted for too long, the result may well be different.

### The DMS and the four-corners rule

A further issue required to be determined by the Lands Tribunal. As will be recalled, rule 11.1(b), as it applied to the development, was in the following terms (our italics):

For the purpose of voting on any proposal at a general meeting ... (b) Granton will have one vote for each Unit (whether completed or not) in the Development *for which there is planning permission*, for so long as Granton has title to such Unit.

Rule 11.1(b) was not part of the model DMS as laid down in the legislation but was added by Granton Homes by way of variation.

If rule 11.1(b) had been a real burden, the reference to planning permission would fall to be disregarded. This is because of the rule that the terms of a real burden must be set out within the four corners of the deed. Obviously, to know whether planning permission has or has not been granted involves an inquiry which takes the reader away from the deed; and that is the very thing that is not allowed.

DMS rules closely resemble real burdens, as already mentioned. But does that resemblance extend to the four-corners rule? On this matter there is no direct statutory guidance.<sup>2</sup> Nevertheless, the analogy with real burdens seems sufficiently strong to suggest that it does. That was the tentative conclusion of the Lands Tribunal: 'we think there is a persuasive argument that the four corners rule does apply to the rules of a DMS'.<sup>3</sup>

Often, the result of applying the four-corners rule is to invalidate the entire provision. In this case, however, the removal of the italicised words from rule 11.1(b) still left sufficient text to produce a workable rule.<sup>4</sup>

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<sup>1</sup> For the latter, see para 96.

<sup>2</sup> Although there is at least a hint in art 6(1) of the Development Management Scheme Order 2009, which allows 'such variations as may be specified in the deed of application'.

<sup>3</sup> Paragraph 84. The reasoning can be found in paras 81–83. One factor which influenced the Tribunal was that s 5 of the Title Conditions (Scotland) Act 2003 – a provision which is only needed if the four-corners rule applies – is one of the provisions of that Act which extends to DMS rules.

<sup>4</sup> Paragraph 84.

## SHORT-TERM LETS<sup>1</sup>

### Introduction

The increase in short-term lets in Scotland and other parts of the world<sup>2</sup> in recent times has led to pressure for greater regulation. While tourists booking flats for short periods via Airbnb or similar online platforms contribute to the economy, the adverse effects of short-term lets are also apparent. The use of properties for this purpose depletes the housing stock although to what extent is controversial.<sup>3</sup> For flats in particular, ever-changing occupants may be noisy and have little concern with keeping common areas free of rubbish.

In 2020, the Scottish Government announced three policies on short-term lets which it intended to take forward.<sup>4</sup> Two of these have been implemented by legislation which is now in force.

First, there is a licensing scheme under the powers contained in the Civic Government (Scotland) Act 1982, namely the Civic Government (Scotland) Act 1982 (Licensing of Short-term Lets) Order 2022.<sup>5</sup> It came fully into force on 1 October 2023 and was covered in last year's volume.<sup>6</sup> The scheme's implementation in Edinburgh has now been the subject of a successful legal challenge.

Secondly, local authorities are enabled to designate 'short-term let control areas' under the powers contained in amendments made to the Town and Country Planning (Scotland) Act 1997 by the Planning (Scotland) Act 2019 as supplemented by the Town and Country Planning (Short-term Let Control Areas) (Scotland) Regulations 2021.<sup>7</sup> In these areas planning permission will be necessary if a property is to be used as a short-term let on the basis that this

<sup>1</sup> This section is by Andrew Steven.

<sup>2</sup> See eg G C Lavita, *The regulation of Airbnb: A property law perspective* (LLD thesis, Stellenbosch University, 2023, <<https://scholar.sun.ac.za/items/4bed4ba8-b69d-44bd-ba39-0a67b443fcdd>>). In Rome, 17% of the housing stock in the city centre is said to be rented out on Airbnb with the area having lost one-third of its residents between 2013 and 2019. See T Kington, 'Italian PM's ally fights plans to curb Airbnb rentals', *The Times*, 26 September 2023. In November 2023, the EU Council and European Parliament agreed a deal for a registration system in relation to short-term lets: see <[www.consilium.europa.eu/en/press/press-releases/2023/11/16/tourism-council-and-parliament-reach-a-deal-to-bring-more-transparency-to-short-term-accommodation-rentals/](http://www.consilium.europa.eu/en/press/press-releases/2023/11/16/tourism-council-and-parliament-reach-a-deal-to-bring-more-transparency-to-short-term-accommodation-rentals/)>. In January 2024, the Welsh Government announced plans for a registration scheme for all visitor accommodation, to be followed up by a licensing scheme: see <[www.gov.wales/plans-unveiled-statutory-registration-and-licensing-scheme-visitor-accommodation-wales](http://www.gov.wales/plans-unveiled-statutory-registration-and-licensing-scheme-visitor-accommodation-wales)>.

<sup>3</sup> It has been reported that Edinburgh lets on Airbnb have doubled to 12,000 since 2016, with councillors considering this to be partly responsible for the loss of up to one third of the private rental stock in some areas: see J Mulholland, 'Court blow to council's anti-Airbnb campaign', *The Times*, 2 December 2023. Compare Association of Scotland's Self-Caterers, *Housing and Short-Term Lets in Scotland: The Facts* (December 2023, <<https://assc.mysites.io/wp-content/uploads/2023/12/Housing-in-Scotland-Briefing-2023-1.pdf>>).

<sup>4</sup> Scottish Parliament, *Official Report*, 8 January 2020, cols 36–39 (Kevin Stewart MSP).

<sup>5</sup> SSI 2022/32 (referred to in the text as 'the 2022 Licensing Order'). See K Clancy, *A Practical Guide to the Short-Term Lets Licensing Scheme in Scotland* (2023).

<sup>6</sup> *Conveyancing 2022* pp 124–40.

<sup>7</sup> SSI 2021/154.

is deemed to be a material change of use.<sup>1</sup> This regime was initially used only by the City of Edinburgh Council, but the Badenoch and Strathspey area of Highland Council became a control area too with effect from 4 March 2024.<sup>2</sup> In 2023 Edinburgh Council's retrospective interpretation of the legislation was held to be erroneous in a judicial review.

Both the licensing and the planning legislation have been regularly in the media spotlight during 2023.<sup>3</sup> A response to a freedom of information request published by the Scottish Government in November 2023 stated that it used short-term lets only 'in exceptional cases'.<sup>4</sup> The Minister for Small Business, Innovation, Tourist and Trade has announced that an update will be provided to the Scottish Parliament on the implementation of the short-term lets licensing scheme in early 2024.<sup>5</sup>

The third policy announced by the Scottish Government in 2020 but so far unimplemented is a possible taxation change requiring short-term lets to 'make an appropriate contribution to local communities and support local services'.<sup>6</sup> There has been no legislative activity yet on this although separately 2023 saw the introduction of a Bill to the Scottish Parliament allowing local authorities to impose a visitor levy on tourists.<sup>7</sup> We do not cover that Bill further.

### The requirement for a licence

The 2022 Licensing Order came into force on 1 October 2022 in respect of new short-term lets beginning after that date.<sup>8</sup> For existing short-term lets, the original deadline for making a licence application was to be 1 April 2023.<sup>9</sup> The Scottish Government, however, decided to put this back to 1 October 2023. The reason given was the cost-of-living crisis.<sup>10</sup> The change was given effect by the Civic Government (Scotland) Act 1982 (Licensing of Short-term Lets) (Amendment) Order 2023.<sup>11</sup> Pressure to put the date back still further was successfully resisted by the Scottish Government.<sup>12</sup> It has also issued updated guidance to hosts and

1 Town and Country Planning (Scotland) Act 1997 s 26B.

2 See <[www.highland.gov.uk/news/article/15776/timetable\\_to\\_implement\\_badenoch\\_and\\_strathspey\\_short-term\\_let\\_control\\_area\\_confirmed](http://www.highland.gov.uk/news/article/15776/timetable_to_implement_badenoch_and_strathspey_short-term_let_control_area_confirmed)>.

3 See eg D Fraser, 'Sizzling controversy over short-term lets', BBC News, 29 September 2023, <[www.bbc.co.uk/news/uk-scotland-scotland-business-66955744](http://www.bbc.co.uk/news/uk-scotland-scotland-business-66955744)>.

4 See <[www.gov.scot/publications/short-term-lets-foi-release/](http://www.gov.scot/publications/short-term-lets-foi-release/)>. In 2022 the amount spent by the Scottish Government on short-term let accommodation was £36,417 compared with £1,257,567 on hotels.

5 Scottish Parliament, *Official Report*, 21 December 2023, col 1 (Richard Lochhead MSP).

6 Scottish Parliament, *Official Report*, 8 January 2020, col 38 (Kevin Stewart MSP).

7 Visitor Levy (Scotland) Bill. The Stage 1 Report was published on 21 December 2023. See S Ritchie, 'Taxing times ahead for tourists with visitor levies', *The Scotsman*, 23 October 2023.

8 Civic Government (Scotland) Act 1982 (Licensing of Short-term Lets) Order 2022, SSI 2022/32, art 4(2).

9 Licensing of Short-term Lets Order 2022 art 7 (as originally promulgated).

10 See <[www.gov.scot/publications/short-term-lets/pages/background/](http://www.gov.scot/publications/short-term-lets/pages/background/)>.

11 SSI 2023/73.

12 An attempt by the Scottish Conservatives to postpone the scheme for a year was defeated by 62 votes to 54 in a debate in the Scottish Parliament on 13 September 2023.

operators,<sup>1</sup> as well as updated supplementary guidance to licensing authorities,<sup>2</sup> although no extra funding has been provided to assist with the processing of applications.<sup>3</sup>

In November 2023 the Scottish Government published statistics on the number of licence applications between the commencement of the scheme on 1 October 2022 and 30 June 2023.<sup>4</sup> The total number of validated applications received in that period was 4,761. To put this figure in context, there were 17,124 self-catering units on non-domestic rates as of December 2023, according to the Association of Scotland's Self-Caterers.<sup>5</sup> Moreover, the ambit of the 2022 Licensing Order is much wider than that, covering for example, bed-and-breakfasts and some lodging arrangements. Earlier figures from January 2019 show approximately 35,000 active listings on AirBnB.<sup>6</sup> The figure of 4,761 as of June 2023 is therefore low although there will have been many more applications since then, particularly in view of the deadline of 1 October 2023 for licensing of existing short-term lets. On the other hand it has been reported that some hosts are withdrawing properties from use as short-term lets on the basis that the licensing scheme is too onerous.<sup>7</sup>

Operating a short-term let without a licence is a criminal offence.<sup>8</sup> It has been reported, however, that Police Scotland have insufficient resources to investigate breaches of the 2022 Licensing Order.<sup>9</sup> So where a breach is brought to a local authority's attention it is more likely at least in the first instance to encourage the offending individual to obtain a licence.<sup>10</sup>

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- 1 Scottish Government, *Short-term lets – licensing scheme part 1: guidance for hosts and operators* (June 2023, <[www.gov.scot/publications/short-term-lets-scotland-licensing-scheme-part-1-guidance-hosts-operators-3/](http://www.gov.scot/publications/short-term-lets-scotland-licensing-scheme-part-1-guidance-hosts-operators-3/)>). It has been reported that the Scottish Health Secretary failed for a period to comply with the licensing conditions for a property he owns in Skye by not listing the licence number in adverts in relation to it: H Rodger, 'Under fire Michael Matheson in fresh scandal after breaking own government's law on short term lets', *The Sunday Mail*, 3 December 2023.
  - 2 Scottish Government, *Short-term lets – licensing scheme part 2: supplementary guidance for licensing authorities, letting agencies and platforms* (June 2023, <[www.gov.scot/publications/short-term-lets-scotland-licensing-scheme-part-2-supplementary-guidance-licensing-authorities-letting-agencies-platforms-3/documents/](http://www.gov.scot/publications/short-term-lets-scotland-licensing-scheme-part-2-supplementary-guidance-licensing-authorities-letting-agencies-platforms-3/documents/)>).
  - 3 See *Short-term let licenses: FOI release*, <[www.gov.scot/publications/foi-202300367923/](http://www.gov.scot/publications/foi-202300367923/)>.
  - 4 Scottish Government, *Short Term Lets Licensing Statistics Scotland to 30 June 2023*, <[www.gov.scot/publications/short-term-lets-licensing-statistics-scotland-to-30-june-2023/pages/summary-of-total-valid-applications/](http://www.gov.scot/publications/short-term-lets-licensing-statistics-scotland-to-30-june-2023/pages/summary-of-total-valid-applications/)>.
  - 5 Association of Scotland's Self-Caterers, *Housing and Short-Term Lets in Scotland: The Facts* (December 2023, <<https://assc.mysites.io/wp-content/uploads/2023/12/Housing-in-Scotland-Briefing-2023-1.pdf>>). The figure amounts to 0.6% of dwellings in Scotland.
  - 6 Scottish Government, *Short-term lets: licensing scheme and planning control area legislation Business and Regulatory Impact Assessment (BRIA)* (2021, <[www.gov.scot/publications/short-term-lets-business-regulatory-impact-assessment/documents/](http://www.gov.scot/publications/short-term-lets-business-regulatory-impact-assessment/documents/)>) para 11.
  - 7 See eg B Donnelly, 'Scottish tourism chief in holiday homes shortage warning', *The Herald*, 1 October 2023.
  - 8 Civic Government (Scotland) Act 1982 s 7. For transitional provisions, see Licensing of Short-term Lets Order 2022 art 7.
  - 9 We would observe that there are numerous other examples on the statute book of criminal sanctions which are not enforced.
  - 10 See G Cameron, 'No capacity for police to investigate breaches of short-term letting licences', *The Times*, 30 September 2023.

One of the more uncertain issues in relation to the 2022 Licensing Order is the extent to which it applies to house swaps.<sup>1</sup> The most relevant of the criteria for licensing in this context seem to be (i) the requirement for accommodation to be ‘provided by a host in the course of business to a guest’, and (ii) the short-term let being entered into for ‘commercial consideration’.<sup>2</sup> While (ii) seems satisfied by the reciprocal provision of accommodation, the position is less clear as regards (i).<sup>3</sup> The subject has attracted significant attention. It has been argued by Homelink, a company that facilitates such arrangements, that their inclusion within the licensing scheme was ‘an unintended consequence of the changes in the law’<sup>4</sup> and suggestion is made that the Scottish Government may amend the legislation in 2024 to exclude these. In a Parliamentary written answer, however, the Housing Minister (Paul McLennan MSP) stated that he had ‘had no discussions which commit to suspending [home sharing or home swapping] from the [licensing] scheme’.<sup>5</sup>

### The first Edinburgh challenge: licensing

In September 2022, the capital’s local authority agreed a policy in relation to the 2022 Licensing Order which became the subject of a judicial review in *Averbuch v City of Edinburgh Council*.<sup>6</sup> The petitioners, who were involved in short-term letting, argued that aspects of the policy were illegal both at common law and under statute, as well as contrary to the European Convention on Human Rights.

First, the policy set out a rebuttable presumption that an application for a licence in respect of a ‘secondary’ letting, that is to say a let where the host is not in occupation, would not be granted in respect of tenement flats. The reason for this was the potential adverse effect on other residents in the building. But in affidavit evidence, the Council’s Head of Regulatory Service<sup>7</sup> had said:<sup>8</sup>

1 See *Conveyancing 2022* pp 130–31. See also A Wightman, ‘Short-term Lets – do house swaps and house-sitting require a license?’ (5 September 2023, <<https://andywightman.scot/2023/09/short-term-lets-do-house-swaps-and-house-sitting-require-a-license/>>); A Wightman, ‘Short-term Lets – the confusing case of house swaps’ (20 September 2023, <<https://andywightman.scot/2023/09/short-term-lets-the-confusing-case-of-house-swaps/>>).

2 Licensing of Short-term Lets Order 2022 art 3.

3 Andy Wightman in his ‘Short-term Lets – the confusing case of house swaps’ (above) writes: ‘My advice to anyone who wishes to engage in a house swap is as follows: House swapping is not “the provision of residential accommodation provided by a host to a guest in the course of business”. You do not need a license or a temporary exemption. You will not be committing a criminal offence. Crack on. For the avoidance of doubt, this statement does not constitute legal advice.’

4 See G Cameron, ‘Home swaps could be exempt from short-let licence scheme’, *The Times*, 20 September 2023. We are sceptical that house swaps were included by mistake given that ‘commercial consideration’ is defined in art 2(1) of the Licensing of Short-term Lets Order 2022 as including ‘reciprocal use of accommodation’. See also Scottish Government, *Policy Note: The Civic Government (Scotland) Act 1982 (Licensing of Short-term Lets) Order SSI 2022/32* (November 2021, <[www.legislation.gov.uk/ssi/2022/32/pdfs/ssipn\\_20220032\\_en.pdf](http://www.legislation.gov.uk/ssi/2022/32/pdfs/ssipn_20220032_en.pdf)>) para 19.

5 S6W-23067, 5 December 2023.

6 [2023] CSOH 35, 2023 SLT 665.

7 Mr Andrew Mitchell.

8 Quoted in *Averbuch* at para 42.

I expect that STL [short-term letting] licences will be granted for secondary letting in some tenements or in accommodation with a shared main door ... I would expect any well run businesses who can show good management arrangements and no history of a problem to have reasonable prospects of obtaining a STL licence ... My view applies to all types of STL, be it home sharing, home letting and secondary letting even in tenements or shared main door accommodation.

Lord Braid held that it was clear from this and the answers submitted by the Council to the petition 'that refusal is not what will normally happen [and therefore there] must come a point when there are so many exceptions to a policy that it ceases to be a policy at all'.<sup>1</sup> The rebuttable presumption accordingly did not provide consistency and failed to inform applicants as to whether their application would be granted. The policy here was therefore unlawful.

Furthermore, it was not for the Council as licensing authority to decide whether a licence should be granted on the basis of the type or location of individual properties. That, properly, was a planning and not a licensing matter. To have a normal practice of not granting a licence even where planning permission had been granted for a property to be used as a short-term let was, in the words of Lord Braid:<sup>2</sup>

irrational and contrary to the purposes of the overall scheme. It would be perverse and oppressive for the respondent, upon receipt of a licensing application, to require an applicant to obtain planning permission for a tenement property; and thereafter, planning permission having been obtained, to refuse the licence for no other reason than that the property was in a tenement.

The overall scheme for regulating short-term lets consisted of the licensing and planning arms. As discussed below, the Council's designation of Edinburgh as a short-term let control area meant that planning permission was required for a change of use to a short-term let. Of course, the Council could refuse a licence on the facts of an individual case, but the blanket policy was unlawful.

Secondly, the petitioners challenged as irrational the part of the policy limiting secondary letting licences to one year. They argued that this prevented bookings being taken for more than 12 months ahead. Lord Braid, however, held that uncertainty was inherent within the licensing system in that the Council had power to revoke or suspend a licence. Moreover, there would always be uncertainty as to the future in the final year of a licence whenever that was.<sup>3</sup>

Thirdly, it was argued by the petitioners, this time successfully, that the Council's policy of a rebuttable presumption against granting temporary licences for secondary lettings was irrational. Lord Braid noted that the Council's rationale here, that the public did not have a right to object to applications for such licences even though they could be granted for several months, applied equally to other forms of short-term let. Further, the Head of Regulatory Service had given the

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<sup>1</sup> Paragraph 46.

<sup>2</sup> Paragraph 47.

<sup>3</sup> Paragraph 54.

impression in his affidavit that, notwithstanding the policy, such licences would often be granted.<sup>1</sup>

Fourthly, the policy imposed as a condition of the grant of a licence for all secondary lettings, regardless of whether a tenement flat was involved, that the bedrooms, living rooms and hallways in the property must have a suitable floor covering, such as a carpet or similar. The aim was noise reduction. The petitioners successfully challenged this. Lord Braid again strongly criticised the Council:<sup>2</sup>

Even a brief perusal of the policies adopted by other licensing authorities shows that the respondent has not properly applied its mind to this issue at all ... By contrast, the respondent has adopted a scattergun approach which is too broad, and a disproportionate means of addressing the issue which it is seeking to address. Further, on one view the policy is too vague as to what is meant by a suitable floor covering ... Quite simply, insufficient attention has been paid to the framing of [the condition]. To the extent that the policy requires carpets for all secondary lets, including ground floor flats and detached houses, I consider that it is irrational and, to the extent that it could expose a licence holder to significant expense for no good reason, it is oppressive and does go beyond what is necessary to control noise.

Fifthly, the petitioners also successfully challenged parts of the policy on the basis that these breached the Provision of Services Regulations 2009.<sup>3</sup> The rebuttable presumption against the grant of a licence for a flat was held by Lord Braid to contravene regulation 15 on the basis that it was (i) not clear and unambiguous and (ii) neither justified by an overriding reason relating to the public interest nor proportionate to the public interest objective of the 2022 Licensing Order of ensuring public safety. The absence in the policy of an indication that, once initially granted, a licence was likely to be renewed provided the licence-holder adhered to the conditions also contravened the 2009 Regulations.<sup>4</sup>

Finally, the petitioners argued that the effect of the policy, in particular the rebuttable presumption against granting licences in respect of secondary lettings of flats, would be 'to completely destroy their respective businesses'.<sup>5</sup> It thus constituted an unlawful and disproportionate interference with their possessions under Article 1 protocol 1 of the ECHR. Lord Braid, however, concluded that this claim was 'premature and speculative',<sup>6</sup> it not yet being known how many licence applications would be unsuccessful.

In the words of one commentator, the effect of the decision was to give the Council 'a bloody nose here, of that there can be no doubt'.<sup>7</sup> Two months later,

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1 Paragraph 58.

2 Paragraph 60.

3 SI 2009/2999. These implement Council Directive 2006/123/EC and are now retained EU law. They apply to 'authorisation schemes'.

4 Regulations 15, 16 and 18. See *Averbuch* at para 82.

5 Paragraph 85.

6 Paragraph 91.

7 C Devlin, 'Unlawful short-term licensing policy' (2023) 218 *Scottish Planning and Environmental Law* 89 at 90.

Councillor Neil Ross, the Convener of its Regulatory Committee, issued the following statement:<sup>1</sup>

The Council was successful in defending large parts of the policy and the Court did not criticise any aspect of the Council's consultation nor the evidence base which it used to reach its decision. Having reviewed the Court's decision in detail, the Council has decided not to appeal the ruling. We have changed our policy to reflect the decisions reached by the court, which took effect from 13 July.

But if the Council thought that this was to be the end of court action against it on short-term letting regulation it was to be disappointed.

### **The second Edinburgh challenge: planning**

In *Muirhead v City of Edinburgh Council*<sup>2</sup> the Council's interpretation of the planning permission requirements for short-term letting was challenged. Under s 26B of the Town and Country Planning (Scotland) Act 1997 (as inserted by the Planning (Scotland) Act 2019), the City of Edinburgh Council designated the whole city as a short-term let control area with effect from 5 September 2022. In April 2023 it amended its non-statutory planning guidance, *Guidance for Businesses*, to state:<sup>3</sup>

In Edinburgh, due to the STL Control Area, to lawfully operate a secondary let STL under an STL licence, there will be a need to either have planning permission in place, or an ongoing application for planning permission, or have it in place confirmation [sic] from the Council that planning is not required.

The Council's interpretation of the legislation was therefore that, even where use of a property for short-term let purposes pre-dated 5 September 2022, planning permission was required to continue that use.

The petitioners, who were engaged in short-term lets, effectively sought declarator that the Council had made a material error of law in its interpretation of s 26B. That interpretation amounted to giving the provision retrospective effect. A change of use lawfully made without planning permission would now need planning permission. This was not how s 26B was to be correctly interpreted. Somewhat surprisingly, the Council's interpretation flew in the face of multiple pieces of guidance by the Scottish Government on the legislation.<sup>4</sup> Lord Braid, making his second decision on the law relating to short-term lets involving the City of Edinburgh Council in a matter of months, commented near the start of his judgment:<sup>5</sup>

Before going further, it is worth pointing out that the correct meaning and effect of section 26B is mired in confusion. As will be seen, the petitioners' view that it is

1 See <[www.edinburgh.gov.uk/news/article/13789/short-term-lets-licensing-policy-update](http://www.edinburgh.gov.uk/news/article/13789/short-term-lets-licensing-policy-update)>.

2 [2023] CSOH 86, 2023 SLT 1351. We do not ordinarily cover planning cases, but given the connection with the licensing scheme an exception will be made for this decision.

3 Quoted in *Muirhead* at para 7.

4 Eg Scottish Government, *Planning Circular 1/2023* para 3.1; Scottish Government, *Short-Term Lets in Scotland: Planning Guidance for Hosts and Operators* (2023) para 2.7.

5 *Muirhead* at para 3.

not retrospective but applies only to future changes of use is shared by the Scottish Government, no less, which has issued guidance to that effect. Meanwhile, the respondent has issued guidance reflecting its contrary view that section 26B applies in respect of any future use, even where a change of use occurred before 5 September 2022. Whichever view is correct, that is not a happy situation for any existing short-term let operators in Edinburgh who might be reliant on official guidance in the management of their affairs.

The Council's position was that the 'usefulness of the [control] measure would be emasculated on the petitioners' interpretation, since it would fail to affect existing short-term lets'.<sup>1</sup> There was no retrospectivity involved in the Council's approach. Planning permission was needed for use as a short-term let only after 5 September 2022.

Perhaps predictably, Lord Braid found for the petitioners in a decision issued in December 2023. He saw the matter as one of statutory construction.<sup>2</sup> Planning permission was not required for use of land, but for material *change of use* of land. The Council's position that there was no retrospectivity because what mattered was use after the date was flawed because 'it is not use, but change of use, which gives rise to a need for planning permission'.<sup>3</sup> The planning legislation envisaged that permission was needed *before* the change and not after. If the Scottish Parliament had intended planning permission to be required in respect of a pre-existing use, following designation of a control area, one would have expected this to be stated expressly in the legislation.<sup>4</sup>

Moreover, as s 26B(2) required planning permission in respect of 'the use of a dwellinghouse for the purpose of providing short-term lets' where there was *now* a control area, it could not, in Lord Braid's view, apply to a property that was *not* being used as a dwellinghouse as of the relevant date, here 5 September 2022. Thus, imagine Anne buys a flat in central Edinburgh in 2020. She never moves in, but makes the property available continuously on AirBnB to tourists for short-term secondary lettings. As of 5 September 2022, the flat would not be a 'dwellinghouse' for the purposes of s 26B(2).

Lord Braid commented also that the Council's interpretation would lead to odd and unfair results.<sup>5</sup> For example, it contended that an owner who had obtained a certificate of lawful use for a short-term let (but not planning permission) prior to 5 September 2022 on the basis that there was no material change of use at that time would *not* be required to seek planning permission after that date. There was nothing in s 26B(2) to support different treatment of an owner who had obtained such a certificate and an owner who had not. Lord Braid did not agree that the petitioners' interpretation would emasculate the usefulness of the control area provisions. Rather, having considered the Parliamentary debates, he concluded that the mischief at which the legislation was aimed was removing the difficulties which planning authorities had in determining whether a change

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1 Paragraph 25.

2 Paragraph 27.

3 Paragraph 29.

4 Paragraphs 27 and 32.

5 Paragraph 28.

of use of a property from being a dwelling to the subject of a short-term let was ‘material’ and thus required planning permission.<sup>1</sup>

The petitioners had also submitted that the retrospective consequences of the Council’s interpretation would have led to a breach of Article 1 protocol 1 of the European Convention on Human Rights. Lord Braid felt no need to decide this question given that he had already found against the Council. He commented, however, that the possibility of a human rights challenge meant ‘that the Parliament is unlikely to have intended section 26B to have retrospective effect without having done [so] in clear and express terms’.<sup>2</sup>

Having lost the case, City of Edinburgh councillors met on 14 December 2023 to consider the implications.<sup>3</sup> The Council decided to reconvene its short-term let working group to examine the consequences of Lord Braid’s decision and requested its planning committee to do so too. More strikingly, it agreed that:<sup>4</sup>

the Leader of the Council should urgently write to the Minister for Local Government Empowerment and Planning to:

- (a) seek clarity of the position of the Scottish Government on the principle of retrospectively requiring planning permission for STLs within a control area and,
- (b) call for an emergency Bill to be introduced to the Scottish Parliament to address the legislative deficiencies in Section 26B, and failing that to consider what changes to primary or secondary legislation or other options might be required so Edinburgh Council can continue with its originally intended approach, as agreed cross-party.

A response from the Scottish Government is awaited with interest, not least considering the terms of its guidance founded upon in *Muirhead*. Meanwhile, Highland Council has accepted that there is no requirement for retrospective planning permission after its short-term let control area in Badenoch and Strathspey came into effect in March 2024.<sup>5</sup>

## READING AND WRITING REAL BURDENS<sup>6</sup>

### Argyll Chambers, in words and pictures

“‘What is the use of a book,” thought Alice, “without pictures or conversations?’”<sup>7</sup>  
We share Alice’s views, as all sensible people must. And as lawyers we

<sup>1</sup> Paragraphs 21 and 33.

<sup>2</sup> Paragraph 34.

<sup>3</sup> It was subsequently reported that the two court cases had cost the Council almost £400,000: see D Turvill, ‘Nearly £400,000 spent defending unlawful short term let policies’, *STV News*, 13 January 2024, <<https://news.stv.tv/east-central/nearly-400000-spent-defending-unlawful-short-term-let-policies-in-edinburgh>>.

<sup>4</sup> See <[www.edinburgh.gov.uk/news/article/13881/councillors-agree-next-steps-on-short-term-lets](http://www.edinburgh.gov.uk/news/article/13881/councillors-agree-next-steps-on-short-term-lets)>.

<sup>5</sup> See <[www.highland.gov.uk/info/20021/short\\_term\\_lets/1033/short\\_term\\_let\\_control\\_areas/3](http://www.highland.gov.uk/info/20021/short_term_lets/1033/short_term_let_control_areas/3)>.

<sup>6</sup> This section is by Kenneth Reid.

<sup>7</sup> Lewis Carroll, *Alice’s Adventures in Wonderland* (1865) ch 1.

would wish to add: what is the use of a court judgment without pictures or conversations? Conversations are not unknown in judgments that follow on from a proof, although they are not always interesting conversations. As for pictures, judges have rarely indulged us. But here we bring some good news. Pictures, or at least illustrations, are beginning to appear in the judgments of our courts. As so often where progress is involved, the Lands Tribunal has long been in the lead.<sup>1</sup> But now the Court of Session, too, is showing signs of catching up.<sup>2</sup> The recent decision of the First Division in *Royal London Mutual Insurance Society Ltd v Chisholm Hunter Ltd*<sup>3</sup> is, in this respect, a model of its kind. With two separate plans plus a charming photograph of Buchanan Street in Glasgow it may even be said to be *lavishly* illustrated. As well as the obvious aesthetic gains, the illustrations contribute in an important way to understanding the factual position with which the court was faced. It is a matter of particular regret, therefore, that they are omitted from the report of the case as it appears in *Scots Law Times*. Readers wishing to enjoy the full immersive experience are directed to the judgment as it appears on the Scottish Courts website.<sup>4</sup>

The pictures are, as they should be, accompanied by a story. The Argyll Arcade in Glasgow, the Lord President (Lord Carloway) tells us, ‘is one of the oldest covered shopping arcades in Europe’ having been constructed in 1827, in the reign of George IV.<sup>5</sup> ‘It runs in an L-shape from Buchanan Street to Argyll Street. The Arcade is essentially a walkway with a glass roof, with what are now predominantly jewellery shops on either side.’ The Lord President continues:<sup>6</sup>

At the Buchanan Street end, the Arcade now runs through and underneath Argyll Chambers. This is a seven storey (plus basement) building which was constructed in 1904 as commercial premises and replaced the existing late eighteenth century Buchanan Street tenement.

It was this handsome Edwardian building that was shown in the photograph.

Fine building though it was, however, all was not well with Argyll Chambers. Repairs were needed to the common parts. The owners of the units into which the building was, today, divided were in disagreement as to the division of the costs. In principle the matter was regulated by maintenance burdens set out in a disposition of 1954 granted by Cranston’s Tea Rooms. But Royal London Mutual Insurance Society, the owner of a substantial shop on four floors (28 Buchanan Street) within Argyll Chambers, applied to the Lands Tribunal for

1 Although the first example known to us is actually from the Court of Session more than a century ago: see the handsome feuing plan facing the first page of the report in *J A Macaggart & Co v Roemmele* 1907 SC 1318.

2 Another example from 2023, in which the Opinion reproduces a plan, is *MacNab v Highland Council* [2023] CSOH 59, 2023 GWD 35-287. At one time, the report on the Scottish Courts website of *Romano v Standard Commercial Property Securities Ltd* [2008] CSOH 108, 2008 SLT 859 contained what we described in *Conveyancing 2008* p 109 as ‘alluring photographs’ of the premises in dispute, but they have since been removed. The Lord Ordinary in that case was the current Lord President, Lord Carloway.

3 [2023] CSIH 29, 2024 SC 17, 2023 SLT 935.

4 <[www.scotcourts.gov.uk/search-judgments/about-judgments](http://www.scotcourts.gov.uk/search-judgments/about-judgments)>.

5 Paragraph 2.

6 Paragraph 3.

a determination that these burdens were invalid and unenforceable.<sup>1</sup> That application, which was unsuccessful,<sup>2</sup> was covered in last year's volume.<sup>3</sup> This was the appeal.

## Principles and practice

### Principles

The principles to be applied in determining the validity of real burdens were not in doubt. They are set out in short form in s 4 of the Title Conditions (Scotland) Act 2003. The constitutive deed, be it a deed of conditions or disposition, must set out the terms of the burdens. The words 'real burdens' must normally be used. The benefited and the burdened properties must each be nominated and identified. And finally the deed must be dual registered, ie registered against both the burdened and the benefited properties. These statutory rules, though terse, are built on the foundations of the former common law, and cases from before the Act can thus be used to add context and colour to the provisions of s 4. So, as the Lord President noted:<sup>4</sup>

There is no dispute that, to be valid, a real burden must be ascertainable within the four corners of the relevant deed (*Anderson v Dickie* 1914 SC 706, Lord Guthrie at 717). The relevant title must not just give the burdened proprietor general notice of the existence of a burden. It must specify 'its exact nature and amount' (*Tailors of Aberdeen v Coutts* (1837) 2 Sh & Macl 609, Lord Brougham at 663, followed in *Anderson v Dickie* 1915 SC (HL) 79, Lord Kinnear at 84). This will involve, first, a sufficient description of the land which is burdened and, secondly, an adequate statement of what the burden entails. Without those elements, a singular successor could not ascertain the measure of any burden upon him and it would fall to be regarded as invalid.

### Practice

How these principles work out in practice is a different matter. Show me a real burden, it might be said, and I will show you what is wrong with it. As language is inherently imprecise, many real burdens are open to attack on the ground of lack of clarity. Hindsight, and new and unforeseen circumstances, can add force to such attacks.

Attack was the tactic adopted by Royal London. In the passage just quoted, the Lord President identified two elements of critical importance for real burdens: 'a sufficient description of the land which is burdened and, secondly, an adequate statement of what the burden entails'. According to Royal London, both were lacking in respect of the maintenance burdens in the 1954 disposition. Furthermore, said Royal London, the internal configuration of the building had changed so much since 1954 that it was no longer possible to apply the

<sup>1</sup> Such a determination is within the Lands Tribunal's jurisdiction: see Title Conditions (Scotland) Act 2003 s 90(1)(a)(ii).

<sup>2</sup> 2022 GWD 30-439.

<sup>3</sup> *Conveyancing* 2022 pp 117-20 and 156-61.

<sup>4</sup> Paragraph 22.

stipulated basis of apportionment of liability, which was by assessed rental (ie rateable value).

Lying behind these arguments was the implicit plea of 'it isnae fair'. The maintenance burdens saddled Royal London with up to 45% of the overall liability, which was significantly more than their proportion of the total floor area.<sup>1</sup> If only the maintenance burdens could be struck out, the position would be governed by the default rules in the Tenement Management Scheme, and these would apportion liability by reference to floor area or some other equitable basis.<sup>2</sup>

### **The description of the burdened property**

Like the Lands Tribunal before it, the First Division gave short shrift to the arguments put forward by Royal London. The main focus of debate was the alleged uncertainties as to the burdened property. This was the subjects conveyed in the 1954 disposition and was described there as follows:

ALL and WHOLE the shop premises forming Number 28 Buchanan Street, and Number 36 Argyll Arcade, Glasgow at present occupied by us [ie Cranston's Tea Rooms], and Number 36A (or 37) Argyll Arcade aforesaid at present occupied by George William Cathro and Others trading as The Iona Shop, situated on the ground floor of the building known as Argyll Chambers, forming Numbers 28, 30 and 32 Buchanan Street, and 34, 35, 36 and 36A (or 37) Argyll Arcade, Glasgow, erected on ALL and WHOLE that plot of ground containing 575 and two ninth square yards or thereby situated on the east side of Buchanan Street.

According to Royal London, this deluge of words did not amount to a proper description of the subjects in question.<sup>3</sup>

There was no definite piece of land exactly described. There was no bounding description of the properties, nor was there any reference to a plan. The only information that could be ascertained from the descriptions was that, in 1954, the disponent and the Iona Shop were occupying unknown areas somewhere within a larger area.

'It was absolutely necessary', Royal London added,<sup>4</sup> 'that a singular successor should be able to ascertain, from the 1954 disposition, the areas to which the title condition applied.' Royal London was such a singular successor. Try as it might, it could not work out what property the deed was talking about.

The First Division, however, proved more than up to the task:<sup>5</sup>

There is no difficulty with this here. The area is identified as Argyll Chambers. These are stated to form numbers 28, 30 and 32 Buchanan Street and, in short, 34 to 37 Argyll Arcade. No 30 is an empty space forming the entrance to the Arcade with 28 and 32 on either side of the void. No 34 is marked on the plan and No 37 was identified by the Lands Tribunal, even if it is not now listed as a separate unit in the Valuation Roll.

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1 Paragraph 10.

2 Tenements (Scotland) Act 2004 sch 1 (Tenement Management Scheme) r 4.2.

3 Paragraph 15.

4 In the Lord President's summary at para 15.

5 Paragraph 23.

No 36 had been subsumed into number 28. The footprint or solum of the Chambers is described down to the nearest ninth of a square yard. Its extent is manifest on the ground and thus from the photograph illustrating that.

There was also a broader point. In this case, as typically, the property being burdened was the same as the property being conveyed; and, like the Lands Tribunal before it, the First Division took the view that if the description was sufficient for the purposes of conveying the property it was also sufficient for the purposes of imposing real burdens. The latter did not demand a higher standard of specificity. 'As a generality', said the Lord President, 'when there is a conveyance of land, the whole of which is to be burdened, the description of that land for conveyancing purposes, if sufficient, will be adequate for the identification of the burdened land. They ought to be the same.'<sup>1</sup>

As the Lord President's opening words ('as a generality') show, this statement is not to be taken as an absolute rule. This is because the terms of a real burden require to be set out within the four corners of the deed, and it is, usually,<sup>2</sup> impermissible to refer to other material (such as the grant of planning permission or an Act of Parliament) without reproducing the content of that material in the deed itself.<sup>3</sup> As no such restriction applies to describing the subjects conveyed, there are likely to be cases where a description which is sufficient to convey property is insufficient for the imposition of real burdens on that property. But such cases will be rare. In practice, the issue is largely one for Sasine conveyances, and hence for older deeds. In the case of the Land Register, the land conveyed must be described either by title number (where the plot is already registered as such) or in a manner sufficiently detailed as to allow the Keeper to delineate the boundaries on the cadastral map (in first registrations or split-offs).<sup>4</sup> Either will be amply sufficient for the purposes of creating real burdens.

Finally, it might be mentioned that not all deeds which impose real burdens seek to convey property. Real burdens, after all, are commonly created in deeds of conditions.<sup>5</sup> The principle articulated by the Lord President in *Royal London Mutual Insurance Society* is pre-eminently a principle which applies to dispositions and other conveyances.

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1 Paragraph 24.

2 Although there can be exceptions, notably the exception set out in s 5 of the Title Conditions (Scotland) Act 2003.

3 The leading case is *Aberdeen Varieties Ltd v James F Donald (Aberdeen Cinemas) Ltd* 1939 SC 788.

4 Land Registration etc (Scotland) Act 2012 ss 23(1)(c), 25(1)(b) and 26(1)(c).

5 But while a deed of conditions does not – indeed cannot – convey property, it does quite often contain a description (typically of common parts in a development) which is intended to be incorporated into the dispositions of individual units in the development. If so, the same description is likely to be used for the burdened property in the real burdens. In recent years there has been a series of cases in which the description of common parts has been found to be inadequate; and while some cases have been decided in the context of a conveyance of property (eg *PMP Plus Ltd v Keeper of the Registers of Scotland* 2009 SLT (Lands Tr) 2) and others in the context of the imposition of real burdens (eg *Duffus v Malcolm Allan Housebuilders Ltd* 2020 GWD 16-236), it will usually be the case that a failure in one of these contexts would also be a failure in the other.

### Other matters

The First Division was equally unmoved by the alleged uncertainties in the maintenance burdens themselves, or by the difficulties in apportioning liability by rateable value in circumstances where the internal configuration of the building had changed and where, as in the case of Royal London's own shop unit, units had extended into a neighbouring building. Commercial buildings often change over time. Such changes should not be taken as destroying the existing real burdens:<sup>1</sup>

It may be that one or other of the units has contracted from its former extent within the Chambers, leaving a space which a retailer with an adjacent unit has obtained. It may equally be that one of the units has expanded beyond the Chambers and has been assessed in a manner which takes into account the extra space. This is to be expected in a city centre commercial building which has existed for over a century. These discrepancies with the original layout of the Chambers do not vitiate the burdens under consideration. They merely mean, as the Lands Tribunal concluded, that some adjustment, probably of a relatively minor nature, may be necessary to take into account the parts of the units within the Chambers. That can be done with the assistance of a surveyor or other suitably qualified professional person, which failing by the court.

### A practical and a constructive approach

We have left the most important aspect of the case to the last. At one time courts approached real burdens in a hostile spirit.<sup>2</sup> Where they could be killed by interpretation, they were. Shortcomings in draftsmanship were ruthlessly punished. But that was back in the days of rapacious feudal superiors and put-upon vassals – and days when the jurisdiction of the Lands Tribunal to vary or discharge real burdens had yet to be thought of. As times have changed so too has the attitude of the courts. With the decision in *Royal London Mutual Insurance Society*, that new approach – practical and constructive – can be regarded as firmly established.<sup>3</sup> That is a thoroughly welcome development.

Three aspects of the Lord President's judgment in particular illustrate this approach. In the first place, there is the statement that, while it might not be definitive in determining whether the burdened property was adequately described, 'it is worthy of remark that the Keeper of the Registers appears to have had no difficulty in registering titles, using cadastral mapping, which set out the extent of the various properties with considerable precision'.<sup>4</sup> Then there is the observation, in relation to the alleged uncertainty of the maintenance burdens, 'that there was no suggestion of there being any substantial problem in operating the burdens provisions over the last seventy years'.<sup>5</sup> Finally, and

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<sup>1</sup> Paragraph 25.

<sup>2</sup> Scottish Law Commission, *Report No 181 on Real Burdens* (2000) para 4.62.

<sup>3</sup> This may be said to have been anticipated by the Lord President's robust finding that common parts had been sufficiently described in *BAM TCP Atlantic Square Ltd v British Telecommunications plc* [2021] CSIH 44, 2022 SLT 972 at paras 32-36.

<sup>4</sup> Paragraph 26.

<sup>5</sup> Paragraph 27.

most importantly, there is a statement in relation to s 14 of the Title Conditions (Scotland) Act 2003, a provision which, in the light of the previously hostile attitude of the courts towards real burdens, requires that real burdens are not to be singled out for rough treatment but rather are to be ‘construed in the same manner as other provisions of deeds which relate to land and are intended for registration’. ‘Suffice it to say’, said the Lord President, ‘that, with a burden of repair and maintenance of common parts, the court would be inclined to look more favourably on a construction which was, as this one appears to have been, workable’.<sup>1</sup> These are words which all conveyancers will be heartened to hear.

## THE COMMUNITY RIGHT TO BUY: MORE BUMPS IN THE ROAD<sup>2</sup>

### Not a good batting average

‘On every occasion when a community has found itself involved in litigation about the community right to buy, it has lost.’ Thus Malcolm Combe in a valuable paper covering the cases on this subject.<sup>3</sup> The most recent is *Moorbrook Textiles Ltd v The Scottish Ministers*, a case in which the community body lost – and in fact lost *twice*.<sup>4</sup>

### The legislative background

First, the legislative background. Part 2 of the Land Reform (Scotland) Act 2003<sup>5</sup> provides that a ‘community body’<sup>6</sup> can apply to the Scottish Ministers for registration of a ‘community interest’ in identified land<sup>7</sup> and, if the Ministers agree, the interest is registered in the Register of Community Interests in Land (‘RCIL’), one of the many registers administered by the Keeper.<sup>8</sup> Registration gives the community body a pre-emption right.<sup>9</sup> The right lasts for five years, though there is a possibility of renewal.<sup>10</sup>

1 Paragraph 28.

2 This section is by George Gretton.

3 Malcolm M Combe, ‘An analysis of Part 2 of the Land Reform (Scotland) Act 2003 using case law relating to the community right to buy’, <https://strathprints.strath.ac.uk/87147/>, p 8.

4 9 September 2020 and 19 May 2022, Selkirk Sheriff Court. These can be found on the RoS website, in the Register of Community Interests in Land, registration number CB00237. The second decision is reported at 2024 SLT (Sh Ct) 1.

5 Much amended, chiefly by the Community Empowerment (Scotland) Act 2015. Part 2 of the Land Reform (Scotland) Act 2003 in its current form (ss 33–67B) runs to 43 sections.

6 Which must be a company limited by guarantee. The qualifying requirements for such a company to count as a ‘community body’ can be found set out in detail and at length in s 34.

7 The land is identified according to the rules set out in the Community Right to Buy (Scotland) Regulations 2015, SSI 2015/400, sch 1 Pt 1. The title number is *not* a requisite. (The entry in the RCIL has its own unique number but that is not connected with title numbers.) Having said that, the types of site in question tend to be those that have not been transacted for a long time, and so may well not yet be in the Land Register.

8 See Land Reform (Scotland) Act 2003 s 36 for details of the register.

9 See LR(S)A 2003 s 40 for the precise consequences of registration.

10 See LR(S)A 2003 s 44.

The 2003 Act sets out the criteria that the Scottish Ministers are to have regard to in considering such an application. We quote selectively from s 38:<sup>1</sup>

- (1) Ministers shall not decide that a community interest is to be entered in the Register unless they are satisfied ...
  - (b) that the acquisition of the land by the community body ... is compatible with furthering the achievement of sustainable development, and ...
  - (e) that it is in the public interest that the community interest be so registered.

Section 61 provides that a disgruntled owner can appeal (within 28 days) against a decision by the Scottish Ministers in favour of an application by a community body. The appeal is to the sheriff court,<sup>2</sup> and the sheriff's decision is final,<sup>3</sup> so that this is not an area where interpretation of the legislation can be developed by the Inner House or the Sheriff Appeal Court, or, putting it another way, this is not an area where binding precedent can emerge. Another point worth noting is that in such appeals the parties to the appeal are the owner and the Scottish Ministers. The community body is not a party. So in the *Moorbrook* litigations the community body lost in the substantive sense but not in the formal sense.

### **The *Moorbrook* litigations**

#### **The site and the competing plans**

The March Street Mill in Peebles, owned by Moorbrook Textiles Ltd, closed in 2015. The owner's plan for the site, which extended to about 2.24 hectares, was to redevelop it for housing. The Peebles Community Trust, a company limited by guarantee, had different ideas. It applied for a community interest in the site. We quote from the PCT website: 'The aim is to develop a 30+ unit managed care facility, construct 30 or more truly "affordable" flats and apartments, develop an array of work spaces and a community run co-working and training facility, and retain the allotments on their present site.'<sup>4</sup> The PCT application was approved by the Scottish Ministers<sup>5</sup> and the interest was accordingly registered in the RCIL.

#### **The first appeal**

The owner appealed. The litigation ended by a joint motion between the parties,<sup>6</sup> and the sheriff (K J McGowan) pronounced the following interlocutor, whose terms must have been agreed between the parties:<sup>6</sup>

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1 These are the provisions round which the litigation was mainly fought.

2 By contrast, appeals on the question of valuation are made not to the sheriff but to the Lands Tribunal: LR(S)A 2003 s 62.

3 LR(S)A 2003 s 61(7)(c).

4 The website <[www.peeblescommunity.org/community-trust-march-street-mills/](http://www.peeblescommunity.org/community-trust-march-street-mills/)> is now listed as having expired and so is no longer available for inspection. The lengthy and well-presented application is set out in full as one of the registered documents in the RCIL.

5 A copy of the decision, dated 6 September 2019, can be found in the RCIL.

6 The interlocutor, dated 9 September 2020, is reproduced in the RCIL under entry number CB00237.

- (i) finds that the Defenders [the Scottish Ministers]<sup>1</sup> erred in law by:- (i) failing to take account of a material consideration in making its Decision, namely, the extent of the potential blighting effect that the said registration would have on the ability of the Pursuer's land to deliver housing; and (ii) failing to give proper, adequate and intelligible reasons in the Decision with respect to why they believed it to be in the public interest given, inter alia, the Site's allocation in the local development plan and its programmed position in the local housing audit that the Right to Buy should be registered;
- (ii) sustains the appeal and reduces the Decision to register the Trust's interest in the Site in the Register;
- (iii) remits the Trust's application for registration of a community interest in the Pursuer's land ... back to the Defenders for reconsideration and redetermination, having due and proper regard to the decision of the Court in relation to these proceedings;
- (iv) pending the outcome of the said reconsideration and redetermination, orders the Keeper of the Register to amend the current entry in the Register in respect of the Trust's said application 'registered' to 'pending' (or otherwise to indicate that the application is awaiting redetermination following appeal) ...

As far as we are aware no opinion was issued to accompany this interlocutor. But some points emerge. In the first place, the decision by the Scottish Ministers had failed to consider the blighting effect that the registration of the community interest would cause. The Ministers accepted that the failure was fatal. The point is important, because in many, and arguably every, case where a community interest is registered there will be some element of blight. The degree of blight will of course vary. If Morag, aged 40 and in robust good health, owns land and has no intention of selling it, but intends to leave it to her children when she dies, the blighting effect of a community interest that lasts five years will be minimal. (Perhaps not absolutely zero, because Morag's mind, or her circumstances, might change.) But in other cases the degree of blight will be substantial, and this seems to have been so in the present case, where the owner had on its hands a site that had become more or less useless in its present condition and which was presumably costing the owner money with every passing day.

In the second place, the decision by the Scottish Ministers had failed to take into account the fact that under the local development plan the site had been earmarked for residential development. The Ministers accepted that that failure too was fatal.

In the third place, the parties agreed, and the sheriff accepted, that whilst the decision itself was to be quashed, the application would remain live so that the Ministers could make a fresh decision.

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<sup>1</sup> We would note, as a minor procedural point, that although the legislation uses the term 'appeal', the parties to such cases are classified as pursuers and defenders, not as appellants and respondents.

### **Back to the drawing board: the Scottish Ministers decide again**

A fresh decision by the Scottish Ministers was made.<sup>1</sup> As with the previous – and now quashed – decision, it was in favour of the Peebles Community Trust.<sup>2</sup> Once again the owner appealed.

#### **The second appeal**

Whereas in the first appeal the Ministers conceded that they had got it wrong, in the second appeal they fought their corner. But the result was no better: the owner succeeded; the ministerial decision was quashed and the community interest was deleted from the RCIL.

The owner (and pursuer) argued that ‘potentially the PCT proposals are in the public interest but ... there is [also] a public interest in the pursuer’s proposals’.<sup>3</sup> The owner’s proposals would make available to the public a substantial number of new houses and, moreover, it was averred, the owner’s proposals were at an advanced stage, unlike those of the PCT. But, argued the owner, the Scottish Ministers had attempted no comparative evaluation of the two sets of proposals.

The sheriff (Peter Paterson) agreed with the owner and allowed the appeal. ‘In my opinion there is a public benefit in the pursuer’s<sup>4</sup> proposals ... in that it has the potential to satisfy the need for housing in Peebles. It is obvious that it is in the public interest that the need for housing is satisfied.’<sup>5</sup> That being so, he continued, ‘as a matter of general principle if there are two proposals or schemes which are in the public interest, they require to be compared’.<sup>6</sup> But the Scottish Ministers ‘did not consider it was necessary to consider the public interest in the pursuer’s proposals ... I can see nothing within the [Ministerial] determination that amounts to a specific attempt to compare the two schemes. In my view this constitutes an error of law.’<sup>7</sup>

One dimension of comparison that the sheriff stressed was that of time: in the case of competing proposals, both in the public interest, if one was well-advanced and the other not, that would be a factor that should be taken into account (and had not been taken into account) in the Ministers’ decision-making process.<sup>8</sup>

#### **Quasi-judicial review**

‘Both parties accept that the court’s function is akin to judicial review’ commented Sheriff Paterson in the second case.<sup>9</sup> The judgment does not develop the point, and indeed it was one of concession by the parties rather than a decision of the sheriff himself, though probably he would have said something had he been of

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1 A copy of the decision letter can be found in the RCIL.

2 Whereas the terms ‘blight’ and ‘local development plan’ are absent from the first ministerial determination, unsurprisingly they can both be found in the second.

3 Paragraph 17.

4 That is to say, the owner. As noted above, in a s 61 appeal the appellant is categorised as a pursuer.

5 Paragraph 24.

6 Paragraph 25.

7 Paragraph 22.

8 See para 26.

9 Paragraph 9.

a different view. As a quasi-judicial review, a s 61 appeal is tied to such concepts as illegality, irrationality, and procedural impropriety.

### Comments

The twin decisions are important. They establish, we think, the following four points.<sup>1</sup> First, in considering an application the Scottish Ministers must take into account the potential blighting effect of an affirmative decision. Secondly, they must take into account the local development plan. Thirdly, they must recognise that the owner's own plans for the property may in themselves be in the public interest, and if that is so they must carry out a balancing exercise. Fourthly, and as an aspect of the third point, where the owner's plans are themselves in the public interest, the Ministers must consider the 'oven-readiness' issue: comparatively speaking, how advanced are the two competing plans?

The view expressed by Sheriff Paterson, that private uses of land, and private proposals for development, may in themselves be in the public interest, seems to us important. New private-sector housing may be in the public interest. Indeed, a new commercial development may be in the public interest: it is likely to decrease unemployment and to increase the tax base. Of course there may be countervailing arguments against a new private-sector development – for instance environmental arguments – but such arguments can also be relevant to proposed public-sector or third-sector developments. The point brought out by the sheriff is that 'public interest' is not a simple concept to deploy. Public benefit can, depending on the circumstances, be delivered by the public sector, or by the private sector, or by the third sector. As between 'public benefit' and 'private sector', the two adjectives are not necessarily in antithesis.

### End of the road?

This seems to have been the end of the road as far as the Peebles Community Trust was concerned. Either the PCT did not make a further application, or, if it did, the Scottish Ministers turned the application down. We understand that a residential development of the site is now likely.<sup>2</sup>

## EXTRINSIC EVIDENCE AND SASINE DESCRIPTIONS<sup>3</sup>

### Introduction

*Ardnamurchan Estates Ltd v MacGregor (No 2)*<sup>4</sup> was a dispute about land on the Ardnamurchan peninsula at Glenborrodale, Acharacle. The land in question

<sup>1</sup> We say 'establish' but it must be borne in mind – see above – that decisions under s 61 of the 2003 Act lack binding precedential force.

<sup>2</sup> <<https://www.whiteburn.co.uk/developments/march-street-peebles/>>.

<sup>3</sup> This section is by Kenneth Reid.

<sup>4</sup> 8 July 2022, Fort William Sheriff Court, unreported, rev [2023] SAC (Civ) 33, 2024 GWD 8-65. The sheriff was Sheriff Eilidh Macdonald, and the Sheriff Appeal Court comprised Sheriff Principal D C W Pyle, Appeal Sheriff Fiona Tait, and Appeal Sheriff Derek J Hamilton.

was, it might reasonably be said, unprepossessing. As far as is known, it had no development value, and little or no agricultural value. It was simply an area extending to some 1.517 acres (0.614 hectares) ‘covered with rough scrub and trees and in some places ... rocky and steeply sloping’.<sup>1</sup> Yet ownership of this land has been vigorously contested in not just one litigation but in two.<sup>2</sup> For the defenders in both actions, Mr and Mrs MacGregor, the disputed land covered what would otherwise have been a gap between the rest of their property (comprising a farm with a visitor centre and holiday lets) and the B8007 public road lying to the north-east. They had possessed the land, the sheriff found after a proof, since acquiring their main property back in 1992. The interest in the land of the pursuer, Ardnamurchan Estates Ltd, was less apparent and seems to have puzzled the sheriff:<sup>3</sup>

I make no comment on the alleged motives of the pursuer company and their representatives to pursue this action, other than to say it is curious that they have committed such time, energy, and probable expense in pursuing what they themselves say is a very small and insignificant piece of land.

At the heart of the dispute was the meaning and effect of the deed by which the MacGregors had acquired their property, a disposition which was recorded in the Register of Sasines back in 1992.<sup>4</sup> At first sight, the description of the subjects disposed looked blameless enough:<sup>5</sup>

ALL and WHOLE [A] those areas or pieces of ground extending in total to Four hundred and sixty four acres and five decimal or one tenth parts of an acre or thereby [B] lying in the Parish of Ardnamurchan and County of Argyll [C] shown outlined in red on the demonstrative plan annexed and executed as relative hereto ... [D] which said areas or pieces of ground hereby disposed are hereinafter referred to as ‘the Feu’ and (i) form part and portion of ALL and WHOLE Ardslnish and Glenmore Farms lying in the said Parish and County and extending to Four thousand and nine acres or thereby all as more particularly described in and disposed (SECOND) by and shown coloured yellow and marked ‘2’ on the plan annexed and signed as relative to [a disposition granted in 1953].

The subjects, it will be seen, were described using four different elements. Nothing more need be said about elements B and D: no controversy surrounded either the parish in which the subjects were located or the larger subjects of which they formed a part. But the other elements turned out to contain a crucial inconsistency. Element A (the verbal description) gave the total area as 464.5 acres. But the plan (element C) delineated land which, expert evidence now revealed, contained a mere 462.16 acres, a shortfall of 2.34 acres. More seriously

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<sup>1</sup> Sheriff’s Note, para 1.

<sup>2</sup> The earlier litigation was *Ardnamurchan Estates Ltd v MacGregor (No 1)* [2020] SAC (Civ) 2, 2020 SC (SAC) 1.

<sup>3</sup> Sheriff’s Note para 81.

<sup>4</sup> The original was lost and the dispute had to be resolved on the basis of a copy from the Registers with a monochrome plan.

<sup>5</sup> Sheriff’s Note para 33; the lettering in brackets is ours.

from the point of view of the MacGregors, the boundaries on the plan excluded the area of 1.517 acres which was the subject of the present dispute.

The MacGregors were alive to the problem. Two years after the recording of the 1992 disposition, they took the precaution of recording a separate *a non domino* disposition of the disputed land, presumably with the intention of confirming their title by positive prescription. Unhappily, the MacGregors were the granters as well as the grantees of the deed – a practice which was not then uncommon but which the Court of Session was later to hold, in the *Aberdeen College* case,<sup>1</sup> disqualified the deed from acting as a foundation for prescription. It was this issue with which the previous litigation between the MacGregors and Ardnamurchan Estates was concerned. Unsurprisingly, the Sheriff Appeal Court in that litigation ruled against the MacGregors, holding that no prescriptive title could follow on the basis of a deed – sometimes called an ‘A-to-A’ deed – in which the grantor and grantee were one and the same person.<sup>2</sup>

Less expected was the interest on the part of Ardnamurchan Estates. But in 2014 Ardnamurchan Estates took the trouble of obtaining a disposition of the disputed land from the executor of a previous owner of the larger subjects of which it had once formed part, and this was registered in the Land Register, albeit with exclusion of indemnity in respect of the possession by the MacGregors.<sup>3</sup> The result was to set up a classic title dispute. The MacGregors claimed ownership on the basis of their disposition from 1992 which was recorded in the Register of Sasines. But it was Ardnamurchan Estates and not the MacGregors who had a title to the disputed area in the Land Register.

It fell to the present action to resolve this dispute. Two main questions arose for decision. First, was the disputed land among the subjects which were conveyed to the MacGregors in 1992? And, second, if it was not, was the 1992 disposition nonetheless *habile* to include the disputed land for the purposes of positive prescription? This second question is discussed elsewhere in this volume.<sup>4</sup> It is the first question with which this section is concerned.

### Area or plan?

What was conveyed in 1992? Was the disputed land in or out? The answer might seem to be clear enough. The plan excluded the disputed land, while the area stated in the disposition (464.5 acres or thereby) was a little greater than the area now known to be covered by the plan (462.16 acres). Plan and area: these were the only relevant descriptive elements. To the extent that they might be thought to be in conflict, which should be preferred? The answer seems almost

<sup>1</sup> *Board of Management of Aberdeen College v Youngson* [2005] CSOH 31, 2005 1 SC 335.

<sup>2</sup> *Ardnamurchan Estates Ltd v MacGregor (No 1)* [2020] SAC (Civ) 2, 2020 SC (SAC) 1; for discussion, see *Conveyancing 2020* pp 167-70.

<sup>3</sup> Under title number ARG20467. In fact, as the Sheriff Appeal Court went on to hold (see paras 152–156 of the judgment by Appeal Sheriff Tait) by that time Ardnamurchan Estates *already* owned 80% of the disputed land by virtue of a disposition of 1996. So, despite purporting to convey the whole of the disputed area, the 2014 disposition conveyed only the 20% not yet owned by Ardnamurchan Estates.

<sup>4</sup> It is discussed at p 120 above. The answer was in the negative.

self-evident. Only the plan delineated the boundaries. And while the statement of area indicated a slightly larger plot of land, there was no basis in the deed itself for supposing that that additional area comprised or included the disputed land. Indeed, the sizes were not the same: the disputed land was 1.517 acres whereas the excess area was 2.34 acres. In those circumstances it seemed inevitable that the plan should prevail. This is a well-settled rule of preference.<sup>1</sup> As was said by the Inner House in *Rivendale v Clark* of the description under scrutiny in that case:<sup>2</sup>

without the plan the disposition was completely imprecise as to the subjects conveyed, and the obvious purpose of incorporating a plan was to denote the extent of those subjects. The reference would have no point otherwise. The dispositive clause must in our opinion be construed in the light of that clear objective.

Yet, contrary to the approach taken in *Rivendale v Clark*, the sheriff in *Ardnamurchan Estates* chose to disregard the plan. She did so on the basis that the plan was deficient and unreliable:<sup>3</sup>

Even without considering any extrinsic evidence it can be said that the plan is not precise and therefore cannot be said to be definitive of the extent of the title. The plan can be seen on the face of it to be imprecise in a number of ways: there are no annotations to show the measurements of the lengths of the boundaries; the area (or acreage) which the lines enclose is not stated on the plan; there are no annotations on the plan identifying physical characteristics on the ground to assist in the identification of where the boundaries lie; the plan is not bespoke to this conveyance in the sense that it is simply a red line drawn on an existing old OS map; the date of that OS map is not specified on the plan; the plan does not identify who drafted the plan, nor whether that person had any professional expertise to do so; there is no scale noted on the plan. Essentially a vast area of land is represented on a relatively small A3 sheet of paper. It is clear to the naked eye that the boundary lines drawn on the plan are thick and appear to be free-drawn. It is surprising to me that anyone would have any confidence when looking at that to be able to say what it actually represents on the ground, precisely.

In all of these circumstances, the plan cannot be said to be an accurately measured depiction of the area of ground to be conveyed. The plan was clearly not intended as such, in any event, as it is specifically stated that it is 'demonstrative'. The plan is therefore more likely to have been intended as a descriptive tool to enable someone looking at the deed to orient the piece of ground being conveyed within a particular area.

But was the plan really so bad? Many of the criticisms made by the sheriff – no linear measurements, no acreage, no identification of physical characteristics, the use of the OS map rather than a bespoke plan – are criticisms which could be made of many plans found in Sasine deeds and which are routinely accepted

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<sup>1</sup> J M Halliday, *Conveyancing Law and Practice in Scotland*, 2nd edn, vol II (1997) para 33-13. This rule was applied, for example, in *Veen v Keeper of the Registers of Scotland* 2017 GWD 17-276, discussed in *Conveyancing 2017* pp 177–78.

<sup>2</sup> [2015] CSIH 27, 2015 SC 558 at para 22.

<sup>3</sup> Sheriff's Note paras 44 and 45.

without complaint. Although no scale was given, the map was in the OS series and, as the findings-in-fact show, the scale used was not in doubt (1:10,000).<sup>1</sup> The labelling of the plan as 'demonstrative' was standard practice for the time and served only to place the plan on the same level as the other descriptive elements in the event of inconsistency. No doubt, of course, the plan was far from perfect.<sup>2</sup> But it was the only plan that there was, and, more than that, the only basis provided by the deed for ascertaining the boundaries of what was being conveyed. Ignore it, and the disposition was in danger of failing altogether for want of a proper description of the subjects conveyed.<sup>3</sup> Accept it, and it was clear that the disputed land was excluded.

Having taken the decision to disregard the plan, the sheriff was then at the mercy of evidence extrinsic to the deed in order to supplement and explain the minimal information that the deed (without the plan) actually contained.<sup>4</sup> In this respect there was, in the first place, the evidence of the chartered surveyor who had handled the 1992 sale, to the effect that what was intended was the sale of the whole of Glenmore Farm. That would have included the disputed land.<sup>5</sup> This was supplemented by evidence of post-deed possession: in taking possession of the subjects acquired in 1992 the MacGregors had taken possession also of the disputed land, and had retained it ever since. Looking at the evidence as a whole, the sheriff was satisfied that the disputed land had been included among the subjects conveyed in 1992.

### The use of extrinsic evidence

Ardnamurchan Estates appealed to the Sheriff Appeal Court. The main issue of contention was whether the sheriff had been entitled to use extrinsic evidence to overwrite the terms of a deed which, or so it was argued, were perfectly clear.

### The general rule

On the use of extrinsic evidence in the interpretation of Sasine deeds, the broad contours of the law are reasonably clear. Sheriff Principal Pyle's formulation was as follows:<sup>6</sup>

In any discussion of the admissibility of extrinsic evidence there is the general rule of construction of any writing, namely that the intention of the parties must be discovered from the writing itself. Only where there is in the language of the writing a doubt or difficulty to the facts of the case is extrinsic evidence admissible. Moreover,

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1 Finding-in-fact 22.

2 Compare here the plan under consideration in *Rivendale v Clark* which was noted by the court as having been professionally prepared.

3 The requirement that the property being transferred (or burdened) is clearly identified is sometimes known as the 'specificity principle'.

4 She did this on the basis that, having regard to the deficient plan, the disposition could not be said to amount to a 'bounding title' – an overused (and often misunderstood) expression but one which, in this context, was just another way of saying that the boundaries of the property could not be determined from the deed alone: see Sheriff's Note para 39.

5 Sheriff's Note paras 15 and 35.

6 Paragraph 23.

the purpose of extrinsic evidence is not to discover the writer's intention separate from the words used, but to determine the proper meanings of those words. These general principles apply equally to conveyancing and the construction of a disposition as they do to any other form of writing.

The difficulty, in this case as in others,<sup>1</sup> was to know how these rather general rules were to be applied in practice. The key issue was whether the description in the 1992 disposition created 'a doubt or difficulty' such that extrinsic evidence was justified. And in answering that question the parties and, following their lead, the Sheriff Appeal Court focused on whether the main descriptive elements – the plan and the acreage – were or were not in conflict with one another.

According to Mr and Mrs MacGregor, there was an obvious conflict between the two which could only be resolved by extrinsic evidence. According to Ardnamurchan Estates, any supposed conflict arising from the too-large acreage (464.5 acres or thereby in respect of an area which, according to the plan, was only 462.16 acres) was covered by the cautious qualifier, 'or thereby'. So there was no real difference, on this view, between the actual area of 462.16 acres and the stated area of 464.5 acres 'or thereby'. As the argument developed, the dispute came to centre on the amount of latitude conferred by the words 'or thereby'.

### The meaning of 'or thereby'

The sheriff at first instance was scathing in her dismissal of the suggestion that a discrepancy of 2.34 acres might be accommodated by the words 'or thereby':<sup>2</sup>

It is not a slight discrepancy. The pursuer company and their representatives, as landowners of vast swathes of the Scottish Highlands have lost a sense of perspective in this matter. An area of 2.34 acres is not a small area of land. We must not misrepresent the size of the 'discrepancy' simply because this piece of land is in a rural area of Scotland where, apparently, huge tracts of land can be passed between wealthy owners with relative carelessness. To use the ubiquitous comparison of a football pitch: this 'discrepancy' represents the area of one football field plus another third thereof. To put it into context in an urban environment, this is an area bigger than some residential housing developments, which could house a number of families in average sized homes. It is not a slight discrepancy, it is a significant ambiguity.

On this point there existed a certain amount of prior authority which, although later cited to the Sheriff Appeal Court, appears not to have been before the sheriff. On the whole, that authority did not support the position taken by the sheriff.<sup>3</sup>

The discrepancy of 2.34 acres amounted to 0.5% of the total area which the 1992 disposition bore to convey. In *Hetherington v Galt*<sup>4</sup> the 'or thereby' principle was said to accommodate a discrepancy of around 1.2% in the length of a boundary. By contrast, in *Young v McKellar*<sup>5</sup> the view was expressed by Lord Low,

<sup>1</sup> For discussion, see *Conveyancing 2010* pp 156–59.

<sup>2</sup> Sheriff's Note para 57.

<sup>3</sup> For how this was put by senior counsel for Ardnamurchan Estates, see paras 96–99 of the judgments in the Sheriff Appeal Court.

<sup>4</sup> (1905) 7 F 706.

<sup>5</sup> 1909 SC 1340.

*obiter*, that an additional 25 square yards on top of 383 square yards (around 6.5%) probably did not fall within the 'or thereby' principle. Similarly, in a published Opinion from 1981 Professor J M Halliday expressed the view 'with some hesitancy' that an additional 4 feet in a boundary of 84 feet 9 inches (4.7%) was probably too great to fall within the 'or thereby' principle although, as Professor Halliday conceded, 'it is difficult to predict what view a court would take'.<sup>1</sup>

On the basis of these, admittedly limited, authorities, a discrepancy of 0.5% falls well within the 'or thereby' qualifier. And to the possible objection that percentages are not everything, and that when the overall figures are large (as in *Ardnamurchan Estates Ltd*), the percentage covered by 'or thereby' must be correspondingly smaller, it might be replied that 0.5% *is* rather small. At any rate the Sheriff Appeal Court, albeit by a majority,<sup>2</sup> took a different view on this matter from the sheriff:<sup>3</sup>

The use of the term 'or thereby' indicates that slight variations might be unavoidable. (*Hetherington v Galt* (1905) 7F 706 per Lord Justice-Clerk Macdonald at page 712 and Lord Kyllachy at page 713). I consider that there is force in the appellant's submission that the extent of the variation governed by the words 'or thereby' should be considered in its actual context, namely the conveyance of hundreds of acres of land in a rural location with challenging geographical features. In the proper context of ground extending to 464.5 acres, I consider that the words 'or thereby' are adequate to cover the variation of 2.341 acres (when the disputed subjects are excluded). The variation is within a reasonable measure. There is no sufficient conflict between the elements of the description of the subjects.

As there was thus 'no sufficient conflict' between the plan and stated area, there could be no question of admitting extrinsic evidence. And as the disputed area was excluded from the only descriptive element which sought to show the boundaries, ie the plan, it followed that it was not carried by the 1992 disposition. Insofar as Mr and Mrs MacGregor had a claim to the disputed land, therefore, that claim could only turn on positive prescription. As already mentioned, we consider that aspect of the case elsewhere in this volume.<sup>4</sup> That claim, too, turned out to be unsuccessful.

### **Extrinsic evidence where descriptive elements conflict**

One final matter may be mentioned. The rule that extrinsic evidence is barred where the descriptive elements align does not mean that such evidence can necessarily be led where the elements happen to conflict. Instead, the question of whether extrinsic evidence is admissible is likely to depend both on the extent of the conflict and also on whether the conflict can be resolved, without

<sup>1</sup> D J Cusine (ed), *The Conveyancing Opinions of J M Halliday* (1992) 202–06.

<sup>2</sup> The dissenting voice was Sheriff Principal Pyle. This is a rare example of a split decision in the Sheriff Appeal Court.

<sup>3</sup> Paragraph 126 per Appeal Sheriff Tait.

<sup>4</sup> See p 120 above. The question of whether the 1992 disposition provided a *habile* title for the purposes of the prescriptive acquisition of the disputed area (which, it was held, it did not) was a different question from the one considered above, namely whether the disposition had conveyed the disputed area at the time when it was recorded in 1992.

such evidence, by the application of well-settled rules (such as the rule that a written description of boundaries is preferred to other descriptive elements).<sup>1</sup> As Professor Halliday noted, in a passage referred to with approval by the court in both phases of the litigation, in cases where descriptive elements conflict, 'the court will endeavour to ascertain the true intention of the parties and *may* admit extrinsic evidence as to the circumstances of the transaction and evidence of possession'.<sup>2</sup>

In the particular circumstances of the present case, Sheriff Principal Pyle, who alone thought that the descriptive elements were in conflict, concluded that extrinsic evidence was competent and that, if taken into account, would result in a finding that the disputed area was, after all, carried by the 1992 disposition. This approach seems open to question. As the Sheriff Principal accepted, 'heritable titles cannot be construed by reference to extrinsic evidence with the same freedom as for contracts. This is because they are part of a public registration system, whether Sasine or land registration, upon which the public is entitled to rely'.<sup>3</sup> Furthermore, and differing here from the sheriff, the Sheriff Principal accepted 'that the plan is formidable evidence' as to the boundaries.<sup>4</sup> But at this point it is possible, indeed necessary, to go further. The question for the court to determine was not what the parties intended to do but what they actually did do, by means of the disposition. A mismatch between intention and achievement might found an application for judicial rectification of the deed,<sup>5</sup> but it could hardly be determinative as to how the deed was to be interpreted. If the parties had really intended to convey the disputed land, then it is surprising that they did not say so. In fact what they did say, by means of the plan, was that the disputed land was *not* conveyed. It is hard to see how such a clear statement in the disposition could be overturned by extrinsic evidence.

## MOVEABLE TRANSACTIONS (SCOTLAND) ACT 2023<sup>6</sup>

### Introduction

Since its establishment in 1999 the Scottish Parliament has passed many significant pieces of legislation in relation to land law. The Abolition of Feudal Tenure etc (Scotland) Act 2000, the Title Conditions (Scotland) Act 2003, the Tenements (Scotland) Act 2004 and the Land Registration etc (Scotland) Act 2012 all emanated from work by the Scottish Law Commission. There have been other important measures, notably the Land Reform (Scotland) Act 2003, the Community Empowerment (Scotland) Act 2015 and the Land Reform (Scotland)

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1 The clearest statement of the rules is that given in W M Gordon and S Wortley, *Scottish Land Law*, 3rd edn, vol I (2009) para 3-08. The issue arose in another case from 2023, *Langskaill v Black* [2023] SAC (Civ) 17, 2023 SLT (SAC) 51; see p 116 above.

2 J M Halliday, *Conveyancing Law and Practice in Scotland*, 2nd edn, vol II (1997) para 33-13.

3 Paragraph 34.

4 Paragraph 43.

5 Ie by virtue of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 s 8.

6 This section is by Andrew Steven.

Act 2016. The Private Housing (Tenancies) (Scotland) Act 2016 placed the law of private-sector residential leases on to a new statutory footing. The statutory landscape in relation to heritable property has therefore changed profoundly since devolution. Not so the law of moveable property. Not until now.

The Moveable Transactions (Scotland) Act 2023, once fully in force, will make major changes which conveyancers need to know about. Some might question why, given that the legislation is about moveable property. The answer is that transactions with such property have traditionally used documentation drafted by conveyancers. John Craigie's *Scottish Law of Conveyancing: Moveable Rights* (2nd edn, 1894) runs to nearly 650 pages<sup>1</sup> and covers numerous types of document, including personal bonds and their assignation, partnership contracts, articles for companies, ante-nuptial contracts, and testamentary writings in relation to moveable property. While many of these are nowadays prepared by other legal specialists, others are not.

The 2023 Act is of particular relevance for those acting for small businesses.<sup>2</sup> It is increasingly likely that the moveable property of small businesses, such as claims for payment, equipment and intellectual property, will be the assets used to access finance, rather than heritable property.<sup>3</sup> Such businesses may only rent premises on a short-term lease and be unable to grant a standard security.<sup>4</sup> Besides, the 2023 Act is also such fundamental legislation that conveyancers should have a general knowledge of it. The overview given here attempts to provide that.

## Background

The 2023 Act implements the Scottish Law Commission's three-volume *Report on Moveable Transactions*<sup>5</sup> which was published in 2017, and the draft Moveable Transactions (Scotland) Bill appended to it. That report provides essential background to the legislation. The vast majority of the Law Commission's recommendations were implemented. The legislation covers two main areas: (i) assignations of claims (typically rights to be paid money) and (ii) security over moveable property. In relation to (ii) a new form of security right known as a 'statutory pledge' is introduced. The overall objective of the 2023 Act is to improve access to finance for businesses. The existing law is outdated and overly restrictive. When compared with English law and the law in other countries, Scotland has lagged far behind.

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1 A contemporary reviewer chides the work for straying into substantive law: 'Following the example of more important writers, Mr Craigie states the law about the lawfulness of contracts, *rei interventus*, winding-up, *jus mariti*, succession, vesting and other subjects, which cannot be said to be part of the law of conveyancing strictly called.' See Anon, 'Scottish Law of Conveyancing – Moveable Rights by John Craigie MA LLB, Advocate. Second Edition. Edinburgh, Bell and Bradfute, 1894' 1896 *Juridical Review* 165 at 166.

2 Often referred to as SMEs (small and medium-sized enterprises).

3 See eg Bruce Wood, 'Why are Scots firms still awaiting legal reform?' *The Scotsman*, 5 November 2018.

4 For a lease to have a standard security granted over it, the lease must exceed 20 years: see Conveyancing and Feudal Reform (Scotland) Act 1970 s 9(8)(b).

5 Scottish Law Commission, *Report No 249 on Moveable Transactions* (2017).

There are three particular issues which the 2023 Act addresses. The first is the requirement for intimation to transfer a claim. Imagine that Peter, a plumber, wishes to sell his customer invoices to a bank. This will give him payment immediately, albeit at a discount, rather than having potentially to wait several weeks or more. Under the existing law, for the bank to become holder of the claim to payment for which the invoice has been issued intimation needs to be made to the customer. If this is not done and the assignor becomes insolvent, the assignee loses out because the claim remains in the assignor's estate.

The Transmission of Moveable Property (Scotland) Act 1862 provides for notarial and postal intimation methods. It unsurprisingly does not authorise electronic intimation. The 1862 Act relaxed the stringent requirements of the common law under which an intimation required a ceremony involving five parties.<sup>1</sup> In recent times the courts have been willing to say that the 1862 Act is merely permissive and ignore the requirements of the law preceding it,<sup>2</sup> but the authority of these decisions is open to question.<sup>3</sup> Even, however, if intimation can be done in a less cumbersome way, it is laborious where the same document assigns multiple claims and impossible in the case of a future claim where the debtor's identity is unknown. For example, Peter the plumber may want to assign to a bank his customer invoices for June to December 2024. In the absence, however, of a crystal ball, he will have no idea to whom he will be issuing future invoices.<sup>4</sup> To avoid these problems, invoice financing and other assignation transactions are often carried out using trusts or under English law.<sup>5</sup>

The second issue is that, apart from the floating charge, which only companies and certain other corporations can grant and which has a relatively low ranking in insolvency, the only way to create security over incorporeal moveable property is to transfer title to the creditor. For example, a business with intellectual property has to assign this and make the creditor the holder of it. There is then a need for complex contractual arrangements to allow the business to deal with the IP, such as to license it. Similar problems arise in relation to trying to create security over financial instruments such as shares in a company.<sup>6</sup> Again these have to be transferred to the creditor with contractual provisions to deal with dividends and voting rights. Regulatory requirements in relation to the 'Person of

1 See R G Anderson 'Intimation 1862–2008' (2008) 12 *Edinburgh Law Review* 275.

2 *Christie Owen & Davies plc v Campbell* [2009] CSIH 26, 2009 SC 436 at para 14 per Lord Clarke; *Promontoria (Ram) Ltd v Moore* [2017] CSOH 88, 2018 SCLR 299 at para 96 per Lord Bannatyne; *Cabot Financial UK Ltd v MacLennan* [2021] SC ABE 6, 2021 GWD 32-422 at para 81 per Sheriff Napier; *Promontoria (Chestnut) Ltd v The Firm of Ballantyne Property Services* [2020] CSOH 56, 2020 GWD 20-273 at para 58 per Lord Doherty.

3 At least as regards the requirements for intimation to effect a transfer, as opposed to notifying the debtor to perform to the assignee.

4 This statement can be qualified in some cases, for example where regular work is done for a particular customer.

5 Such workarounds may, however, come unstuck. See *Joint Administrators of Rangers Football Club plc, Noters* [2012] CSOH 55, 2012 SLT 599, discussed in G L Gretton 'The Laws of the Game' (2012) 16 *Edinburgh Law Review* 414.

6 See eg *Farstad Supply A/S v Enviroco Ltd* [2011] UKSC 16, [2011] 1 WLR 921.

Significant Control<sup>1</sup> legislation<sup>1</sup> as well as the National Security and Investment Act 2021<sup>2</sup> arising from the secured creditor becoming the shareholder are also problematic.

The third issue is that, again apart from the floating charge and certain limited exceptions,<sup>3</sup> security over corporeal moveable property needs to be carried out by means of a (possessory) pledge. This necessitates delivery of the asset, and it is hardly possible to run a business if equipment and vehicles have to be handed over to a bank. Further, banks typically do not want to have to store assets unless these are very small. While the law recognises other forms of delivery, in particular constructive delivery by intimating to a warehouse and symbolical delivery by handing over a bill of lading,<sup>4</sup> the case of *Hamilton v Western Bank*<sup>5</sup> is authority for the proposition that only actual delivery is permissible. While ignored in practice, the case has never been overruled. The stringencies of the law of pledge have led to the use of workarounds such as hire-purchase, and sale and leaseback, but these too have their problems and limitations.<sup>6</sup>

### Scope

The term 'moveable transaction' is apt to include any dealing with moveable property, but the 2023 Act is more limited in its scope. The transactions where the law is reformed are the three identified in the previous section. The first is the assignation of claims, where the rules on intimation are modernised and provision is made for an alternative means of completing transfer by registration in a new Register of Assignations ('RoA'). The 2023 Act does not cover the transfer of other incorporeal moveable property, because this is typically the subject of special legislative regimes which are UK-wide.<sup>7</sup> It also does not deal with the transfer of corporeal moveable property. The usual reason for such a transfer is sale and here the Sale of Goods Act 1979 applies, once again throughout the UK.<sup>8</sup>

The second type of transaction is security over incorporeal moveable property. Here the new statutory pledge, whose creation requires registration in a new Register of Statutory Pledges ('RSP'), is introduced. The 2023 Act as passed only permits statutory pledges over intellectual property or an application for,

<sup>1</sup> Companies Act 2006 Pt 21A and sch 1A (inserted by the Small Business, Enterprise and Employment Act 2015 s 81) and sch 3. See R Caldwell, A Kirk, M Yells and K Horbury 'Scottish share pledges and PSC registers: vexed issues for lenders' (2018) 33 *Butterworths Journal of International Banking and Financial Law* 162.

<sup>2</sup> In November 2023 the UK Government announced a call for evidence on the operation of the 2021 Act including in relation to security transfers of shares in Scottish companies: see <[www.gov.uk/government/calls-for-evidence/call-for-evidence-national-security-and-investment-act/call-for-evidence-national-security-and-investment-act](http://www.gov.uk/government/calls-for-evidence/call-for-evidence-national-security-and-investment-act/call-for-evidence-national-security-and-investment-act)>.

<sup>3</sup> In particular aircraft mortgages, aircraft objects and ship mortgages: see p 196 below.

<sup>4</sup> See now also the Electronic Trade Documents Act 2023 in relation to electronic bills of lading.

<sup>5</sup> (1856) 19 D 152.

<sup>6</sup> For example, a sale and leaseback arrangement may fail because of s 62(4) of the Sale of Goods Act 1979.

<sup>7</sup> Eg Bills of Exchange Act 1882, Stock Transfer Act 1963, and Patents Act 1977.

<sup>8</sup> But compare Law Commission, *Report No 398 on Consumer sales: contracts: transfer of ownership* (2021). This makes recommendations in relation to England and Wales only in relation to reforming rules in the Sale of Goods Act 1979. Note para 1.14 of that Report.

or licence over, intellectual property<sup>1</sup> but there is power given to the Scottish Ministers to specify other categories of incorporeal property over which a statutory pledge may be granted.<sup>2</sup> It is anticipated also that there will be a UK statutory instrument to allow statutory pledges to be granted over financial instruments.<sup>3</sup>

The third type of transaction is security over corporeal moveable property.<sup>4</sup> The statutory pledge will be available for this type of property as well, again requiring registration in the RSP. There are three limited exceptions where there are special security regimes.<sup>5</sup> The traditional (possessory) pledge will remain available for all types of corporeal moveable property, including for consumers under the law of pawn regulated by the Consumer Credit Act 1974.<sup>6</sup>

Finally, in respect of statutory pledges, individuals will be able to grant these only in limited cases. For individuals, the statutory pledge will generally be just for those in business.<sup>7</sup>

### Structure and timetable

The 2023 Act has three parts and runs in total to 122 sections. Part 1 (ss 1–41) deals with assignation of claims. As well as setting out general transactional rules, it establishes the new Register of Assignations ('RoA'). Part 2 (ss 42–113) regulates pledge, in particular making provision for the new Register of Statutory Pledges ('RSP'). In addition, it forbids the creation of new agricultural charges (s 112), a special type of right in security available only to agricultural co-operatives. The rationale for this is that such organisations can grant floating charges instead, which have the same scope. Part 3 (ss 114–122) is much shorter. It deals with miscellaneous and general matters.

The 2023 Act is expected to come into force in the second half of 2024. This is quite an ambitious timetable which may slip. Prior to then the IT work on the RoA and RSP will need to be completed. A number of pieces of subordinate legislation will also be required including register rules for the two new registers. In addition, the UK statutory instrument in relation to financial instruments mentioned above is anticipated although it would be possible for the 2023 Act to be brought into force without this.

### Assignation of claims

#### Claims

Part 1 of the 2023 Act provides for the assignation of claims. A 'claim' is defined as 'a right to the performance of an obligation (including an obligation not to

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1 Moveable Transactions (Scotland) Act 2023 s 47(2).

2 MT(S)A 2023 s 47(3).

3 See p 196 below.

4 See also the Electronic Trade Documents Act 2023 s 3(4) under which electronic trade documents are made corporeal moveable property for the purposes of granting a statutory pledge.

5 Aircraft, aircraft objects and ships: see p 196 below.

6 Consumer Credit Act 1974 ss 114–122.

7 See p 195 below.

do something), but ... does not include a non-monetary right relating to land or a negotiable instrument'.<sup>1</sup> By far the most common example will be a right to payment, such as the right of a business to payment from its customers for goods and services.<sup>2</sup> Another important type of claim is royalties arising from intellectual property. As can be seen from the definition, *monetary* rights against other persons in relation to land are included. This is the one place where the 2023 Act deals with heritable property. The aim of the legislation here is to make assignment of rents payable under leases of land much simpler than under the current law where, for example, if the rents due in respect of all the units in a shopping centre are assigned in security, intimation will be needed to all the tenants. Other incorporeal heritable property, such as an option to acquire land, or real rights such as lease and standard security, is clearly excluded from the definition of 'claim'. So too are many types of incorporeal moveable property, such as intellectual property, as we have already noted above.<sup>3</sup>

### Assignment documents

As under the existing law, there is no requirement for a contract to assign to be in writing, although in practice it typically will be. In contrast to the position under the Requirements of Writing (Scotland) Act 1995,<sup>4</sup> the assignment itself will require a document subscribed in ink or signed electronically by the assignor (cedent).<sup>5</sup> A 'qualified' (that is to say advanced form of) electronic signature is not needed.<sup>6</sup> The document must identify the claim being assigned,<sup>7</sup> but can do so by reference to another document,<sup>8</sup> or in the case of multiple claims identify these by reference to a class (for example, 'customer invoices for February 2024').<sup>9</sup> It is also possible for the document to assign claims not yet held by the assignor, including claims not yet in existence.<sup>10</sup> This will facilitate the assignment of future invoices, although the actual transfer cannot take place until later. An assignment document may also assign a claim which is not to be transferred until a condition is satisfied.<sup>11</sup>

### Transfer of the claim

For the claim to be transferred from the assignor to the assignee, several requirements must all be satisfied. First, the assignor must be the holder of the claim.<sup>12</sup> This is the *nemo plus* rule. It also means that a future claim cannot be transferred until it comes into existence. For example, if an assignment document

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1 MT(S)A 2023 s 41(1).

2 Often termed 'receivables'.

3 See p 189 above.

4 Requirements of Writing (Scotland) Act 1995 s 11(3)(a).

5 Moveable Transactions (Scotland) Act 2023 s 1(1).

6 MT(S)A 2023 s 120(1), (2)(a).

7 MT(S)A 2023 s 1(2).

8 MT(S)A 2023 s 1(5).

9 MT(S)A 2023 s 1(3).

10 MT(S)A 2023 s 1(4).

11 MT(S)A 2023 s 2.

12 MT(S)A 2023 s 3(1), (2)(a).

assigns 'my right to payment in respect of customer invoices' there can be no transfer until a claim against a particular customer arises.<sup>1</sup> Secondly, the claim must be identifiable as a claim to which the assignment document relates.<sup>2</sup> For example, if the assignment document assigns 'my right to payment in respect of the customer invoices listed in schedules to be sent from time to time to [the assignee]', the claim against a particular customer cannot transfer until the relevant invoice is mentioned in such a schedule. Thirdly, any condition to which the assignment is subject must be satisfied.<sup>3</sup> Fourthly, there must either be (i) intimation of the assignment to the debtor or (ii) registration of the assignment document in the Register of Assignations (RoA).<sup>4</sup>

This fourth and final requirement gives effect to one of the major policy objectives of the 2023 Act. Intimation is no longer necessary to transfer a claim. There is the alternative of registration. The reform is facilitative. Registration is not obligatory. For one-off transactions, for example involving members of a family, intimation will doubtless still be used. But for many commercial transactions, such as invoice financing and securitisations, registration is likely to be the preferred option.

### Intimation

At the same time, the 2023 Act modernises the rules on intimation. Normally, this will be done by means of written notice to the debtor by either the assignor or assignee.<sup>5</sup> The notice must provide details of the assignor and assignee, as well as of the claim which has been assigned.<sup>6</sup> It does not have to be signed.<sup>7</sup> In contrast to the position for postal intimation under the Transmission of Moveable Property (Scotland) Act 1862,<sup>8</sup> the notice does not need to be accompanied by a copy of the assignment document, but the debtor may request such a copy before performing to the assignee.<sup>9</sup> The notice may be physically delivered, or posted, or sent electronically to the debtor.<sup>10</sup> As well as intimation by notice, there can be constructive intimation either if the debtor acknowledges to the assignee that the claim has been assigned (such as by making performance) or if there is intimation to the debtor in a court action to which the debtor is a party that the assignment will be founded on.<sup>11</sup> The constructive intimation rules replicate the existing law.

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1 MT(S)A 2023 s 3(3)(a). The common-law rule of accretion is disapplied with there being special rules dealing with where the assignor becomes insolvent: MT(S)A 2023 ss 3(3)(b) and 4.

2 MT(S)A 2023 s 3(1), (2)(c).

3 MT(S)A 2023 s 3(1), (2)(d).

4 MT(S)A 2023 s 3(1), (2)(d). The Scottish Ministers have power to prescribe for certain types of claim that registration is compulsory for transfer but whether that power is used remains to be seen: see MT(S)A 2023 s 3(8).

5 MT(S)A 2023 s 8(1)(a), (3)(b).

6 MT(S)A 2023 s 8(3)(a).

7 MT(S)A 2023 s 8(3)(c).

8 Transmission of Moveable Property (Scotland) Act 1862 s 2.

9 MT(S)A 2023 s 15(1), (2).

10 MT(S)A 2023 s 8(5).

11 MT(S)A 2023 s 8(1)(b).

Intimation will always be needed if the assignee wants to be paid directly by the debtor. The debtor can hardly be expected to do this if that person has no knowledge of the assignment. The 2023 Act gives effect to this policy by having a number of good-faith rules protecting debtors.<sup>1</sup> For example, Angus owes Brenda £1,000. Brenda assigns the claim for payment to Carol who registers the assignment document in the RoA. There is no intimation to Angus. He pays the £1,000 in good faith to Brenda. The debt is discharged.<sup>2</sup> He does not have to pay Carol too. She will require to recover the £1,000 from Brenda.

### Register of Assignations

The RoA is to be managed by the Keeper of the Registers of Scotland.<sup>3</sup> It will consist of two parts: (a) the assignments record; and (b) the archive record.<sup>4</sup> The assignee of a claim may apply for registration of the assignment document.<sup>5</sup> The Keeper is required to accept the application if the relevant criteria are satisfied, including that the application is accompanied by a copy of the assignment document and the registration fee is paid.<sup>6</sup> An entry for the assignment will then be made up in the assignments record which will be given a unique number.<sup>7</sup> This will contain information in relation to the assignment, notably details of the assignor and assignee, and the copy of the assignment document.<sup>8</sup> The applicant for registration will be sent a verification statement by the Keeper if the application is successful.<sup>9</sup> In line with similar registers in other countries, the registration process will be automated but there is a procedure for an entry in the register to be corrected,<sup>10</sup> if for example the wrong document is submitted. Where an entry, or merely a copy assignment document, is removed from the assignments record it will be transferred to the archive record.<sup>11</sup>

Like the Register of Inhibitions, the RoA is a person-based register. It will be searchable normally by reference to the assignor.<sup>12</sup> It will not be searchable by reference to the debtor in the claim, the assignee or the details of the claim itself. The principal purpose of the register is publicity: it enables third parties to see if the holder of a claim has assigned it. For example, a bank seeking to enter into an invoice-financing transaction with a small business can check if there has already been an assignment of claims held by the business.<sup>13</sup>

1 MT(S)A 2023 ss 10–13.

2 MT(S)A 2023 s 10(1), (2).

3 MT(S)A 2023 s 19.

4 MT(S)A 2023 s 20.

5 MT(S)A 2023 s 23(1).

6 MT(S)A 2023 s 23(3).

7 MT(S)A 2023 s 25.

8 MT(S)A 2023 s 21.

9 MT(S)A 2023 s 26.

10 MT(S)A 2023 ss 29, 30.

11 MT(S)A 2023 s 30(1), (2).

12 MT(S)A 2023 s 33(2).

13 While the RoA is not comprehensive, in that claims can still be transferred by intimation to the debtor, it is likely to become standard practice for certain commercial transactions such as invoice financing that there will be registration. Intimation is also impractical for assignment of future claims. See p 188 above.

The publicity objective would be defeated if the details contained in the RoA were materially incorrect, for example the wrong registered number is given for a company which has assigned claims. Therefore the claim will transfer only if the registration is ‘effective’.<sup>1</sup> This means that the entry in the assignments record must not be seriously misleading.<sup>2</sup> The 2023 Act provides a non-exhaustive list of situations where there is this type of inaccuracy, typically where a search by reference to the assignor’s details will not retrieve the entry.<sup>3</sup> In addition, an effective registration enabling a claim to transfer requires the entry in the assignments record to include a copy of the assignment document and that document must be valid.<sup>4</sup>

Certain persons, such as creditors with the right to execute diligence, are entitled to seek further information from the assignee identified in the entry, for example as to whether specific claims have been assigned if the details of these are in off-register documents.<sup>5</sup>

### Miscellaneous

The 2023 Act also codifies a number of other rules on assignment of claims, including making provision in relation to (i) the rule *assignatus utitur jure auctoris* (the debtor has the same defences against the assignee as the debtor had against the assignor);<sup>6</sup> (ii) the effect of the assignment on accessory security rights;<sup>7</sup> (iii) partial assignment;<sup>8</sup> and (iv) warrandice.<sup>9</sup> There are also provisions on how assignability may be limited by statute, common law or the agreement of the parties to the claim.<sup>10</sup> Since the 2023 Act will make the assignment of claims easier, it has a specific consumer-protection provision debarring the assignment of wages or salaries.<sup>11</sup> Finally, certain common-law rules are abolished,<sup>12</sup> including the ability of a mandate to operate as an assignment of a claim<sup>13</sup> and the right of an assignee to sue in the name of the assignor.<sup>14</sup>

### Security over moveable property

Part 2 of the Moveable Transactions (Scotland) Act 2023 makes provision both for the ‘possessory’ pledge already recognised prior to the legislation and for

1 MT(S)A 2023 s 3(4).

2 MT(S)A 2023 s 27(1)(a)(ii).

3 MT(S)A 2023 s 28.

4 MT(S)A 2023 s 27(1)(a)(i), (b).

5 MT(S)A 2023 s 36.

6 MT(S)A 2023 s 14.

7 MT(S)A 2023 s 16.

8 MT(S)A 2023 s 5.

9 MT(S)A 2023 s 9.

10 MT(S)A 2023 s 6.

11 MT(S)A 2023 s 7.

12 MT(S)A 2023 s 17(1).

13 See G L Gretton and K G C Reid, *Conveyancing* (5th edn, 2018) para 24-09.

14 But this does not affect where there is subrogation, so that insurance companies can continue to sue in the name of the insured: MT(S)A 2023 s 17(2). See further R G Anderson, ‘The Redoubtable Procurator *in rem suam*’ in N Jansen and S Meier (eds) *Iurium itinera: Historische Rechtsvergleichung und vergleichende Rechtsgeschichte* (2022) 269 at 283–90.

the new 'statutory' pledge which it introduces. The two types of pledge differ as to (i) who can grant them, (ii) the property which can be encumbered, and (iii) how they are created. The enforcement rules are broadly the same. Much of Part 2 of the Act regulates the Register of Statutory Pledges (RSP) in which statutory (but not possessory) pledges are to be registered.

### Statutory pledge

#### Who can grant?

The 2023 Act uses the term 'provider' for a person granting a pledge.<sup>1</sup> Typically this will be the same person as the debtor in relation to the debt secured by the pledge, but third-party security (where one person grants a pledge for the debts of another) is also possible.<sup>2</sup>

The Scottish Law Commission had recommended that any person could grant a statutory pledge, but with special protections for consumers. During the passage of the Bill which led to the 2023 Act, the Scottish Government accepted the evidence of Citizens Advice Scotland, law centres and money advisers that this placed vulnerable consumers at risk of exploitation by sub-prime lenders. The solution was to ban the statutory pledge from being granted by consumers to any lender.<sup>3</sup> This resulted in changes being made to the Bill mid-passage. Such amendments always risk unforeseen consequences.<sup>4</sup> There are no restrictions on statutory pledges being granted by companies and other juristic persons.

Under the 2023 Act as passed only three types of individual may provide a statutory pledge.<sup>5</sup> The first is a sole trader in relation to assets used or to be used wholly or mainly for business purposes. The second is a charity trustee in relation to assets of the charity. The third is a member of an unincorporated association in relation to assets held for the association. In all three cases, where the asset is corporeal moveable property the asset must be worth at least £3,000 immediately before the grant of the statutory pledge.<sup>6</sup> This amount can be modified by statutory instrument; likewise the categories of asset over which individuals may grant a statutory pledge can be restricted.<sup>7</sup> It is not clear why only charity trustees are included and not, for example, pension trustees.<sup>8</sup> The amendment also arguably excludes partnerships constituted under the law of England or another legal system under which, unlike Scotland, the firm does not have legal personality.<sup>9</sup>

1 As defined in MT(S)A 2023 s 113(1).

2 MT(S)A 2023 s 43(1)(a).

3 The more appropriate solution is stricter regulation of lenders (a matter for the Consumer Credit Act 1974 rather than the law of security).

4 See eg s 53 of the Title Conditions (Scotland) Act 2003. The problems with this eventually necessitated the Scottish Law Commission being requested to review it. See Scottish Law Commission *Report No 254 on Section 53 of the Title Conditions (Scotland) Act 2003* (2019). This has not yet been implemented.

5 MT(S)A 2023 s 46(1), (2)(a).

6 MT(S)A 2023 s 46(2)(b).

7 MT(S)A 2023 s 46(3).

8 If a pension trustee is a corporation, it may grant a statutory pledge.

9 The counter-argument is that the partners are individuals acting in the course of their business (together) as individuals within the meaning of MT(S)A 2023 s 46(1)(a)(i).

### Encumbered property

Statutory pledges may be granted over corporeal moveable property with three minor exceptions, in respect of each of which there are already special security regimes: certain aircraft,<sup>1</sup> aircraft objects<sup>2</sup> and ships.<sup>3</sup> As noted above,<sup>4</sup> statutory pledges over incorporeal moveable property are restricted initially to intellectual property or applications for, or licences over, intellectual property. The Scottish Ministers have power to add further categories of incorporeal moveable property to the regime. The Scottish Law Commission had recommended that financial instruments should be included but the Scottish Government considered that the law in relation to these is reserved to the UK Parliament.<sup>5</sup> The intention is that an order will be sought under s 104 of the Scotland Act 1998 to bring these within the scheme. This will need to be made by UK Ministers.

### Fixed security

Like a standard security but unlike a floating charge, a statutory pledge is a 'fixed security' for the purposes of corporate insolvency law. This means that it has a higher ranking than a floating charge. The price for that is that the provider cannot be free to deal with the encumbered property, and give a purchaser an unencumbered title, without the secured creditor's consent. The 2023 Act therefore has provisions to prevent the parties enabling the statutory pledge to be used in a way tantamount to a floating charge.<sup>6</sup> This means that the statutory pledge is not suitable for stock-in-trade and is more aimed at assets such as vehicles and equipment with which a business is not dealing.

### Creation

Statutory pledges require a constitutive document.<sup>7</sup> This has to identify both the encumbered property and the secured obligation.<sup>8</sup> The signing rules are the same as for documents assigning claims: ink or a basic electronic signature may be used.<sup>9</sup>

For a statutory pledge to be created it is required that: (i) the encumbered property belongs to the provider; (ii) the encumbered property is identifiable as property to which the constitutive document relates; and (iii) there is registration in the RSP.<sup>10</sup> In respect of (i), while it is competent to create a statutory pledge

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- 1 In respect of which an aircraft mortgage can be created under the Civil Aviation Act 1982 s 86.
  - 2 In respect of which an international interest in aircraft can be created under the International Interests in Aircraft Equipment (Cape Town Convention) Regulations 2015, SI 2015/912.
  - 3 In respect of which a ship mortgage can be created under the Merchant Shipping Act 1995 s 16.
  - 4 See pp 189–90 above.
  - 5 In terms of the Scotland Act 1998 sch 5 Pt II Head A4 (regulation of financial markets). See Scottish Government, *Moveable Transactions (Scotland) Bill Policy Memorandum* (2022) para 151.
  - 6 If the provider and secured creditor agree that the provider can deal freely with the encumbered property, the statutory pledge will be extinguished: see MT(S)A 2023 ss 51, 52.
  - 7 MT(S)A 2023 s 45(1).
  - 8 MT(S)A 2023 s 45(2)(b), (c).
  - 9 MT(S)A 2023 ss 45(2)(a) and 120.
  - 10 MT(S)A 2023 s 48(1), (2).

over future assets, for example ‘all vehicles which we acquire’,<sup>1</sup> the secured creditor will obtain a right in security only on the provider becoming owner of the property.<sup>2</sup> In respect of (ii), it is competent for the encumbered property to be identified for example as ‘vehicles to be listed in schedules sent to the secured creditor’, in which case a particular vehicle is not encumbered until so listed and sent. In respect of (iii), there needs to be an effective registration, as discussed below.

Statutory pledges granted by companies and LLPs will also require to be registered at Companies House under Part 25 of the Companies Act 2006. This alas means double registration as for standard securities. It can only be hoped that in the future information-sharing arrangements between the RSP and the Companies Register will be authorised under section 893 of the 2006 Act so that only a single registration is required.

### Register of Statutory Pledges

The Register of Statutory Pledges works in broadly the same way as the Register of Assignations (discussed above), but is more complex. This is because an assignation is a type of event, namely a transfer, whereas a statutory pledge is itself a right. As such, a statutory pledge can be amended, assigned, restricted or discharged. The RSP needs to be able to reflect such changes. Like the RoA, it is to be managed by the Keeper<sup>3</sup> and to have two parts: (a) the statutory pledges record, and (b) the archive record.<sup>4</sup> When a successful application is made to register a statutory pledge the Keeper will make up an entry for it in the statutory pledges record<sup>5</sup> and send the applicant a verification statement.<sup>6</sup> The entry will include details of the provider, the secured creditor, and the encumbered property, together with a copy of the constitutive document.<sup>7</sup>

It is possible for the Scottish Ministers to prescribe categories of encumbered property where a unique serial number must be registered.<sup>8</sup> The standard example in comparator legislation in other countries is a vehicle identification number (‘VIN’). Registration of such a number is practical only in certain types of transaction; it would not for example be practical if security is being granted over vehicles present and future because it would be too onerous to have to update the register repeatedly.

As for the RoA, a registration in the RSP needs to be ‘effective’.<sup>9</sup> If it is not, no statutory pledge will be created. Registration is ineffective if the entry is seriously misleading (normally meaning that a search against the

<sup>1</sup> It is competent to identify the encumbered property by reference to a class: MT(S)A 2023 s 45(3)(b).

<sup>2</sup> There are also special rules for where the provider of the statutory pledge subsequently becomes insolvent: MT(S)A 2023 s 50.

<sup>3</sup> MT(S)A 2023 s 81.

<sup>4</sup> MT(S)A 2023 s 82.

<sup>5</sup> MT(S)A 2023 s 87.

<sup>6</sup> MT(S)A 2023 s 90.

<sup>7</sup> MT(S)A 2023 s 83.

<sup>8</sup> MT(S)A 2023 s 83(1)(e).

<sup>9</sup> MT(S)A 2023 s 48(3).

provider would not be able to find it) or if it lacks a copy of a valid constitutive document in respect of the statutory pledge.<sup>1</sup> Again like the RoA, certain persons such as creditors seeking to execute diligence have the right to request information in relation to the entry, such as whether certain property (remains) encumbered.<sup>2</sup>

The secured creditor can apply to correct an entry if it is inaccurate.<sup>3</sup> The inaccuracy may have arisen due to a mistake made at the time of the registration, for example wrong details being given in relation to the provider. Supervening inaccuracies will be much more common because, as shall be seen below, a number of transactions in relation to a statutory pledge, such as discharge, can be done off-register in the interests of commercial expediency. The entry can then be brought up to date by correcting it. There is also a procedure whereby someone who is (now)<sup>4</sup> wrongly named as the provider of a statutory pledge can demand that the secured creditor corrects the entry, failing which that person can apply directly to the Keeper for the correction to be made.<sup>5</sup>

### **Amendment**

Writing being required for the creation of a statutory pledge, it is also needed for its amendment.<sup>6</sup> It will only, however, be necessary to register an amendment if it increases the scope of the secured obligation or encumbers additional property.<sup>7</sup> The amendment procedure is unlikely to be much used. As for standard securities, the secured obligation from the outset will typically be all sums due and to become due. Where it is intended that the statutory pledge will cover future assets, the description of the encumbered property in the constitutive document will be in broad terms or by reference to off-register documents.

### **Protection of good-faith acquirers**

As a real right, a statutory pledge survives the transfer of the encumbered property by the provider to a third party. Acquirers can protect themselves by searching against the provider in the RSP. In certain situations, however, it would be unreasonable to expect a search to be carried out and therefore the 2023 Act has rules allowing good-faith acquirers to take the encumbered property free of the statutory pledge in certain situations.

The first situation is a purchase from someone acting in the ordinary course of a business.<sup>8</sup> Since a statutory pledge is inappropriate for stock-in-trade this rule is likely to operate where the property has come into the hands of another business from the provider or otherwise and that business then sells the property.

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1 MT(S)A 2023 s 91.

2 MT(S)A 2023 s 107.

3 MT(S)A 2023 ss 96, 97 and 101.

4 Where the statutory pledge did exist but is now extinguished.

5 MT(S)A 2023 ss 98, 99.

6 MT(S)A 2023 s 58(1).

7 MT(S)A 2023 s 58(6), (7).

8 MT(S)A 2023 s 53.

The second situation is a purchase by someone wholly or mainly for personal, domestic or household purposes. The Scottish Ministers have power to set a maximum value for assets falling within this rule.<sup>1</sup>

The third situation is a purchase of a motor vehicle by a private individual.<sup>2</sup> This mimics the existing rule protecting private purchasers of vehicles which are subject to hire-purchase.<sup>3</sup>

In addition, a good-faith purchaser will be protected where it is not possible to find the seller in the RSP because of a supervening inaccuracy, such as a provider who is an individual and who changes name.<sup>4</sup>

### Assignment

Assignment of a statutory pledge by the secured creditor must be done in writing.<sup>5</sup> Registration in the RSP is not necessary but the parties may choose to update the register by means of a correction. The secured debt will of course also need to be assigned.

### Ranking

The ranking of a statutory pledge follows the normal rule *prior tempore potior jure* (ie first in time, first in right). The relevant moment in time is creation.<sup>6</sup> Where more than one statutory pledge is granted over future assets, ranking is by date and time of registration.<sup>7</sup> A statutory pledge ranks below a security arising by operation of law.<sup>8</sup> Ranking agreements can be made to alter the default ranking rules as between the parties who sign up to them, but these are not registrable on the basis that other creditors are not affected.<sup>9</sup>

### Enforcement

The normal trigger for enforcement of a statutory pledge is default on the secured obligation, but the parties can agree other circumstances in which enforcement can take place.<sup>10</sup> In enforcing, the secured creditor must conform to reasonable standards of commercial practice.<sup>11</sup> First, a pledge enforcement notice must be served on the provider and certain other persons.<sup>12</sup> A court order

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1 MT(S)A 2023 s 54.

2 MT(S)A 2023 s 55.

3 Hire Purchase Act 1964 s 27.

4 MT(S)A 2023 s 93. For example, on marriage. For corporations, the RSP will typically be searched by registration number so if, say, a company changes name the entry will still be retrieved by a search against the number.

5 MT(S)A 2023 s 57.

6 MT(S)A 2023 s 60(1).

7 MT(S)A 2023 s 60(2).

8 MT(S)A 2023 s 60(3).

9 MT(S)A 2023 s 60(4).

10 MT(S)A 2023 s 64.

11 MT(S)A 2023 s 64(4). This requirement is found in comparator legislation in other countries and may already be Scots law. For example, to delay unduly in realising the encumbered property could breach the requirement because of the adverse effect on other creditors.

12 MT(S)A 2023 s 65.

is generally not required but, importantly, is needed where the provider is a sole trader.<sup>1</sup> In the case of corporeal moveable property, the secured creditor is entitled to take possession of the encumbered property under a regulated procedure.<sup>2</sup>

Generally, the secured creditor will want to sell the property and may do so subject to a duty to take all steps to obtain the best price reasonably obtainable.<sup>3</sup> Other possibilities are (i) to lease the property and obtain rental income;<sup>4</sup> (ii) in the case of intellectual property, to grant a licence and receive the royalties;<sup>5</sup> and (iii) to appropriate the property.<sup>6</sup> In the case of (iii) what happens is that the value of the property is put towards satisfying the secured debt. In the absence of a prior agreement with the secured creditor allowing appropriation, the provider, and other parties with an interest such as other creditors, can veto appropriation and require the property to be sold. The proceeds realised following enforcement must be distributed to creditors in accordance with their ranking.<sup>7</sup>

### Restriction and discharge

A statutory pledge may be (i) restricted to some of the encumbered property or (ii) entirely discharged, in either case by the secured creditor using writing.<sup>8</sup> Registration in the RSP is not necessary but in practice the provider will want to see the entry in the statutory pledges record corrected to reflect the change. Where there has been discharge, the correction will result in the entry being moved by the Keeper to the archive record.<sup>9</sup>

### Possessory pledge

As under the common law, possessory pledges may continue to be created over corporeal moveable property.<sup>10</sup> The 2023 Act provides for the methods of delivery which can be used to create a possessory pledge, therefore overturning *Hamilton v Western Bank*.<sup>11</sup> The first possibility is 'actual' delivery whereby the property is physically handed over, or control of it or the premises in which it is stored is given to the secured creditor.<sup>12</sup> The second possibility is 'constructive' delivery by intimating the pledge to a third-party custodian such as a warehouse company.<sup>13</sup> The third possibility is 'symbolical' delivery, applying only to goods on board a

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1 MT(S)A 2023 s 66.  
2 MT(S)A 2023 s 67.  
3 MT(S)A 2023 s 68.  
4 MT(S)A 2023 s 70.  
5 MT(S)A 2023 s 71.  
6 MT(S)A 2023 ss 73–76.  
7 MT(S)A 2023 s 77.  
8 MT(S)A 2023 s 59.  
9 MT(S)A 2023 ss 101(2) and 102(2).  
10 MT(S)A 2023 s 42(2)(a), (b).  
11 See p 189 above.  
12 MT(S)A 2023 s 44(1)(a), (b).  
13 MT(S)A 2023 s 44(1)(c).

ship where delivery is made by handing over the bill of lading.<sup>1</sup> No writing is required for possessory pledges.<sup>2</sup>

In the case of consumers pledging to pawnbrokers, enforcement continues to be regulated by the Consumer Credit Act 1974.<sup>3</sup> But in all other cases the rules for enforcement of possessory pledges are put on the same footing as statutory pledges.<sup>4</sup> This is sensible as the two types of pledge, while created in a different way, give a secured creditor the same thing, a right of security in the encumbered property.

### Assessment

Once completely in force, the 2023 Act will bring considerable change to the law of moveable transactions in Scotland. The need to use cumbersome workarounds because of outdated rules on assignation of claims and security over moveable property should be a thing of the past.<sup>5</sup> The hope is that the 2023 Act regime will be rolled out further, in the first instance by enabling statutory pledges to be created over financial instruments by means of an order under s 104 of the Scotland Act 1998. Other classes of incorporeal moveable property may be added later. The reform should bring significant economic benefits. At the very least, Scots law will catch up with the more flexible arrangements which English law offers. It might even surpass them.<sup>6</sup>

## LAND REGISTRATION AND POSSESSION OF THE SOLUM<sup>7</sup>

### The problem of inconsistent titles

Suppose that flats in a tenement are sold over a number of years. There are four flats altogether. The split-offs of the three upper flats confer a right of common property in the solum. But the split-off of the ground-floor flat, the last to be granted, purports to confer 100% ownership of the solum. That might be done expressly. But, more commonly, it would be done by implication because, under the default provisions of the Tenements (Scotland) Act 2004, the unqualified conveyance of a ground-floor flat includes, by implication, a conveyance of the solum underneath that flat.<sup>8</sup> This is a trap for conveyancers. If, in a split-off, the

<sup>1</sup> MT(S)A 2023 s 44(1)(d).

<sup>2</sup> Although under the Consumer Credit Act 1974 s 114 a pawnbroker must issue a receipt.

<sup>3</sup> MT(S)A 2023 s 63.

<sup>4</sup> MT(S)A 2023 ss 64–77. For the common law rules, see A J M Steven, *Pledge and Lien* (Studies in Scots Law vol 2, 2008) paras 8-01 to 8-18.

<sup>5</sup> The use of some workarounds, in particular hire purchase, will nevertheless continue.

<sup>6</sup> See further H Patrick and A Kinnes, 'Moveable transactions: Scotland v England: Round 1 – assigning receivables' (2023) 38 *Butterworths Journal of International Banking and Financial Law* 602, and 'Moveable transactions: Scotland v England: Round 2 – taking security over chattels' (2023) 38 *Butterworths Journal of International Banking and Financial Law* 675.

<sup>7</sup> This section is by Kenneth Reid.

<sup>8</sup> Tenements (Scotland) Act 2004 s 2(4). In the same way, as a result of s 2(3), the unqualified conveyance of a top-floor flat includes, by implication, a conveyance of the roof above that flat.

intention is for the ground-floor flat to be given only a right of common property in the solum, this must be stated expressly. Silence is the equivalent of a grant of 100% ownership.

Inconsistencies of the kind just described are perhaps more common than they ought to be. What are the consequences? In 'ordinary' property law, the position is straightforward enough. By the time the split-off of the ground-floor flat comes to be granted, the granter has already given away one-quarter *pro indiviso* shares in the solum to each of the three upper flats. Only a single one-quarter share is left to the granter. Accordingly, whatever the split-off disposition of the ground-floor says or does not say, the disposition cannot convey more than a quarter share in the solum. Chronology thus rescues inattention. Because the ground-floor flat is conveyed last, the result is happiness all round: as was always intended, each flat receives a quarter share in the solum.

Matters would be less happy, of course, if the ground-floor flat was disposed first. Then the granter would have given away 100% of the solum and so have had nothing left to convey in the dispositions of the three remaining flats.

Let us leave that unhappy prospect on one side. Our case is the apparently happy one, where the ground-floor flat is conveyed last. Importantly, though, the case is happy only for as long as it is regulated by ordinary property law. The position is different if the title to one or more of the flats happened to be registered in the Land Register at a time when the governing legislation was still the Land Registration (Scotland) Act 1979. For, as often as not, the 1979 Act acted to subvert the ordinary rules of property law, with consequences that can be far from happy.

### The new case

#### The facts

All of this is by way of background to the decision of the Lands Tribunal in *Graham v Keeper of the Registers of Scotland*.<sup>1</sup> The facts were much as in the example discussed above. The split-off deed of an upper flat at Dickson Street in Hawick, granted in 1984, conveyed 'a joint right in common' to the solum. Much later, in 2005, the split-off disposition of the shop on the ground floor conveyed 100% of the solum.<sup>2</sup> The disposition induced first registration in the Land Register, and so the new title sheet, in turn, was expressed as including sole ownership of the solum. Meanwhile the title to the upper flat continued to be held on a Sasine title. So matters rested until recently when (presumably because of a change in ownership) the title to the upper flat, too, fell to be registered in the Land Register. At this point the issue with the solum came to light. In order to resolve this (and other) matters, the new owners of the upper flat applied to the Lands Tribunal for a determination of the accuracy of the title sheet of the ground-floor shop.<sup>3</sup>

<sup>1</sup> 16 November 2023, Lands Tribunal. The Tribunal comprised R Smith KC.

<sup>2</sup> Whether this was expressly or by implication we do not know.

<sup>3</sup> The application was made under s 82 of the Land Registration etc (Scotland) Act 2012.

### The law

Was the title sheet of the ground-floor shop inaccurate in respect of the solum? Perhaps, or perhaps not. Plainly, it was inaccurate at the time of first registration, in 2005, because, for reasons already mentioned, the split-off disposition could have carried no more than a right of common property in the solum. And, incontestably, the title sheet remained inaccurate for as long as it continued to be governed by the 1979 Act – that is, until 8 December 2014 (the so-called ‘designated day’ on which the Land Registration etc (Scotland) Act 2012 replaced the 1979 Act). Being inaccurate, the title sheet could in principle have been rectified. But whether it could actually be rectified would have depended on whether, in relation to the solum, the owner of the ground-floor shop was a proprietor in possession – or, to say the same thing more simply, was in possession of the solum. This is because, under the 1979 Act, the Register could not usually be rectified to the prejudice of a proprietor in possession.<sup>1</sup>

But matters had now moved on. The 2012 Act had replaced the 1979 Act. Whether the title sheet continued to be inaccurate today – and hence whether it was still capable of being rectified – was determined by the transitional provisions set out in schedule 4 of the 2012 Act. And, under these provisions, the result depended on whether, immediately before the changeover (ie on 7 December 2014, the day before the designated day), the Register could have been rectified by the Keeper. As we have seen, that in turn depended on whether, on that day, the owner of the ground-floor shop was or was not in possession of the solum. If rectification would have been possible, then, in terms of the transitional provisions in the 2012 Act, the title sheet continued to be inaccurate and so could still be rectified today.<sup>2</sup> If, conversely, rectification would not have been possible, the title sheet ceased to be inaccurate on the designated day meaning that, today, there could be no longer be any question of rectification.<sup>3</sup>

### A preliminary question: possession of what?

The issue to be determined by the Lands Tribunal, therefore, was whether, on 7 December 2014, the owner of the ground-floor shop was or was not in possession of the solum. But at this point a complication arose which, as far as we know, has not arisen in any previous case. What the parties were fighting over was not the solum but only a *share* in the solum. The title sheet showed the ground-floor as including the entirety of the solum whereas, or so it was alleged by the proprietors of the upper flat, it should only have included a *pro indiviso* share in the solum – another such share being associated with the upper flat. We do not know how many flats were in the tenement but if, for example, there were four (as in the hypothetical case with which this section began), then the argument

1 Although there were some exceptions: see Land Registration (Scotland) Act 1979 s 9(3)(a).

2 LR(S)A 2012 sch 4 para 17. Under this provision, what had previously been a ‘bijural’ inaccuracy became an ‘actual’ inaccuracy, that is to say, the 100% ownership in the solum was, by force of law, reduced to a right in common (even without the Register being altered), so that there was now a mismatch between what the law said and what the title sheet said.

3 LR(S)A 2012 sch 4 para 22.

would have been that (i) only a one-quarter share in the solum should have been included in the title sheet of the ground-floor shop and (ii) that another one-quarter share was a pertinent of the upper flat and so should be included in the title sheet of that flat as part of the process of first registration which was currently underway. Hence the property in dispute was not the whole solum but only a fractional share in it – on the figures just given, a one-quarter share. And so the issue to be determined was less whether the ground-floor proprietor had been in possession of the solum than whether he had been in possession of the one-quarter share in the solum which was now being claimed by the upper proprietor.

The question of how, precisely, one possesses a mere *pro indiviso* share is far from clear.<sup>1</sup> But in the present case the issue really resolved into whether, on 7 December 2014, the ground-floor proprietor (i) had been in sole possession of the solum (in which case he was also in possession of the disputed quarter share) or (ii) had been sharing the possession with the upper proprietor (among others), in which case it would have been the upper proprietor, and not the ground-floor proprietor, who was in possession of the disputed quarter share.

### **The main question: who was in possession of the solum?**

What, then, was the state of possession on 7 December 2014? Unsurprisingly, there was no direct evidence as to the position, and matters had to proceed by inference. The starting point was the provision of the 2012 Act to the effect that, on 7 December 2014, it is the registered proprietor who is presumed to be in possession. The registered proprietor was of course the owner of the shop. Nonetheless, and with a proper hesitation borne of the fact that the shop proprietor had ceased to engage with the issue and hence to offer contrary arguments, the Lands Tribunal concluded that, while the shop proprietor had possessed the solum on 7 December 2014, that possession was shared with, among others, the proprietor of the upper flat. Hence the inaccuracy on the Register remained.

The Tribunal's reasoning is founded on common sense:<sup>2</sup>

The solum is the soil and ground upon which the property is built. If a share of the solum is part of a ground floor flat (and there is no basement) belonging to a party within a tenement, it is easy to see how that party can be said to be in possession of the solum. Why should the position be any different for the party occupying the first floor flat? That flat relies upon the solum for its foundations and in that sense the solum is used by the owner. In these circumstances, albeit without the benefit of citation of authority, we would be inclined to think that the applicants and their predecessors have all along been in possession of a share of the solum by virtue of their occupation of their upper flat. In these circumstances we do not think the act of registration of the ground floor shop in 2005, and its consequent occupation, can properly be said to have displaced that possession.

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<sup>1</sup> The issue also arose in another case from 2023, *Wallace-Martinez v Nisbet* [2023] SC EDIN 9, 2023 GWD 10-105: see pp 124–26 above.

<sup>2</sup> Paragraph 13.

That may be correct. Apart from anything else, it has the great merit of sorting out the blundered conveyancing, leaving each flat with a right in common to the solum. Yet there are grounds for hesitation. There were no *actual* possessory acts in respect of the solum. What the Tribunal was doing, therefore, was to say that possession of one thing (a flat in the tenement) was also the possession of another thing (the solum of the building).<sup>1</sup> For that to be compelling as a conclusion there has to be a clear connection between the first thing and the second. The Tribunal found the connection in the fact that both flats were supported by the solum. But was that enough? In what might seem to be the analogous case of minerals, there is old authority to the effect that possession of the surface can be treated as possession of the minerals beneath the surface if the owner of the surface has a title, and possibly only an express title, to the minerals.<sup>2</sup> In the present case the solum, at the material time, was owned solely by the shop proprietor and not at all by the proprietor of the upper flat. It may seem open to question, therefore, whether possession of the upper flat could count as possession of a solum which was the sole property of someone else.

### Does the result matter?

At one time, the ownership of the solum in a tenement was thought to matter a very great deal, and those acting in the purchase of upper flats expended much time and effort in ensuring that the title included a right in common to the solum. But these days are largely gone. In particular, if a tenement is demolished, s 22 of the Tenements (Scotland) Act 2004 now provides that the proceeds of sale of the site are to be divided amongst all flat-owners regardless of who happened to own the solum. Yet there are two circumstances where the ownership of the solum might still be important. One is if the solum is to be put to use – for example, if it is to be excavated to provide a cellar or, more exotically, a swimming pool. The other is if the air-space above the tenement is to be used, because whoever owns the solum is the owner also of the airspace.<sup>3</sup> These, however, are hardly everyday occurrences.

## PROPERTY TAXES IN SCOTLAND<sup>4</sup>

### Overview

Despite there being potentially about a year to go in the United Kingdom and longer still in Scotland, there was the whiff of elections in the air in the tax world in 2023. In the UK as a whole, this manifested itself in an actual tax cut,

<sup>1</sup> That, in itself, is a principle that is well established, going back at least as far as Viscount Stair: see Stair, *Institutions* II.1.13.

<sup>2</sup> *Crawfurd v Bethune* (1821) 1 S 111; *Forbes v Livingstone* (1827) 6 S 167 at 175.

<sup>3</sup> Tenements (Scotland) Act 2004 s 2(6). But the owner of the roof owns such air-space as is likely to be needed for a dormer window: see s 2(7).

<sup>4</sup> This section is by Alan Barr of Brodies LLP and the University of Edinburgh.

in that income tax by another name, National Insurance Contributions.<sup>1</sup> There was much speculation about further tax cuts to come in the Spring Budget, set for 6 March 2024 (very early in historic terms), including possible reductions in, or even abolition of, inheritance tax. In contrast, in Scotland, there are to be significant income tax rises for more wealthy Scottish taxpayers following the Scottish Budget for 2024–25, which may point to getting some unwelcome news (to some) out of the way well in advance of the next Scottish Parliamentary elections.

After the confusing wealth of tax announcements (and reversals) involving the range of Prime Ministers and Chancellors who held office in 2022,<sup>2</sup> the sequence of Government tax events returned to something like normal, with a UK Autumn Statement (including the NIC cut mentioned above) on 22 November 2023, followed by the early Christmas gift of the Scottish Budget on 19 December 2023.

The pattern of new deliverers (or at least deliverers with different hats) of Scottish Budgets also continued, with this latest one being the first delivered by Shona Robison as Cabinet Secretary for Finance, succeeding (in reverse order) John Swinney as maternity cover for Kate Forbes, Kate Forbes in her own right, Kate Forbes as a very late replacement for Derek Mackay, and Derek Mackay himself.

Before that, the Scottish *Programme for Government 2023–24*, published in September 2023, had rather more to say than usual on tax policy, at least at the highest level. Shona Robison explained:<sup>3</sup>

In a short time, my team and I have taken important steps to ensure our public finances remain on a sustainable trajectory, targeting our funding and prioritising our spending to support our key missions, while also continuing to deliver the most progressive tax system in the UK.

The publication of the Medium-Term Financial Strategy has been central to this work. It is underpinned by three pillars: focusing spending decisions on achieving our three critical missions, supporting sustainable, inclusive economic growth and the generation of tax revenues, and maintaining and developing our strategic approach to tax. It outlines our approach to addressing the challenges to the sustainability of our finances so that we can continue to deliver high quality public services in the face of high inflation, and it also details the failure of the UK Government funding to keep pace with it. The first meeting of the external Tax Advisory Group has taken place, which will support the development and delivery of our longer-term tax strategy. As part of this, the group will review evidence and consider the appropriateness of tax reforms in the Scottish context. We have also reached an agreement with the UK Government on the Fiscal Framework Review, the first substantive amendment to the Fiscal Framework since it was originally agreed in February 2016, which will give

1 *Autumn Statement 2023*, paras 3.5–3.13, see <[https://assets.publishing.service.gov.uk/media/6568909c5936bb00133167cc/E02982473\\_Autumn\\_Statement\\_Nov\\_23\\_Accessible\\_Final.pdf](https://assets.publishing.service.gov.uk/media/6568909c5936bb00133167cc/E02982473_Autumn_Statement_Nov_23_Accessible_Final.pdf)>. The main reductions in Class 1 and Class 4 contributions have been implemented from 6 January 2024 by the National Insurance Contributions (Reduction in Rates) Act 2023; the abolition of Class 2 contributions will take effect from 6 April 2024.

2 See *Conveyancing 2022* pp 215–18 for an attempt to describe the sequence of events.

3 *Equality, Opportunity, Community: Programme for Government 2023–24*, <[www.gov.scot/publications/programme-government-2023-24/](http://www.gov.scot/publications/programme-government-2023-24/)> p 13.

us more tools to manage tax volatility. While this additional flexibility is welcome, UK funding decisions are still the largest determinant of the Scottish Government's Budget, and we still do not have the full range of fiscal levers at our disposal to manage the scale of the challenges that we face.

The plethora of frameworks and strategies which has marked Scottish tax policy continues and further developments in a formal Tax Strategy can be expected to be published in 2024.<sup>1</sup> In the meantime, those taxes under the control of the Scottish Government continue to diverge from their equivalents in rUK (usually on a more 'progressive' basis, in the sense of being proportionately higher for those with greater resources). This applies to land and buildings transaction tax in terms of past changes, and to Scottish income tax in relation to forthcoming ones, dealt with below. All tax-gatherers are still having to cope with the aftermath of Covid-19 along with more recent economic shocks deriving from war in Ukraine and otherwise.

The Scottish Government continues to receive advice on taxation from more or less external sources. As dealt with in some detail last year,<sup>2</sup> these include the Scottish Land Commission. While there was in 2023 nothing as detailed as their paper from January 2022, *Land Reform and Taxation: Advice to Scottish Ministers*,<sup>3</sup> a short article in November 2023 continued to develop overlapping themes of land taxation and land reform:<sup>4</sup>

Calls for reform are unlikely to go away, with a challenging outlook for public finances and a high proportion of our national wealth held in land and property. Questions of how that wealth is used productively, and therefore who contributes more and how, are rightly questions for our politics and governments.

The importance of land in the tax base has long been recognised, with proposals for reforms in a series of tax reviews over the years including the Mirrlees review of 2011 which concluded there is a strong case for replacing business rates with a land value tax and for reform of council tax.

The Scottish Land Commission, in our advice to Ministers, recommends strengthening the role land plays in the tax base. We propose systemic reforms to include all land on the valuation roll and to develop a cadastral 'one-stop-shop' approach to information on land ownership, use and value. Putting these measures in place would open up the future policy options for governments to reform and improve the way we tax land values.

Overlapping but more radical advice on taxation was offered by the Institute for Public Policy Research, in a joint briefing note with various charities and other organisations, *The case for fair tax reform in Scotland*.<sup>5</sup> The briefing note advises

1 For further information on the Tax Advisory Group, see <[www.gov.scot/news/advisory-group-on-tax-strategy/#:~:text=%E2%80%9CA%20we%20set%20out%20recently,finances%20on%20a%20sustainable%20footing](http://www.gov.scot/news/advisory-group-on-tax-strategy/#:~:text=%E2%80%9CA%20we%20set%20out%20recently,finances%20on%20a%20sustainable%20footing)>.

2 See *Conveyancing* 2022 p 219.

3 <[www.landcommission.gov.scot/downloads/61efa7134df72\\_Land%20Reform%20and%20Taxation%20-%20Advice%20to%20Scottish%20Ministers.pdf](http://www.landcommission.gov.scot/downloads/61efa7134df72_Land%20Reform%20and%20Taxation%20-%20Advice%20to%20Scottish%20Ministers.pdf)>.

4 Hamish Trench, *Taxing Questions*, <[www.landcommission.gov.scot/news-events/news/taxing-questions?p\\_slug=news](http://www.landcommission.gov.scot/news-events/news/taxing-questions?p_slug=news)>.

5 <[https://oxfamapps.org/scotland/wp-content/uploads/2023/09/The-case-for-fair-tax-reform-in-Scotland-Joint-briefing-FINAL\\_September-2023-1-2.pdf](https://oxfamapps.org/scotland/wp-content/uploads/2023/09/The-case-for-fair-tax-reform-in-Scotland-Joint-briefing-FINAL_September-2023-1-2.pdf)>.

higher income tax rates and even a local inheritance tax; on property it offers the following summary:<sup>1</sup>

Property is the most valuable type of wealth held by households in Scotland, making property taxation a natural starting point for improving wealth taxation. Any reforms or replacement of the Council Tax must tax property wealth more fairly and seek to contribute towards gender equality. Rapid consideration is needed of options such as a new percentage of value property tax, alongside measures to tax other forms of wealth.

The IPPR, even with its allies in relation to this briefing, does not have the same degree of influence as the Scottish Land Commission, but discussions of, and recommendations for, some form of land value tax continue to emerge from various sources. When this is added to a continuing programme of land reform more generally, it seems unlikely that forms of land taxation will ever be off the potential agenda in Scottish tax policy.

On the Scottish tax litigation front, there were far fewer cases before the Scottish Tax Tribunal than in 2022; all were on additional dwelling supplement for LBTT and continued Revenue Scotland's 100% success rate on such cases. However, a very large proportion of all such cases on ADS would not have been required, and if taken would have reached the result sought by the taxpayers, if a series of long-awaited reforms to ADS had been in place. All of these matters are discussed below.

### Land and buildings transaction tax

#### Rates of basic LBTT

In contrast to developments following some similar remarks in relation to Scottish income tax, the Scottish Government has maintained its commitment not to change the basic rates and thresholds of LBTT for the duration of this Parliament.<sup>2</sup> This was confirmed in the 2023 Scottish Budget.<sup>3</sup> This means that the residential rates remain as follows:

Consideration	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%

<sup>1</sup> Institute for Public Policy Research, *The case for fair tax reform in Scotland*, Summary of recommendations.

<sup>2</sup> See *A Fairer, Greener Scotland: Programme for Government 2021–22*, <[www.gov.scot/publications/fairer-greener-scotland-programme-government-2021-22/documents/](http://www.gov.scot/publications/fairer-greener-scotland-programme-government-2021-22/documents/)> pp 95 (LBTT), 114 (Scottish income tax).

<sup>3</sup> *Scottish Budget 2024–25* pp 24–26.

Non-residential/mixed rates for purchases are as follows:

Consideration	Rate
Up to £150,000	Nil
£150,001–£250,000	1%
Over £250,000	5%

For leases, the rates remain:

NPV of rent payable*	Rate
Up to £150,000	Nil
£150,000–£2m	1%
Over £2m	2%

\*LBTT on lease premiums is payable at the same rates and bands as non-residential conveyances.

Among the more interesting expectations for the 2023 Scottish Budget was a forecast that LBTT residential receipts will fall quite considerably in 2024–25, before recovering in subsequent years.<sup>1</sup> This forecast is thought to derive from general economic considerations, rather than LBTT policy, although, interestingly, receipts from non-residential transactions are forecast to increase in every year covered by the forecast.

### Green freeports relief

Inverness and Cromarty Firth Green Freeport and Forth Green Freeport have been selected as the two Scottish green freeports.<sup>2</sup> Within each green freeport area there will be three designated tax sites. There is a range of tax and other incentives available within green freeports and the specifically tax sites (the latter not yet having been designated). The tax measures include:

- LBTT relief on the purchase or lease of qualifying non-residential property;
- enhanced capital allowances;
- National Insurance Contributions (NICs) relief;
- non-domestic rates relief, available for businesses occupying property in the green freeport tax sites; and
- customs duty exemptions and other benefits.

The relevant LBTT relief has been introduced, although in advance of the designation of the tax sites, it is not yet in effective force.<sup>3</sup> The Order provides for

<sup>1</sup> *Scottish Budget 2024–25* p 26.

<sup>2</sup> See announcement at <[www.gov.scot/news/green-freeports/](http://www.gov.scot/news/green-freeports/)>.

<sup>3</sup> See Land and Buildings Transaction Tax (Green Freeports Relief) (Scotland) Order 2023, SSI 2023/280, inserting sch 16D into the Land and Buildings Transaction Tax (Scotland) Act 2013.

a full or partial relief from LBTT. The relief is available for eligible transactions relating to land in the designated green freeport tax sites only. Full relief is available when at least 90% of the chargeable consideration for the transaction relates to qualifying land in a designated green freeport tax site. Partial relief is available when at least 10% of the chargeable consideration for the transaction relates to qualifying land in a designated green freeport tax site. The land in question has to be used in a qualifying manner – essentially this means commercial/business use (including property rental), but not necessarily in any way connected with the type of trade implied by the designated areas including ‘port’ in their names.

There are some concerns (on both sides of the border) over the technical detail of the conditions for the reliefs being obtained. As an example, the meaning or interpretation of the word ‘develop’ in this context, particularly where ‘forward funding’ for the development is part of the intended financial structure, remains to be established.

Detailed guidance, with examples, on this important relief for the areas selected is now available on the Revenue Scotland website.<sup>1</sup>

### **Additional dwelling supplement**

Although forecast receipts from additional dwelling supplement (‘ADS’) track those for basic LBTT (falling for 2024–25, before full recovery and an increase by 2026–27),<sup>2</sup> the proportion of overall residential LBTT deriving from ADS continues at its somewhat surprising level of around 30%. This is an increase from previous years, doubtless driven by what was the then surprising 50% increase in the rate of ADS (from 4% to 6%) which took effect from 16 December 2022.<sup>3</sup> There appears to be little fear of a downturn in the proportion of purchases which attract ADS.

The forecast period also covers (one must optimistically assume) the time when some long-anticipated reforms to ADS will actually come into effect; and this indicates that the Scottish Government does not expect the reforms to cost a great deal of revenue. The possible reforms were first formally discussed as long ago as 2021.<sup>4</sup> Consultation has continued since then, the latest public version in February 2023 including a draft statutory instrument.<sup>5</sup> That undoubtedly required some amendments; and the amending (and suitably amended) legislation has now been laid before the Scottish Parliament.<sup>6</sup> A further minimum period requires to elapse before any new law comes into force; and one thing that has been stated often since reforms were proposed is that they will not be

1 See <<https://revenue.scot/taxes/land-buildings-transaction-tax/lbtt-legislation-guidance/lbtt3001-exemptions-reliefs/lbtt3010-tax-reliefs/lbtt3049-green-freeports>>.

2 *Scottish Budget 2024–25* p 26.

3 See Land and Buildings Transaction Tax (Additional Amount: Transactions Relating to Second Homes etc) (Scotland) Amendment Order 2022, SSI 2022/375.

4 See *Conveyancing 2021* pp 197–99.

5 See <[www.gov.scot/publications/land-buildings-transaction-tax-additional-dwelling-supplement-proposed-amendments-additional-dwelling-supplement-legislation/](http://www.gov.scot/publications/land-buildings-transaction-tax-additional-dwelling-supplement-proposed-amendments-additional-dwelling-supplement-legislation/)>.

6 See *Scottish Budget 2024–25* p 25, and the draft Land and Buildings Transaction Tax (Miscellaneous Amendments) (Scotland) Order 2024 at <[www.legislation.gov.uk/sdsi/2024/9780111058992/](http://www.legislation.gov.uk/sdsi/2024/9780111058992/)>.

retrospective. The revisions are scheduled to come into effect on 1 April 2024. As a reminder, the changes will cover:

- an extension to 36 months of the 18-month time limit within which a disposal of a previous main residence must occur to allow for the repayment of ADS; and a similar extension to 36 months of the period before a purchase within which the purchasers must have owned their previous main residence;
- an improvement to the position of divorcing and separating couples (but only those in a formal relationship), allowing in rather limited circumstances a partner who has departed but still owns a share in the previous home to purchase a new home without ADS being charged;
- a very limited exclusion of inherited properties when considering whether more than one dwelling is owned at the time of purchase;
- a welcome extension of the exclusion which applies to dwellings with a value less than £40,000, so that the threshold applies where a share of a property is owned rather than applying to the total value of the property;
- a complex but reasonably comprehensive change in the rules which apply to owners in common acquiring and disposing of dwellings, where they each previously owned a separate main residence; and
- a new relief for local authorities acquiring residential property for affordable housing.

### Litigation on ADS

A very high proportion of First-tier Tribunal cases since additional dwelling supplement was introduced has concerned its perceived unfairness in a wide range of circumstances; and they have involved the Tribunal frequently pointing out that it has no jurisdiction to consider the fairness or otherwise of the legislation.<sup>1</sup> Many of the issues considered would be obviated as and when the reforms to ADS mentioned above become law, but this will be of little comfort to the losing taxpayers (and they have all been losing taxpayers) in that litigation, nor to the undoubtedly larger number who did not proceed to litigate – and as noted the changes will not affect transactions settling before they come into effect.

There were very few Scottish tax tribunal decisions issued in 2023, but all were on additional dwelling supplement.

*Tavendale v Revenue Scotland*<sup>2</sup> concerned a claim for repayment of ADS. The purchase of a new main residence settled on 26 February 2021; ADS of some £7,000 was paid. The taxpayer proceeded to sell his previous main residence and submitted a claim for repayment on the basis that this had been achieved on 23 August 2022 – three days before the permitted period of 18 months expired. But

<sup>1</sup> See for a good range of examples the cases considered in *Conveyancing 2022* pp 221–24.

<sup>2</sup> [2023] FTSTC 1, 2023 GWD 12-127.

all that had happened on that date was the issuing of a qualified acceptance by the purchaser of the previous main residence – as that very document revealed, settlement of that transaction was not to be due until 29 September 2022, well beyond 18 months after the new purchase. The appeal was on the basis that, although settlement of the sale was outwith the permitted period, the sale had in fact been agreed by the earlier date. This argument was understandably rejected by the Tribunal, again emphasising that it has to apply the law as it stands, with no ability to consider fairness or extenuating circumstances. The case serves as a reminder that the date which counts for LBTT is almost always the date of settlement. It is not the date of conclusion of missives (although in this case the missives were not even concluded by the relevant date) – which is the opposite of the position which applies for capital gains tax. The extension of the relevant period to 36 months as proposed in the ADS reforms would have brought a different result in this case, but the principle as to the appropriate date to be considered will remain the same.

*Duran v Revenue Scotland*<sup>1</sup> dealt with difficulties at the other end of the relevant period, before the purchase of a new main residence. Mr Duran had left the matrimonial home, owned in common with his wife, in April 2015. He purchased a new property on 29 August 2019, and paid ADS of £12,348 on that purchase. On 5 November 2021, he transferred his share of the former matrimonial home to his ex-wife and sought to reclaim the ADS on his purchase. Although this was outwith the 18-month period allowed for the disposal of a previous main residence, Mr Duran's purchase was at a time where that period was, briefly, extended to 36 months because of Covid-19.<sup>2</sup> His repayment claim, however, was refused, on the basis that the residence of which he had disposed had not been his main residence since April 2015.

Mr Duran's argument was that, although he had not physically occupied his previous matrimonial home, it nevertheless remained his main residence. He had only resided in temporary accommodation through necessity and had not had any other main residence; his children continued to reside in the former matrimonial home. This was rejected. It was not really conceivable that a property in which a person had had no physical occupation at all could be that person's 'main residence'. Based on case law where the concept of a main residence had been considered in relation to other taxes (and indeed non-tax matters), the Tribunal concluded that 'it is difficult to envisage a scenario in which a property could be viewed as a main residence if, as a matter of fact, no time had been spent there in the relevant period, as is the case in the present appeal'.<sup>3</sup>

In terms of the proposed reforms of ADS, the extension of the period before a purchase within which a previous main residence would require to be occupied as such would not have assisted – the gap here was more than four years. And

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1 [2023] FTSTC 2, 2023 GWD 34-284.

2 Coronavirus (Scotland) (No 2) Act 2020 sch 4 para 6(3), inserting Land and Buildings Transaction Tax (Scotland) Act 2013 sch 2A para 8B for a temporary period. The change expired by virtue of the Coronavirus (Scotland) Acts (Early Expiry of Provisions) Regulations 2020, SSI 2020/249, regs 1, 3(b)(ii).

3 Paragraph 27.

the proposed reform for divorcing couples is unlikely to have assisted, as in terms of the draft legislation a formal agreement as to the retention of the former matrimonial home would have been required.<sup>1</sup>

In the third Tribunal decision from 2023, *McCarter v Revenue Scotland*,<sup>2</sup> the substantive point was essentially the same as that in *Duran*, although hung around with procedural failures by both the taxpayer and Revenue Scotland. For various, possibly good, reasons, the taxpayer had not occupied his previous main residence to any extent at all in the 18 months before the purchase of his new main residence – it had been let out.<sup>3</sup> Once again, the lack of any occupation was sufficient to exclude the right to repayment, regardless of any considerations of fairness.

### Scottish income tax

While income tax, of course, is not only about the taxation of land, income from land is one of the categories of income for Scottish taxpayers which is affected by the differing rates (and thresholds) applying to Scottish taxpayers, although not, perhaps ironically, to other taxpayers with income from Scottish land. This is another anomaly deriving from a partially devolved tax system: fully independent tax systems generally tax income (and indeed gains) deriving from land located within their jurisdiction regardless of the location of the recipient.

For 2023–24 the following income tax rates and thresholds were confirmed.<sup>4</sup>

Bands	Band name	Rate
Over £12,570–£14,732*	Starter rate	19%
Over £14,733–£25,668	Scottish basic rate	20%
Over £25,669–£43,662	Intermediate rate	21%
Over £43,663–£125,140	Scottish higher rate	42%
Above £125,140**	Top rate	47%

\* Assumes individuals are in receipt of the standard UK personal allowance.

\*\* Those earning more than £100,000 will see their personal allowance reduced by £1 for every £2 earned over £100,000, as in the rest of the UK.

Moving to 2024–25, the Scottish Budget brought two substantial changes to Scottish income tax. The first was extensively trailed before the Budget announcements – a new rate of Scottish income tax affecting income between

1 See the draft statutory instrument attached to the February 2023 consultation, <[www.gov.scot/publications/land-buildings-transaction-tax-additional-dwelling-supplement-proposed-amendments-additional-dwelling-supplement-legislation/](http://www.gov.scot/publications/land-buildings-transaction-tax-additional-dwelling-supplement-proposed-amendments-additional-dwelling-supplement-legislation/)>.

2 [2023] FTSTC 3.

3 It is not known at what point he *had* occupied his previous property and thus whether the proposed ADS reforms would have assisted his position if they had been in place.

4 See Scottish Rate Resolution, 9 February 2023, <[www.parliament.scot/chamber-and-committees/official-report/search-what-was-said-in-parliament/meeting-of-parliament-09-02](http://www.parliament.scot/chamber-and-committees/official-report/search-what-was-said-in-parliament/meeting-of-parliament-09-02)>.

£75,001 and £125,140. The rate will be 45%. The rate acquired a name ('advanced'), increasing the menagerie of differentiated Scottish tax-rate names by one. As in education, so in tax – 'Advanced' meaning beyond 'Higher'.

In a less anticipated change, the Scottish top rate of tax itself advanced, by one percentage point, to 48%. It thus creeps closer to the figure of 50% which has been at least mentioned as a possibility in recent years, and increases the differential for Scottish taxpayers on the highest part of their earned (or property) income from 2% to 3%. It is always worth the reminder that Scottish income tax rates apply only to Scottish taxpayers, and then only on their income from employment, self-employment, or land (and buildings).

The introduction of the new advanced rate means that Scotland will have six rates of income tax as compared to the three rates which apply in the rest of the UK.

The thresholds for the starter and (Scottish) basic rate bands will increase in line with inflation (6.7%), while the higher and top rate thresholds will remain the same. The starter band, which previously covered taxable income up to £14,732 will now extend to income up to £14,876. The (Scottish) basic rate band will now cover income between £14,877 and £26,561. All of this produces the following table of tax rates on earned and property income for Scottish taxpayers for 2024–25:<sup>1</sup>

<b>Bands</b>	<b>Band name</b>	<b>Rate</b>
£12,571–£14,876	Starter rate	19%
£14,877–£26,561	Scottish basic rate	20%
£26,562–£43,662	Intermediate rate	21%
£43,663–£75,000	Scottish higher rate	42%
£75,001–£125,140	Advanced rate	45%
Above £125,140	Top rate	48%

\* Assumes individuals are in receipt of the standard UK personal allowance.

\*\* Those earning more than £100,000 will see their personal allowance reduced by £1 for every £2 earned over £100,000, as in the rest of the UK.

The introduction of the advanced rate increases the effects of an anomaly which derives from the UK rule that the personal allowance is withdrawn gradually (at £1 for every £2 of income) for incomes above £100,000. For Scottish taxpayers with earned/property income above that level, the slice of income between £100,000 and £125,140 will now be subject to income tax at a marginal rate of 67.5%, with 2% NICs payable in addition. The attractiveness of increased income subject to that level of tax will be increasingly questionable. On the other hand, using that income for pension contributions or charitable donations would come at a further reduced direct cost to affected taxpayers.

<sup>1</sup> *Scottish Budget 2024–25* pp 23–24.

In contrast, one other anomaly continues with slightly reduced effects, although the reduction derives from the changes to National Insurance. NIC thresholds, and the reduction in the main rates of NICs which takes place when income exceeds certain levels, are now tied to the rUK higher-rate income tax threshold (now fixed at £50,271 unless altered in the UK Spring Budget). This means that an employee with earnings between the Scottish higher-rate threshold of £43,663 and the rUK higher-rate threshold of £50,271 will suffer a marginal income tax and NIC rate of 52% on that slice of income (reduced to 50% in the UK Spring Budget 2024). The fact that the Scottish higher-rate threshold did not increase at all for 2024–25 (despite a high rate of inflation) will mean that fiscal drag does its stuff, bringing more people into this marginal anomaly. As this is actually caused by the NIC rates, only pension contributions (and not charitable donations) can provide a version of an escape route.

The increased income tax rates for Scottish taxpayers have inevitably caused comments on the possible effects of the Laffer curve, beloved of some economists, on the successive income tax ranges. The basic notion is simple enough – increase tax rates by enough and taxpayers will decline to earn the income taxable at the higher rates, thus reducing the overall tax take at some point on the curve. It is equally simple when considered at the extremes – 0% tax rates would produce no tax, while 100% tax rates would also produce no tax, as no-one would work to retain nothing. The simplicity towards the 100% end of the curve is, however, flawed because taxpayers' decisions are also driven by what is provided in return for the tax – an argument doubtless attractive to the Scottish Government.

In the Scottish context, there is another factor that is particularly relevant: in addition to taxpayers who may decide to do less work because of higher marginal or absolute rates, there may be taxpayers who decide to do the same amount of work, but not as Scottish taxpayers, or not for receipts in the form of earned or property income. While that consideration also applies to fully independent tax systems from which taxpayers can choose to withdraw in favour of a new location, it is perhaps easier and less disruptive for a Scottish taxpayer to become a taxpayer elsewhere in the UK than to lose UK residency entirely: easier, but not easy, with the tests for intra-UK tax status more akin to those applying to domicile than the residence rules. But the pure financial incentive to consider the possibility of such a move has certainly grown with this Scottish Budget, and any who successfully make such a move will take all of their income tax with them, not just that at the increased Scottish rates.

### Other Scottish property taxes

#### Scottish landfill tax

Rates of Scottish landfill tax for 2023–24 were set by the Scottish Landfill Tax (Standard Rate and Lower Rate) Order 2023<sup>1</sup> at £102.20 per tonne (standard rate) and £3.25 (lower rate). The rates for 2024–25 were set out in the Scottish

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<sup>1</sup> SSI 2023/50.

Budget in December 2023 at £103.70 (standard) and £3.30 (lower), maintaining consistency with landfill charges in the rest of the UK and discouraging ‘waste tourism’.<sup>1</sup> The credit rate for the Scottish Landfill Communities Fund (‘SLCF’) will be maintained at 5.6%, the same as in the previous year.<sup>2</sup>

### Scottish aggregates tax and aggregates levy

Provision was made in the Scotland Act 2016<sup>3</sup> for the devolution of aggregates levy to Scotland, but a combination of litigation on the UK version of the tax and a range of consultations, including a UK-wide review in 2020, delayed the process. After this long delay (during which a number of consultations were carried out),<sup>4</sup> real progress was finally made with the introduction of the Aggregates Tax and Devolved Tax Administration (Scotland) Bill to the Scottish Parliament on 14 November 2023.<sup>5</sup> The Scottish Budget confirmed that, assuming the Bill and necessary secondary legislation is passed, a Scottish aggregates tax will come into operation on 1 April 2026.<sup>6</sup>

Scottish aggregates tax will replace the current UK aggregates levy. In determining the overall approach, the Scottish Government considered leaving matters under the UK legislation entirely or alternatively initiating a radically different approach. In the end a middle course was chosen:<sup>7</sup>

The second option, which the Bill provides for, is a replacement tax that retains the fundamental structure of UKAL, while also ensuring there is scope to consider an approach that is tailored to Scotland’s needs and aligned with Scottish Government objectives. This includes options for the improved collection and administration of the tax. Overall, this approach offers a degree of continuity for taxpayers, retaining core elements of UKAL that have been subject to litigation and scrutiny, as well as the above-mentioned review, while also ensuring that the devolved tax can evolve over time to support Scottish Government circular economy objectives.

Thus the Bill, perhaps predictably, draws heavily on its rUK predecessor,<sup>8</sup> although there are significant differences of ordering and otherwise, for example on aggregates moving from and to other parts of the United Kingdom. There is also room for considerable flexibility in future, including to move from a single flat rate (a single rate being the initial intention), and on matters such as credits.

The Bill is divided into six substantive chapters, with an important additional chapter on interpretation. Chapter 1 defines the tax and gives responsibility to Revenue Scotland to administer and collect it. Chapter 2 deals with key concepts

1 *Scottish Budget 2024–25* p 26.

2 *Scottish Budget 2024–25* p 26.

3 See Scotland Act 2016 s 17; Scotland Act 1998 s 80M.

4 For details, see *Aggregates Tax and Devolved Taxes Administration (Scotland) Bill Policy Memorandum*, <[www.parliament.scot/-/media/files/legislation/bills/s6-bills/aggregates-tax-and-devolved-taxes-administration-scotland-bill/introduced/policy-memorandum-accessible.pdf](http://www.parliament.scot/-/media/files/legislation/bills/s6-bills/aggregates-tax-and-devolved-taxes-administration-scotland-bill/introduced/policy-memorandum-accessible.pdf)> paras 29–35.

5 See the Bill and full range of related documentation, <[www.parliament.scot/bills-and-laws/bills/aggregates-tax-and-devolved-taxes-administration-scotland-bill/introduced](http://www.parliament.scot/bills-and-laws/bills/aggregates-tax-and-devolved-taxes-administration-scotland-bill/introduced)>.

6 *Scottish Budget 2024–25* p 31.

7 *Aggregates Tax and Devolved Taxes Administration (Scotland) Bill Policy Memorandum* para 25.

8 See Finance Act 2001 Pt 2.

underlying the tax, including what aggregate is taxable, what aggregate and processes are exempt from the tax, what is commercial exploitation, and who is liable to pay the tax. Chapter 3 sets out how the amount of tax is to be calculated and gives a power to the Scottish Ministers to set the rate of tax.

Chapter 4 deals with administration of the tax, including registration, tax returns, and special cases (more general administration deriving from the Revenue Scotland and Tax Powers Act 2014). Chapter 5 continues this theme by dealing with penalties, including those for failure to make a return, failure to pay tax, and failure to register for tax. Chapter 6 deals with reviews and appeals, while chapter 7 contains interpretation provisions on important terms.

### **Non-domestic (business) rates (and council tax)**

The basic rate poundage was set at 49.8p for 2023–24.<sup>1</sup> A number of sets of regulations were passed in early 2023,<sup>2</sup> implementing a range of announcements on non-domestic rates made in the Scottish Budget 2023–24.<sup>3</sup>

As in several recent years, announcements on non-domestic rates for 2024–25 were substantial in the most recent Scottish Budget<sup>4</sup> – receipts from them form a significant part of overall Scottish tax revenue. The most significant announcement was a further freezing of the basic property rate, charged on properties with a rateable value up to £51,000, at 49.8p. Other rates will rise by inflation: the intermediate property rate, which applies to properties with a rateable value of between £51,001 and £100,000, will be charged at 54.5p; the higher property rate of 55.9p will be charged on properties with a rateable value above £100,000. A number of reliefs are to be maintained, including the business growth accelerator (UK) and day nursery and fresh start reliefs (Scotland only).

A special 100% relief is to be introduced in 2024–25 for the hospitality sector in island communities for businesses located on islands as defined by the Islands (Scotland) Act 2018, capped at £110,000 per business.

<sup>1</sup> Non-Domestic Rate (Scotland) Order 2023, SSI 2023/29.

<sup>2</sup> These were: (i) Non-Domestic Rates (Restriction of Relief) (Scotland) Regulations 2023, SSI 2023/28, placing conditions on the granting of certain reliefs so that they comply with the Subsidy Control Act 2022; (ii) Non-Domestic Rates (Levying and Miscellaneous Amendment) (Scotland) Regulations 2023, SSI 2023/30, making provision for special rates charges (usually reductions from the norm) in various specified circumstances (as set out in the *Scottish Budget 2023–24*); (iii) Non-Domestic Rates (Transitional Relief) (Scotland) Regulations 2023, SSI 2023/31 (amended very quickly by the Non-Domestic Rates (Transitional Relief) (Scotland) Amendment Regulations 2023, SSI 2023/63), dealing with transitions into various reliefs; (iv) Valuation for Rating (Plant and Machinery) (Scotland) Amendment Regulations 2023, SSI 2023/32, adding (in relation to renewable energy and vehicle-charging equipment) to the exceptions which apply to the rules on plant and machinery being treated as heritable for rating purposes; and (v) Valuation Timetable (Scotland) Amendment Order 2023, SSI 2023/109, Valuation Timetable (Scotland) Amendment (No 2) Order 2023, SSI 2023/166, and Valuation (Proposals Procedure) (Scotland) Amendment Regulations 2023, SSI 2023/207, all extending various deadlines in relation to property revaluation and processes following it.

<sup>3</sup> Most of these announcements were discussed in *Conveyancing 2022* pp 227–28.

<sup>4</sup> *Scottish Budget 2024–25* pp 27–30. Some of these announcements have now been implemented: see Non-Domestic Rate (Scotland) Order 2024, SSI 2024/3; Non-Domestic Rates (Levying and Miscellaneous Amendment) (Scotland) Regulations 2024, SSI 2024/4; and Non-Domestic Rates (Transitional Relief) (Scotland) Regulations 2024, SSI 2024/5.

The 90% renewables district heating relief will be continued until 31 March 2027, and will be expanded to include not only new networks, but all district heating networks, where at least 80% of the thermal energy generated derives from renewables. Enterprise areas relief, currently due to end on 31 March 2024, will instead be phased out over the succeeding next two years, offering in effect a transitional relief. Telecommunications mast relief will be extended from 31 March 2029 until 31 March 2031.

All other existing NDR reliefs will be maintained in 2024–25. This includes the multi-year transitional relief schemes announced in the Budget 2023–24, which protects many businesses from the full effects of the 2023 revaluation, and was introduced to protect those properties which saw the biggest increases in rateable values as a result of that.

Empty property relief will remain devolved in 2024–25 to individual councils.

Council tax remains the responsibility of local authorities and received only a brief mention in the Scottish Budget 2024–25. However, that confirmed the ongoing discussions with COSLA to deal with the funding required to meet the (Scottish) Government's announcement of a national council tax freeze.<sup>1</sup>

### **Further (potential) Scottish tax measures**

In a slightly surprising move (given that Scottish Bills are often restricted in their permitted scope), some changes to tax administration were contained in the Aggregates Tax and Devolved Tax Administration (Scotland) Bill, introduced to the Scottish Parliament on 14 November 2023.<sup>2</sup> While these might be considered relatively minor, some of their implications may be more far-reaching. For example, provision is made for Revenue Scotland to refuse a repayment claim for tax where the claimant has failed to pay other devolved tax due. There is also provision for offset of tax debits against credits. This will be rare at present (given that it does not extend to the main UK-based taxes), but would provide for example a right to Revenue Scotland to refuse to repay LBTT where there was an apparent liability to pay Scottish landfill tax. More welcome (although perhaps somewhat taxpayer age-dependent) may be provisions allowing for the extension of electronic communication to and from Revenue Scotland, and also powers to allow greater use of automation by Revenue Scotland.

The Scottish Budget also contained mention that the Scottish Government was seeking the transfer of powers to introduce a devolved building safety levy, to fund the Cladding Remediation Programme.<sup>3</sup> There will be consultation on this process.

Noting the potential overlap with other Scottish Government objectives on 'land management outcomes' with particular relevance to peatland and

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<sup>1</sup> *Scottish Budget 2024–25* p 30.

<sup>2</sup> See Aggregates Tax and Devolved Tax Administration Bill Pt 2, <[www.parliament.scot/-/media/files/legislation/bills/s6-bills/aggregates-tax-and-devolved-taxes-administration-scotland-bill/introduced/bill-as-introduced.pdf](http://www.parliament.scot/-/media/files/legislation/bills/s6-bills/aggregates-tax-and-devolved-taxes-administration-scotland-bill/introduced/bill-as-introduced.pdf)>.

<sup>3</sup> *Scottish Budget 2024–25* p 31. This will require further UK involvement to allow for the creation of a new national tax under the Scotland Act 1998 s 8B, as there is as yet no relevant existing levy to be devolved. For the Cladding Remediation Programme, see p 68 above.

woodland, the Scottish Government will also consider proposals for a carbon emissions land tax, suggested by the John Muir Trust.<sup>1</sup>

## UK taxes on land

### Capital gains tax

The phased reduction of the annual exempt amount for capital gains tax from its 2022–23 level of £12,300 to £6,000 in 2023–24 will continue to its (currently) final level of £3,000 in 2024–25.<sup>2</sup> As noted last year, this will bring many more disposals into the charge to tax; and, coupled with the need to report chargeable disposals of residential property within 60 days of settlement,<sup>3</sup> it increases the compliance burden on those disposing of land assets, in particular following a sale or gift. However, the need for reporting where there is no tax payable has been reduced somewhat, as this will no longer be required where disposal proceeds are less than £50,000. This figure was previously tied to a multiple of four times the annual exempt amount.<sup>4</sup>

Some significant changes have now been made in relation to capital gains tax for separating or divorcing couples, for disposals after 5 April 2023.<sup>5</sup> Until then, transfers between such partners were only treated as made on a no gain/no loss basis if such transfers were made in the same tax year as separation. That has been extended until the end of the third year of assessment after the year of separation; and indefinitely where such transfers take place in terms of formal arrangements between the parties for the termination of their relationship. In a further important relaxation of the rules, a partner who leaves the matrimonial home but retains ownership in whole or in part is given the option of claiming principal private residence relief for the period after he or she has left.<sup>6</sup>

An anomaly has been corrected in relation to exchanges of interests in land, where such exchanges could previously qualify for rollover relief or principal private residence relief for capital gains tax if made by individuals. It has been clarified that the reliefs will be available where title is held by limited liability or Scottish partnerships.<sup>7</sup>

We do not in these pages normally deal with what can be a substantial amount of litigation on UK taxes. However, it is worth mentioning one case, a decision of the Upper Tribunal, as it relates directly to the acquisition and disposal of land and buildings, resolves competing decisions from (lower) tribunals, and involves considerations of ‘ownership’, on which some of the underlying law may differ as between England and Scotland. The case is *Lee and Another v HMRC*.<sup>8</sup>

1 *Scottish Budget 2024–25* p 31.

2 Finance Act 2023, amending Taxation of Chargeable Gains Act 1992 s 1K(2).

3 See Finance Act 2019 sch 2 para 3(1)(b), as amended by Finance Act 2022 s 23(2).

4 Finance Act 2023 s 8(7), amending Taxes Management Act s 8C(1)(b).

5 Finance (No 2) Act 2023 s 41, amending Taxation of Chargeable Gains Act 1992 s 58 and inserting s 225BA.

6 Taxation of Chargeable Gains Act 1992 s 225B, as amended by Finance (No 2) Act 2023 s 41(3).

7 Taxation of Chargeable Gains Act 1992 ss 248A and 248E, as amended by Finance (No 2) Act 2023 s 43.

8 [2023] UKUT 00242 (TCC).

The issue relates to the availability of CGT principal private residence relief on a disposal of land and buildings where the purchaser does not move into a residence immediately after the acquisition, either for the very good reason that the house has not been built yet, or it requires renovation or decoration. For the most part, this problem did not arise very often in practice, because of what was originally Extra Statutory Concession D 49 and is now s 223ZA of the Taxation of Chargeable Gains Act 1992. This enables the period of ownership prior to occupation to be treated as a period of occupation for the purposes of PRR, provided that the house as built (or renovated or decorated etc) became the main residence of the owner within two years of acquisition of the land. However, the relaxation did not apply in *Lee* as the period between acquisition of the property and the house being completed and becoming the main residence of the owner was greater than two years.

The facts and indeed the legal problem were summed up with admirable concision in the opening paragraphs of the Upper Tribunal decision:

Mr and Mrs Lee bought a plot of land on 26 October 2010, demolishing the existing house, and building a new house which they then lived in from 19 March 2013. They claimed Private Residence Relief ('PRR') on the gain which arose when they later sold the plot on 22 May 2014 under s 223(1) Taxation of the Chargeable Gains Act 1992 ('TCGA 1992'). That provided that no gain was chargeable 'if the dwelling-house ... has been the individual's only or main residence throughout the period of ownership ...'. They thus considered all of the gain accruing from 26 October 2010 to 22 May 2014 was eligible for PRR.

HMRC's position, however, was PRR was only available for a proportion of the gain. Under the apportionment provisions of s 223(2) TCGA 1992, that proportion was derived by the fraction calculated by dividing the length of the period of ownership during which the new house was the Lees' main residence (March 2013 to 22 May 2014) by the (in this case longer) 'period of ownership' of the land (26 October 2010 to 22 May 2014).

The question here was whether 'period of ownership' refers to ownership of the house alone, or whether it includes the period of ownership of the land on which the house was subsequently built. If the latter, this can be bad news for the taxpayer, as a proportion of the gain will potentially be chargeable as not covered by PPR. The taxpayers here succeeded at the Finance and Tax Tribunal, in that their period of ownership was decided to relate to the period of ownership of the newly-built house – and as that had been their principal residence throughout the period of its existence, the whole gain was exempt. HMRC appealed, arguing that the 'period of ownership' must refer to the whole period of ownership of the land on which the house was built. Self-evidently, the land could not have been the taxpayers' 'residence' throughout that period and a proportion of the gain was thus chargeable. In this case, that produced an eye-watering chargeable gain of £541,821.

The Upper Tribunal agreed with the taxpayers and the lower tribunal, despite eight carefully argued grounds put forward by HMRC. The key was interpreting 'period of ownership' where there was no statutory expansion on that term. The Upper Tribunal's starting point was that, on a straightforward textual analysis,

the period of ownership must refer to the ownership of the house. The Tribunal judges then proceeded to decide whether there was any reason to depart from this basic analysis.

One possible ground, according to HMRC, was that it was simply not possible to own the house separately from the land on which it stood, an argument which would perhaps be even more true in Scotland. The Tribunal did not accept HMRC's view on this entirely, citing the case of a flat, where the ownership of a flat may well be separate from the ground on which the block stands. But, in the Tribunal's view, if one is considering the period of ownership of a dwelling-house, that period can only commence after the dwelling-house exists.

Further HMRC arguments based on the possibility of apparently absurd results, unfairness, and 'double relief' (once on the land and then again on the house) were also rejected. Possibly inconsistent case law from the Court of Appeal<sup>1</sup> was distinguished and a Special Commissioner's decision to the opposite effect<sup>2</sup> was not followed. Arguments on unnecessary complexity, difficulties of ascertaining when ownership (of a dwelling house) commenced, possible abuse, and apparent redundancy of other provisions were also rejected.

Mention of possible abuse points to this not being a decision directing advisers to planning, but it does remove a threat which would have surprised taxpayers living in their house throughout its existence.

### **Annual tax on enveloped dwellings**

The annual tax on enveloped dwellings ('ATED') was increased by CPI inflation (the September 2022 figure) for the 2023–24 fiscal year.<sup>3</sup> There will be a similar indexation rise (6.7%) for 2024–25.<sup>4</sup>

### **Value added tax**

VAT assignment under the Scotland Act 2016 allows for the first 10 pence of standard-rate VAT receipts and the first 2.5 pence of reduced-rate VAT receipts raised in Scotland to be assigned to the Scottish Government. It has now been confirmed that, in the absence of separate Scottish VAT returns from which to make estimates, the assignment will be based on a model of expenditure in Scotland. Once agreed between officials, the assignment methodology and operating arrangements will be agreed between the Governments in terms of the 2023 Fiscal Framework Agreement.<sup>5</sup>

<sup>1</sup> *Higgins v HMRC* [2019] EWCA Civ 1860, [2020] 1 WLR 906.

<sup>2</sup> *Henke v HMRC* [2006] STC (SCD) 561.

<sup>3</sup> Annual Tax on Enveloped Dwellings (Indexation of Annual Chargeable Amounts) Order 2023, SI 2023/107.

<sup>4</sup> See *Autumn Statement 2023* para 5.77.

<sup>5</sup> See *Scottish Budget 2024–25* p 31.



⌘ P A R T V ⌘  
T A B L E S



# TABLES

## CUMULATIVE TABLE OF DECISIONS ON VARIATION OR DISCHARGE OF TITLE CONDITIONS

This table lists all decisions since 1 January 2019 on opposed applications under the Title Conditions (Scotland) Act 2003 for variation or discharge of title conditions. Decisions on expenses are omitted. A table of decisions prior to that date can be found at the end of *Conveyancing 2018*. Note that the full opinions in Lands Tribunal cases are usually available at <[www.lands-tribunal-scotland.org.uk/](http://www.lands-tribunal-scotland.org.uk/)>.

### Restriction on building

<i>Name of case</i>	<i>Burden</i>	<i>Applicant's project in breach of burden</i>	<i>Application granted or refused</i>
<i>Toomey v Smith</i> 2020 GWD 10-146	1995 disposition. No building without consent.	None.	Granted.
<i>Christie v Carroll</i> 2020 GWD 31-401	1882 disposition. No building. Servitude of recreational use.	Erection of a house.	Refused.
<i>Anderson v Morton</i> 27 July 2020 and 26 April 2021, Lands Tribunal	1964 deed of alteration. Only five houses.	Erection of a sixth house.	Granted.
<i>Rollo v Jamieson</i> 2022 GWD 31-454	1974 feu charter. No additional buildings.	Erection of two holiday lodges.	Refused.
<i>Smith v Lewis</i> 2022 GWD 36-528	1920 deed of conditions.	Substitution of floor area for equality of contribution.	Granted.

### Restriction on use

<i>Name of case</i>	<i>Burden</i>	<i>Applicant's project in breach of burden</i>	<i>Application granted or refused</i>
<i>Inspire Scotland CC Ltd v Wilson</i> 2022 GWD 25-351	1969 feu disposition. Buildings to be used as private dwellinghouses for one family only.	Use of house as a care facility for young persons.	Granted.
<i>BNP Paribas Depository Services (Jersey) Ltd v Safeway Stores Ltd</i> 2022 GWD 34-502	1993 deed of condition. Prohibition of retail sale of food and groceries.	Leasing the premises to a discount supermarket.	Granted subject to payment of £1.8 million in compensation.

### Applications for variation of community burdens/DMS rules

<i>Name of case</i>	<i>Burden</i>	<i>Applicant's project in breach of burden</i>	<i>Application granted or refused</i>
<i>Smith v Lewis</i> 2022 GWD 36-528	1920 deed of conditions.	Substitution of floor area for equality of contribution.	Granted.
<i>Marshall v Granton Homes Ltd</i> 2023 GWD 44-364	2016 deed of conditions.	None. The DMS rule gave the developer a golden vote.	Refused.

### Servitudes

<i>Name of case</i>	<i>Servitude</i>	<i>Applicant's project in breach of servitude</i>	<i>Application granted or refused</i>
<i>Leehand Properties Ltd</i> 2019 GWD 29-468	1994 feu disposition. Pedestrian right of way.	Building houses on site of the projected route.	Granted (unopposed).
<i>Nicol v Crowley</i> , 2019 GWD 40-646; 2022 GWD 24-337	1973 disposition. Pedestrian right of way.	Rerouting of path as part of garden redesign.	Refused but later granted (opposed).
<i>Mahoney v Cumming</i> 2019 GWD 32-506	1907 feu charter. Pedestrian right of way.	Blocking of route to increase privacy.	Refused (opposed).
<i>Thomson v Savage</i> [2021] CSIH 22, 2021 SLT 1101	1961 disposition. Right of access and parking.	Building of a house, which would require the area covered by the servitude to be restricted.	Granted (opposed).

<i>Name of case</i>	<i>Burden</i>	<i>Applicant's project in breach of burden</i>	<i>Application granted or refused</i>
<i>Pallot v Carter</i> 2020 GWD 25-335	1988 disposition. Pedestrian right of way.	Building rear porch which would require minor re-routing of the access.	Supported in principle (opposed) but no final determination until planning consent for re-routing and reassurance as to building materials.
<i>Smitton v Forbes</i> 2022 GWD 28-406	Servitude of access.	Erection of a garage.	Granted in part (opposed).

### CUMULATIVE TABLE OF APPEALS

A table at the end of *Conveyancing 2008* listed all cases digested in *Conveyancing 1999* and later annual volumes in respect of which an appeal was subsequently heard, and gave the result of the appeal. A second table, at the end of *Conveyancing 2018*, covered the years from 2009 to 2018. This is a continuation of the tables, covering the years from 2019 onwards.

#### *Anderson v Wilson*

[2018] CSOH 5, 2018 GWD 4-62, 2018 Case (39) *affd* [2019] CSIH 4, 2019 SC 271, 2019 SLT 185, 2019 Case (44)

#### *Ardnamurchan Estates Ltd v Macgregor*

14 June 2019, Fort William Sheriff Court, 2019 Case (76) *rev* [2020] SAC (Civ) 2, 2020 SC (SAC) 1, 2020 SLT (Sh Ct) 49, 2020 SCLR 408, 2020 Case (65)

#### *Ashtead Plant Hire Company Ltd v Granton Central Developments Ltd*

[2019] CSOH 7, 2019 Hous LR 2 *rev* [2020] CSIH 2, 2020 SC 244, 2019 Case (55) *leave to appeal refused* UKSC 2020/0171, 2021 Case (23)

#### *BAM TCP Atlantic Square Ltd v British Telecommunications plc*

[2020] CSOH 57, 2020 GWD 25-334, 2020 Case (32) *affd* [2021] CSIH 44, 2021 GWD 27-366, 2021 Case (18)

#### *Commodity Solution Services Ltd v First Scottish Searching Services Ltd*

[2018] SC DUNF 14, 2018 SLT (Sh Ct) 117, 2018 Case (53) *affd* [2019] SAC (Civ) 4, 2019 SC (SAC) 41, 2019 SLT (Sh Ct) 63, 2019 Case (51)

#### *Dougherty v Taylor*

[2021] SC INV 61, 2021 GWD 40-529, 2021 Case (59) *affd* [2022] SAC (Civ) 20, 2022 GWD 27-395, 2022 Case (54)

*EE Ltd v Duncan*

2021 SLT (Lands Tr) 1, 2020 Case (23) *rev* [2021] CSIH 27, 2021 GWD 17-252, 2021 Case (14)

*Guidi v Clydesdale Bank plc*

[2021] SC GLW 59, 2021 SLT (Sh Ct) 441, 2021 Case (44) *rev* [2023] CSIH 4, 2023 SCLR 417, 2023 Hous LR 2, 2023 Case (51)

*Johnston v Davidson*

29 August 2019, Forfar Sheriff Court, 2019 Case (16) *affd* [2020] SAC (Civ) 22, 2021 GWD 1-12, 2020 Case (17)

*Leafrealm Land Ltd v City of Edinburgh Council*

[2020] CSOH 34, 2020 GWD 15-219, 2020 Cases (24) and (31) *affd* [2021] CSIH 24, 2021 Case (17)

*McCabe v Patterson*

[2020] SC GLA 14, 2020 GWD 11-155, 2020 Case (13) *affd* [2022] SAC (Civ) 2, 2021 Case (7)

*O'Boyle's Tr v Brennan*

[2018] CSOH 90, 2018 GWD 29-369, 2018 Case (83) *affd* [2020] CSIH 3, 2020 SC 217, 2020 SLT 152, 2020 SCLR 470, 2020 Case (69)

*PHG Developments Scot Ltd (in liquidation) v Lothian Amusements Ltd*

[2020] CSOH 58, 2020 SLT 988, 2020 Case (62) *affd* [2021] CSIH 12, 2021 SC 245, 2021 SLT 325, 2021 Case (57)

*Ramoyle Developments Ltd v Scottish Borders Council*

[2019] CSOH 1, 2019 SLT 284, 2019 Case (1) *affd* [2020] CSIH 9, 2020 SC 290, 2020 SLT 537, 2020 Case (1)

*Rittson-Thomas v Oxfordshire CC*

[2019] EWCA Civ 200, [2019] Ch 435, 2019 Case (37) *rev* [2021] UKSC 13, [2021] 2 WLR 993, 2021 Case (5)

*Royal London Mutual Insurance Society Ltd v Chisholm Hunter Ltd*

2022 GWD 30-43, Lands Tribunal, 2022 Case (7) *affd* [2023] CSIH 29, 2023 SLT 935, 2023 Case (4)

*Ruddiman v Hawthorne*

[2019] CSOH 65, 2019 GWD 29-463, 2019 Case (18) *affd* [2020] CSIH 46, 2021 SLT 111, 2020 Case (16)

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*Samson v D C Watson & Sons (Fenton Barns) Ltd*

[2021] SC EDIN 3, 2021 GWD 4-54, 2021 Case (29) *affd* [2022] SAC (Civ) 4, 2022 SCLR 281, 2022 Case (33)

*Savage v Thomson*

2020 GWD 30-389, 2020 Case (27) *affd* sub nom *Thomson v Savage* [2021] CSIH 22, 2021 Case (16)

*Soofi v Dykes*

[2019] CSOH 59, 2019 GWD 27-442, 2019 Case (74) *affd* [2020] CSIH 10, 2020 GWD 10-152, 2020 Case (59)

*Soulsby v Jones*

[2020] CSOH 103, 2021 SLT 286, 2020 Case (14) *affd* [2021] CSIH 48, 2021 SLT 1259, 2021 Case (9)

*South Lanarkshire Council v Boyd*

[2021] UT 24, 2021 Case (2) *affd* [2022] CSIH 41, 2022 Case (4)

*Ventgrove Ltd v Kuehne + Nagel Ltd*

[2021] CSOH 129, [2022] STC 346, 2021 Case (26) *rev* [2022] CSIH 40, 2022 SLT 1037, 2022 STC 1765, 2022 Case (34)

*West Lothian Council v Clark's Trs*

[2020] SC LIV 30, 2020 SLT (Sh Ct) 269, 2020 Case (11) *affd* [2021] SAC (Civ) 11, 2021 SLT (Sh Ct) 267, 2021 SCLR 235, 2021 Case (4)

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