

CONVEYANCING 2021

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and Brodies LLP

Edinburgh Legal Education Trust
2022

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

First published 2022

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ISBN 978-1-7399939-0-0

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

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PREFACE

This is the twenty-third annual update of new developments in the law of conveyancing. It is divided into five parts. There is, first, a brief description of all cases which have been reported, or appeared on the websites of the Scottish Courts (www.scotcourts.gov.uk) or of the Lands Tribunal for Scotland (www.lands-tribunal-scotland.org.uk/), or have otherwise come to our attention since *Conveyancing 2020*.

The next two parts summarise, respectively, statutory developments during 2021 and other material of interest to conveyancers. The fourth part is a detailed commentary on selected issues arising from the first three parts. Next, the important topic of the Register of Persons Holding a Controlled Interest in Land ('RCI') is given extensive treatment in a part of its own. Finally, in part VI, there are two tables. A table of decisions 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 Norman Baikie, Alan Barr, Douglas Ballantyne, Malcolm Combe, Lynne Johnstone, Chris Kerr, Roddy Paisley, and Scott Wortley.

Kenneth G C Reid
George L Gretton
Andrew J M Steven
14 March 2022

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⌘ **PART I** ⌘
CASES

CASES

TENEMENTS AND OTHER DEVELOPMENTS

(1) DH v SI

[2021] SC FAL 14, 2021 SLT (Sh Ct) 231

A tenement roof needed repairs. Liability under the titles was shared equally among the owners of the eight flats. The owners, however, agreed by a majority that liability for this particular repair should be borne by the owners of just two flats. The owners of one of those flats carried out the repairs and sought to recover half the cost from the other. It was held (i) that the decision of a majority could not impose liability in this way, and (ii) that, accordingly, the defender was liable only for a one-eighth share of the cost of repairs. See **Commentary** p 173.

(2) South Lanarkshire Council v Boyd

[2021] UT 24

Question: if the owner of one or more units in a development acts as factor for the development, can the owner/factor recover the factor's management fee exclusively from the units which the factor does not own? Answer: only if so provided in the deed of conditions (or equivalent) or in a contract between factor and the other owners.

This issue arises sharply in the case of developments with a mixture of social housing and former social housing which is now in private ownership due to the right-to-buy legislation. The council or other social landlord may continue to factor the whole development. But who then pays the management costs?

We do not know whether the arrangements disclosed in *South Lanarkshire Council v Boyd* are typical but would not be surprised if they are. The Council owned 53 out of the 72 flats in Rosebank Tower, a residential tower block in Cambuslang, South Lanarkshire. The remaining 19 flats were in private ownership. Mr Boyd was the owner of one of those flats, his title being registered under title number LAN202039. The Council's practice, for this development and apparently for the rest of its housing stock as well, was to distinguish between (i) ordinary common charges, including maintenance costs and (ii) the fee for property management. The cost of the former was divided among the owners

or tenants of the 72 flats; the cost of the latter was divided among the owners of the 19 flats in private ownership alone. Furthermore, the management fee did not relate specifically to Rosebank Tower but rather was a proportionate share of the overall cost of managing all of the 8,518 properties that the Council factored. The sum involved was not large; in 2019/20 the share allocated to individual units in private ownership was £117.32 per unit.

Mr Boyd objected to this practice on two main grounds. First, it was clear from the Deed of Conditions governing the development (and registered on 15 January 1993) that all common charges, including management costs, were to be split among the owners of all 72 flats. Second, only management costs specific to Rosebank Tower could be recovered. Hence the method the Council used for calculating the amount due was unsound.

Before the First-instance Tribunal both arguments were successful. The contract between the Council and the flat-owners, embodied in the mandatory written statement of services, did no more than incorporate the terms of the Deed of Conditions; and on this topic the Deed of Conditions was perfectly clear. Clause 6(c) set out the basic rule that all common charges were to be divided 'in the proportion of one equal share in respect of each dwellinghouse', ie that each owner was liable for a $1/72$ share. And 'common charges' were defined in clause 1(6) to include, in para (c), 'the remuneration of the factor and the reimbursement to him of any expenses properly incurred by him in performing his duties in relation to Rosebank Tower'. The management fee, therefore, was a 'common charge', and common charges were to be divided among all of the owners. Furthermore, only management costs 'in relation to Rosebank Tower' could be recovered – not a proportionate share of the Council's aggregated costs for the factoring of all of its properties.

The way in which the issue arose was an objection by Mr Boyd to the quarterly statements issued by the Council, which allocated the full management fee on the 19 flats in private ownership alone. This, said the First-tier Tribunal, was contrary to clause 1(6) of the Deed of Conditions. Accordingly, in a decision dated 5 April 2020, the Tribunal, finding that the Council had breached its duties as a factor in terms of s 17(5) of the Property Factors (Scotland) Act 2011, granted a Property Factors' Enforcement Order requiring the Council to issue a statement of quarterly common charges which included 'notification that the proportion of the quarterly management fee for the core services provided by the appellants ending in the quarter in question payable by the proprietor of the Property is one seventy-second of the management fee for Rosebank Tower, Cambuslang'.

Unsurprisingly, given the importance of the issue, the Council appealed to the Upper Tribunal. Various ingenious arguments were put forward to explain the Deed of Conditions away. Only the private flats benefited from the management arrangements and so only they should be liable for the fee, as (it was said) was implicit in clause 1(6)(c). To hold otherwise would be unfair and unreasonable. Apart from anything else, it was not permissible under the Housing (Scotland) Acts for the Council to recover by way of rent a share of the management costs from its tenants; this was because the

costs related in part to the provision of services to private persons such as Mr Boyd.

All these arguments were rejected and the decision of the First-tier Tribunal was upheld. Much of the problem, thought the Upper Tribunal, arose from the Council wearing so many hats – as owner, landlord and factor. But that was a problem for the Council to resolve; it was not a basis for disregarding the clear terms of the Deed of Conditions. As the Upper Tribunal explained (paras 84 and 85):

[I]f there is a conflict in law caused by the different capacities in which the appellant [the Council] acts it is for the appellant to resolve. I am unable to sustain an argument that the interpretation of the title conditions is unfair because there is an apparent conflict between the legislation in terms of the Housing (Scotland) Acts and the Deed to which the appellant, in a different capacity, is subject in a mixed tenancy property. It is for the appellant to determine how to discharge its obligations and how to legally harmonise these determinations. The appellant is legally disentitled from relying on its obligations in one capacity as a basis not to fulfil its obligations in a separate and distinct capacity. It cannot be that the Housing (Scotland) Acts which relate to the appellant in the capacity as a landlord can prevail over its separate and distinct obligations as factors? The appellant needs to consider the separate suite of obligations which exist in its different capacities and find a process whereby they can be reconciled. Failing to follow the Deed of Conditions is not an option.

In only one respect did the appeal succeed. The original Property Factors' Enforcement Order required compliance by 31 March 2021, a date that had already passed. Accepting the Council's argument that to recalculate the basis of charging management fees would be a complex and time-consuming business, the Upper Tribunal substituted the date of 31 March 2024.

This result is bad news for South Lanarkshire Council and, it may well be, for other local authorities as well. But, as the Upper Tribunal pointed out (at para 90), it might not be wholly good news for Mr Boyd. The aggregate method by which management charges were previously calculated carried economies of scale. These might be lost if the charges are now to be recalculated in relation to Rosebank Tower alone.

REAL BURDENS

(3) *Bryson v Salmond*

[2021] SAC (Civ) 29, 2022 SLT (Sh Ct) 50

In terms of the titles, the amount due, from time to time, under a maintenance real burden was to be determined by a certificate issued by the benefited proprietor, such certificates being declared as unchallengeable 'save in the case of manifest error'. A dispute having arisen as to a number of items covered by a certificate, it was held that, except in cases of obvious error, the certificate must be taken to be final. See **Commentary** p 176.

PRE-EMPTIONS AND REVERSIONS

(4) *West Lothian Council v Clark's Trs* [2021] SAC (Civ) 11, 2021 SLT (Sh Ct) 267, 2021 SCLR 235

By a feu disposition recorded GRS Midlothian on 7 November 1985, Lothian Regional Council feued West Muir Farm in West Calder to a Mr George Clark. Among the real burdens in the deed was a clause of pre-emption. With the abolition of the feudal system, on 28 November 2004, the pre-emption ceased to be enforceable against Mr Clark as a real burden. But as Mr Clark and, following his death, his executors continued to own the farm, the question arose as to whether the pre-emption was still enforceable as a matter of contract. It was argued for the executors that any contractual effect of the original feu disposition was displaced when, on 7 November 1985, the pre-emption was constituted as a real burden. In rejecting this argument, the Sheriff Appeal Court held that the pre-emption continued to bind the executors as a contractual term. See **Commentary** p 132.

A second question then arose. On the assumption that the pre-emption was still alive the executors had notified West Lothian Council (as statutory successors of Lothian Regional Council) of their intention to sell part of the subjects, a notification to which the Council had failed to reply with an offer to purchase within the 21 days prescribed in the clause of pre-emption. The Council argued that the notification was flawed in respect that it did not properly identify the part of the subjects that was to be sold. Hence the pre-emption remained alive, and the executors were bound to offer the property back to the Council. Following a proof, this argument was accepted by the sheriff (see [2020] SC LIV 30, 2020 SLT (Sh Ct) 269, *Conveyancing 2020* Case (11)) and that view has now been upheld by the Sheriff Appeal Court.

(5) *Rittson-Thomas v Oxfordshire CC* [2021] UKSC 13, [2021] 2 WLR 993

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

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

Where used carefully, s 14 prevents the statutory reversion from operating, because the replacement school is viewed as a continuation of the original school. (In Scotland, s 14 was repealed along with the rest of the 1841 Act in 1945: for details of how s 14 worked in Scotland, see Scottish Law Commission, *Report No 181 on Real Burdens* (2000) para 10.50.) But in the present case there had been a gap of 18 months between the closure of the school and the sale of the site.

In the Court of Appeal it was held that, as soon as the school closed down on the original site, the statutory reversion came into operation. The only way in which this could have been avoided would have been to keep the school open until the sale had been completed. See [2019] EWCA Civ 200, [2019] Ch 435, *Conveyancing 2019* Case (37). That decision has now been reversed by the Supreme Court. Emphasising that a 'broad and practical' approach should be applied in the interpretation of the 1841 Act (para 49), and that an appropriate balance required to be struck between the potentially conflicting interests of the original grantor and of the public (para 37), the Supreme Court concluded that the site had continued to be used for the purposes of the school 'because there was an intention throughout by the County Council, as made clear in the relevant documentation, to apply the proceeds of sale of the land in the improvement (by buildings or otherwise) of the adjacent new school premises' (para 49). Hence the statutory reversion had not been triggered.

Although s 14 no longer applies in Scotland, the decision is of interest both for the approach taken to the interpretation of the 1841 Act and also for the assumption underlying the decision that the person entitled to the statutory reversion is the heir of the original grantor, as opposed to the current owner of the estate from which the school site was taken. This question has yet to be settled in Scotland; in England, *Rittson-Thomas v Oxfordshire CC* is merely the latest of a number of decisions favouring the heir, the most recent previous case being *Fraser v Canterbury Diocesan Board (No 2)* [2005] UKHL 65, [2006] 1 AC 377.

SERVITUDES

(6) *Skene v Braveheart Hotels Ltd* [2021] SC DUN 25, 2021 GWD 16-239

Circumstances in which the servient proprietor in an access servitude was held entitled to install gates at either end of a private road. Following a proof, an action for the removal of the gates by the dominant proprietor was accordingly unsuccessful. See **Commentary** p 142.

(7) McCabe v Patterson
[2022] SAC (Civ) 2, 2022 GWD 6-93

This was an action to interdict the defenders from using property (in Baillieston, Lanarkshire) said to belong to the pursuers for 'parking, storing and depositing vehicles and storage units' and for 'locking or otherwise securing the gates at the southern boundary'. This met with a number of defences, among which was the claim that a servitude of parking had been created by prescription, and that this included, as an implied ancillary right, the right to lock the gates which gave access to the property. At first instance the sheriff (Aisha Y Anwar) allowed a proof in respect of the alleged servitude of parking but not in respect of the right to lock the gates. The latter, said the sheriff, could not be implied as an ancillary right because (i) it was repugnant with the servient proprietor's ownership, and (ii) it could not be said to be necessary for the comfortable enjoyment of the servitude. See [2020] SC GLA 14, 2020 GWD 11-155 (*Conveyancing 2020 Case (13)*). The defender appealed but the Sheriff Appeal Court has now upheld the sheriff's decision: see **Commentary** p 145.

(8) Macallan v Arbuckle (No 2)
[2022] SC DUN 5 , 2022 GWD 10-160 affd [2022] SAC (Civ) 9,
2022 GWD 10-161

This is a successor case to, but in substance a re-run of, *Macallan v Arbuckle* 2022 GWD 10-159 (*Conveyancing 2019 Case (17)*), a decision of Dundee Sheriff Court from 2019, and it comes to the same result.

The dispute arose from the splitting up of the Carphin Estate, Luthrie, Cupar, Fife in 2016. Carphin House and its policies were disposed to the pursuers (their title being registered under title number FFE114227). The surrounding farmland was disposed to the defenders under title number FFE115626. Access to Carphin House from the public road was by means of a single-track private roadway which was part of the subjects disposed to the defenders. The roadway had been metalled in 2012, before the sale.

The 2016 disposition in favour of the pursuers conferred:

an unrestricted heritable and irredeemable right of pedestrian and vehicular access by to and egress from the Disposed Property [Carphin House and policies] from the public road over the private access roadway coloured green on plan no 1 and plan no 2 annexed and signed as relative hereto.

The plans, which were extracts from the OS map, indicated the roadway by means of dotted lines, and the green colouring ran strictly between these lines. This left a gap, for verges and field entrances, between the line coloured green and the fields on either side of the roadway. However, once the roadway entered the policies of Carphin House itself (ie the subjects of the disposition), the colouring of the roadway extended beyond the dotted lines, leaving no gap between roadway and fields.

The parties seem to have been on bad terms and one might speculate that this was because of the pursuers' use of Carphin House as a venue for weddings and other events. The usability of the roadway would presumably be of some importance for the success of such a venture.

In this action the pursuers sought declarator that, by virtue of the express servitude, they enjoyed an implied ancillary right to use the passing places and verges of the private access roadway to the extent necessary to allow passing when two vehicles were on the road. They also asked for interdict against obstruction of the passing places and placing items likely to cause a hazard in the grass verges of the roadway. The passing places and verges lay outside the green colouring on the plans, as already explained, but were part of the metalled surface of the roadway and therefore, it might be thought, intended to be used as part of it. The defenders in turn counterclaimed for declarator that the pursuers were not entitled to use the defenders' land beyond the rights as expressly defined in the servitude.

It was argued for the pursuers that, for the servitude right to be effective, cars must be able to pass each other. That in turn meant making use of the verges and passing places. Such use should therefore be regarded as necessary for the convenient and comfortable use and enjoyment of the servitude.

This argument had some force. While the owner of the farmland, and those travelling with his permission, could make free use of the verge, those seeking access to and from Carphin House were not, without the ancillary right claimed, in the same fortunate position. In the absence of such a right, the use of the roadway would require either that no vehicle bound for Carphin House entered the roadway when a vehicle bound from Carphin House was already on the roadway, or that when an encounter took place one of the vehicles reversed to the end of the roadway. That this would make life difficult for wedding guests was all too evident.

Nonetheless, the pursuers' argument failed, as it had failed also in the earlier action. The servient tenement was delineated by the green colouring on the plan. That, thought the sheriff (Jillian Martin-Brown), marked the geographical limit of the dominant proprietors' rights. There could not, therefore, be implied ancillary rights in areas beyond the servient tenement (paras 24–27). A proof would not be allowed. The action was dismissed and the counterclaim granted. That decision was upheld on appeal by the Sheriff Appeal Court.

At para 7.08 of his forthcoming book on *Rights Ancillary to Servitudes*, Professor Roderick Paisley questions whether ancillary rights are necessarily limited to the geographical extent of the primary right (ie the servitude). Whether that was so, Professor Paisley thinks, would depend on the circumstances of the particular case, including the nature of the ancillary rights claimed. Ancillary rights different in character from the primary right might reasonably extend over a different geographical area. But where, as in *Macallan v Arbuckle* (No 2), the activities involved were similar, the geographical restriction was much more likely to apply. So far as *Macallan* is concerned, Professor Paisley thought 'that the activity of pulling in a vehicle to stop temporarily on the passing places whilst other traffic passes on the carriageway is so similar to the activity of

passage on the carriageway that a claim to such an ancillary right is little more than an attempt to extend the geographical extent of the primary servitude and that it is likely that the intention of the parties was to exclude this because of the express title provision limiting the geographical extent of the activity of access'. In similar vein, the sheriff had concluded (at para 24) 'that the pursuers are seeking ancillary rights which are not truly ancillary to their servitude, but which are, in reality, an extension of the geographical extent of the servitude itself'.

For an ancillary right of a different kind, the position might possibly have been different, as Professor Paisley argues, although the position adopted by the Sheriff Appeal Court (at para 29) is not encouraging in this respect.

One other matter might be mentioned. At para 20 the Sheriff Appeal Court said, under reference to *Moncrieff v Jamieson* [2007] UKHL 42, 2008 SC (HL) 1, *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619, and *Ashtead Plant Hire Co Ltd v Granton Central Developments Ltd* [2020] CSIH 2, 2020 SC 244, that:

There is no dispute between the parties that servitudes expressly granted originate in contract and that the principles of interpretation involve determining what a reasonable person with the background knowledge available to the parties would have understood them to have meant by the language used in the contract.

Yet it seems improbable that the rather flexible rules of contractual interpretation can simply be carried over into the interpretation of servitudes, not least because the dispute will often arise between successors of the original parties. Such authority as there is suggests otherwise; and s 14 of the Title Conditions (Scotland) Act 2003 presupposes the existence of distinctive interpretative rules for 'deeds which relate to land and are intended for registration'.

(9) *Soulsby v Jones* [2021] CSIH 48, 2021 SLT 1259

The parties owned adjoining houses in Elie, Fife, both dating from the seventeenth century. Between the houses was a narrow strip of land sufficient for the purposes of carrying out maintenance on each. For some of its distance, the strip was a passageway, owned in common by both parties; for the rest, the strip was on land which belonged solely to the defenders. The present dispute concerned the latter part of the strip. Narrow at the best of times, it had been made narrower still by the erection of an extension to the defenders' house. The pursuer had objected to the extension at the time but the building work had gone ahead anyway.

In this action the pursuer sought (i) declarator that he had a servitude right of access over the strip 'for the purposes of inspecting, cleaning, maintaining, repairing and renewing' his house, (ii) declarator that the defenders were not entitled to build on the strip, and (iii) an order ordaining the defenders to remove the offending structure. The servitude was said to have been established either (a) by positive prescription, or (b) without possession, by force of necessity (for example *rebus ipsis et factis*).

At first instance, and following a proof, the claim failed on both counts: see [2020] CSOH 103, 2021 SLT 286, *Conveyancing 2020* Case (14). The First Division

has now refused the appeal. For a discussion of (b), see **Commentary** p 150. The account here considers only (a).

To establish a servitude for repair by prescription faces, as the Lord Ordinary (Lady Carmichael) had pointed out (at para 297), the ‘particular challenge’ that ‘a right of access for repair will be exercised infrequently if at all’. So it proved in this case. On the evidence, Lady Carmichael concluded that ‘the only user of regularity and frequency which I am satisfied has occurred is access for the purpose of window cleaning’ which took place ‘at most ten times per year’ (para 321). As for other acts of maintenance, ‘there was no suggestion from any witness that the exterior wall itself had been painted at any time between 2005 and the erection of the extension in 2018’ (para 323), and the same was true of the gutters (para 326). There was no evidence as to roof repairs (para 331). No doubt the proximity to the sea made a reasonably frequent cycle of maintenance desirable, but the evidence led did not support the view that this had occurred. On a balance of probabilities the strip had been used by the pursuer (or his mother) on up to three occasions each year to inspect the condition of the property. None of this, said Lady Carmichael, was sufficient for the purposes of prescription.

On appeal, the First Division affirmed this view (para 30):

The evidence which the Lord Ordinary accepted was of very limited use indeed. It came nowhere near approaching the level of use of a small section of ground which would have been needed to support a contention that the pursuer was asserting a right, far less what the nature of that right might be. The pursuer complains that the Lord Ordinary has not taken into account the limited nature of the right claimed and that, by its very nature, use of such a right would be infrequent. There is little substance in this. The Lord Ordinary did have regard to this factor. She commented, correctly, that limited use by itself creates difficulties for a person claiming a right of a nature never advanced prior to the dispute which ultimately led to the litigation. There is no sound basis upon which the Lord Ordinary can be faulted on this central aspect of the prescription element of the case. The use did not assert a right. It was correctly attributable to mere tolerance or permission, as would be expected of a neighbour in these circumstances.

If this line of reasoning is accepted, it must follow that it will rarely be possible to establish a servitude by prescription in cases where, by the very nature of the right claimed, the possession/use is intermittent and infrequent.

In the course of the Lord Ordinary’s judgment, onus of proof had been discussed extensively (paras 305–318), as it also is in Alasdair Peterson’s *Prescriptive Servitudes* (2020). As Dr Peterson explains in chapter 9, the onus is on the pursuer to prove that there has been a sufficient volume of possession to indicate that a servitude is being asserted – and hence to sweep away any idea that the possession was due to tolerance (as opposed to lassitude) on the part of the defender. Only then does the onus switch to the defender to establish, if the defender can, that the possession was explicable by the exercise of some kind of right (whether in private or public law) and hence not, after all, in assertion of a servitude. In the appeal in *Soulsby v Jones*, the Lord President doubted whether onus was of much importance (para 29):

Once a proof is completed, questions of onus will seldom arise (see *Woodhouse v Lochs and Glens (Transport)* 2020 SLT 1203, LP (Carloway), delivering the opinion of the court, at para 46 citing *Gibson v British Insulated Callenders Construction* 1973 SC (HL) 15, Lord Reid at 22). The Lord Ordinary's reference to onus is slightly misplaced. The pursuer did not fail because of the application of onus. The evidence at proof simply did not demonstrate the requisite degree of use.

If the pursuer had succeeded in establishing the existence of a servitude, the question of remedy would then have arisen. The pursuer sought removal of the building to the extent that it encroached on the maintenance strip. The defenders urged that the court should exercise its discretion to refuse to order its removal. At first instance, the Lord Ordinary had not seen this as a suitable case for the exercise of judicial discretion. The fact that the defenders proceeded with the building work in the knowledge of the servitude claim, and of the pursuer's objection, put them in bad faith; whereas good faith, it had been held in the leading case of *Anderson v Brattisanni's* 1978 SLT (Notes) 42, was one of the prerequisites for the invocation of the judicial discretion not to order demolition. But even if the defenders had proceeded in good faith, the Lord Ordinary would still have ordered demolition (had the servitude been established) to the extent that the extension was built on the maintenance strip. It was true that demolition would be both disruptive and also expensive (£58,000 plus VAT) for the defenders. But that must be set against the malign effect of the extension on the exercise of the servitude. In balancing the interests of the parties in a case like the present, the loss to the encroaching proprietor from demolition must not merely be disproportionate to the gain to the other proprietor but, as the Inner House had said in *Anderson*, 'wholly disproportionate'. That exacting standard could not be met on the facts of the present case.

On appeal, however, the First Division was less certain as to this approach (para 34):

The Lord Ordinary held that the defenders had not acted in good faith because the pursuer had asserted the existence of a servitude right of access prior to the construction work commencing. Had this matter required to be determined, the court would have examined this conclusion with some care. By the time the pursuer asserted his servitude right, the defenders had obtained planning permission and instructed contractors who were on the brink of commencing construction. The defenders may well have taken the view that, standing the state of the titles, there was little merit in the pursuer's stance, especially as the pursuer did not take any active steps to stop the construction. Describing the defenders' decision to proceed as being one not taken in good faith may be seen as harsh. Given that the encroachment does not prevent inspection, maintenance and repair and that re-establishing of the 900 mm width would cost some £58,000, the court may have revisited the Lord Ordinary's conclusion on this aspect of the case.

This may, possibly, indicate a greater willingness on the part of the courts than in the recent past (as to which see *Conveyancing* 2015 pp 158–61) to decline to order the demolition of encroaching parts of buildings.

(10) Robinson v Brownriggs (Thornhill) LLP
26 July 2021, Dumfries Sheriff Court

This was an action of declarator that the defenders had no right of parking in a strip of land within the pursuers' registered title, and for interdict against parking. The substantive defence was that a servitude of parking had been established by prescription, detailed averments being made as to parking on the strip over many years. A speciality was the apparent frailty of the pursuers' title. The area of land on which the strip lay had been the subject of an *a non domino* disposition in favour of Dumfries and Galloway Council in August 2014, and the Keeper had excluded indemnity from the title. When in 2018 the pursuers acquired the whole property from the Council the Keeper had again excluded her warranty in respect of the area of ground.

At debate the defender argued (i) that the pursuers had an insufficient title to sue, and (ii) that in any event they had failed to make sufficient averments to support their declarator – for example they had failed to aver the absence of use by the defenders or that any use by the defenders had been challenged. The sheriff (Scott Pattison) rejected the first defence but accepted the second, and dismissed the action.

The first defence raised a difficult issue on which authority is meagre and uncertain. If the Council's title in 2014 proceeded on an *a non domino* deed then, even if the area had been possessed since then (and the suggestion was that it had not been possessed), the ten years of positive prescription would still not have run by 2021. In that case the pursuers were *not* the owners of the area in question. Nonetheless, they were treated by the sheriff as having a *prima facie* title; and, on the authority of cases such as *Douglas & Angus Estates v McAllister* [2015] CSIH 2, 2015 SC 411, that was all that was needed unless the defender advanced a competing title. (See also on this point K G C Reid *The Law of Property in Scotland* (1996) para 143.) No competing title, said the sheriff, had been so advanced; for although a servitude of parking was a competing title, the existence of such a servitude had yet to be established. There was a difference 'between title and an asserted right not yet recognised as a matter of law' (para 17). The defenders' alleged servitude fell into the second category.

This line of reasoning can, however, be questioned. If a servitude is a competing title, then such a title was indeed being advanced by the defenders and, had the case continued, would have been the subject of proof. This is not necessarily to say that the pursuers should have been put to a proof of their title. The rules for resisting servitudes may possibly – we speculate – be different from those for resisting unlawful possession in cases such as *Douglas & Angus Estates v McAllister*. But that is another matter.

(11) Thomson v Fotheringham
1 August 2014, Perth Sheriff Court

This unreported decision from 2014 has only recently come to our attention. The pursuer had a servitude right of way for pedestrian and vehicular access

over a track which ran through two fields belonging to the defenders. The fields were part of the defenders' farm, near Dunkeld in Perthshire. The pursuer had a number of complaints of which the most important concerned the presence of cattle and sheep on the track. According to her evidence, the cattle could be aggressive, or hard to persuade to move on. And they particularly tended to congregate on the track because they took water from an adjacent ditch. More precisely (para 14):

The pursuer gave evidence about a number of incidents when cattle were congregated at the middle gate, or when they were simply lying on the track. She described at least one occasion when she had set out on foot to travel down the track to meet a friend and a large group of cows and calves began to follow her so that she became afraid that she would be injured. She described the cattle approaching her as a 'stampede' but in the event she was not injured in any way nor did any of the cattle attempt to do her any harm.

The defenders' evidence was that the cattle (which were of a valuable pedigree breed) were relatively docile and extremely unlikely to act aggressively.

In evaluating the evidence the sheriff (Michael John Fletcher) saw his task as striking a balance between the right of the pursuer to the unobstructed use of the servitude and the right of the defenders to use their fields and track for whatever purpose they chose. 'Obviously', said the sheriff (at para 26), 'there must be no permanent obstruction of the passage of vehicles or pedestrians but the servient tenement [proprietor] is entitled to make use of the land over which the right-of-way travels either for the purpose of passage or for any other legitimate purpose which does not interfere with the right of the dominant tenement [proprietor]'.

The sheriff expressed some sympathy for the point of view of the pursuer 'as a person who, I do not think she would object to my saying, was not in the first flush of youth, being approached by a relatively large group of inquisitive cattle which could easily inadvertently or deliberately knock her over or otherwise injure her' (para 14). But he thought her complaints were exaggerated, and that her evidence was marked by confusion as to whether particular events were recent or had happened a long time ago. Furthermore, in striking a balance between the parties it was necessary to have regard to the location. After all (para 27):

a right of access leading to a relatively isolated and rarely used destination such as a forest plantation would have different considerations from right of access to busy commercial premises or a fire station or other emergency operation ... In this case the right of access was granted over a farm track passing through open fields. It leads to one isolated domestic property [ie the pursuer's] situated in a position where it is entirely surrounded by agricultural land which has been used for a very considerable lengthy period for amongst other things the grazing of sheep and cattle ... Inevitably both sheep and cattle will be apt to stray temporarily onto the road. The evidence was that the animals were not dangerous or prone to aggression. They are easily able to be moved off the road if they have decided to occupy it. While the need to move the animals might be a minor irritation to the users of the track I do not think it can be said that the presence of cattle or sheep in the field where the track is, and sometimes on the track itself can be said to be an interference with the right of access.

It would be different, thought the sheriff, if a bull were present in one of the fields, but the evidence was that no bull had been present for a number of years.

In assoilzing the defenders, the sheriff indicated that, even if he had found for the pursuer, he would not have been inclined to grant the remedy that was sought. This was to require the defenders to fence the fields. Not only would this have cut the cattle off from their source of water, but it would remove from the defenders the choice as to the means of ending the obstruction. The appropriate remedy would have been interdict. The defenders could then have decided whether, for example, to remove the cattle and to use the fields for another purpose.

(12) McFadzean v Currie
27 November 1985, Kilmarnock Sheriff Court

This unreported decision from 1985 has only recently come to our attention. At one time the defender owned the Brodick Bar in Arran and also the neighbouring property, known as Castle View. In 1979 the defender disposed the Brodick Bar to the pursuers 'Together with ... all existing rights of access thereto and egress therefrom'. What was meant by 'existing rights of access'? Was it capable of including the access which the defender (and disponer) had habitually taken to the rear of the Brodick Bar through Castle View? And if it did, was the effect to give the pursuers (and disponees) a servitude of access over Castle View?

If the word 'rights' was to be given its technical meaning, it could only mean existing rights – most probably servitude rights – by means of some *other* property or properties. It could not refer to access rights to the Brodick Bar via Castle View, because the defender, as owner of both properties, could have no access rights as such. Conversely, a less strict interpretative approach might lead to the view that a servitude over Castle View had been created in favour of the pursuers.

For the defender it was argued that the words in question were mere conveyancing surplusage and could not create a servitude. The pursuers in turn argued that the words had to be given some meaning, that that meaning could conceivably be a servitude of access over Castle View, and that there would have to be a proof of the matter.

The cause of the dispute was the erection of a locked gate on Castle View in 1985 which had the effect of preventing the pursuers taking access. The pursuers sought and obtained an interim interdict. The present stage of proceedings was a motion by the defender for recall.

In finding for the pursuers, the sheriff (D B Smith) said this:

It appears to me that the words quoted are capable of bearing the meaning contended for by the pursuers. The disposition is the measure of the pursuers' rights. It cannot be construed in the light of correspondence which preceded it. Since the pursuers have since 1979 used the defender's feu as a means of access to the rear of the Brodick Bar the balance of convenience is clearly in favour of maintaining the status quo. I have therefore refused the defender's motion.

This decision is of course a long way from being the last word on this issue. Whether there was a proof, and if so with what result, is unknown. Fuller

argument would have brought out the issues more clearly. But the decision is nonetheless of some interest.

ELECTRONIC COMMUNICATIONS CODE

(13) Cornerstone Telecommunications Infrastructure Ltd v Marks & Spencer plc 2021 GWD 40-534, Lands Tribunal

This is a decision of the Lands Tribunal in respect of an application under the Electronic Communications Code, which is set out in sch 3A of the Communications Act 2003 (as amended, in 2021, by the Telecommunications Infrastructure (Leasehold Property) Act 2021: see p 77 below). For discussion of the Code, see *Conveyancing 2017* pp 71–73. The Electronic Communications Code replaced the Telecommunications Code, set out in sch 2 of the Telecommunications Act 1984, with effect from 28 December 2017. The first decisions on the new Code are beginning to come through both in Scotland and in England. Only the former can be covered in this series. A number of decisions were also noted in last year's volume.

The purpose of the Code (as of its predecessor) is to facilitate 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 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 (see para 131). Although it was an 'operator' in the sense of the Code, it did not itself operate a telecoms network, and so required to share 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.

Three issues arose for decision. (i) Should the Tribunal impose an agreement on Marks & Spencer (para 21 of the Code)? If so, (ii) on what terms (para 23) and (iii) subject to payment of what consideration (para 24)?

In terms of para 21 of the Code, two conditions must be met before an agreement conferring Code rights can be imposed. 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). The Tribunal began its discussion by quoting with approval the analysis provided by the Upper Tribunal in England in *Cornerstone Telecommunications Infrastructure Ltd v University of the Arts London* [2020] UKUT 248 (LC), [2021] RVR 51 at paras 51 and 52:

It is clear that Parliament in enacting the Code intended private landowners to participate in the provision of telecommunications sites for the public good by suffering the use of their land for that purpose, being compensated for any damage caused but for consideration calculated on a basis that prevents them from making a profit out of the deal as they could under the Code's statutory predecessor. The test for the imposition of such rights is quite a stiff one; for the respondent to escape this public duty, unless it is itself going to redevelop the site, it must show either that it will suffer loss that cannot be compensated in money, or that the prejudice it will suffer is so great that it outweighs the public benefit derived from the use of the site. The level of prejudice must be very high indeed to outweigh the public benefit, in the light of the public demand for, and dependence upon, the availability of electronic communications. The benefit is perhaps even higher today than it was when the Code was enacted and certainly in the current circumstances we are all keenly aware of it ... But the very fact that Parliament provided, in paragraph 21(2), a way out for the land owner who will suffer prejudice that cannot be compensated, or in paragraph 21(3) contemplated a level of prejudice so great that it would outweigh the public benefit, points to the fact that Parliament did not intend a landowner to comply with this public duty at all costs. There comes a point when it is too much to ask.

That the second of the conditions in para 21 was satisfied in the present case was not in dispute. Self-evidently, there was a strong public interest in providing telecommunications systems in a location that could serve Waverley Station and other important venues in the centre of Edinburgh. Discussion therefore focused on the first condition (prejudice capable of being adequately compensated by money). Here Marks & Spencer drew attention to a number of potential difficulties that it would face. Most concerned the installation period – for example, the temporary shut-down of lifts and electricity, or the potential overloading of the carriageway on Rose Street South Lane, directly above part of Marks & Spencer's premises, resulting from the use of a crane. All, however, were temporary, and all, thought the Tribunal, were adequately compensable by money (paras 37–48). An ongoing matter was access and security concerns, but here again the matter seemed resolvable by a combination of terms in the agreement and compensation (para 49). The Tribunal therefore decided that an agreement to confer Code rights should be imposed on Marks & Spencer.

That disposed of the first issue. The second issue, the terms of the agreement, was more vexing. The unpromising background was described by the Tribunal as follows (para 7):

The Tribunal's timetable had provided for a 'travelling draft' of the Code agreement and dates for certain communications to try and narrow the issues. Our impression is the issues were not much narrowed. The travelling draft 'agreement' shows disputed

terms on most of the main provisions, and many of the minor terms. Even the use of a benign looking ADR clause was disputed without apparent sense of bathos. While testament to the ability of the legal profession to make formidable arguments on both sides of an issue, this maximum approach to litigation makes it difficult for us to infer how much of the dispute is 'real'. It is doubtful the Ofcom Code of Practice ('parties should make every effort to reach voluntary agreement first') was uppermost in parties' minds. The 'joint' statement of the valuation experts contains hardly any agreement at all and has been used by both witnesses to add in new matters to support their positions. Therefore, if we conclude that a Code agreement should be imposed, we will require to settle the terms by going through the travelling draft, clause by clause. Parties themselves are best able to judge where the real dispute lies, and it would be preferable in future cases if they were to restrict themselves, where possible, to seeking a determination on the particular issues which they think would be likely to unlock everything else.

In these circumstances the Tribunal was indeed faced with the task of 'going through the travelling draft, clause by clause' in order to produce a final version. The decisions reached and the compromises made were set out in painstaking detail at paras 51–145 of the opinion.

In fixing the terms of an agreement it is permissible, under para 23(1) of the Code, to go beyond the basic Code rights ('with such modifications as the court thinks appropriate'). This question arose particularly in the context of upgrading and sharing apparatus. Here the basic Code rights are set out in para 17 of the Code. But they are subject to limitations. Changes as a result of upgrading or sharing of apparatus must 'have no adverse impact, or no more than a minimal adverse impact, on its appearance'; and the sharing or upgrading must impose 'no additional burden on the other party to the agreement'. In relation to upgrading the Tribunal was willing to discard these limitations. In doing so it placed weight on a passage by the Upper Tribunal in the English case of *Cornerstone Telecommunications Infrastructure Ltd v London and Quadrant Housing Trust* [2020] UKUT 282 (LC), [2021] L & TR 1 at para 83:

As far as upgrading is concerned, it is not possible to know how communications technology will develop in the next 10 years, but it is reasonable to expect that improvements will occur. One such improvement which is already being deployed is 5G; it is likely that there will be others although what form they will take is speculative. Any improvement will arguably involve 'upgrading' within the meaning of the Code. Upgrading is a Code right in itself, and the facilitation of new technology is one of the objectives of the Code. For those reasons it would not be appropriate to impose terms which may significantly impede upgrading. To do so would diminish the public benefit which is the object of the agreement and which justifies its imposition on financial terms significantly less valuable than the market would demand. In our judgement paragraph 17 conditions would be likely to have that effect, making it necessary for CTIL to negotiate for each new item of equipment it wished to install, slowing down delivery and increasing costs with CTIL and ultimately for the consumer.

In relation to sharing, the Tribunal acknowledged that the nature of Cornerstone's business model presupposed that sharing would take place. The initial equipment

was to be operated by Telefonica, and the Tribunal concluded that a second active operator should also be permitted.

The final issue to be decided was compensation and, in particular, the annual rent ('consideration') to be paid to Marks & Spencer by Cornerstone. Under the Code this was to be assessed on a 'no network' assumption, para 24(3)(a) providing as a valuation assumption 'that the right that the transaction relates to does not relate to the provision or use of an electronic communications network'. The expert valuers on both sides agreed that the valuation should proceed on the basis of the three-stage approach adopted by the Upper Tribunal at paras 134–137 of *Cornerstone Telecommunications Infrastructure Ltd v London and Quadrant Housing Trust*. This was summarised by the Tribunal as follows (paras 147 and 148):

Stage 1 is to find an existing or alternative use value for the site. The second step is to consider additional benefits which are conferred on the operator by the rights which may warrant additional payment. In particular, a grantor's annual expenditure in repairing, maintaining and insuring the building upon which the operator can mount and operate its equipment is likely to benefit the operator. A contribution to such expenditure is a proper component in the consideration. The third stage requires any greater adverse effect on the site provider than the existing or alternative use to be reflected in a payment.

After considering the arguments in detail (paras 149–189), the Tribunal fixed the annual consideration at £3,850.

(14) EE Ltd v Duncan
[2021] CSIH 27, [2021] RVR 243, 2021 GWD 17-252

This being the first decision of the Inner House on the Electronic Communications Code, the court took the opportunity to set out the background to the Code (paras 13–15). In particular, Lord Malcolm, giving the opinion of the court, explained (at para 14) how:

In May 2016, in recognition of a need for more extensive coverage, better connectivity and faster services, the Department for Culture, Media and Sport published a policy document entitled 'A New Electronic Communications Code' setting out the government's proposals. They were designed to 'pave the way for future technological evolution' and 'provide a robust platform to enable long-term investment and development of digital communications infrastructure' throughout the UK (Ministerial foreword). The main reforms would be a 'no scheme' valuation basis to bring electronic communications into line with utilities such as water and electricity, and new rights to share and upgrade facilities to aid the speedy and cost-effective deployment of new technology. The context was widespread acceptance of the importance of digital communications in respect of economic growth, productivity gains and social interaction.

As for the case itself, it concerned the transition from the old Code (ie the Telecommunications Code) to the new Code (ie the Electronic Communications Code). The latter replaced the former with effect from 28 December 2017. But agreements made under the old Code remain subject to that Code. From the

point of view of operators, that is a disadvantage, because the new Code is more operator-friendly, eg in relation to assignation of rights, or levels of rent.

Potentially, however, the position may change once an existing agreement comes to an end. Under part 5 (paras 28–35) of the new Code, an agreement made under either Code continues in existence even after it has expired. But once an agreement has expired, or (as with a lease continuing by tacit relocation) is capable of being brought to an end, paras 33 and 34 of the new Code provide a mechanism for variation of the agreement or even its complete replacement; if negotiations between the parties fail, the new terms can be fixed by the court.

This was an application to the Lands Tribunal by operators, in nine conjoined cases, to have the existing agreements, currently continuing by tacit relocation, terminated and replaced by agreements under the new Code. The main issue, and an important one, was whether the proposed changes required individual and detailed justification (which had not been provided) or whether it was enough for the operators to say, in general terms, that they have a business need to take advantage of the new Code, especially in respect of the freedom given to assign and to share sites, and of the reduced rental payments. The Tribunal was firmly of the former view, especially in the light of para 34(13) which requires the court, in reaching a decision, to ‘have regard to all the circumstances of the case’ including ‘the operator’s business and technical needs’. See 2021 SLT (Lands Tr) 1 (*Conveyancing 2020 Case (23)*). That view, however, has now been rejected by the Inner House. Lord Malcolm explained why (para 24):

The tribunal read the requirement to have regard to the operators’ ‘business and technical needs’ as setting a high bar, in the sense that it must be demonstrated that the agreement is operating in an unduly onerous or restrictive way, for example by thwarting a specific project or rendering it unfit for purpose. However Parliament has identified certain minimum code rights for operators, including sharing/upgrading abilities and reduced outlays resulting from valuation on a no scheme basis. The view was taken that these are required if network operators and infrastructure providers are to be in a position to deliver the modern low cost electronic communications system which Parliament wants and which business and the public at large expect. Given the underlying aims and purposes of the new code, which include that over time old agreements will be brought into line with new ones, we understand the phrase ‘business and technical needs’ where it appears in paragraph 34(13) to be a generic term which, whatever else, includes the benefits for operators mandated by the new code. We agree with the operators’ submission that it can be construed as a reference to matters which are reasonably required from a business and/or technical point of view.

The approach favoured by the Tribunal ‘would severely curtail the legislative intention to create the opportunity to bring old agreements into line with new code arrangements’ (para 28). Contrary to the Tribunal’s view, this would not amount to ‘judicial cancellation of an existing contract’. ‘The tribunal was not being asked to cancel a contract, but rather to replace it with one in tune with the provisions of the new code’ (para 27).

The appeal therefore succeeded, the Tribunal’s decision to dismiss the application was quashed, and the matter was remitted to the Tribunal for further procedure in the light of the Inner House’s opinion.

On a different issue, the Inner House upheld the decision of the Lands Tribunal. Under para 33 of the new Code, an operator seeking to change or replace the existing agreement must serve a notice on the site operator. This must include the date on which the proposed changes are to take place. Not only must that date be more than six months after the giving of the notice, but also, by para 33(b), it must be after (i) the expiry of the agreement or (ii) the time when the agreement could have been brought to an end. In the present application, it was (ii) that was relevant. It was held by the Tribunal: (a) that a lease continuing on tacit relocation was an agreement which could be brought to an end in the sense of (ii); (b) that there was no further requirement that the agreement must also have been terminable by the site provider under para 31(4) (which, for the most part, required breaches of the agreement by the operator); and (c) that the date specified in the notice need not be an anniversary of the date of the lease. The accuracy of this last point was the subject of a cross-appeal, but the Inner House was content with the view taken by the Tribunal (paras 34–40).

A brief discussion of the decision by Daniel Bain and Colin Archibald can be found in ‘Powering up the network’ (2021) 66 *Journal of the Law Society of Scotland* June/22.

VARIATION ETC OF TITLE CONDITIONS

(15) *Anderson v Morton*

27 July 2020 and 26 April 2021, Lands Tribunal

On the merits, this was a straightforward case. The applicant owned a house with an extensive garden at 12 Wellgate Drive, Bridge of Allan. The garden (but not the house) was part of a feu of 1.586 acres on which five houses had been built, each now in separate ownership. In terms of a deed of alteration of feuing conditions, granted by the superior in 1964, the feu could be ‘used for the erection of not more than five private residential dwellinghouses’. The applicant wanted to build a house, which would be the sixth on the feu, in her garden – or, as it turned out, to sell part of the garden to a developer for that purpose. Accordingly, she sought the discharge of the limitation to five houses. Planning permission had been obtained for a 1½-storey house of traditional appearance.

It was taken for granted that the restriction was a community burden, mutually enforceable by the owners of each part of the now-divided feu. Presumably either or both of ss 52 and 53 of the Title Conditions (Scotland) Act 2003 were thought to apply to what was evidently a common scheme of real burdens. In the event the application was opposed by the owners of only one of the houses built on the feu.

The Tribunal found there to be ‘a persuasive case for loosening the current restriction’ by reference to the factors set out in s 100 of the 2003 Act (para 51). The original purpose of the condition (factor (f)) was to allow the superior to control the density and layout of the feu; and ‘following the abolition of feudal tenure it is at least arguable that preservation of the conditions under Part 4

of the 2003 Act transfers what was a feudal purpose into a statutory purpose for the benefit of proprietors within the area of a common scheme' (para 40). Relatively speaking, the restriction was of limited benefit to the respondents, whose house was some distance from the proposed development (factor (b)). On the other hand, in considering the impediment to the enjoyment of the burdened property (factor (c)) 'it is unsafe to ignore the issue of development potential if such exists: *McPherson v Mackie*' [2007 SCLR 251, *Conveyancing 2006* Case (28)]. While the matter was not explored, intuitively we would think that the value of the development opportunity exceeds the value of the property as a garden to Number 12 by some margin' (para 46). Other factors were of minor importance. As a result of new building there had been a modest change to the neighbourhood since the restriction was imposed (factor (a)). Planning permission had been granted (factor (g)). The restriction itself was, at 55 years, relatively elderly (factor (e)).

Some peculiarities of the case should be mentioned. Today the original feu comprised five houses plus the applicant's garden, ie six units in total. That suggested a community of six. But, on first registration, the title sheets of two of the houses had omitted from the burdens section the prohibition on building – why was unclear. On one view that excluded the houses in question from the community, and hence from enforcement rights (para 5). That would leave a community of four. (On another view, the presence on the title sheets of other burdens from the same deed (if such was the case) would have been sufficient to include these houses within the common scheme.)

On the basis that the community was indeed reduced to four the application was brought, not under s 90(1)(a)(i) of the 2003 Act, as would be normal, but under s 91. This provides, in subsection (1), that:

an application may be made to the Lands Tribunal under this section by owners of at least one quarter of the units in a community for the variation ('variation' including imposition) or discharge of a community burden as it affects, or as the case may be would affect, all or some of the units in the community.

The key to s 91 lies in the final words. It is appropriate where what is sought is not merely a variation or discharge of a burden as it affects the applicant's own property but as it affects the whole community. In other words, the applicant seems to have been seeking the removal of the five-house restriction for the entire feu. Quite why the applicant proceeded in this way is unclear. It is true that, on the view that the community comprised four units, the applicant met the eligibility threshold of owning a quarter of the units. But it was, presumably, nothing to the applicant as to whether there should be a global discharge of the restriction rather than merely a discharge limited to the applicant's own property. And in seeking the former rather than the latter there was a danger of overreach, and of failure.

Having questioned, perhaps surprisingly, whether s 91 was suitable for the discharge of building restrictions as opposed to maintenance burdens, where the power to impose increased obligations could be of particular value (para 8), the Lands Tribunal concluded that any variation to be granted in the present case

should be restricted to the applicant's property, ie the garden – and that it should be a targeted variation, ie tied to the erection of the house for which planning consent had been obtained, rather than a total discharge (para 54).

But the global powers inherent in s 91 would still be needed to deal with a different issue. At present, the maintenance costs of an unadopted drive and footpath were, according to the titles, split six ways. If a new house were to be built in the applicant's garden it would be unfair for the owner of that house to be liable only for a one-twelfth share (ie half of the applicant's original one-sixth share). An appropriate variation under s 91 could sort that out, making each unit liable for a one-seventh share. But since the 'community' for the purposes of this burden was six units, the applicant (owning only one of those units) could not reach the 25% threshold needed for s 91 on her own. The Tribunal's (ingenious) suggestion was that the respondents might agree to be co-opted as joint applicants for this limited purpose. Meanwhile no decision would be taken by the Tribunal on the merits of the applicant.

Thus matters rested at the time of the Tribunal's first opinion, dated 27 July 2020. The Tribunal's suggestion as to the respondents joining as applicants having thereafter been acted upon, the Tribunal was able to issue a formal decision on 26 April 2021 which varied the burden to allow a sixth house while at the same time changing the maintenance allocation from one-sixth to one-seventh.

The case is a particularly good illustration of the admirably flexible approach often taken by the Lands Tribunal, seeking and frequently obtaining a practical outcome acceptable to all the parties. In one other respect, not yet mentioned, the Tribunal also showed flexibility. The strongest argument on the merits for the applicant was factor (c) in s 100 of the 2003 Act, ie that the burden as it stood impeded the enjoyment of the property in that it prevented a chance to realise development potential. Yet on this crucial matter the applicant apparently failed to make a submission – which, as the Tribunal drily remarked, was 'something of an omission' (para 46). Nothing daunted, however, the Tribunal proceeded to make for itself the kind of argument which the applicant had failed to make. Had the Tribunal not done so the outcome of the case might possibly have been different.

(16) Thomson v Savage
[2021] CSIH 22, 2021 SLT 1101

Former stables in Elie, Fife occupying the western and southern sides of a courtyard had been converted into three flats in 1961. The applicant had owned the courtyard since 2014; the respondent acquired one of the flats in 1992 and used it as a holiday house. In terms of the split-off disposition of 1961 there had been granted in favour of the respondent's flat a:

right of access to the subjects hereby disposed from the said public road by the gateway in the north boundary wall of said courtyard and by the courtyard itself with right to use the same for the parking of cars in front of the subjects hereby

disponed which gateway, north boundary wall and courtyard and the remaining boundary walls thereof so far as not forming the boundary of the small piece of common ground or part of the building of said line of flats and stables are hereby reserved to and shall be maintained in good order and repair by us and our successors in all time coming ...

The split-off dispositions of the other flats were in similar terms.

Much later, the applicant obtained planning permission for the erection of a house on the east side of the courtyard, where a garage had previously stood. A condition of the planning consent was that there should be parking to the north of the house. In this application the applicant sought a variation of the servitude so as to restrict the access and parking rights to the western half of the courtyard. This would still allow the flat-owners to park a car outside their flats (there was room for one each); but there would be insufficient space for the flat-owners each to park two cars in the restricted area which was being proposed.

The Tribunal's decision is summarised at 2020 GWD 30-389 (*Conveyancing 2020* Case (27)); the full judgment is available on the Tribunal's website (<http://www.lands-tribunal-scotland.org.uk/>). An initial question was the scope of the right of parking. In considering this question the Tribunal was constrained by the fact that its jurisdiction did not extend to determining the proper construction of servitudes (unlike real burdens). Nonetheless, it was impossible for the Tribunal to assess the reasonableness of granting the application without forming a view as to the servitude's scope (para 62). Unsurprisingly, given its terms, the Tribunal concluded that the servitude conferred no more than a right to park a single car in front of the owner's flat. But even if the scope had been wider, the Tribunal would still have allowed the variation. The proposed erection of a house was a change in circumstances (Title Conditions (Scotland) Act 2003 s 100 factor (a)), and planning permission had been granted (factor (g)). And while an untrammelled servitude was certainly of benefit to the respondent (factor (b)), this was decisively outweighed by the manner in which it impeded enjoyment of the burdened property (factor (c)). Apart from anything else, it prevented the building of the proposed house. In all the circumstances, therefore, the application would be granted.

The respondent appealed, but the First Division has now upheld the Lands Tribunal's decision. A preliminary argument by the respondent (now appellant) – that, if the servitude was already restricted in the way the Tribunal suggested, the Tribunal had no power to discharge it in respect of an area to which (on the Tribunal's view) it did not apply – was rejected by the First Division on the basis that the servitude undoubtedly applied to the entire courtyard at least in respect of access rights. On the merits of the decision, the court saw no reason to depart from the Tribunal's order, which was supported by 'a careful and detailed judgment' and by a site inspection and the benefit of expert evidence (para 7).

For commentary on this decision, see Ken Swinton, 'Taking liberty with servitudes' (2021) 80 *Scottish Law Gazette* 25.

COMPETITION OF TITLE

(17) Leafrealm Land Ltd v City of Edinburgh Council [2021] CSIH 24, 2021 GWD 15-225

This case concerned rights in the *solum* of a former boundary wall which, from 1912 until it was demolished in 2014, had separated Comely Bank Road, in Edinburgh's Stockbridge area, from ground to the north. The main issue was as to ownership of this long thin strip, the *solum* of the former wall. The pursuer asserted that it had acquired the strip by means of a 2018 disposition in its favour by the Trustees of the Grange Trust. The defender argued that the strip had been conveyed by a deed of 1912 (recorded in the Register of Sasines) to the City Council as part of a road-widening project, and that accordingly it continued to belong to the Council, notwithstanding the 2018 deed. (The 2018 deed had been lodged for registration but it was sitting in the Keeper's in-tray, ie no decision had yet been made as to whether to accept or reject it.)

A proof was held last year: [2020] CSOH 34, 2020 GWD 15-219, *Conveyancing* 2020, Case (31). The question as to whether the 1912 deed had transferred title to the City Council had two aspects. One was whether the strip was within the subjects described in the deed. The Lord Ordinary (Lady Wolffe) held that it was. The other was whether the deed was in fact a disposition. The deed had various oddities, one in particular being that it did not use the word 'dispone' but instead said that the granters were to 'give up' the ground in favour of the City Council. The Lord Ordinary held that, looking at the deed as a whole, it was reasonable to interpret it as a conveyance. For a full discussion of the Lord Ordinary's decision, see *Conveyancing* 2020 pp 208–14.

The pursuer reclaimed, and the Inner House has now affirmed the Lord Ordinary's decision.

LAND REGISTRATION

(18) BAM TCP Atlantic Square Ltd v British Telecommunications plc [2021] CSIH 44, 2021 GWD 27-366

The title sheets of two adjoining properties in Glasgow, A and B, appeared to conflict. The title sheet of A, the older of the two, showed a certain area of land as common property of both A and B. The title sheet of B showed the area as the sole property of B. Both first registrations had taken place under the Land Registration (Scotland) Act 1979.

At first instance it was held: (i) that, in principle, the later of the two title sheets (ie B) should prevail, but (ii) as the conferral of sole property in the title sheet of B was an inaccuracy which might have been reversed under the transitional provisions in sch 4 of the Land Registration etc (Scotland) Act 2012, and as such reversal depended on whether, immediately before the designated day, the area of land had been possessed by the owner of B, a proof was allowed on the question

of possession. See [2020] CSOH 57, 2020 GWD 25-334, *Conveyancing 2020 Case* (32). That decision was appealed to the Inner House.

Although the First Division has now affirmed the Lord Ordinary's decision in the sense of allowing proof of possession, two of the judges thought, though for quite different reasons, that the title sheets were not in conflict. According to Lord Doherty (dissenting), no right of common property had been conferred on property A because the description of the common parts in the deed of conditions rested on events which, at the time of the split-off disposition of that property, had yet to occur. See **Commentary** p 168. But according to the Lord President, it was the title to property B which required closer examination. Read properly, the title sheet did in fact confer only a right of common property. This was because the property section of the title deed had to be read subject to the burdens section, which contained the deed of conditions. See **Commentary** p 79.

Leave to appeal was refused by the Inner House but is now being sought from the Supreme Court.

(19) Aberdeen Endowments Trust v Whyte 2021 GWD 32-426, Lands Tribunal

In terms of s 80 of the Land Registration etc (Scotland) Act 2012, the Keeper must rectify an inaccuracy on the Land Register provided the inaccuracy is 'manifest' and that what is needed to rectify the Register is equally 'manifest'. Neither in s 80 nor elsewhere in the Act is anything said about the procedure to be adopted. The statutory assumption is simply that, on discovering the inaccuracy – by whatever means – the Keeper must rectify the Register if the two 'manifest' requirements are met. Naturally, procedures for rectification do in fact exist at Registers of Scotland. They are summarised as follows in K G C Reid and G L Gretton, *Land Registration* (2017) para 11.15 (footnotes omitted):

Strictly, it is not possible to apply for rectification. So strong is the Keeper's duty to rectify that a formal application process was thought to be out of place – it would be to ask a public official to do what that public official is already bound to do. But RoS recognise the reality of the situation by providing a short form for the 'notification' of inaccuracies and by encouraging its use. No fee is payable. The form requests information on matters such as whether the inaccuracy is manifest, whether it existed immediately before 8 December 2014, and whether it might have been cured by realignment. The Keeper's decision is made on the basis of the form. She will not call for further information from the person who submitted it, or enter into any sort of correspondence. Nor will she seek comments from others who might be affected by the inaccuracy. Rather than choosing between competing submissions her task is simply to decide, on the basis of the information provided, whether the existence of a 'manifest' inaccuracy has been established. Where it has not, the person is informed accordingly, and has the option of making a second notification, supported this time by fuller information. If, conversely, the inaccuracy is found to exist, the Keeper makes the necessary correction to the Register, and retains in the archive record all supporting documentation. It is only then that the Keeper gives notice, by email or more typically by letter, to any person who appears to be materially affected by the rectification.

The facts of *Aberdeen Endowments Trust v Whyte* provide an example of this process in action. In 1955 Aberdeen Endowments Trust disposed to the local authority a 'gathering area' for water, being an area of ground at Birkenhills Farm on the road from Turriff to Fyvie and now registered in the Land Register under title number ABN104971. The disposal was part of a scheme to gather and pipe water to nearby housing. In 2011 the ground came to be acquired by a Mr Whyte.

Certain real burdens were imposed by the original 1955 disposition, including a general prohibition of building. In addition, the Trust and their tenants were declared to be entitled to cultivate the ground free of charge for agricultural purposes and to take a supply of water from the ground to a nearby field trough.

In 2014 Mr Whyte tried but failed to have these burdens removed by the Lands Tribunal in an application which was opposed by the Trust. Later, in 2016, Mr Whyte, through his solicitors, sought to have the burdens removed from his title sheet on the ground that they were spent and hence an inaccuracy. The relevant 'ILR' form was submitted to the Keeper. The Lands Tribunal describes what happened next (para 6):

The form stated that there was no longer a water-gathering area on the subjects and that the field trough and pipe referred to in the title conditions had been removed. It was also stated that the said area was no longer cultivated by the benefited proprietor. There does not appear to have been separate supporting evidence as to what was said on the form. The form was not intimated to the Trust. The Keeper accepted the information as implying abandonment and extinction of the rights in the title conditions and proceeded with the rectification by deleting the title conditions. The Keeper states that she relied on Mr Whyte's solicitors' duty of care not to have misrepresented the situation.

Whether the account provided on behalf of Mr Whyte was sufficient to indicate a 'manifest' inaccuracy, and hence to justify rectification, seems open to doubt. Had the Keeper known of the earlier, failed application to the Lands Tribunal she might have taken a different view. Canvassing the opinion of the Trust might have had the same effect. But the RoS procedures are designed precisely to avoid such conflicts of evidence – conflicts which the Keeper is neither equipped nor intended by the legislation to resolve. Instead the Keeper listens to one side only and forms a judgment as to whether the information provided is credible and indicative of an inaccuracy that is 'manifest'.

In *Aberdeen Endowments Trust v Whyte* the Lands Tribunal expressed some discomfort at this approach (para 14): 'the Keeper's procedures have not been particularly robust in seeking to ascertain the factual position'. The Tribunal continued (para 15):

As s 80 deals with the situation where the Keeper becomes aware of a manifest inaccuracy in a title sheet, Parliament perhaps thought that [due to] the fact an inaccuracy was to all intents and purposes 'obvious' it would not be necessary to intimate the notification to other parties. The problem lies in cases such as the present where the alleged 'manifest inaccuracy' is fact sensitive, and in terms of the relevant 'notification of inaccuracy' 'ILR' form to the Keeper, only one party's version of the facts will be supplied to the Keeper. No separate evidence of background

facts (photographs, affidavits etc) appears to be required in terms of the form. No separate supporting evidence was sought by the Keeper's staff in dealing with the present case. If for example the form required background information as to the existence of any current dispute, or a history of prior proceedings, the Keeper would no doubt take a more circumspect approach before concluding that an alleged inaccuracy was 'manifest'. If the form had required mention of the existence of previous Tribunal proceedings, it could have been found that various competing submissions had been made showing that the Trust had no intention of abandoning their rights. In this event we sense that the procedures and outcome before the Keeper could well have been different. But in short, there was nothing in the Keeper's procedures to mark the fact sensitive nature of the issue, which might have alerted her to the need to consider more detailed background evidence or to ascertain the views of an interested party.

These criticisms have some force. By and large, however, they are criticisms of the system which the legislation itself imposes. Under that system the Keeper is not able to resolve factual disputes, and will not seek them out by making enquiries. Instead the Keeper proceeds on the information provided by the applicant alone. Even then, the Keeper will usually refuse rectification if third-party rights are at stake. Where the applicant's account is accepted, as in the present case, there is a danger that it turns out to be incomplete or just plain wrong.

That may have been the case here. For on finding out about the removal of the real burdens, the Trust sought counter-rectification and hence the restoration of the burdens. But this the Keeper was bound to refuse because, by this time, the factual disputes were all too apparent.

Following that refusal the Trust applied to the Lands Tribunal under s 82 of the 2012 Act to have the inaccuracy declared and the Register rectified. In the application, the Trust strongly disputed the version of events that had been presented to the Keeper on Mr Whyte's behalf. In particular, the Trust stated that water continued to be gathered in the ground, that it continued to feed a field trough, and that the ground was still cultivated by the Trust's tenants. In his answers, opposing the application, Mr Whyte submitted that the Trust had 'ceased to maintain a field trough and connecting pipe in a satisfactory condition', a position not consistent with that adopted in the form submitted to the Keeper but one which, according to Mr Whyte, triggered a resolute condition in terms of the real burdens. As the Tribunal noted (para 8): 'In response to a query from the Tribunal, the respondent says that at the time of the application for rectification the agents believed the field trough had been removed, but that further investigation established it is still on the land but in a poor state.'

The full truth of the matter will not now be uncovered because the Trust abandoned the application at a relatively early stage, apparently because of the likely expense of a drawn-out oral hearing (the respondent not being willing to agree to proceed by written submission). The only remaining issue was expenses. Although acknowledging that expenses usually follow success and that, the application having been withdrawn, success lay with the respondent, the Tribunal decided that in all the circumstances no expenses should be due to or by any party.

LEASES

(20) Sapphire 16 SARL v Marks & Spencer plc [2021] CSOH 103, 2022 SLT 84

Marks & Spencer plc was the tenant in a 99-year lease of a store in the East Kilbride Shopping Centre. The lease was granted by the East Kilbride Development Corporation in 1972. The current landlord was Sapphire 16 SARL. The store had two entrances, the first from within the shopping centre and the second from Righead Gate, a street to the north east. Marks & Spencer, one of the largest retailers within the centre, was regarded by the landlord as the anchor tenant.

In March 2020, during the first Covid lockdown, the store stayed open for the sale of food from its food hall, with entry only from Righead Gate. A wall was erected to prevent access to the clothes section of the shop. At the entrance from the shopping centre, black film was applied over all the glass frontage and doors. But as restrictions were eased Marks & Spencer did not resume trading as before. On the contrary it ran down the stock in the food hall until there were only biscuits and juice for sale. A sign was put up directing shoppers to another Marks & Spencer store in East Kilbride. The company made no secret of the fact that it wanted to close the store. But in terms of clause TENTH of the lease it was obliged 'to keep the [store] open for business during normal business hours' until the end in 2071.

In July 2020 Sapphire successfully obtained an interim order of specific implement requiring Marks & Spencer to reopen the store in full. But the tenant failed to do so in a way which satisfied Sapphire. In September 2021 it came back to court raising the following questions: (i) whether Marks & Spencer's current manner of trading was in breach of the order, and (ii) whether it was therefore in contempt of court.

Evidence was led that the store was now being used only as an outlet store, that is to say a store selling clearance products, normally at a discounted price. Only clothes and furniture were being sold. The food hall had not been reopened. Neither had the store entrance from within the shopping centre. Shoppers could only enter from Righead Gate. The quantity of stock was low. The effect of this on footfall was apparent. A private detective had been employed by the landlord. His visual evidence presented a compelling picture to the Lord Ordinary (Braid) (at para 21):

[A] striking feature of the photographs and video footage is, perhaps not surprisingly given the limited nature of the stock, that not a single customer can be observed, despite [the detective] visiting at around lunchtime on a Saturday ... I did fleetingly think I spotted several customers on the video footage but on closer inspection they turned out to be mannequins.

When the private detective visited there were few staff members. Most of these seemed to be security staff in high visibility jackets. None wore the M&S livery. Nonetheless, the signage above the only open entrance in Righead Gate continued, misleadingly, to say 'M&S Foodhall'.

Lord Braid was unconvinced by Marks & Spencer's evidence on the closing of the entrance from within the shopping centre. The reasons which it had given were first, Covid and, second, to help with reduced footfall and sales, allowing staff to be situated elsewhere in the store without an increased risk of shoplifting. On the first, the judge commented somewhat tartly (at para 27) that 'the much busier Hamilton [M&S] store apparently operates two entrances and it was not suggested that the risk of Covid transmission is any greater in East Kilbride than in Hamilton'.

As to the second reason, this neither explained why there was a greater risk of shoplifting now than previously, particularly as there was less stock, nor why it was the entrance from the shopping centre that had been closed and not that from Righead Gate.

Ultimately, deciding whether the keep-open order was being complied with was 'a question of fact and degree' (para 40). In terms of the lease, Marks & Spencer was not obliged to have a food hall and was entitled to sell outlet products. But its manner of trading was 'half-hearted' and thus in breach of the order (para 43). In this regard 'the proof of the pudding, as it were lies in the dearth of customers in the shop at a peak shopping time on a Saturday' (para 44). Lord Braid concluded (para 45):

In the modern vernacular, the defender has 'pushed the envelope' by doing what it considers the bare minimum in order to comply with the order. It is not enough. The defender must do more.

On the question of contempt of court, Lord Braid was willing to give Marks & Spencer the benefit of the doubt albeit his decision on this point was 'a marginal one' (para 48). He referred to the fact that there was a level of uncertainty as to what exactly was required to comply with the order and that there had been reliance on legal advice. Moreover, any penalty would be financial. Marks & Spencer could yet find itself liable for damages if a breach was established after a proof.

The area of keep-open clauses has for a long time been one where English and Scots law diverge, the former only being willing to give the landlord damages rather than compel the tenant to trade. See in particular *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1. For a discussion of the present case from an English perspective, see G Featherstonhaugh and I Dodds, 'Enforcing keep open covenants' (2021) 2144 *Estates Gazette* 63.

Finally, this case has a sad aspect in that the successful senior counsel for the landlord was Stephen O'Rourke QC, who died in December 2021. He is much missed.

(21) Kilmac Properties Ltd v Tesco Stores Ltd [2021] CSOH 70, 2021 Hous LR 61

Tesco Stores Ltd was the tenant of a unit in a shopping centre. The decision does not reveal the location but it appears to have been in Monifieth, Angus: see K Carruthers, 'Who bears responsibility' (2021) 2149 *Estates Gazette* 59. The

landlord was Kilmac Properties Ltd. Clause (FOURTH) of the lease, which was entered into in 1978, provided that:

THE TENANTS HEREBY AGREE AND DECLARE that with regard to the maintenance and use of the premises they shall implement and fulfil the following conditions, namely:- (1) At all times throughout the period of this Lease they shall at their own expense maintain and keep the structure and the fabric of the premises both inside and outside including all additions thereto and the fixtures and fittings thereof and the water and sanitary apparatus, sewers, drains, pipes and pertinents thereof in good and substantial repair, condition and decoration (damage by fire and other risks against which the Landlords have insured excepted) ...

The landlord sought declarator that the clause was apt to cover both ordinary and extraordinary repairs and, alternatively, that the tenant was liable for any extraordinary repairs arising out of a failure to carry out ordinary repairs during the period of the lease.

The Lord Ordinary (Clark) held that, as properly interpreted, liability for extraordinary repairs was excluded by the clause. But he granted decree in respect of the alternative conclusion for declarator, which had not been the subject of a substantive defence by the tenant.

The decision was informed by a review of the previous case law. Lord Clark noted (at para 13), in relation to 'extraordinary repairs', that there is 'no definition, but the case law indicates that matters such as latent defects, long-term decay and deterioration, problems with foundations and serious damage caused by fire are likely to fall within that category'. The landlord had placed emphasis on the width of clause (FOURTH), in particular the obligation to 'maintain and keep the structure both inside and outside ... in good and substantial repair, condition and decoration'. But earlier decisions interpreting similar wording had confined liability to ordinary repairs.

Lord Clark concluded (at para 20) that 'a sufficiently clear pointer away from the tenant being liable for only ordinary repairs must be contained in the wording'. For example, in *Westbury Estates v Royal Bank of Scotland plc* 2006 SLT 1143 the repairs clause had imposed liability for 'all work necessary whether structural or otherwise and whether of the nature of rebuilding and whether normally the obligation of the landlord'. In the present case there was 'no sufficiently clear pointer'. This was needed given in particular that the lease was for longer than 40 years and that the costs in respect of extraordinary repairs could be very high.

One aspect of the decision might be questioned. After summarising the arguments of counsel, Lord Clark began his reasoning with the following statement (at para 12):

The common law position, repeatedly vouched in the authorities, is that the tenant is liable for ordinary repairs and the landlord is liable for extraordinary repairs.

In fact the common law imposes ordinary repair duties on landlords. According, for example, to J Rankine, *The Law of Leases in Scotland* (3rd edn, 1916) p 241: 'The landlord of an urban tenement is ... bound at common law and unless it be

otherwise stipulated, to uphold it in a tenantable or habitable condition during the course of the lease.’ Similar statements of the law can be found in: R Rennie et al, *Leases* (2015) para 26-31; K S Gerber, *Commercial Leases in Scotland* (4th edn, 2021) para 13-02; and L Richardson and C Anderson, *McAllister’s Scottish Law of Leases* (5th edn, 2021) para 3.40.

Earlier in his decision (at para 7), Lord Clark referred to a submission on behalf of the landlords that ‘at common law ... a tenant is not liable for what may be termed extraordinary repairs’. The authority cited, *Napier v Ferrier* (1847) 9 D 1354, concerned a lease of a mansion with an express obligation on the tenant to keep the property ‘in good and sufficient repair and condition’. Lord President Boyle stated (at p 1359):

[There is] a general principle, that where a party undertakes an obligation to put the premises in good and sufficient repairs, it covers all things that can come under ordinary repairs ... I hold the principle of the law to be as clear as the sun at noon-day, that the landlord is liable for extraordinary repairs.

Nevertheless, in the absence of expressly signing up to such an obligation, the tenant is not liable at common law unless the repairs are a consequence of a failure to take reasonable care of the property. (The position was different historically for rural leases, that is to say leases predominantly of land rather than of buildings: see Rankine, *The Law of Leases* pp 250–51).

A modern commercial lease will almost invariably be done in FRI (full repairing and insuring) form. As the name suggests, the repairing obligation is set out expressly and imposed on the tenant. But to achieve tenant liability for extraordinary repairs, as *Kilmac Properties* underlines, clear wording is needed. This is not new. Rankine, *The Law of Leases* p 251 stated that:

The burden of keeping the houses wind and water tight may be thus thrown on the tenant or it may be retained by the landlord, who will in either case, unless it be otherwise stipulated, be liable also for the extraordinary repairs necessitated by lapse of time, natural decay, extraordinary accident, or latent defect.

(22) MonSolar IQ Ltd v Woden Park Ltd [2021] EWCA Civ 961, [2021] L & TR 29

This Welsh case concerned the rent review clause in a lease of land near Cardiff to MonSolar IQ Ltd for use as a solar farm. The landlord was Woden Park Ltd. The period of the lease was 25 years and six months, commencing in 2013, at an initial rent of £15,000 a year. The rent was to be reviewed annually in accordance with a formula set out in a schedule to the lease document:

Revised Rent =
Rent payable prior to the Review Date (disregarding any suspension of Rent) x
Revised Index Figure
Base Index Figure.

The ‘Index’ was the Retail Price Index (‘RPI’), which seeks to measure inflation, but the result of the formula was to increase the rent at a much higher rate than

actual inflation. Whereas the cumulative increase in RPI between 2013 and 2020 was 17%, under the formula the rent increase was 83% (these figures appear in the Appendix to the decision where the help of the judicial assistant who calculated them is acknowledged). This was because the formula produced an aggregated increase. The schedule also provided that if RPI was no longer published there would be 'a new arrangement (the "Revised Indexation") whereby the figure to be calculated ... shall reflect increases in the cost of living on a similar basis to [under the formula]'.

The parties sought a judicial determination in relation to the clause. At first instance, the High Court accepted MonSolar's argument that the formula contained a drafting error, and should be interpreted so that the rent was indexed in line with RPI. Thus the appropriate formula was: previous year's rent multiplied by RPI for the current year divided by RPI for previous year. Woden Park appealed on the basis that it was not clear that there was an error and, if there was an error, what it was.

The Court of Appeal found for the tenant. Under reference to *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101 it was possible for the literal meaning of a provision to be corrected if it was clear both (i) that a mistake had been made and (ii) what the provision was intended to say. Lord Justice Nugee stated (at para 35) that it was 'abundantly clear that the Formula contains a drafting error, and that is about as plain a case of such a mistake as one could find'. The results of applying the provision literally were 'nonsensical and absurd' (para 39). Precisely this error had been warned against both in a leading textbook and in the *Estates Gazette* (para 41 of the judgment). There was an Australian case, *Westpac Banking Corporation v Tanzone Pty Ltd* [2000] NSWCA 25, where a similar mistake had been made and was corrected by the court. The statement in the schedule about an alternative arrangement showed what the parties had intended, namely that the rent should be increased in line with the rise in the cost of living.

In fact it was not just an Australian case where this error was made. The same defective formula prompted the professional negligence case of *STV Central Ltd v Semple Fraser LLP* [2015] CSIH, 2015 SLT 313 (*Conveyancing 2015 Case* (59)). The parties there eventually reached agreement on a replacement formula. As *MonSolar IQ Ltd v Woden Park Ltd* shows, creative interpretation is another possible way of dealing with problems of this kind. Otherwise there is always the possibility of judicial rectification action under s 8 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985.

(23) Ashtead Plant Hire Company Ltd v Granton Central Developments Ltd **UKSC 2020/0171**

In this case about the meaning of a rent review clause, the tenants, Ashtead Plant Hire, were successful at first instance – [2019] CSOH 7, 2019 Hous LR 2 – but lost on appeal to the Inner House: [2020] CSIH 2, 2020 SC 244. For details, see *Conveyancing 2019* pp 43–45. The Supreme Court has now refused permission

to appeal 'because the application does not raise an arguable point of law of general public importance'.

(24) Paccor UK Ltd v United UK Propco 8 SARL
[2021] CSOH 124, 2022 GWD 7-109

This and the next case involved a dispute between the landlord and tenant of commercial premises in an industrial estate in Livingston, West Lothian. Paccor UK Ltd was the tenant and was in occupation until around 2015. After that it continued to pay rent to the landlord, United UK Propco 8 SARL. In 2019, travellers who camped on the estate damaged the leased premises. Paccor sought a number of orders from the court: declarator that the damage took place as a result of an insured risk (resulting in the abatement of rent and service charges); repayment of rent paid for the period after the damage occurred; declarator that the landlord required to spend the monies obtained under the insurance policy; and declarator that, if the premises were not repaired, the lease would be terminated. United opposed the granting of the orders and counterclaimed for the rent which Paccor had failed to pay following the damage. A debate was held before Lord Clark.

The landlord (United) argued, first, that the tenant's (Paccor's) pleadings about damage to the leased premises were irrelevant and lacking in specification. In particular, they were not sufficiently clear as to whether something was (i) part of the premises or (ii) the common parts shared with other units in the estate. On this point it was held that fair notice of the damage had been given and that the detail could be considered at proof stage.

A second issue was whether the tenant's duty to 'intimate' the damage to the landlord had been fulfilled. Under reference to *Christie Owen & Davies plc v Campbell* [2009] CSIH 26, 2009 SC 436 it was held that 'intimate' merely meant 'make known' and that this had been done.

Thirdly, the tenant had averred that it was an implied condition of the lease that the landlord would take reasonable care to prevent squatters in the estate. The court found no basis for such a condition and held the averment to be irrelevant.

Fourthly, in relation to the landlord's counterclaim for rent, the tenant founded upon the terms of a letter from the landlord's agents as amounting to a waiver of the landlord's right to payment of rent and service charge following the damage. It was held that this was not the effect of the letter and that therefore the averment was irrelevant.

In turn, the tenant challenged some of the landlord's pleadings, in particular that there was an implied duty on the tenant to take reasonable care to avoid break-ins. Lord Clark stated, however, at para 35, that: '[t]he tenant's payment of the insurance premium to relieve it of liability for repair following insured risks would be rendered meaningless if the tenant became liable under this implied term.' In any event, fair notice was not given in the pleadings as to what steps should have been taken and how they would have stopped the damage.

(25) Paccor UK Ltd v United UK Propco 8 SARL (No 2)
[2021] CSOH 125, 2022 GWD 7-110

Following the previous case, this was a second action relating, this time, to other leased premises in the same industrial estate which had been damaged in the same incident. Lord Clark applied the parts of his opinion in the previous case which were equally relevant in this action. There were a small number of additional issues.

First, the tenant had lodged two expert reports but these were not referred to in the summons. The landlord unsuccessfully submitted that this was an additional reason why the tenant's pleadings on damage were irrelevant or lacking in specification. On the facts it was held sufficient for the reports to be lodged as productions.

Secondly, the landlord, although averring that the tenant's enjoyment of the premises was not being restricted or prevented by the damage, had earlier averred that the tenant had moved out. It was held that the tenant's decision no longer to occupy was irrelevant to the question of whether the damage had the averred effect.

Finally, the tenant argued, successfully, that the landlord's averments that (i) it had not received any insurance monies, (ii) it was not in breach of any obligation and (iii) it was under no duty to reinstate the premises, were irrelevant because the lease required rebuilding and reinstatement within a two-year period. The failure to do this was central to the tenant's case.

(26) Ventgrove Ltd v Kuehne + Nagel Ltd
[2021] CSOH 129, [2022] STC 346

This case primarily concerned the correct interpretation of a break clause in relation to whether VAT was payable. Ventgrove Ltd was the landlord of commercial premises on an industrial estate at Dyce, Aberdeen. The ten-year lease to Kuehne + Nagel, which began in 2016, was constituted by missives of let. It gave the tenant a break option which the parties agreed would be effective from January 2022 provided that the required conditions were satisfied by April 2021. These included the payment of £112,500 'together with any VAT properly due thereon'.

The landlord had opted to charge VAT on the rental income and its position was that this tax was chargeable on the sum payable under the break option. The tenant required therefore to have paid the relevant amount of VAT. The landlord consequently sought declarator that the break option had not been validly exercised. The position of the tenant was that the wording amounted only to an indemnity to the landlord in respect of any claim for VAT from HMRC.

A debate was held before Lord Ericht. He relied on the 1996 decision of the VAT and Duties Tribunal in *Lloyds Bank plc v Commissioners of Customs and Excise* LON 95/2424. It held that the exercise of a break option was not a chargeable transaction provided that the option was in the lease from the outset. Following a consideration of developments since that decision, Lord Ericht concluded that

this was still the law as regards the lease in question. No VAT was properly due, therefore, and declarator was refused. For more on the VAT position, see p 205 below.

There was a subsidiary issue of whether comments made by a representative of the landlord to the tenant's property director personally barred the landlord from disputing the validity of the exercise of the break option. Lord Ericht would have allowed this to go to a proof before answer had he not held for the tenant on the primary issue.

(27) SW v Chesnutt Skeoch Ltd

[2021] CSIH 11, 2021 SC 302, 2021 SLT 276, 2021 SCLR 197, 2021 Hous LR 2

SW held an assured tenancy under the Housing (Scotland) Act 1988 of a flat in Port Glasgow. When this was terminated the landlord, Chesnutt Skeoch Ltd, made an application to the First-Tier Tribunal (FTT) for payment of rent arrears of £4,050 and for damages of £450 in respect of cleaning and repairs. The jurisdiction to deal with cases involving assured tenancies was transferred from the sheriff court to the FTT by s 16(1) of the Housing (Scotland) Act 2014.

The tenant opposed the application. She initially made written representations that she lacked capacity to enter into the tenancy because of learning difficulties, but subsequently withdrew these, now submitting in writing that the tenancy should be reduced because of facility and circumvention.

The FTT held that it did not have jurisdiction under s 16 of the 2014 Act to deal with reduction and that in any event no formal application for this remedy had been made under r 70 of the First-Tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017, SSI 2017/328.

The tenant appealed to the Upper Tribunal ('UT') arguing that her written submissions had been an application under r 70, that the FTT did have jurisdiction, and that even if the submissions were not such an application, they were a defence that the tenancy should be reduced *ope exceptionis*. The UT refused the appeal. It held that there had been no application under r 70, reduction *ope exceptionis* was not competent and even it were wrong on this the tenant should have sought amendment of the written submissions to refer to the new defence argument.

This led to a further appeal by the tenant, this time to the Inner House. The appeal court held that the written submissions did not comply with r 70. In particular they had not been signed and dated by the tenant. Further, they were not described therein as an application. Nevertheless, the FTT did have jurisdiction to entertain all relevant defences. An interpretation of s 16 of the 2014 Act which excluded a defence was contrary to the presumption against statutory interference with rights of legal process. The court's general authority for this was F A R Bennion, *Statutory Interpretation* (7th edn by D Bailey and L Norbury, 2019) para 27.10. Reference was also made to the Stage 1 Report in the Scottish Parliament in relation to the Bill which became the 2014 Act. It was confirmed there that the move of jurisdiction from the sheriff to the FTT was not to affect how a case was to be decided: see paras 29 and 30 of the Inner House judgment.

The correct question for the FTT to consider was whether the written submissions had been a proposed amendment of the original written representations. The matter was remitted to the FTT for it now to do so.

Even if the statutory tenancy is reduced, this may not exclude a claim at common law for compensation to Chesnutt Skeoch in respect of the occupancy of the property and any damage to it. But this area of law is difficult: see A J M Steven, 'Recompense for Interference in Scots Law' 1996 JR 51 at 52–57.

(28) Granton Central Developments Ltd v Len Lothian Ltd
[2021] SAC (Civ) 7, 2021 SLT (Sh Ct) 101

Granton Central Developments Ltd was the landlord in a lease of a warehouse and office near Granton Harbour in Edinburgh. Len Lothian Ltd was the tenant. The landlord sought, first, payment for water supplied to the premises and, secondly, declarator that there was no obligation to provide this and that therefore it could turn off the supply. The lease did not confer an express right to a water supply. There were, however, other terms in the lease which did refer to water, in particular duties on the tenant to maintain and repair 'water apparatus' and to relieve the landlord from charges for water and other services.

At first instance the sheriff (T Welsh QC) held that these terms implied (in fact) a right to water. See [2020] SC EDIN 6, 2020 SLT (Sh Ct) 71 (*Conveyancing* 2020 Case (36)). The sheriff considered separately whether a right to a water supply is part of the implied-in-law term that the property must be reasonably fit for the purposes of let. Although it was not necessary to decide this point, he expressed the view that, while this would ultimately depend on the lease in question, it would be highly unlikely in the twenty-first century for the term to be satisfied for a commercial warehouse if there were no water supply.

The landlord appealed, successfully, to the Sheriff Appeal Court in relation to the implied-in-fact term. The appeal court held that the sheriff had conflated the exercises of (i) construing the express terms of the lease, and (ii) deciding what may or may have not been implied into the lease. These are separate: see *Marks and Spencer plc v BNP Parabis Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] AC 742 at para 29 per Lord Neuberger. The tenant had not pled a case based on an implied-in-fact term. The court stated at para 20:

Nowhere in the lease are there words which oblige the pursuer to supply water to the defender or give the defender a right to receive a water supply from the pursuer. Although the starting point is the wording, the court must consider the context, read the contract as a whole and ascertain the objective meaning. This is not a situation where there are competing interpretations of a clause in the lease and the court must consider which of the two or more interpretations fit with business common sense. The defender's position is that the provisions of the lease together with the knowledge of the parties at the time of the grant require the imposition of an implied term that the landlord is obliged to continue to supply water to the defender. There is in our view no language in the lease which imposes such an obligation.

In relation to whether a water supply was implied in law as part of the obligation that the property is reasonably fit for the purposes of let, this would be a matter for a proof.

(29) Samson v D C Watson & Sons (Fenton Barns) Ltd
[2021] SC EDIN 3, 2021 GWD 4-54

Like the previous case, this case too turned on the distinction between terms implied in law and implied in fact. Philip Samson leased a storage unit at the Turkeytorium, Fenton Barns Farm, East Lothian from D C Watson & Sons (Fenton Barns) Ltd. In 2016 the building in which the unit was situated was destroyed in a fire. This had been started deliberately within another unit at the other end of the building. Mr Samson lost assets which he valued at £300,000. He sought damages for that amount plus return of the rent that he had paid.

Mr Samson argued that the landlord was in breach of the implied-in-law terms that the leased property must be reasonably fit for the purposes of let and in a tenable condition. He submitted that this included an obligation on the landlord to comply with fire-safety legislation and that it had failed to do so. Mr Samson further argued that he had been induced to enter into the lease by the landlord's false and negligent representation that the unit was in a tenable condition. He averred that because of this he had been entitled to retain the rent from the outset of the lease to the date of the fire. The landlord had thus been unjustifiably enriched and should now return the money.

The sheriff (N A Ross) dismissed the action. There was no direct common law authority on tenable condition in relation to the safety of stored goods, as opposed to the safety of people within the leased property. Further (at paras 17–18):

The pursuer's argument seeks to attach a statutory regime, or regimes, to private law contractual relations. The regulations and provisions relied upon create no such relationship. The common law has not hitherto created such a relationship ... It is not axiomatic that the common law requires premises to meet standards imposed by legislation from time to time. Accordingly, even if it were open to me on the authorities to infer such a term (and in my view it is not), I would not in any event do so.

The court then considered whether an obligation to comply with the fire-safety legislation was an implied-in-fact term between the parties in terms of their particular contract of lease. Such terms will only be implied where a contract would otherwise lack commercial or practical coherence: *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] AC 742 at para 21 per Lord Neuberger. The lack of reference to fire-safety legislation in the lease could not be said to make it incoherent.

In relation to the alleged misrepresentation, the sheriff said that no statement could be identified in the pleadings that amounted to a representation by the landlord in relation to fire safety. This was perhaps unsurprising given that Mr Samson's case was founded on purported implied terms.

Finally, the claim for return of the rent was, the sheriff held, misconceived. Mr Samson had enjoyed the use of the unit for over 18 months prior to the fire. He could not expect that to be free. The sheriff continued (at para 42):

In any event, the ability to retain rent is not a claim for payment, but a form of set-off against claims against the landlord, or possibly a security against performance by the landlord of a contractual obligation.

In fact retention and set-off are different defences. Set-off can result in a debt being reduced or extinguished whereas retention is generally used as a tool to prompt the other party to do something. But certainly a right of retention is not of itself a ground for an action for payment. Moreover, a claim in unjustified enrichment will not normally be available where there is a contractual claim: see *Pert v McCafferty* [2020] CSIH 5, 2020 SC 259 at para 18 (see *Conveyancing* 2020 pp 184–86). Here the claim was one of alleged breach of contract.

(30) Rockford Trilogy Ltd v NCR Ltd
[2021] CSOH 49, 2021 SLT 1525, 2021 Hous LR 67 affd [2021] CSIH 56,
2021 GWD 36-484

A lease of business premises in Motherwell was due to end in March 2020. Neither the landlord nor the tenant had served a notice to quit more than the required 40-day period before the ish. But there had been correspondence between the parties in which the tenant had indicated that it was only willing to stay on in return for more favourable terms. The question was whether this was sufficient to exclude tacit relocation. The Lord Ordinary held that it was, a decision which was subsequently affirmed on appeal by the Inner House. See **Commentary** p 136.

(31) Coal Pension Properties Ltd v Technip UK Ltd
[2021] CSOH 39, 2021 SLT 1224

This case concerned the interpretation of a dilapidations clause. Coal Pension Properties Ltd was the landlord and Technip UK Ltd the tenant in a lease of business premises at Westhill, Aberdeen. When the lease ended Coal Pension Properties sought payment from Technip of the cost of repairs. The tenant's liability, as provided for in clause 17 of the lease, was to 'pay to the landlord the reasonable sum certified by the landlord's surveyor as being equal to the cost of carrying out such work'. It was further provided that if the tenant paid that sum along with the surveyor's reasonable fees within 20 days of written demand, the tenant's liability would be discharged. But if this were not done the tenant would also become liable for a payment equivalent to loss of rent for the period which it took to carry out the works.

The written demand eventually sent by Coal Pension Properties, following prior correspondence between the parties, was for £380,207.27 in respect of repairs and £214,219.70 in respect of lost rent. Technip disputed that the amount stated for repairs was 'reasonable'. Coal Pension Properties then raised an action

for payment in respect of the above sums plus interest, in terms of clause 17, or alternatively for damages for the same amount plus an additional £4,860 being other costs which it had incurred in relation to the matter. The Lord Ordinary (Tyre) upheld the claim on the basis of clause 17.

The written demand made by Coal Pension Properties was found to be defective in that it claimed both for the repairs and the lost rent. No payment, however, was due in respect of the latter unless or until 20 days had passed without payment of the former. A judicial reprimand was given to the responsible lawyers (para 19): 'It is unfortunate that the pursuer's solicitors' letter of demand ... was not drafted with more careful attention to the terms of clause 17.' Nevertheless, this did not mean that Technip's only options were either to pay the whole amount or to pay nothing. Despite its shortcomings, the argument that no valid demand had been made in respect of the repairs was misconceived.

The correct interpretation of clause 17 was that it conferred authority on the surveyor to determine what was to be paid. It provided an incentive to the tenant to pay promptly and thus avoid liability for lost rent. This was a significant financial benefit to the tenant. The 'reasonableness' qualification was a control: a certified sum which was unreasonable would not result in the clock running in respect of the 20 days. The drafting of the clause indicated that a detailed discussion about what was 'reasonable' was not intended by the parties.

As for the alternative damages claim, clause 17 had provided an exhaustive remedy where repairs were required at the end of the lease. It did not make commercial sense to allow a common law damages claim in addition. Lord Tyre referred in this regard to the English case of *Scottish Power UK plc v BP Exploration Operating Co Ltd* [2016] EWCA Civ 1043 and stated (at para 29):

In particular, the opportunity afforded to the tenant to obtain a discharge of any liability for lost rent is a key element of the parties' bargain, materially departing from the common law, and it cannot have been intended by the parties that the landlord could deprive the tenant of that opportunity simply by choosing to make a claim for common law damages.

(32) Castle Water Ltd v Kemble Estates Ltd
[2021] SC PER 38, 2021 SLT (Sh Ct) 433

Castle Water Ltd was a licensed water supplier under the Water Services etc (Scotland) Act 2005. It sought payment for water and waste charges in relation to premises owned by Kemble Estates Ltd. In terms of s 20A of the 2005 Act liability to pay the charges fell on the 'occupier of the premises' or 'if the premises are unoccupied ... the owner of the premises'. The premises here had been leased but the tenant was in liquidation. Kemble Estates disputed liability arguing that the lease had not been terminated.

It was held that, on a consideration of its terms, the 2005 Act envisaged a situation where premises could be unoccupied even although a party had an entitlement to occupy such as under a lease. Giving the terms used in the legislation their ordinary and natural meaning produced a fair and reasonable

result. The owner was liable if there was no other occupier. This was the position here as the premises were currently vacant.

(33) Re Buzzlines Coaches Ltd
[2020] EWHC 3027 (Ch), [2021] BCC 239, [2022] 1 P & CR 2

What happens to a lease when the tenant company is struck off? On this point a new decision of the High Court in England adopts a different approach from that taken by the Inner House of the Court of Session in *ELB Securities Ltd v Love* [2015] CSIH 67, 2016 SC 77 (*Conveyancing* 2015 (Case 66)).

Mistral Asset Finance Ltd had provided loan finance to a subsidiary of Buzzline Coaches Ltd. In return, Buzzline granted Mistral a legal mortgage over leasehold property which it held at 3A–3B Defiant Close, Hawkinge, Folkestone, Kent. The subsidiary subsequently defaulted and then Buzzline itself was struck off the Register of Companies. Under s 1012 of the Companies Act 2006 the lease fell to the Crown as *bona vacantia*. But the Crown disclaimed title to it under s 1013 of the 2006 Act.

In these proceedings Mistral sought (i) a declaration that it was entitled to the mortgage and (ii) an order for the restoration of the company to the register or alternatively an order under s 1017 of the 2006 Act to acquire the lease. But before the hearing took place a former director of the company had Mistral restored under s 1024 of the 2006 Act.

Judge Halliwell, sitting in the Chancery Division District Registry, held that Mistral was entitled to the declaration. He further held that Mistral's rights had survived the Crown's disclaimer on the basis of s 1015(2) of the 2006 Act. This provides that such a disclaimer does not, except so far as is necessary for the purpose of releasing the company in question from any liability, affect the rights or liabilities of any other person. In any event, the Crown's disclaimer had not taken effect because, in terms of s 1016(1) of the 2006 Act, Mistral's application for an order in respect of the lease had been made within 14 days of receiving notice of the Crown's intention to disclaim.

Where the court differed from the Inner House was in holding that, even if the Crown had disclaimed the lease effectually, it would have automatically re-vested in Buzzline on its restoration. In doing so it relied on s 1028 and s 1032 of the 2006 Act. These relate respectively to administrative restoration and restoration by court order. Both provide that the general effect is that 'the company is deemed to have continued in existence' as if it had not been removed from the register. The Inner House held that these provisions are subject to ss 1012 and 1013 referred to above. On that basis, the lease does not re-vest. In the view of Judge Halliwell, however, these provisions do not qualify the general restoration provisions. Rather, the correct qualifying provision is s 1034. This protects disposals by the Crown to third parties during the period when the company is off the register; the Crown's disclaiming of property as such does not fall within s 1034.

Perhaps surprisingly, s 1034 was not considered by the Inner House in *ELB Securities Ltd v Love*. The Scottish court's decision was not followed in the

Northern Irish case of *Re Carrowreagh Management Co Ltd* [2018] NICH 18 which had also considered the restoration provisions in the 2006 Act.

The Inner House had expressed concern about uncertainty and confusion in relation to property rights, given that generally it is possible in terms of s 1030 of the 2006 Act to restore a company up to six years following removal from the register. But in *Carrowreagh* at para 48, McBride J regarded such concerns as being 'more theoretical than real. This is because the rights of the dissolved company, if disclaimed, will not pass to third parties. It is therefore difficult to see how third parties could obtain rights which would be affected on restoration. Further, if the Crown effect a disposition of the property in question section 1034 ensures that the third party's position is protected'.

Carrowreagh concerned freehold property which, although disclaimed by the Crown, still ultimately fell to the Crown under the doctrine of escheat. With leases, at least in Scotland, the position could be more awkward in practice. Take the case of a commercial landlord relying on the fact that a lease has been terminated by the tenant company being struck off. It grants a new lease to a third party. The original tenant is restored to the register. Does that mean that the new tenant has to leave? Section 1034 does not appear to provide protection as it is restricted to grants by the Crown. It is open to debate what might happen were the issue to be litigated again in a Scottish court.

**(34) Lazari Properties 2 Ltd v New Look Retailers Ltd
[2021] EWHC 1209 (Ch), [2021] Bus LR 915**

This and the next case, both from England, concern landlords challenging a company voluntary arrangement ('CVA') in respect of tenants. The relevant law here is found in Part 1 of the Insolvency Act 1986. While there are some separate provisions in respect of England and Scotland, the regime is generally a UK one.

New Look Retailers Ltd was a clothing retailer with more than 400 stores and over 10,000 employees. Its business being badly affected by the Covid pandemic, it stopped paying rent and service charge to its landlords. When its stores reopened it made a contribution to the rent on the basis of turnover. The company had significant financial liabilities and was likely to go into administration unless its debt was restructured. The proposal as to how this should be done involved a CVA. This would amend the terms of its shop leases where the landlords did not terminate them. It was approved by the necessary 75% of New Look's creditors. A group of landlords then challenged the CVA on three grounds.

The first was jurisdictional. It was argued that what was proposed did not comply with s 1(1) of the 1986 Act because: (i) it amounted to a number of different arrangements with different categories of creditor; (ii) there was insufficient 'give and take' as between New Look and the different creditors; and (iii) it would mean an improper interference with the landlords' property rights.

Mr Justice Zacaroli disagreed. He held that, while the differential treatment of creditors might require to be justified, it was not inherently unfairly prejudicial. On the facts, there was sufficient 'give and take'. As to an interference with

proprietary rights, in *Re Instant Cash Loans Ltd* [2019] EWHC 2795 (Ch) it had been held that a CVA which purported to surrender the relevant company's leases was impermissible. But in the present case the landlords were not required to agree to a surrender, although for some of the leases it was proposed that no rent would be payable. Mr Justice Zacaroli relied here on s 205(1)(xxvii) of the Law of Property Act 1925, under which rent is not an essential requirement of a lease. The Scottish position, at least for commercial leases, is that it is: see eg K S Gerber, *Commercial Leases in Scotland* (4th edn, 2021) para 2-05. So perhaps a different result might have been reached on this point north of the border.

The second ground of challenge was there were material irregularities in the proposal, within the meaning of s 6(1)(b) of the 2006 Act, including in relation to the calculation of the landlords' claims for voting purposes. It was held on the facts that no such irregularities had been established.

The third and final ground of challenge was that the proposal was unfairly prejudicial to the landlords within the meaning of s 6(1)(a) of the 2006 Act. This too failed. Mr Justice Zacaroli held that the lease modifications were not unfair. The CVA gave the landlords a choice of either terminating the leases or accepting a rental stream that, although lower than before, was above what they would have received if New Look had gone into administration. Although other creditors had incentives to vote for the CVA not shared by the landlords, this was not, on the facts, unfairly prejudicial.

For discussion of the issues, see further Amy Flavell and Stuart Taylor, 'CVAs and landlord interests: when unequal is not unfair' (2021) 66 *Journal of the Law Society of Scotland* June/Online.

**(35) Carraway Guildford (Nominee A) Ltd v Regis UK Ltd
(in administration)
[2021] EWHC 1294 (Ch), [2021] BPIR 1006**

As in the previous case, landlords challenged a CVA. The same solicitors and counsel appeared for the landlords. Once again Mr Justice Zacaroli presided. The tenant this time was Regis UK Ltd. In proposing the CVA it had stated that the alternative would be a 'shut-down' administration in which the creditors would get nothing. As matters turned out, and despite the CVA having been approved, the company went into administration and the CVA was terminated. The purpose of this action was to have the CVA formally revoked and require two nominees who had been appointed under it to repay their fees.

The grounds of challenge were similar to those in the previous case: material irregularity and unfair prejudice. The former rested principally on there being non-disclosure of certain information, and that a statement of affairs annexed to the CVA proposal was inadequate. This challenge failed. The court was not satisfied that disclosure of the information would have led to creditors voting in a different way. The statement of affairs was held to be adequate.

Unfair prejudice to the landlords was claimed to have occurred in a number of respects. First, the CVA had treated two creditors (Regis Corporation and International Beauty Ltd), unjustifiably, as being critical to the company staying

in business. Regis Corporation was Regis UK Ltd's parent company. Mr Justice Zacaroli concluded, however, that leaving the debt due to it unimpaired had no real impact on other creditors. Its nature was that it would either never have to be paid (because of no event of default) or would become payable in full. In the latter scenario Regis UK Ltd would have doubtless gone into administration. The position as regards International Beauty Ltd, a shareholder of Regis UK Ltd, was different. There was a £600,000 debt due to it, payable immediately under the CVA. This caused unfair prejudice to the landlords who were being treated far less favourably.

Secondly, the landlords challenged the modification of the lease conditions. But as in the *New Look* case (above), they retained the right to terminate the leases. Therefore the time during which lower rents would have to be accepted was effectively only the notice period for termination. There was no realistic prospect that the landlords would have obtained a higher level of rent during that period, given that without the CVA the company would have been in administration.

Thirdly, the discounting of the landlords' claims by 75% for voting purposes was challenged as being both unfairly prejudicial and amounting to material irregularity. Again the challenge failed. While the blanket nature of the discount and its size were held to be unjustified, there had been no impact on the result of the meeting at which the CVA was approved.

Finally, there was the question of breach of duty by the nominees. It was held that one of these had fallen below the required standard in not questioning the identification of International Beauty Ltd as a critical creditor, but that in the absence of fraud or bad faith he should not have to return his fee.

(36) Apcoa Parking (UK) Ltd v Crosslands Properties Ltd [2021] CSOH 77, 2021 GWD 26-352

This was primarily a construction law case concerning the Kingsgate Shopping Centre in Dunfermline. The centre was owned by Crosslands Properties Ltd. Around 2008 it was extended by the addition of new retail units above which was a multi-storey car park. The car park was operated by Apcoa Parking (UK) Ltd under an 'Agreement for a Lease' to which a draft 25-year lease was annexed. No actual lease seems to have followed the agreement and there was no mention in the pleadings of registration in the Land Register, which is a requirement for a lease over 20 years to be a real right.

Following the completion of the extension, numerous problems came to light and remedial work was carried out. For an earlier litigation, see *Apcoa Parking (UK) Ltd v Crosslands Properties Ltd* [2016] CSOH 63, 2016 GWD 14-268, *Conveyancing* 2016 Case (39). After the remedial work was completed, Crosslands issued two repairs notices to Apcoa (the first in 2018 and the second in 2020) seeking payment in terms of the agreement.

Apcoa responded by raising an action for declarator that it was entitled to rescind the agreement. It contended that Crosslands was in breach of its obligations (i) to use all reasonable endeavours to procure that the building contractor performed its obligations under the building contract in relation to the

shopping centre extension, and (ii) to procure the completion of the car park 'in a good and workmanlike manner using all due diligence' and other conditions associated with this. Seven specific defects of construction were identified. Crosslands argued that it was too late for Apcoa to rescind, averring that Apcoa had known of some of the defects since 2008 and others since 2016, but continued to operate the car park and pay rent. Accordingly, it was now personally barred from rescinding. Apcoa disputed this, averring that it had only become aware of the defects in 2018 on receipt of the first repairs notice.

The Lord Ordinary (Lady Wolffe) found that five of the seven alleged defects were not established, the sixth had only been established in part, and the seventh, while established, was *de minimis*. Apcoa could not therefore show that Crosslands was in material breach of the agreement and thus had no entitlement to rescind. Furthermore, no relevant case of personal bar had been made out.

(37) Uddin v Henderson
[2021] UT 15, 2021 Hous LR 28

Is it competent for a notice to quit to be served by a sheriff officer? The Upper Tribunal concluded that it is competent. The Act of Sederunt (Messengers-at-Arms and Sheriff Officers Rules) 1991, SI 1991/1397, in r 14, says that a sheriff officer can 'execute a citation or serve *any document required under any legal process*'. The Upper Tribunal (Sheriff Ian Miller) took the view that 'any legal process' was a broad term and included not only documents issued by a court or tribunal but also pre-litigation documents such as notices to quit. See **Commentary** p 171.

(38) Smith v MacDonald
[2021] UT 20, 2021 Hous LR 76

This case involved essentially the same question as the previous case. Section 62 of the Private Housing (Tenancies) (Scotland) Act 2016 says that a notice to quit must state 'the day on which the landlord under the tenancy in question expects to become entitled to make an application for an eviction order to the First Tier Tribunal'. This date is calculated by counting forward from the date of service. The notice was served by sheriff officer, and also was posted. The 2016 Act says (s 62(5)) that 'it is to be assumed that the tenant will receive the notice to leave 48 hours after it is sent'. Was the date of service the actual date of service by sheriff officer or two days later? On this question depended the validity of the landlord's application. In substance the issue was whether service by sheriff officer is competent. It was held that the date of service was the date of actual service by the sheriff officer, thereby implying that service by sheriff officer is competent. See **Commentary** p 172.

(39) Hughes v Glasgow City Council
[2021] UT 12, 2021 Hous LR 41

Part 8 of the Antisocial Behaviour etc (Scotland) Act 2004 introduced the system whereby private-sector landlords must be registered with the local authority.

Section 94 provides that, if a landlord is not registered, the local authority can, by the issue of a rent penalty notice (RPN), terminate the tenant's obligation to pay rent.

In this case residential property, co-owned by Hughes and another (X) in what may have been an unwritten partnership, was let out. Both owners were registered under the 2004 Act as landlords, but X's registration lapsed, whereupon the local authority issued a RPN. X quickly re-registered, whereon the RPN was recalled, but there was still a period of about two months for which rent was lost.

Hughes did not seek to argue that the RPN should have affected only X's share of the rent. His argument was that the RPN breached his rights under article 1 of Protocol 1 (A1P1) of the European Convention on Human Rights – the property protection provision. He was unsuccessful before the First-tier Tribunal, and appealed to the Upper Tribunal.

His appeal was refused, for two reasons. The first was that a remedy under the ECHR could not be pursued where there is a remedy under domestic law. Here, said the Upper Tribunal (Sheriff F McCartney), Hughes could have claimed damages from X. The second was that, in any event, the RPN system was compatible with A1P1. It pursued a legitimate aim and was not disproportionate in its operation.

(40) Ostendorf v Rollos
[2021] UT 11, 2021 Hous LR 49

This was a phase in a dispute between Ms Ostendorf and her landlord, or the landlord's agents, or both. But the details of that dispute are not known to us, so we cannot place the case in any context.

The specific issue for decision was whether the letting agent (Rollos Law LLP, designed in the litigation, puzzlingly, as 'Rollos Solicitors & Estate Agents') had breached para 82 of the Letting Agent Code of Practice (Scotland), the legislative underpinning of which is the Letting Agent Code of Practice (Scotland) Regulations 2016, SSI 2016/133. Paragraph 82 of the Code says:

You [= the letting agent] must give reasonable notice of your intention to visit the property and the reason for this. Section 184 of the Housing (Scotland) Act 2006 specifies that at least 24 hours notice must be given unless the situation is urgent or you consider that such notice would defeat the object of the entry. You must ensure that the tenant is present when entering the property and visit at reasonable times of the day unless otherwise agreed with the tenant.

The property, at 14 South Street, St Andrews, had 14 occupants, each of whom had a bedroom, in addition to which there was some communal space. This phase of the litigation was about whether, in order for the letting agent to gain access to a particular bedroom, notification had to be given to all 14 occupants, on the footing that such access would involve passing, however briefly, through communal space. Seemingly in this case such access had been taken without notice having been given to all 14.

The First-tier Tribunal had held that such notification would be disproportionate and so not what para 82 could have intended in the context of a HMO such as this. The Upper Tribunal (Sheriff Pino Di Emidio) has now reversed that decision, holding that para 82 has to be applied strictly.

There was mention of the last part of para 82, requiring that ‘the tenant is present when entering the property’, which would seem to mean that all 14 occupants would have to be present if the agent passed through the communal space, but no view was expressed, since it was extraneous to the appeal to the Upper Tribunal. In a case such as this, notice to all 14 occupants might perhaps be just about workable, albeit onerous, and somewhat pointless when only a specific room is to be looked at. But a requirement to assemble the physical presence of all 14 seems wholly unworkable.

Indeed, even in the case of an apartment with just one tenant, the requirement for the tenant’s presence is not without difficulty, because it affords an uncooperative tenant the power to make matters impossible for the letting agent.

(41) *Purina v Zaharchenko*

9 November 2021, First-tier Tribunal (Housing and Property Chamber)

Cases continue to be common in which a residential tenant (or, more usually, former tenant) claims against the landlord for having failed to pay the deposit for a residential tenancy into a deposit protection scheme as required by the Tenancy Deposit Schemes (Scotland) Regulations 2011, SSI 2011/176 (summarised in *Conveyancing 2011* pp 55–56). Most such cases raise no significant issues of law, so we will mention only one or two.

The 2011 Regulations reg 3 says that ‘a landlord who has received a tenancy deposit in connection with a relevant tenancy must, within 30 working days of the beginning of the tenancy pay the deposit to the scheme administrator of an approved scheme’.

In the present case there was a tenancy of flat 3/1, 40 Cobury Street, Glasgow. The tenant did not pay the deposit until *after* the beginning of the tenancy. The landlord did not pay the deposit into an approved scheme and the tenant claimed the penalty. The landlord argued that (para 15):

[B]ecause the deposit was not fully paid up within 30 working days of the commencement of the tenancy and, as a result, the Respondent was unable to lodge it in an approved scheme within the timescale specified in the Regulations, she was not under an obligation to lodge it thereafter.

This argument did not persuade the Tribunal, which said (para 15):

This could not have been the intention of the Scottish Parliament. It would be a stateable defence to a complaint that a deposit had been lodged late, but Parliament can never have intended that the obligation to lodge tenancy deposits did not apply at all if the deposit itself was paid late. The Tribunal accepted that the situation was not covered by the 2011 Regulations and determined that the only reasonable interpretation of the intention of Parliament was that, if a deposit was not paid until after the expiry

of the 30-working-day period, then that period commenced on the day the deposit was paid, rather than the date of commencement of the tenancy.

(42) Addington Formwork Ltd v Khan
10 November 2021, First-tier Tribunal (Housing and Property Chamber)

Addington Formwork Ltd was a construction company that needed a flat for the temporary accommodation of one or two employees who were working on a construction site. For this purpose in 2000 it took a tenancy of Flat 0/1, 18 Naburn Gate, Glasgow, from City Centre Lets Ltd. After the tenancy ended, Addington Formwork Ltd claimed under the 2011 Regulations on the ground that the deposit (£2,000) had not been paid into a deposit protection scheme as required by the Tenancy Deposit Schemes (Scotland) Regulations 2011, SSI 2011/176. It checked the Land Register and found that the owner was not in fact City Centre Lets Ltd but someone by the name of Shoukat Ali Khan. The present proceedings were against both City Centre Lets Ltd and Mr Khan.

The proceedings were served by 'I J Beim & Associates, Process Servers'. According to an internet search they are located at Suite 3, Chessington Business Centre, Cox Lane, Chessington, Surrey. We have not previously encountered 'process servers' operating in Scotland.

The Tribunal ordered the maximum penalty to be paid, namely thrice the deposit. (The deposit had been £2,000 so the penalty amount was £6,000.) The order for payment was made against both respondents, presumably jointly and severally (*in solidum*) though this is not stated. One factor leading to the imposition of the maximum penalty seems to have been the fact that the style of the tenancy agreement was that of a short assured tenancy, which, readers will not need to be reminded, ceased to be competent on or after 1 December 2017, as a result of the Private Housing (Tenancies) (Scotland) Act 2016.

Since the tenant was not a natural person (an individual) it might seem surprising that the 2011 Regulations were engaged. But the test for the applicability of the Regulations seems to be the nature of the property (residential) rather than the nature of the tenant. However, since the proceedings were undefended this issue was not tested.

The Tribunal found that 'City Centre Lets had the authority to act on behalf of and legally bind Mr Khan as an undisclosed principal'. The basis for this finding is not stated. If it is correct, then it is not obvious why the company was liable jointly with Mr Khan.

(43) Cowan v Somasundaram
[2021] UT 4, 2021 GWD 13-195

Ms Somasundaram held a short assured tenancy. The landlord served a notice to quit on 27 July 2019, terminating the tenancy with effect from 4 February 2020. The tenant refused to flit, and so the landlord raised proceedings in the First-tier Tribunal to recover possession.

The Tribunal found in favour of the landlord. The tenant asked the Tribunal for permission to appeal but without success. She then sought permission from the Upper Tribunal. Permission was refused (Sheriff Frances McCartney). The main point of the case is that the tenant's attempt to invoke the Coronavirus (Scotland) Act 2020 sch 1 para 3(4) could not succeed because that statute had received the Royal Assent on 6 April 2020 by which time the tenancy had already reached its end.

STANDARD SECURITIES

(44) *Guidi v Promontoria (Chestnut) Ltd* [2021] SC GLW 59, 2021 SLT (Sh Ct) 441, 2021 Hous LR 88

There had been a bulk assignment of standard securities by Clydesdale Bank plc in favour of Promontoria (Chestnut) Ltd. One of the standard securities had been granted by a Mr Guidi. When Promontoria came to enforce it, Mr Guidi challenged the company's right to do so on the basis that the assignment did not comply with the statutory style in the Conveyancing and Feudal Reform (Scotland) Act 1970. This challenge was successful. See **Commentary** p 155.

There was a second major issue in the case. This was the obligation of a party founding on a document in written pleadings (or incorporating that document into these pleadings) to lodge the whole unredacted document or a true copy of it in process. What happened if this was not done? Here Promontoria founded its title to the standard security on a redacted certified copy assignment which it had lodged and averred that the redactions were required because of 'commercial sensitivity' and that only 'irrelevant' information was removed (para 6).

The sheriff (Stuart Reid) referred to the Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993, SI 1993/1956, sch 1 r 21.1 and the Act of Sederunt (Rules of the Court of Session) 1994, SI 1994/1443, sch 2 r 27.1 on the lodging of documents. Case law such as *Independent West-Middlesex Fire and Life Assurance Co v Cleugh* (1840) 2 D 1053 had long emphasised that the original document, complete and unredacted, should be lodged. If instead it was to be a redacted version, the leave of the court must be sought. It is not usually for a party to decide which parts of a document it is necessary for the court to see in order to construe it. Confidentiality is not of itself a justification for redacting a document that is being lodged. The sheriff referred (at para 274) to a recent English Court of Appeal case also involving Promontoria and with remarkably similar facts: *Hancock v Promontoria (Chestnut) Ltd* [2020] EWCA Civ 907, [2020] 4 WLR 100. At paras 89 to 90, Lord Justice Henderson stated:

Since the process of construction requires the document as a whole to be considered, the starting point must always be that the entire document should be made available to the court, and any redactions to it on grounds of irrelevance should either be forbidden or, if permitted at all, convincingly justified and kept to an absolute minimum. Except in the clearest of cases, the question of relevance to the process of construction is one that the court should be left to decide for itself ... Redaction on the grounds of

confidentiality alone is a very different matter, and as at present advised I find it hard to see how it could ever be justified where the confidential material forms a relevant part of the document which the court is asked to construe. As I have already said, there are other ways of dealing with problems of confidentiality, such as the use of confidentiality rings which have become a familiar feature of competition and intellectual property cases.

Hancock was also approved in a still more recent Court of Appeal decision, *Promontoria (Oak) Ltd v Emanuel* [2021] EWCA Civ 1682.

The consequences of not complying with the duty to lodge will depend on the facts of the case. Here the sheriff (at para 280) relied once again on *Hancock* as well as on the decision of the Inner House in a recent case involving another Promontoria group company: *Promontoria (Henrico) Ltd v Friel* [2020] CSIH 1, 2020 SC 230. He set out seven different possibilities (there is mis-numbering at para 288 where 'sixth' is repeated). These ranged from the defaulting party being ordered to produce the document and being liable for the expenses in relation to this, to decree by default being granted against that party.

In the event the sheriff concluded that: (i) Promontoria's motion for dismissal should be refused; (ii) the assignation and another document which was referred to within it had to be produced in their entirety and unredacted within a specified period; and (iii) Promontoria should bear the expenses of the debate. Those seeking to enforce standard securities which have been assigned cannot therefore be in doubt as to what must be lodged in court, given both this decision and also *Hancock*.

A final mysterious point is why the assignation document was redacted. A copy could have been obtained from the Land Register where it had to be registered to be effective: 1970 Act s 14(1). In fact, there was apparently more than one assignation document executed by the parties. The sheriff notes (at para 225) that Promontoria made no averment that the redacted assignation was registered in the Land Register. A search (see p 166 below) reveals that an assignation was registered there on 11 September 2015. Promontoria may have founded on the wrong document although we cannot be sure. The confusion as regards the documentation is likely to be addressed in the appeal which we understand is underway.

(45) McLeod v Bank of Scotland plc [2021] CSOH 76, 2021 Hous LR 56

Stewart McLeod has a track record as a party litigant trying to prevent enforcement of standard securities which he has granted. See *McLeod v Prestige Finance Ltd* [2016] CSOH 69, 2016 Hous LR affd [2016] CSIH 97, 2016 GWD 39-690, discussed in *Conveyancing 2016* pp 196-7. The present case concerned a standard security granted by Mr McLeod in 2001 in favour of Halifax plc over his property in Old Glasgow Road, Stewarton. In 2012 the Bank of Scotland, as successor to Halifax, raised an action in Kilmarnock Sheriff Court to enforce the standard security. Decree in absence was granted in 2014. In 2016 Mr McLeod raised an action for reduction of that decree in the Court of Session. He also sought

interim interdict against it being enforced. The bank, to forestall this, gave an undertaking not to enforce pending the outcome of the action. But no summons was lodged to call the action. In 2019 Mr McLeod once again applied for interim interdict. In proceedings which appear to have been unreported Lady Carmichael refused to grant this and in 2020 the Inner House refused Mr McLeod's motion for her decision to be reviewed. In 2021, presumably having lost its patience, the bank sought dismissal of the action of reduction.

Opposing this move, Mr McLeod put forward three grounds for reduction of the decree. First, he contended that the bank did not hold the security at all, on the basis that the HBOS Group Reorganisation Act 2006 could not affect him, as a party to the security, without his consent. The Lord Ordinary (Lord Turnbull) politely described this argument as 'misconceived' (para 25). In fact it was hopeless. The terms of the 2006 Act were not in doubt. Institutional reorganisations have been common in recent times leading to many standard securities being transferred to successors.

The second ground was that the standard security had been obtained by fraud. Mr McLeod stated that the Halifax had not lent him any money. Rather he 'created the money involved by putting his signature to the [standard security] document. Until he had done that the document had no life' (para 29). He further averred that the bank 'had sold on the security, that was where the fraud was'. Unsurprisingly, the court was unpersuaded.

Mr McLeod's third ground was that there was insufficient evidence given to the sheriff in 2014 to enable decree to be granted. He averred that no copy of the calling-up notice to enforce the security had been lodged and neither had the original standard security. The bank contended that there had been compliance with all necessary procedural requirements. Mr McLeod founded on a statement made by Lord Tyre in the earlier *Prestige Finance Ltd* case, at para 17, that, when a right based on a document is the subject of a court action, 'the "best evidence" rule requires production of the principal document'. But Lord Turnbull held that, in the absence of a credible statement from Mr McLeod that the sheriff received inadequate documentation from the bank, the presumption of regularity in the law of evidence (*omnia rite et solemniter acta praesumuntur*) applied. It was notable too that Lord Tyre's statement was made at an evidential hearing where both parties made representations, whereas the sheriff had granted decree in absence. Lord Turnbull questioned also why Mr McLeod had not entered the sheriff court proceedings and had not applied for recall of the decree.

The action was therefore dismissed. Presumably the bank will now go on to remove Mr McLeod nearly ten years after it sought initially so to do.

(46) Pearce v Myers
[2021] SC EDIN 17, 2021 GWD 13-199

Gillian Pearce owned a flat in Essendean Place, Edinburgh. From about 2007 to 2017 she was in a relationship with Mark Easton. For most of that period they lived in the flat. Around 2012 she discovered that in the previous year a

standard security had been granted over the property in favour of David Myers of Ingatestone, Essex, a commercial lender. (A search at Companies House reveals that he is a director of Central Mortgages (Essex) Ltd.) The standard security bore to have been signed by Ms Pearce in consideration of a loan of £32,000 and all sums due and to become due. According to the sheriff (John Mundy) it was 'registered in the Registers of Scotland [sic] for the County of Midlothian on 6 October 2011' (finding-in-fact 7). Ms Pearce's signature was forged. At around the same time a cheque for £32,000 was drawn on Ms Pearce's Nationwide Building Society account in favour of Mr Easton. Once again Ms Pearce's signature was forged.

In a subsequent meeting with a financial advisor, Mr Easton 'indicated' to Ms Pearce that he had forged her signature on the standard security. But he told her not to be concerned and that she 'would not lose her home' (findings-in-fact 6 and 10). Words are so easy.

In 2016 solicitors acting for Mr Myers sent a letter to Ms Pearce stating that she owed £146,326 and that they intended to call up the security. One year later, in 2017, they did this. Ms Pearce then took legal advice and reported the matter to the police. But for reasons which are unknown the procurator fiscal did not instigate criminal proceedings against Mr Easton.

Ms Pearce subsequently sought reduction of the standard security and suspension of the calling-up notice. A proof was held. She gave evidence that she had not signed the standard security and was supported in that by an experienced forensic document examiner who stated that the forgery was so different from Ms Pearce's true signature that the two 'were not actually comparable' (para 13 of the judgment). It was agreed by both parties to the case that if the signature were found to be a forgery the standard security was void and not voidable (para 20, under reference to *Chalmers v Chalmers* [2015] CSIH 75, 2016 SC 158, discussed in *Conveyancing 2015*, pp 200–03). The sheriff, accepting the evidence led by Ms Pearce, so held.

A mysterious part of this case is that Ms Pearce had other financial difficulties and was sequestered between around 2016 and 2019. It might be thought that the issues with the standard security would have come to the fore then.

(47) Lindsay's Exr v Outlook Finance Ltd
[2021] CSOH 82, 2021 GWD 26-349

The parties were in a long-running dispute and some of the story is a sad one. For an earlier stage, see *Outlook Finance Ltd v Lindsay's Exr* 2016 Hous LR 75 (*Conveyancing 2016 Cases* (52) and (69)).

The pursuer, William Lindsay, like his late uncle, Euan Lindsay, for whom he was executor, belonged to a dairy-farming family which had a number of farms in south-west Scotland. The family businesses had entered into various complex borrowing arrangements with the defender, a sub-prime lender. The original contact with the defender came from a recommendation by another farmer in relation to getting finance to set up a bull stud. High street banks apparently lack expertise in this area (para 30). We are always learning. The family also had had

previous financial difficulties, and several of its members had been the subject of bankruptcy proceedings in England.

In 2008 a limited company was incorporated for the family business and called Metal Bridge Ltd ('MBL'), named after a farm which it owned over the English border near Carlisle. This was done on the advice of the now deceased Derek Fradgley, a then director of the defender. He became the company secretary and sole signatory on MBL's bank accounts. Its registered office was the defender's address. When MBL was set up, Euan Lindsay and his brother James Lindsay gave unrestricted personal indemnities to the defender in respect of its debts.

Then in 2009 Derek Fradgley informed Euan Lindsay that MBL was in severe financial difficulty. He said that it owed £2.6 million to the defender. By this time Euan Lindsay was seriously ill with lung disease and would die in 2011. Derek Fradgley advised that the only way to stop the bank, which, he stated, had funded the defender's loans, from selling MBL's assets and the personal indemnities being enforced was as follows. Euan Lindsay would have to enter into two new loan-facility agreements with the defender worth £1.8 million, both with personal indemnities. Loan agreement 1 would require to be secured by an 'all sums' standard security over Harperfield, one of Euan Lindsay's farms, replacing an earlier standard security which he had granted in favour of the defender which was restricted to £275,000. Loan agreement 2 would have to be secured by a legal charge over the farm at Metal Bridge. This would enable Euan Lindsay to acquire MBL's assets including cattle and equipment which it leased from the defender. Euan Lindsay's solicitors expressed concerns over these arrangements but said that they were not providing advice in relation to them. Mr Lindsay signed. It was subsequently admitted by Derek Fradgley that the statement in relation to the bank was untrue.

In this action, Euan Lindsay's executor (and nephew) sought reduction of loan agreement 1 and the standard security on the basis of (i) facility, circumvention and lesion, or alternatively (ii) fraudulent misrepresentation and bad faith. He sought declarator that loan agreement 2 had also been obtained by facility, circumvention and lesion. The charge over Metal Bridge Farm had already been enforced some years before, the farm sold and the proceeds paid to the defender. Following a debate, for which see [2020] CSOH 90, 2020 GWD 37-476 (*Conveyancing 2020 Case (51)*), the case now went to proof.

Both parties submitted detailed expert evidence on MBL's financial position at the time of the transactions. Evidence was also given by members of the Lindsay family and the defender's directors. Both parties were represented by senior and junior counsel. The proof lasted nine days and the judgment of the Lord Ordinary (Lady Wolffe) runs to 161 pages. The legal costs will have been considerable.

The pursuer was successful on all counts. On facility, Lady Wolffe referred to Euan Lindsay's poor state of health. He 'had had limited education and was not comfortable even in basic financial matters' (para 217). In the words of the pursuer (para 106): 'He knew the value of a cow, but that was it.' In contrast, Lady Wolffe found that Derek Fradgley 'was persistent, domineering and, at times, aggressive in order to get his way'. (The contrast with the report of Mr Fradgley's death in *The Kidderminster Shuttle*, 17 July 2017, where he is described as 'a hugely

popular Stourbridge businessman and community champion' is stark: see www.kidderminstershuttle.co.uk/news/15416462.tributes-paid-community-spirited-stourport-businessman-derek-fradgley/)

On circumvention, Lady Wolffe accepted that Derek Fradgley was in effective control of both MBL and the defender. The Lindsay family completely trusted him. But he had 'presented a false narrative of "bank pressure" and grossly misrepresented the position to Euan Lindsay and the Lindsays in respect of MBL's financial position' (para 236). The untrue statement in relation to the prospective bank action was an 'instrument of oppression' (para 148). Further, 'the pressure Derek Fradgley applied at the material time could not have been much greater. Derek Fradgley told Euan Lindsay that he would be held personally liable for the debts of MBL if he did not sign. The inescapable outcome of that would be losing Harperfield. All of this was done at a time when there was a high degree of facility' (para 247). What Derek Fradgley had achieved was 'a prolonged and elaborate circumvention to a very high degree' (para 248). On lesion, the result of the transactions was that the defender's position was materially improved. It received a valuable 'all sums' security over Harperfield which put it in a much stronger position than if it had to rely only on the personal indemnities. Given the inaccurate statement as to MBL's indebtedness to the defender provided by Derek Fradgley, Euan Lindsay's effective loss was more than £700,000. Moreover, MBL's assets had been under-valued. The lesion was therefore 'substantial' (para 256).

As to fraudulent misrepresentation and bad faith, in signing all the personal indemnities Euan Lindsay was agreeing to act as a cautioner in relation to MBL's duty to repay the loans to the defender. In terms of *Smith v Bank of Scotland* 1997 SC (HL) 111 the defender therefore had a duty to act in good faith and in particular not to mislead either by silence or positive misrepresentation. This duty had not been fulfilled. Euan Lindsay had been pressurised by Derek Fradgley. (In passing, it might be noted that this element of the action is easier to understand as regards the earlier indemnities where MBL was the debtor rather than the later ones where the debtor was Mr Lindsay himself. The judgment, however, does not appear to make the distinction.) One particularly egregious aspect noted by Lady Wolffe was a statement in the loan agreements that Euan Lindsay was a 'high net worth' individual which had the effect of disapplying information otherwise required under the Consumer Credit Act 1974. Furthermore, there had been fraudulent misrepresentation by Derek Fradgley who had knowingly and materially mis-stated MBL's financial position.

The final part of the case concerned the doctrines of *restitutio in integrum* and unjustified enrichment. For there to be reduction, the parties must be returned to their previous positions. The defender contended that this was impossible. It argued that the cattle and equipment obtained by Mr Lindsay using loan agreement 1 could not be returned. Curiously, Lady Wolffe had already rejected this argument at the debate stage. Under reference to *Spence v Crawford* 1939 SC (HL) 52 she stated that a compensatory payment would be sufficient. But in any event the pursuer argued that, on a correct analysis of the financial dealings

between Euan Lindsay and the defender, the defender had received more than was due. Lady Wolffe accepted this. This raised the issue of unjustified enrichment. The transactions set aside by the court meant that there was no basis under which the defender could retain this balance. It therefore had to be returned.

(48) G1 Properties Ltd v Royal Bank of Scotland plc
[2021] CSOH 78, 2021 GWD 28-374

G1 Properties Ltd was a company which acquired properties on a buy-to-let basis. The defender bank funded the purchases by providing the company with loans which were secured on the properties. This was originally done on a property-by-property basis. Subsequently, however, the bank suggested a more general loan facility known as a 'hunting licence' (the imagery is striking). This was eventually accepted by the company, but soon after the relationship between the parties deteriorated. The bank subsequently advised the company that the hunting licence had expired. Some time later it appointed a receiver.

After the receivership ended, the company raised an action against the bank for breach of promise. It contended that the bank had promised to provide the company with a new term-loan on expiry of the hunting licence. The dispute to a significant extent was a factual one with the company founding on alleged statements made by bank employees at various social occasions, including at the Grapevine Restaurant in Bothwell and the Hilton Hotel in Glasgow. The Lord Ordinary (Lord Summers), perhaps unsurprisingly, found for the bank, upholding its submissions that the company's pleadings were irrelevant and lacking in specification.

One standard security held by the bank encumbered 2 Heather Gardens, Uddingston. The relevant loan had expired in 2010 and the company had outstanding borrowings on it of £81,429. The company wanted the bank to discharge the security so that it could raise money on the property, presumably by obtaining funds from another lender which would be the subject of a new standard security. The bank refused to grant a discharge unless the company repaid all its debts including those arising under the hunting licence. The company contended that repaying the £81,429 was sufficient to oblige the bank to grant a discharge. Lord Summers held the company's pleading on this point to be irrelevant on the basis that the company did not incorporate the terms of the security within it. He noted that "'All sums" securities are ubiquitous' (para 34), a statement certainly true where a bank is the creditor. If the security were indeed for all sums, the bank was entitled to refuse the discharge. For the company's pleadings to be relevant, contrary averments would have been required.

(49) Serene Construction Ltd v Salata and Associates Ltd
[2021] EWHC 2433 (Ch), [2022] PNLR 1, [2022] 1 P & CR DG5

This English case concerned a damages claim by Serene Construction Ltd against the receivers who had acted in the sale of a development site which it

owned at Bilston (a settlement south of Portobello, but in the West Midlands not Lothian). This was by way of enforcement of a fixed charge which the company had granted in favour of a bank. The company argued that the receivers had not achieved proper value.

Here English and Scottish law are essentially the same. Thus in *Silven Properties v Royal Bank of Scotland* [2013] EWCA Civ 409, [2014] 1 WLR 997 at para 22, to which reference was made in the case, the Court of Appeal said that there was a duty on a receiver appointed by a mortgagee 'to take care to obtain the best price reasonably obtainable'. The wording is remarkably similar to s 25 of the Conveyancing and Feudal Reform (Scotland) Act 1970 which requires a creditor selling land on enforcement of a standard security 'to take all reasonable steps to ensure that the price at which all or any of the subjects are sold is the best than can be reasonably obtained'.

The planning history of the site was complex. There had, alas, been no serene construction. Valuation was therefore not straightforward. The site had been sold by the receivers for £175,000. The company led evidence from a surveyor that, with planning permission which had been granted in 2003, it was actually worth £575,000. Its damages claim was therefore for £400,000 plus interest. In the absence of planning permission the same surveyor assessed the value at £475,000. By contrast, the receivers' surveyor valued the land at £404,000 with planning permission and £200,000 without.

The court concluded that the 2003 planning permission had lapsed because work had not commenced on the site within the required timescale. It also preferred the valuation evidence of the receivers' surveyor because it was more detailed and took account of problems in relation to the markets for residential properties and development finance at the relevant time.

On that basis the case was effectively lost, but we mention a number of the allegations of breach of duty which were pled. First, the receivers had only taken valuation advice prior to the sale from a Mr Sparrow of Connells, a firm which was to market the property. Mr Sparrow was not a MRICS. The court held that he was nonetheless a very experienced surveyor. It was not persuaded that instructing a different valuer would have led to the receivers taking a different approach to the marketing of the property which would in turn have achieved a higher price. The likelihood is that such an alternative suitably qualified individual would have valued the site at around £200,000.

Secondly, in the first instance the receivers had confined their marketing to a targeted list of known local developers. Such a strategy, the court thought, was reasonable for the site in question. Matters would be different for an individual residential property where 'the range of potential purchasers is wide and unpredictable, so it is likely to be reasonable to expose them widely to the argument by way of signage and advertisement' (para 90).

Finally, the receivers had accepted an offer of £175,000 when the market value of the property was £200,000. This too, said the court, was not a breach of duty on the part of the receivers. There was no guarantee that anyone would offer that higher figure. We would add that those acting for selling creditors will find this view reassuring.

For commentary on the case, see L Clark, 'A mortgagee's duties under a power of sale' (2021) 2138 *Estates Gazette* 84.

FAMILY PROPERTY

(50) *Marwaha v Kumra* [2020] SC DUM 52, 2021 GWD 2-27

A residential property at 17 Hillfoot Drive, Bearsden, Dunbartonshire, was bought by the pursuer and the defender. They were sisters-in-law, the pursuer being married to the defender's brother. The reason that title was so arranged was that they were the only two in the extended family who were sufficiently creditworthy to be able to borrow. Even so, neither could borrow enough for the whole purchase, but jointly they were able to raise enough money. There followed various problems, including insolvencies, immigration problems, and divorces, which do not need to be entered into here, other than to mention that the pursuer and defender ceased being sisters-in-law. The position emerged whereby the defender was living in the property, with her mother, and the pursuer was not. The pursuer wished the property to be sold, but the defender refused. The pursuer raised the current action for division and sale. The defender pled (para 33) that:

[T]he pursuer is not entitled to the remedy of division and sale as either (i) there was an express agreement that the pursuer had agreed not to seek the sale of property, or (ii) on an *esto* basis, it was an implied term of the agreement between the parties that the pursuer would not seek to sell the property whilst either Rugbinder or Kamlesh Marwaha [the parents of the defender, the former of whom was now deceased] were alive, or that (iii) the pursuer is personally barred from seeking the remedy of division and sale due to her words and actions relative to the property.

The defender also pled (para 34) that the pursuer and defender had agreed that they 'would not consider themselves the true owners of the property, but rather the true owners would be Kamlesh and Rugbinder Marwaha'.

What the expression 'true owners' means is unclear. Was the suggestion that the Land Register was inaccurate in showing the pursuer and defender as owners? Or perhaps a trust relationship, as between the pursuer and defender on the one hand and the latter's parents on the other, was being suggested? But neither line of reasoning was developed and so will not be discussed further, other than to remark that neither would have been easy to substantiate.

A proof was held, Sheriff Frances McCartney concluding that the defender had failed to prove her averments: accordingly decree in favour of the pursuer was granted. The question as to whether the proceeds of sale should be divided equally or unequally was not discussed. Equality, of course, is the general rule (assuming that the shares of title are equal) but it can sometimes be departed from. Here it seems that the pursuer had made only very limited contributions to the purchase, and that fact might possibly have been the basis for an argument

against equal division: see *Malak v Inglis* [2019] SC HAM 100, 2020 Fam LR 47 (*Conveyancing* 2020, Case (55)).

(51) Slight v Tait's Exx
[2021] SC EDIN 24, 2021 SLT (Sh Ct) 495

Is writing required for a contract to dispoise heritable property? In this case it was accepted without argument that it is not required, so that a purely oral agreement to dispoise can be binding. See **Commentary** p 183.

(52) Ludman v McIvride
8 November 2021, Oban Sheriff Court

The defender, Andrew McIvride, owned some land in Argyll. His brother Graeme worked in Dubai where he (Graeme) met the pursuer, Lorraine Ludman (where she ran a 'theatrical lighting and translation equipment business'). The pursuer and the defender entered into a 'romantic relationship' which lasted several years. A plan was evolved among the three – the two brothers and the pursuer – for the development of the land. Title was to be transferred to the pursuer. The pursuer paid the defender £140,000 towards the price, but the plan fell through. She never acquired title and the development never took place.

In this action she craved payment of three sums: (i) the return of the £140,000; (ii) the return of a further £10,000 that she had paid, she said, in anticipation that the scheme would go ahead; and (iii) the return of substantial sums that the defender had, she said, embezzled by withdrawals from her bank account. (She had made him a co-signatory for one of her bank accounts. Thus he did have authority to withdraw: her case was that he withdrew unauthorised sums for his own benefit, as well as authorised sums.)

The defender's position was that, as to (i) and (ii), the sums 'were gifts, reimbursements of expenses incurred, the costs of materials for the pursuer's other renovation projects, money for contractors and £10,000 wages for the defender' (para 179). As to (iii) his defence was on broadly similar lines. There was a long proof, involving numerous witnesses. The sheriff (Patrick Hughes) preferred the evidence of the pursuer to that of the defender and his brother. The judgment runs to 78 pages and predominantly deals with disputed issues of fact.

As to (i) it was held that the alleged agreement, though not in writing, was binding under the 'statutory personal bar' provisions of the Requirements of Writing (Scotland) Act 1995, because the pursuer had acted in reliance on the agreement, and that accordingly the pursuer could claim by way of breach of contract, and that even if that had not been the case, she would have been entitled to the return of the money under the law of unjustified enrichment.

As to (ii) the pursuer was successful on the basis of the law of unjustified enrichment, and on (iii) she was successful on the basis of the law of delict, the sum awarded under head (iii) being £47,693. (A small part of (iii) was actually a claim for breach of contract, but we will not go into the *minutiae*.)

SOLICITORS, SURVEYORS AND ARCHITECTS

(53) WPH Developments Ltd v Young & Gault LLP **[2021] CSIH 39, 2022 SC 28, 2021 SLT 905, 2021 SCLR 616**

A residential development company (the pursuer) instructed a firm of architects (the defender) to prepare drawings for new buildings, and the latter did so. On the basis of those drawings construction began. It then emerged that the construction encroached on neighbouring properties. The neighbours immediately objected. The construction work already done had to be demolished. Moreover, dispositions granted in favour of purchasers were being rejected by the Keeper. The residential development company raised the present action for damages, in the sum of £300,000 plus interest. Whether there had in fact been negligence and whether any such negligence had in fact been causative of loss were issues not determined, for the case was disposed of on the basis of the defender's preliminary plea that any liability had been extinguished by negative prescription.

The general rule is that the prescriptive clock begins to tick 'on the date when the loss, injury or damage occurred': s 11(1) of the Prescription and Limitation (Scotland) Act 1973. But s 11(3) contains an exception which has generated much litigation, of which this case is the latest:

In relation to a case where on the date referred to in subsection (1) above ... the creditor was not aware, and could not with reasonable diligence have been aware, that loss, injury or damage caused as aforesaid had occurred, the said subsection (1) shall have effect as if for the reference therein to that date there were substituted a reference to the date when the creditor first became, or could with reasonable diligence have become, so aware.

It was held that s 11(3) was inapplicable; accordingly, the defence of prescription was upheld.

We will not delve into the law of prescription here, but will note that the factual aspect of the case is unusual. Had the defender been a firm of conveyancing solicitors, the case would be understandable – whether well-founded or ill-founded. Conveyancers are experts on title to land. Architects are not. Speaking generally, it is not for architects to tell their clients where the legal boundaries of their land lie. The reasons why the architects were being pursued do not appear from the case.

(54) Large v Hart **[2021] EWCA Civ 24, [2021] PNLR 13, [2021] BLR 189, [2021] TCLR 2**

Mr and Mrs Hart were interested in buying a seaside house in Devon, which had recently been extensively rebuilt and extended. They instructed a RICS Homebuyer report from Mr Large. There was no NHBC certificate or equivalent, and Mr Large failed to advise that a certificate from the firm of architects that had supervised the work should be sought. The Harts went ahead with the purchase at a price of £1.2 million. It turned out that the

recent works had been defective – so defective that the only reasonable course would be demolition.

The Harts claimed damages from their solicitors. Details of this claim are unclear, but the basis of the claim may have been that they had failed to advise that a certificate should be obtained. That claim settled, but for a sum that did not fully compensate the Harts, who proceeded with an action against Mr Large.

It was found as a matter of fact that (i) if the architects had been asked to provide a certificate they would have declined to do so, and (ii) under those circumstances the claimants would not have gone ahead with the purchase.

When the case came before the Court of Appeal the question was the method by which damages payable by Mr Large were to be assessed. We quote from para 27:

Mr Large argued that it [the measure of damages] should be the diminution in value arising from any defects that he negligently failed to report on in the HomeBuyer Report (which would make him liable only for defects he should have reported on but did not). As the judge noted ... this would involve the assessment of the extent to which any defects he should have noted and reported on would have reduced the value of the property below £1.2 million. On the other hand, the Harts argued that it should be the difference in value between the property with the defects as reported, and its value with all the defects which in fact existed.

The Court of Appeal preferred the approach of the claimants. This is the most recent case on surveyor liability, an issue that has been before the courts a number of times over the years: such as *Philips v Ward* [1956] 1 WLR 471, *Perry v Sidney Phillips & Son* [1982] 1 WLR 1297, and *Watts v Morrow* [1991] 1 WLR 1421.

(55) Lennon v Englefield
[2021] EWHC 1473 (QB), [2021] Lloyd's Rep FC 432, [2022] PNLR 3

The Lennons were a family of some wealth. One of their properties was a leasehold of a flat at Aria House, Newton Street, London, which was held by Michelle Lennon as bare trustee for her mother Kathleen Lennon. They decided to sell it. The family were in touch with someone called Philip Anthony Devereux Englefield who was, they believed, a solicitor. He had indeed once been a solicitor, but had been struck off for embezzling, back in 1991, the sum of £900,000, for which embezzlement he had served a prison sentence. They appointed Mr Englefield to handle the sale, and they instructed the conveyancing solicitors to pay the net proceeds of sale to his firm, Grace Associates Ltd.

The sale price was £1,250,507.39, and after fees and outlays the net sum of £1,218,519.39 was remitted to Grace Associates Ltd. What happened to the money, what happened to Grace Associates Ltd, and what happened to Mr Englefield are not known to us, but at all events it is clear that the family never received the money. In this action they sued their conveyancing solicitors. They argued that the firm had not carried out a proper identity check on Michelle Lennon

and that they had not advised her of the risks of transferring the sale proceeds to a third party.

The action failed, unsurprisingly. If the firm had carried out an identity check on Michelle Lennon it would have made no difference. Moreover, a failure by conveyancing solicitors to carry out an identity check on a selling client in line with the Solicitors Regulatory Authority Code of Conduct could not found a cause of action in negligence, because the duty was owed pursuant to regulations which were intended to protect the general public, not clients of solicitors. As for the alleged failure to advise the family about the risks, that was not part of the firm's duty.

(56) Spire Property Development LLP v Withers LLP
[2021] EWHC 2400 (Comm)

In 2012 Spire Property Development LLP bought two adjacent sites in Fulham Road, London, for the purpose of redevelopment, the prices being £7.8 million and £34 million respectively. In 2013 the buyer discovered that three high-voltage cables ran through the sites. The redevelopment went ahead but, because of the cables, not as originally planned.

The buyer sued its law firm for damages. The claim had two branches: (i) that the defendant should have carried out a power line search with UK Power Networks, the electricity distribution company for the London area, or at least should have advised that it was not doing so; and (ii) that when, in 2013, the problem came to light, 'Withers negligently failed to advise the claimants correctly as to their position as against UKPN by failing to advise that either UKPN could have been compelled to move the HVCs or pay compensation unless it could establish a lawful authority for laying the cables that had not been discharged' (see para 11).

By way of background, the seller of the two sites was a receiver, and so it is likely (though the point was not discussed in the case) that the deal was of a 'take-it-or-leave-it' type.

As to the first point, expert evidence about good conveyancing practice was led. 'The experts', found Judge Pelling QC, 'are agreed that in almost all circumstances where a purchaser intends to develop a property, a combined utilities search including a UKPN search will now (in 2020) be undertaken' (para 21). There was disagreement as to whether that was already the case in 2012; the court took the view that it was. Accordingly (para 35), 'I conclude that Withers were under a duty to carry out a UKPN power line search or at least to inform the claimants that one would not be carried out in the absence of express instructions and enquire of the claimants whether such a search was required.'

So the defendant had been negligent at the time of purchase. It was also held, in relation to the second branch of the claim, that it had been negligent the following year, in the way it handled the problem when it came to light. The fee-earner in question, a Ms Robinson, was examined (we quote selectively from her testimony to the court):

- Q: Now, when you answered question 2, you referred specifically to the Electricity Act 1989. Did you look at that Act, Ms Robinson?
- A: No, I didn't. I have a vague recollection of looking on PLC, the precedent information website, to assist with the response to that enquiry...
- Q: ... So pausing there, what you were doing there was paraphrasing, do you agree, what some of those provisions that we have just looked at in paragraph 6 of schedule 4 to the Act, do you agree?
- A: I didn't look at the Act so – I have a vague recollection of looking on the PLC note and I would have taken it from there.
- Q: Just help us with this, Ms Robinson. If you are going to advise someone about rights under an Act, a specific Act, don't you think you ought to actually look at the Act itself?
- A: I was just answering a question about how could these wires be there without us knowing. It wasn't a detailed – it wasn't a sort of lengthy, detailed piece of work. It was answering a question about why something hadn't come up during the conveyancing process.
- Q: Well, the question he raised was about statutory rights and you are purporting to advise on those statutory rights, aren't you? How can you do that without looking at the relevant statute?
- A: I looked at PLC and that is where I got the information from to expand. I think he had asked – sorry, I can't see the previous email now, but I think he just wanted a bit more information on the comment I had made in the previous email.

The judge commented: 'It is inconceivable that Ms Robinson would not have realised the implications of what is set ... out in Schedule 4 of the Act for her clients *had she taken the trouble to read the provision ...*' (emphasis added). We might add that those who, courageously defying all hazards to their mental health, have attempted actually to read the Electricity Act 1989, which, in the legislation.gov.uk/ version, runs to a sprightly and joyous 427 pages, may perhaps feel a small if secret twinge of sympathy for Ms Robinson.

The decision, though English, and only at first instance, will be of interest to conveyancers, especially commercial conveyancers, in Scotland.

JUDICIAL RECTIFICATION

(57) PHG Developments Scot Ltd (in liquidation) v Lothian Amusements Ltd [2021] CSIH 12, 2021 SC 245, 2021 SLT 325

This was a petition under s 8(1)(b) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 for the rectification of a deed of conditions in relation to a block of 55 flats on the waterfront at Edinburgh's Portobello. The developer (and petitioner in this application) was PHG Developments Scot Ltd ('PHG'). The deed of conditions had been granted by PHG and registered in the Land Register in 2015 under title number MID51821. In the usual way the deed was then

incorporated, both for pertinents and for burdens, in the split-off dispositions of each of the 55 flats. So far as pertinents were concerned, each disposition conveyed the flat in question together with 'the whole rights, common, mutual and exclusive (if any) and others more particularly described in the Deed of Conditions aftermentioned'.

Among the pertinents in the deed of conditions was a right to park in the basement car-park. Although there were only 55 flats, the car-park had 73 spaces. The additional 18 spaces had been intended for an adjacent development to be carried out by a different developer, Lothian Amusements Ltd ('LEL'), and missives had been entered into with LEL for the sale of the spaces. In the event, that development did not proceed. In a subsequent action for damages by LEL for breach of the missives, it was held that PHG's deed of conditions had granted to each of the 55 flats in the main development a servitude of parking over the entire car-park (ie including the additional 18 spaces) and that, furthermore, the wall through which access would have been taken to the adjacent development was, under the deed of conditions, the common property of the 55 flat-owners. See *Lothian Amusements Ltd v The Kiln's Development Ltd* [2019] CSOH 51, 2019 GWD 23-354 (*Conveyancing 2019* pp 12–13). The upshot was that the missives with LEL could no longer be implemented, leaving the seller in breach.

The purpose of the present petition was to put PGH in a position to implement the missives to LEL. To that end PHG sought rectification of the deed of conditions to the effect of (i) removing the 18 car-parking spaces from the servitude of parking, and (ii) excluding the access wall from the development common parts. Of course, rectifying the deed of conditions would be of no help to PHG unless the 55 split-off dispositions were also 'altered' (to use a neutral term). And the obvious way to achieve such alteration was to seek rectification of the dispositions as well. This is allowed under s 8(3) of the 1985 Act: where one deed is rectified (in this case, the deed of conditions), it is possible to procure the rectification of other deeds which are 'defectively expressed by reason of the defect in the original document'. So for example where a disposition is rectified and the disponee has gone on to grant a standard security, the standard security too can be rectified under s 8(3). But there was a problem for PHG with using s 8(3): s 8(3A) provides that a document which is registered in the Land Register in favour of a person acting in good faith cannot be rectified under s 8(3) unless the person consents. So, if s 8(3) was to be used, it would be necessary to obtain the consent of each of the 55 disponees to a rectification that would deprive them of common property as well as restrict their servitude of parking. It was improbable that such consent would be forthcoming.

If, therefore, the dispositions could not, as a practical matter, be rectified under s 8(3), how then were they to be altered? The argument advanced by PHG was this. (i) Rectification of the deed of conditions, if allowed, would be retrospective in effect: s 8(4) (except in relation to its 'real effect' as to which see s 8A). (ii) The 55 dispositions incorporated the pertinents set out in the deed of conditions. (iii) If the pertinents in the deed of conditions were changed by rectification, then the same change would occur, automatically, to the pertinents in the 55 dispositions. (iv) Hence, on registration of the order for rectification in terms of s 8A, the 55

disponees would lose their common property in the wall and also have their parking servitude restricted.

At first instance this argument was accepted by the court and a proof before answer allowed on the question of whether, in the respects averred, the deed of conditions failed to reflect PHG's intentions: see [2020] CSOH 58, 2020 SLT 988 (*Conveyancing 2020 Case (62)*). The First Division has now upheld that decision (although with a quasi-dissent by Lord Malcolm). See **Commentary** p 185.

(58) UK Agricultural Lending Ltd v Hamilton Orr Ltd
[2021] CSOH 54, 2021 GWD 18-254 affd [2021] CSIH 70, 2022 GWD 5-76

In a standard security, the debtor and the granter of the security are usually one and the same person. But it need not be so. A is free to grant a security in respect of the indebtedness of B. In such a case, personal and real liability are split. B, as the debtor, is bound personally to repay the loan, but it is A's land which is burdened by the standard security and hence A's land which is potentially vulnerable to sale by the creditor or other forms of enforcement.

Because such securities are relatively uncommon, they require particular vigilance by the solicitor responsible for the drafting. Otherwise there is a danger that the standard style – with A as both debtor and granter – takes over. That is what appears to have happened in this case. A and B were connected companies. The arrangement which was agreed upon, and amply vouched for, was that a number of standard securities were to be granted over A's land for the indebtedness of B. It was only when the lender came to enforce the securities that it was discovered that the securities made no mention of B, and that A was named as both granter and debtor. In those circumstances, the lender petitioned for the rectification of the securities, under s 8(1)(a) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, to the effect of substituting B for A as the debtor.

The petition was opposed by both A and B. But it was clear from the documentation – including in particular a facility letter entered into between B and the lender – that the common intention of the parties was for B to be the debtor. Rectification of the securities was accordingly ordered.

A appealed to the Inner House but without success, there being 'no merit', according to Lord President Carloway (at para 4), in any of the arguments put forward.

BOUNDARIES AND POSITIVE PRESCRIPTION

(59) Dougherty v Taylor
[2021] SC INV 61, 2021 GWD 40-529

The pursuer owned the house at number 110 of an unnamed street in Inverness. The defender owned the house lying immediately to the north, number 108. Although the parties had been neighbours for 30 years it was only from 2007 onwards that a dispute arose as to the precise line of the boundary between their

properties. The dispute evidently aroused strong feelings, and the police were called in on at least one occasion. 'The disputed boundary', noted the sheriff (Ian Hay Cruickshank) in introducing his judgment, 'varies in width but, at the widest disputed point, represents less than one metre of differing opinion. So far as resolution of the dispute is concerned, the parties remain miles apart'. The action was one of declarator as to the boundary and interdict against the defender's alleged encroachment by means of a fence, shed and a motor cycle. The real issue, of course, was the correct location of the boundary.

At one time both properties had been part of the same larger subjects. The respective split-off dispositions were recorded in 1918 (number 110) and 1950 (number 108). In each case the subjects disposed were described both by a verbal account of the individual boundaries and by a plan. The verbal descriptions were of no help for present purposes because each property was described as bounded by the other. Nor, due to limitations of scaling, were the plans of much assistance in a dispute over so small an area. Matters were hardly improved by the voluntary first registration of number 110 procured by the pursuer in 2015, for the disputed area fell within the scaling tolerances of the OS (and hence the cadastral) map. These tolerances were described by the sheriff as follows (para 131):

The published accuracy tolerances relevant to the scale of the map involved can be found published online by the Ordnance Survey itself. The width of a line on a 1:1250 OS map roughly represents 0.3 metres on the ground. The OS publishes expected confidence levels in the accuracy of their maps in terms of relative and absolute accuracy. Relative accuracy compares the scaled distance between features from the map data with distances measured between the same features on the ground. Absolute accuracy is the measure which indicates how closely the coordinates of a point in the OS map data agree with the 'true' National Grid coordinates of the same point on the ground. The root mean square error ('RMSE') is the square root of the mean of the sum of the squares of the errors between the observations. At a scale of 1:1250, up to a distance of 60 metres, absolute accuracy with a 99% confidence level is 0.9m, 95% confidence level is 0.8m and the RMSE is 0.5m. On the same scale, up to the same distance, relative accuracy 99% confidence is $\pm 1.1\text{m}$, 95% confidence is $\pm 0.9\text{m}$ and the RMSE is $\pm 0.5\text{m}$.

The description in the A (property) section of the title sheet for number 110 was, as might be expected, simply 'Subjects cadastral unit INV [] 110 [] ROAD, INVERNESS [] edged red on the cadastral map', although, with apparently faltering confidence, the title sheet added the following note:

Further information relating to the particular boundaries of the plot is narrated in the Disposition by Thomas MacDonald to Donald MacKenzie and Christina MacLeod or MacKenzie, recorded G.R.S. (Inverness) 16 May 1918.

At one level, the case was a competition between a Land Register title (number 110) and a Sasine title (number 108). But that was not the real issue. There was no suggestion that the title sheet for number 110 was inaccurate, for example by including land that was properly part of number 108. Nor were there any quibbles about the underlying Sasine titles, ie the split-off dispositions of 1918 and 1950. The question rather was: what *precisely* did these various titles mean?

There are two – and only two – ways of resolving disputes of this kind. One is by resort to positive prescription. The other is to seek the true (or at least the best available) interpretation of the words used in the titles. Where the first is available – where, in other words, one of the parties has been in possession of the disputed area on a *habile* title for the prescriptive period of 10 years – the second falls away. For prescription is always decisive of the matter. It is thus only where prescriptive possession is absent that it is necessary (and competent) to try to tease out the true meaning of the titles.

For as long as the Land Registration (Scotland) Act 1979 was in force, prescription was not available to fortify a Land Register title (except in the unusual case where indemnity had been excluded by the Keeper). But the Land Registration etc (Scotland) Act 2012 restored prescription to Land Register titles by way of amendments to s 1 of the Prescription and Limitation (Scotland) Act 1973. Furthermore, and by contrast with the 1979 Act, the title on which the possession was to be founded (ie the foundation writ) was not the description as found in the title sheet but rather the description in the underlying deed registered in the Land Register. All of this has a rather old-fashioned feel. Despite the glossy allurements of the title sheet, disputes of this kind are resolved by recourse to the underlying deed, and to whatever possession may have followed on that deed.

As it happens, because the pursuer's title was the result of voluntary first registration, there was no deed underlying her title sheet; and in any event the necessary prescriptive period had not elapsed since first registration in 2015. It was, however, still open to the pursuer to prescribe on the basis of the (Sasine) disposition in her favour. The defender too had a Sasine deed on which to rely. The terms of those dispositions were not given in the sheriff's judgment, but it may be assumed that the respective properties were described by reference to the descriptions contained in the respective split-off dispositions. And both such descriptions were capable of being read as including the disputed area – or in other words were *habile* for the purposes of prescription. The sheriff put it this way (para 139):

As was conceded by both parties' agents in their submissions the titles to both 108 and 110 [] Road are *habile* in nature. I agree with that concession. Neither property can claim to have a bounding description.

One might take issue with the view that the descriptions – which included a plan as well as a meticulous account of every boundary – were not 'bounding'. But at any rate each was sufficiently flexible to be read as including an area as small as the one in dispute. That settled, the result then came down to the evidence of possession. Here the spoils were divided. The defender was found to have possessed for the prescriptive period some, but not all, of the disputed area. The part she possessed was therefore hers by operation of prescription. The part which she had not possessed, and which the pursuer had possessed instead, belonged to the pursuer on the same basis. In respect of that part alone, therefore, there had been encroachment by the defender on land belonging to the pursuer.

(60) Mellish v Boyd
2021 GWD 31-416, Lands Tribunal

This case too turned on prescriptive possession on the basis of Sasine titles notwithstanding that properties – both properties as it happened – were now on the Land Register. But the facts were rather different from the previous case.

The parties – whom we may call couple A and couple B – owned adjacent properties in Kirkinch, Blairgowrie. A's property was a house and garden, B's a field. A acquired the property in 1995 and held on a Sasine title. B acquired only in 2016, the transaction inducing first registration under title number ANG71150. On or near the boundary between the properties was, first, a stone wall, and then, on B's side of the wall, a dilapidated fence. The distance between wall and fence varied over the length of the boundary but was around a metre. A dispute arose as to whether the true boundary was (as A asserted) the fence or (as B asserted) the wall.

B's title sheet, from 2016, showed the boundary as being the fence. In the following year A sought and obtained voluntary first registration in respect of their property. If, however, this was in the hope of having the boundary likewise shown as the fence, A was to be disappointed, because the title sheet (ANG77252) showed the boundary as the wall. There was thus an area of no-man's land between the wall and the fence which was allocated to neither title sheet – what is sometimes called an 'underlap'.

The purpose of the present application to the Lands Tribunal, by A, was to lay claim to this disputed area. In essence, A argued that they had possessed the disputed area for more than the prescriptive period on the basis of a *habile* title, namely the disposition in their favour of 1995 which in turn incorporated by reference the description contained in the original split-off disposition of 1969. Hence they were owners of the disputed area. Hence their title sheet was inaccurate in failing to include the disputed area and so should be rectified. The application was opposed by B.

Two issues arose. First, was the description in the 1969 disposition capable of founding prescription or did it, on the contrary, exclude the disputed area? Secondly and if the answer to the first question was yes, had there been sufficient possession by A for the prescriptive period of 10 years to allow prescription to operate in their favour?

On the first issue, the 1969 disposition described the subjects conveyed in three different ways: by verbal description, by plan, and by measurements. The first and the last of these were inconclusive. In respect of the former, the subjects were described on the relevant boundary as being bounded 'by subjects belonging to J McDiarmid', ie by the next-door property which today was owned by B. Such a description, as the Lands Tribunal pointed out under reference to *Suttie v Baird* 1992 SLT 133 at 135, did not disclose a 'fixed or indisputable line' (paras 65 and 66). In respect of the latter, which comprised a statement of area as well as measurements of individual boundaries, changes in the ground, and some flattening of boundaries on first registration, made it difficult to draw any definite conclusions in relation to an area as small as the disputed area. 'In these

circumstances', said the Tribunal, 'particular leeway has to be given to the words "or thereby"'.

That left the plan. Although only a low-quality, monochrome version was now available, this appeared to show the relevant boundary as being the wall, with the result that the disputed area was excluded from the subjects (paras 8, 9 and 64). But the plan was described in the 1969 disposition as, 'while believed to be correct ... demonstrative only and not guaranteed'. So it too, said the Tribunal, could not be regarded as conclusive of the matter (para 66) – a view which, however, is not easy to reconcile with the decision of the Inner House in *Rivendale v Clark* [2015] CSIH 27, 2015 SC 558, especially at para 23. Be that as it may, and taking all three descriptive elements together, the Tribunal found the description was *habile* for the purposes of prescribing a title to the disputed area (para 67).

That, of course, was a different question from what might be the 'true' interpretation of the 1969 deed (para 67). *Habile* titles are concerned only with *possible* interpretations. If the question before the Tribunal had been the straightforward one of interpretation of the 1969 deed, the conclusion might well have been that the disputed area was excluded. And such an exclusion would have been consistent with what appears to have been the split-off writ for B's property, a disposition of 1921 which described the boundary as being 'the east or outside face of a dyke'. In all likelihood, therefore, the original boundary was indeed the stone wall (para 15). But that was not the question before the Tribunal. The question was: what was the position today, following the possible operation of positive prescription? And in that connection it was sufficient if the 1969 deed was *capable* of being read as including the disputed area, even if that was not the natural or best reading of the deed.

Of course, a *habile* title is only half-way to prescriptive acquisition. There must also be sufficient possession for a continuous period of 10 years. Here the leading case, much referred to in the course of the present decision, is *Hamilton v McIntosh Donald Ltd* 1994 SC 304. Plainly, it is not easy to demonstrate possession of a marginal area of this kind, and any possession is likely to be more by things – shrubs and hedges or service media – than by people. In the event, the Tribunal found that there had been sufficient possession of the upper part of the disputed area – in the form of a path, the presence of services, and a hedge maintained by A – but not of the lower part. In relation to the latter the Tribunal noted that (para 80):

We saw no evidence of domestic flowers for ourselves and none was shown in any of the lodged photographs. We accept that the applicants are not suggesting that the area was anything other than a 'wild' garden, but this immediately raises a question whether such 'possession' is sufficiently open and conspicuous that a person with a competing title would have reasonable opportunity to challenge.

It was argued for A, following a passage in Stair's *Institutions* (II.1.3), that possession of a part of a clearly demarcated area was the equivalent of possessing the whole. But here, said the Tribunal, the lower part of the disputed area could not be regarded as a clear continuation of the upper part such that possession of the latter could be treated as possession also of the former.

The end result, therefore, was an incomplete victory for A. The upper section of the disputed area (only) had been acquired by prescription. Hence A's title sheet was inaccurate to that extent, and fell to be rectified.

INSOLVENCY

(61) Lafferty v Amil and Overwaele [2021] CSIH 41, 2021 SCLR 533

Mariam van Overwaele owned Knockderry Castle in Argyll. In 2000 she was sequestrated. According to *The Times* (21 July 2021) this was 'after repeatedly refusing a bill relating to a bridalwear business she ran in 1997', the bill having been, according to the newspaper, a mere £230. We add the comments of Lord Woolman, giving the opinion of the Inner House (para 9):

The petitioning creditor's debt was relatively small, but significant other claims quickly emerged after sequestration was granted. Creditors' claims and the expenses of the trustee's administration of the estate now amount to several hundred thousand pounds. Part of the reason for that is that both the pursuer and his predecessor as trustee have been embroiled in various litigations raised at the instance of the second defender over the past 20 years.

The trustee in sequestration obtained decree to eject Mariam van Overwaele from the castle. But, for reasons not known to us, that decree was never implemented. Instead there was interminable litigation, culminating in the present case, which was about a disposition of the castle that Ms van Overwaele granted to her brother, the first defender. This was granted in 2009 for 'certain good and onerous causes'. It reserved to her a liferent, presumably a proper liferent. The disposition was not registered at the time. It was finally registered in 2013, the Keeper excluding indemnity on the ground of the sequestration. The reason for the delay in registration is not known.

In 2018 the trustee raised the present action to reduce the disposition. (The reason for the delay in raising the action is not known.) In the Outer House the pursuer was successful, and, needless to say the defenders reclaimed. The decision of the Outer House has now been affirmed. Is the battle now over? That is another unknown.

Ms van Overwaele was eventually discharged from her sequestration. The date of the discharge is not known, but clearly was earlier than 2009. The property was not sold by her trustee. Nor had her trustee completed title in his own name, as trustee. That being the case, was she not, by 2009, free to deal with the property as she saw fit? When a bankrupt is discharged, any unrealised property remains, in principle, subject to the sequestration. But s 44(4) of the Conveyancing (Scotland) Act 1924 says that if a certain period of time has elapsed, and if the trustee has not completed title in his own name as trustee, then 'no deed ... granted ... by a person whose estates have been sequestrated ... shall be challengeable ... on the ground of such sequestration.'

In *Fortune's Tr v Medwin Investments Ltd* [2015] CSIH 139, 2016 SC 824 it was held that s 44(4) of the 1924 Act applies only if the grantee is unaware of the sequestration. (For discussion of this complex issue, see *Conveyancing 2015* pp 180–86.) The Inner House in the present case took the view that it was 'highly unlikely' (para 42) that the disponent (the first defender) had been unaware, although s 44(4) is not mentioned in the opinion. In the end, however, the case was decided on a procedural point: whether the Lord Ordinary had been justified in granting decree because of the failure by the defenders to appear.

POSTSCRIPT: this case is incorrectly reported in Westlaw and in the SCLR as *Amil v Lafferty*. In fact the pursuer was Mr Lafferty. Mr Amil and Ms van Overwaele were the defenders.

⌘ PART II ⌘

STATUTORY
DEVELOPMENTS

STATUTORY DEVELOPMENTS

Heat Networks (Scotland) Act 2021 (asp 9)

Overview

Once fully in force this new legislation will regulate the provision of thermal energy to homes and other buildings by means of heat networks. The term ‘heat network’ essentially means pipes and other apparatus which transmit heat from a central source to a number of users. The heat is normally in the form of hot water or steam. Section 1 of the Act divides heat networks into two types: (i) a ‘district heat network’ where thermal energy is supplied from one or more sources to more than one building and (ii) a ‘communal heating system’ where the energy is delivered to a single building comprising more than one unit, such as a tenement.

The overall policy objective of the Act is ‘to encourage greater deployment of heat networks in Scotland, in order to help reduce emissions from heating homes and buildings’ (Heat Networks (Scotland) Bill Policy Memorandum para 8). Such networks are, it is said, generally more energy-efficient than fossil-fuel heating systems serving individual houses and, as of March 2020, there were already more than 830 in Scotland (Statement by Paul Wheelhouse MSP, Minister for Energy, Connectivity and the Islands, available at www.gov.scot/news/heat-networks-bill/). The Act provides the first statutory framework, and aims to assist meeting a Scottish Government target that 50% of all energy consumption comes from renewables by 2030. For an overview, see Judith Stephenson, ‘Heat networks – the key to low-carbon heating?’ (2021) 66 *Journal of the Law Society of Scotland* Aug/34.

The Act extends to nine parts and 103 sections. Much of this deals with regulatory issues aimed at protecting consumers. For example, in terms of s 2(1), thermal energy may only be supplied by means of a heat network by a person holding a ‘heat networks licence’. To do so otherwise is a criminal offence (s 2(2)). The rest of Part 1 (ss 1–17) goes on to provide detailed rules on heat network licences. There is to be a register of these which may be inspected by the public free of charge (s 16).

Part 2 (ss 18–45) deals with ‘heat network consents’. These relate to the construction or operation of heat networks (s 18). Carrying out such work without a heat network consent is likely to result in the service of an ‘enforcement notice’ (s 39) by the ‘enforcement authority’ (the Scottish Ministers or a prescribed person) (s 37). Failure to comply with the steps required by the notice, such as altering or removing an unauthorised installation, is again a criminal offence (s 42).

Part 3 (ss 46–54) allows local authorities to designate an area as a ‘heat network zone’. This is to encourage a strategic planning approach to the construction of heat networks. Part 4 (ss 55–62) then permits the Scottish Ministers to award a ‘heat network zone permit’ to a single operator within a particular zone. Part 5 (ss 63–67) imposes a duty on public-sector owners to assess the viability of their buildings being connected to a heat network. They are required then to report on the matter to the local authority in which the building is situated and to the Scottish Ministers.

It is only Part 6 of the Act (ss 68–83) which is of direct relevance to property law and conveyancing. It is discussed in some detail below. It is also the subject of a thorough analysis by Professor Roderick Paisley in chapter 18 of his magisterial *Rights Ancillary to Servitudes* (forthcoming, 2022), to which the present account is indebted. The drafting of Part 6 was also amended as a result of Professor Paisley’s evidence to the Economy, Energy and Fair Work Committee of the Scottish Parliament, during the passage of the legislation.

The remainder of the Act can be dealt with briefly. Part 7 (ss 84–91) is on ‘key heat network assets’. In applying for consent to construct and operate heat networks it is necessary to list the types of property, such as land, buildings and apparatus, which are ‘necessary to the operation of the heat network’ (s 84). Following receipt of the application the Scottish Ministers must prepare a schedule of such assets (s 85). This will assist transfers schemes (s 89) where an operator of a network ceases to operate it. Part 8 (ss 92–93) deals with heat network targets and delivery plans, imposing duties on the Scottish Ministers to reach certain targets for supply of thermal energy by heat networks by 2027 and 2030. There is no sanction for failure. A draft delivery plan was published for consultation on 15 November 2021: see www.gov.scot/publications/draft-heat-networks-delivery-plan/. Finally, Part 9 (ss 94–103) deals with miscellaneous and general matters, including fees for applications.

Part 6: compulsory purchase

The opening provision of Part 6, s 68, confers compulsory purchase powers on heat network licence holders. On authorisation being given by the Scottish Ministers, land ‘that is required for the construction or operation of a heat network’ may be acquired (s 68(1)). This includes power to acquire ‘any right or interest in or over land’ or ‘a servitude or other right in or over land by the creation of a new right’ (s 68(2)). The power does not apply to the Queen’s private estates unless consent is given on her behalf, something which attracted media attention following the passing of the Act: see eg ‘Queen’s lawyers secured amendment to Scottish green energy law’ available at www.bbc.co.uk/news/uk-scotland-58005875. Nor can land held or used by a Minister of the Crown or UK Government department be acquired (s 68(5)). The Act (s 68(4)) applies the regime in the Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947 to the purchase.

Often all that will be required is a right to lay pipes through land rather than acquiring the land itself. But there is a difficulty in the compulsory acquisition

of a servitude here. Servitudes necessarily need a benefited property as well as a burdened property; and there may be so many properties benefiting from the heat network that it would be cumbersome and impractical to list them all (although s 75(3)(b) of the Title Conditions (Scotland) Act 2003 makes no requirement of registration in the case of pipeline and cable servitudes). Recourse may, however, be made instead to the wayleave right provisions in ss 69 to 77.

Part 6: network wayleave rights

Section 69(1) introduces the concept of a 'network wayleave right'. This is defined as 'a right for a licence holder to convey steam or liquids in land for a purpose connected with the supply of thermal energy by means of a heat network by the licence holder'. The term 'land' is further defined in s 69(12) to include apparatus being installed 'under, over, across, along or on the land'. Some of these terms may surely overlap. Under s 69(11) 'land' does not include a road within the meaning of s 107 of the New Roads and Street Works Act 1991. That definition is wider than the more familiar one in s 151(1) of the Roads (Scotland) Act 1984, which requires a way over which there is an existing right of passage: see *Hamilton v Dumfries and Galloway Council* [2009] CSIH 13, 2009 SC 277 (discussed in *Conveyancing 2009* pp 157–63). Given that pipes and cables often go under roads this is a surprising exclusion. The thinking appears to be that a separate provision to carry out road works (s 82) deals with the issue. Section 82, however, does not explicitly confer the right to use the apparatus installed under it to transmit heat. In his book, Professor Paisley goes back to Roman law authorities to argue that the rights expressly conferred by the provision can be interpreted as ancillary rights which imply the existence of the primary right to convey the heat. Perhaps the Act might yet be amended under s 100(1) to put the point beyond doubt. This would save conveyancers who act for licence holders having to dig out their copy of Justinian's *Digest*.

There are three ways in which a network wayleave right can be created. The first is by the unilateral grant of the owner of the land or by agreement with the licence holder (s 69(3)(a)). In the case of tenements this might be done under s 19 of the Tenements (Scotland) Act 2004 and the statutory instruments relative to this (on which see *Conveyancing 2018* pp 93–94). It may be expected that, as for servitudes, wayleave rights will normally be granted on a perpetual basis. Writing will be required in terms of the Requirements of Writing (Scotland) Act 1995 s 1(1)(b) because, in terms of the 2021 Act s 69(9), a network wayleave right is a real right. Further, s 69(11) defines a 'wayleave document' as 'a written document conferring a network wayleave under subsection (3)(a)'. Will registration in the Land Register be needed? The answer is no. Instead there is to be a new register of wayleave rights which will be established under the regulation-making power in s 75. In terms of s 75(2)(h) the regulations are to set out 'the consequences of failure to comply with the requirements of the registration'. This seems such an important issue that it is unfortunate that it is not dealt with in the 2021 Act itself.

The second method of creation is by means of a 'necessary wayleave' (s 69(3)(b)). This is provided for by s 70 and require the authorisation of the

Scottish Ministers. Certain conditions require to be satisfied. In particular, Ministers must consider the wayleave 'necessary or expedient' in relation to the supply of thermal energy by the licence holder (s 70(1)). Compensation is provided for by s 77. There is not an exception this time for the Queen's private estates, but there is for land held or used by a Minister of the Crown or UK Government department (s 70(9)).

The third form of creation is positive prescription (s 69(3)(c)). Section 3(2) of the Prescription and Limitation (Scotland) Act 1973, which deals with servitudes, is applied by s 69(8) of the 2021 Act. This means that the apparatus will require to have been in place for 20 years but no registration is needed.

Network wayleave rights include certain ancillary rights, such as installing and keeping apparatus on the land, entering on to the land to carry out work, and the undertaking of 'any works in respect of the land that are reasonably necessary or incidental to the network wayleave right' (s 69(2)). The drafting of the provision is deliberately in general terms. All the rights set out here may be described as positive ancillary rights. Professor Paisley suggests that the parties may wish to replicate the statutory wording in the wayleave document and to supplement this with any additionally agreed rights.

It is possible to add negative ancillary rights such as a prohibition on building above the apparatus or what Professor Paisley describes as affirmative ancillary rights ie obligations on the landowner to carry out a positive act such as using the land in a particular way. But these can only be done expressly by means of a 'development condition' (s 69(4)–(7)). Conveyancers acting in the purchase of sites will therefore require to check the new register of wayleave rights to see any restrictions, assuming of course that the regulations to be made under s 75 provide for the registration of development conditions.

When apparatus is installed it does not become the property of the landowner (s 69(10)). The doctrine of accession is overridden at least in part. On one view, the apparatus still becomes heritable because of the attachment, assuming that this is sufficiently permanent. In effect it becomes a separate tenement and thus presumably can be transferred by a disposition registrable in the Land Register. This is an awkward result. The counter-view is that all effects of accession are overridden and the apparatus remains moveable. Thus in contrast to the Abolition of Feudal Tenure etc (Scotland) Act 2000 s 65A (reservation of sporting rights) there is no express provision that a separate tenement is created. Whatever view is taken on this point, it might have been simpler for the licence holder to be given a right of alteration and removal which would be enforceable against successor landowners, like a tenant's right in respect of trade fixtures (*Brand's Trs v Brand's Trs* (1876) 3 R (HL) 16).

The Lands Tribunal will have no jurisdiction over network wayleave rights. Rather, variation is either by agreement with the landowner or by the consent of the Scottish Ministers (s 72). Discharge of a network wayleave right can be carried out unilaterally by the licence holder or by agreement with the landowner (s 74). Once again writing will be required.

In addition to providing for the acquisition of network wayleave rights, the Act confers three specific powers on licence holders: (i) to carry out surveys

(s 78); (ii) to enter land to replace or repair apparatus (s 79); and (iii) to carry out road works (s 82, mentioned above). Strikingly, the first two of these are backed up by criminal offences where someone interferes with the exercise of the rights. Therefore landowners who are unhappy about the prospect of such a wayleave will have to exercise restraint.

Coronavirus (Extension and Expiry) (Scotland) Act 2021 (asp 19)

In 2020 the Covid-19 pandemic gave rise to two emergency statutes of the Scottish Parliament: the Coronavirus (Scotland) Act 2020 and the Coronavirus (Scotland) (No 2) Act 2020. Taken together they made important if temporary changes in a number of matters of interest to conveyancers including the rules on eviction in residential tenancies, irritancy in commercial leases, the duration of planning permission, remote authentication by notaries or equivalent, and the digital submission of deeds to the registers. For details, see *Conveyancing 2020* pp 63–68. Both Acts had expiry dates of 30 September 2020, but in both cases the expiry date was extended, first to 31 March 2021 and then to 30 September 2021: see the Coronavirus (Scotland) Acts (Amendment of Expiry Dates) Regulations 2020, SSI 2020/299 and **Coronavirus (Scotland) Acts (Amendment of Expiry Dates) Regulations 2021, SSI 2021/152**. Both statutory instruments are now revoked by s 8(10) of the Coronavirus (Extension and Expiry) (Scotland) Act 2021. In their place the 2021 Act provides, in s 1, for the two Acts of 2020 to be extended to 31 March 2022, with the option of a further extension by regulations to 30 September 2022. The provisions of the first of the two Acts concerning the extension of the period of effect of advance notices (sch 7 paras 15–18) were, however, extinguished on 30 March 2021 by the **Coronavirus (Scotland) Acts (Early Expiry and Suspension of Provisions) Regulations 2021, SSI 2021/93** reg 2(b)(i); they were already spent in practice, as explained in *Conveyancing 2020* pp 66 and 86–87.

Meanwhile the Scottish Government has been consulting on the possibility of making some of the changes permanent, notably rules on eviction in residential tenancies (pre-action requirements and making all grounds of termination discretionary) and on remote authentication by notaries: see *Covid Recovery: a consultation on public services, justice system and other reforms* (17 August 2021, available at www.gov.scot/publications/covid-recovery-consultation-public-services-justice-system-reforms/) paras 104, 105 and 129–135. This is now to be implemented by ss 30 and 33–37 of the Coronavirus (Recovery and Reform) (Scotland) Bill which was introduced to the Scottish Parliament on 25 January 2022. As noted later in this volume (p 87), and following a separate consultation, the digital submission service for the Land and Sasine Registers is also to be made permanent, and s 24 of the Bill provides the legislative basis.

Telecommunications Infrastructure (Leasehold Property) Act 2021 (c 7)

The Telecommunications Infrastructure (Leasehold Property) Act 2021, when it is in force, will insert a new Part 4A into the Electronic Communications

Code, which is itself set out in sch 3A of the Communications Act 2003. For discussion of the Code, see *Conveyancing 2017* pp 71–73. The new Part 4A provides a procedure that telecommunications operators can use to gain access rights (so-called ‘Code rights’) to multi-dwelling premises for a defined period. This only applies where: (i) a lessee in occupation of a multi-dwelling building requests a telecommunications service from an operator; (ii) in order to connect the property the operator requires an access agreement with another person such as the landlord; and (iii) the landlord does not respond to the operator’s request for access.

Register of Persons holding a Controlled Interest in Land

Section 39 of the Land Reform (Scotland) Act 2016 requires Scottish Ministers to make regulations setting up a public register of persons who have controlling interests in owners and tenants of land. After a prolonged period of consultation and delay, the necessary regulations have finally been passed, as the **Land Reform (Scotland) Act 2016 (Register of Persons Holding a Controlled Interest in Land) Regulations 2021, SSI 2021/85**, as subsequently amended by the **Land Reform (Scotland) Act 2016 (Register of Persons Holding a Controlled Interest in Land) Amendment Regulations 2021, SSI 2021/495**. The new regulations came into force on 1 April 2022, and the new Register of Persons Holding a Controlled Interest in Land opened its doors on the same day. See p 209 below.

Property Factors Code of Conduct

Around 400 property factors are registered in the Property Factor Register (www.propertyfactorregister.gov.scot/PropertyFactorRegister/Search.aspx) in terms of the Property Factors (Scotland) Act 2011. Searches in the Register can be carried out free of charge (i) by name of property factor, (ii) by addresses factored (approximately 620,000 addresses), or (iii) by name of property (approximately 2,500 names).

In addition to registration, the 2011 Act provided for a Code of Conduct to be prepared by the Scottish Ministers (s 13). This was implemented by the Property Factors (Code of Conduct) (Scotland) Order 2012, SSI 2012/217, with the Code itself being published at www.scotland.gov.uk/Publications/2012/07/6791/0. Since 2017 the Scottish Government has been considering changes to the Code of Conduct in the light of experience of its operation. A consultation was carried out (www.gov.scot/Publications/2017/10/5817) and an analysis of responses published (www.gov.scot/publications/consultation-draft-revised-code-conduct-registered-property-factors-analysis-responses/): see *Conveyancing 2017* pp 91–92. The end result is a new version of the Code of Conduct which was laid before the Scottish Parliament on 15 January 2021 and came into force on 16 August 2021 by virtue of the **Property Factors (Code of Conduct) (Scotland) Order 2021, SSI 2021/113**. The text of the Code of Conduct can be found at www.gov.scot/publications/code-of-conduct-for-property-factors-2021/.

Increase in registration fees

Following a consultation last year the Registers of Scotland (Fees) Order 2014, SSI 2014/188, has been amended with effect from 1 April 2021 by the **Registers of Scotland (Fees) Amendment Order 2021, SSI 2021/139**. For some further details, see p 91 below.

E-registration: exceptions to the requirement of probativity

As with 'traditional' (ie paper) deeds, so with electronic deeds, probativity is a requirement for registration in any register under the control of the Keeper of the Registers of Scotland, including the Land Register, Register of Sasines and Books of Council and Session. But to this rule, which is set out in s 9G of the Requirements of Writing (Scotland) Act 1995, there are exceptions to be found in subsection (6) of s 9G, especially in respect of court decrees. Subsection (6), however, was not initially brought into force, but, by virtue of the **Land Registration etc (Scotland) Act 2012 (Commencement No 3) Order 2021, SSI 2021/472**, it finally came into force on 1 April 2022.

Short-term let control areas

The **Town and Country Planning (Short-term Let Control Areas) (Scotland) Regulations 2021, SSI 2021/154**, were made on 18 March 2021 and came into force on 1 April. It supplements s 26B of the Town and Country Planning (Scotland) Act 1997 under which a local authority can designate all or part of its area as a 'short-term let control area'. For details, see p 83 below.

Adjustments to common parts for the disabled

Some minor amendments to the Relevant Adjustments to Common Parts (Disabled Persons) (Scotland) Regulations 2020, SSI 2020/52, were made by the **Relevant Adjustments to Common Parts (Disabled Persons) (Scotland) Amendment Regulations 2021, SSI 2021/459**. Among other matters, these correct an unhappy omission noted in *Conveyancing 2020* p 176 by adding to a time limit for appeals to reg 10 of the 2020 Regulations.

Variation and discharge of s 75 agreements

Agreements made between the owner (or other user) of land and the planning authority under s 75 of the Town and Country Planning (Scotland) Act 1997 bear some resemblance to real burdens, and for that reason the Scottish Law Commission in its work on real burdens considered, but in the end rejected, the idea of allowing s 75 agreements (like real burdens) to be varied or discharged by the Lands Tribunal: see Scottish Law Commission, *Report No 181 on Real Burdens* (2000) para 6.34. Instead variation and discharge are governed by ss 75A and 75B of the 1997 Act. Significant changes to these provisions have now been made by s 37 of the Planning (Scotland) Act 2019 with effect from 18 November 2020.

Hitherto, the procedure for variation or discharge was to apply to the planning authority, with the possibility of appeal to the Scottish Ministers. That route remains available, and the powers of the planning authority (and the Scottish Ministers) are extended by allowing it to propose (subject to the applicant's approval) a variation or discharge which was not requested by the applicant. Importantly, a second and simpler means of variation and discharge has now been added. Rather than go through the formalities of the application procedure, the parties can simply agree in writing that the s 75 agreement is to be varied or discharged. The model is evidently a minute of waiver of real burdens. As with a determination under the application procedure, the agreement does not take effect until it is registered in the Land or Sasine Register.

⌞ PART III ⌞
OTHER MATERIAL

OTHER MATERIAL

Short-term lets

Introduction

Following a public consultation in 2019 (as to which see *Conveyancing 2019* pp 104–05), a statement was made to the Scottish Parliament on 8 January 2020 by the Minister for Local Government, Housing and Planning, Kevin Stewart, announcing the policy as to short-term lets to be adopted by the Scottish Government: see *Official Report*, 8 January 2020, cols 36–39. The policy had three prongs. First, a licensing scheme for short-term lets was to be established under powers contained in the Civic Government (Scotland) Act 1982. Secondly, local authorities would be able to introduce ‘short-term let control areas’ under powers contained in amendments made to the Town and Country Planning (Scotland) Act 1997 by the Planning (Scotland) Act 2019. The use of property for short-term lets in such areas would require planning permission. Thirdly, the Government would ‘carefully and urgently consider the tax treatment of short-term lets’ with the aim of ensuring ‘that short-term lets make an appropriate contribution to local communities and support local services’ (col 38). This was in addition to a proposed visitor tax (‘transient visitor levy’) for which legislation was also planned.

Since that parliamentary statement was made, there has been significant activity on the first two of the proposed policy approaches, ie licensing under the Civic Government (Scotland) Act 1982 and the establishment of control areas under the Planning (Scotland) Act 2019. This indeed is an area where things change rapidly, and for the current state of play it is important to check the appropriate Scottish Government website: www.gov.scot/publications/short-term-lets/.

At first matters seemed to be going quickly and well. A consultation was launched between 14 September and 16 October 2020, leading to the Scottish Government’s *Consultation report on proposals for a licensing scheme and planning control areas for short-term lets in Scotland* which was published on 10 December. In implement of the report, two statutory instruments were laid before the Scottish Parliament on 14 December 2020: the Civic Government (Scotland) Act 1982 (Licensing of Short-term Lets) Order and the Town and Country Planning (Short-term Let Control Areas) (Scotland) Regulations: see *Conveyancing 2020* pp 76–78. The latter prospered and passed into law; the former, with which we begin, quickly foundered.

A revised Business and Regulatory Impact Assessment for both orders was eventually published on 23 November 2021: www.gov.scot/publications/short-term-lets-business-regulatory-impact-assessment/.

Licensing of short-term lets

On 18 February 2021, only two months after it was laid in the Scottish Parliament, the Civic Government (Scotland) Act 1982 (Licensing of Short-term Lets) Order was withdrawn by the Scottish Government. Officially, this was so that draft guidance could be prepared on the licensing scheme in order to allay concerns that had been expressed. A stakeholder working group was to assist with the guidance. The intention was to lay a revised version of the Order in June. By June that date had slipped to September. One problem was that a consultation on the revised draft, which closed on 13 August and received over 1,000 responses, made a number of fresh criticisms; these are summarised in the consultation report (www.gov.scot/publications/short-term-lets-consultation-draft-licensing-order-business-regulatory-impact-assessment-bria-consultation-report/) which was published on 23 November. Another problem was that the working group charged with assisting with preparing the guidance turned out to be divided, and in August four major players – the Association of Scotland’s Self-Caterers, Airbnb, the Scottish B&B Association, and the UK Short Term Accommodation Association – resigned from the group. The date for laying the revised Licensing Order in Parliament was pushed back again, with the Order – now the Civic Government (Scotland) Act 1982 (Licensing of Short-term Lets) Order 2022, SSI 2022/32 – finally being laid only on 23 November 2021.

Meanwhile, the overall timetable has slipped. Under the Licensing Order, licensing authorities have until 1 October 2022 to establish a licensing scheme, existing hosts and operators must have applied for a licence by 1 April 2023 in order to keep operating, and all short-term lets must be licensed by 1 April 2024.

An account of the original version of the Licensing Order was given in *Conveyancing 2020* p 77. The main changes since then are indicated in a letter dated 8 October 2021 from Shona Robison, Cabinet Secretary for Social Justice, Housing and Local Government, to the Local Government, Housing and Planning Committee of the Scottish Parliament: see www.gov.scot/publications/short-term-lets-licensing-order-update-letter-from-cabinet-secretary-LGHP-committee/. These include:

Removing overprovision powers

During the 2021 consultation, concerns were raised that overprovision powers in the Licensing Order created additional complexity and uncertainty and that it would take time to consult on and introduce overprovision policies. Having considered these representations, I am of the view that the powers given to local authorities to establish control areas [ie under the Town and Country Planning (Scotland) Act 1997, discussed below] are sufficient to implement overprovision policies, where local authorities wish to do so. One of the main purposes of control areas is to help manage high concentrations of secondary letting (where it affects the availability of

residential housing or the character of a neighbourhood), achieving largely the same effect as the overprovision powers ...

Simplifying publicity and notifications

The consultation draft Licensing Order put the duty on licensing authorities, rather than the applicant, to publicise a licensing application. It gave licensing authorities the choice of doing this by sending notice to neighbours or displaying a notice. I have listened to concerns raised about this by the Law Society and a number of local authorities. The proposal that notification should be undertaken for all premises within 20 metres was considered disproportionate (compared to other regimes such as alcohol licensing where the equivalent distance is 4 metres). There were also concerns that local authorities did not have the resources to cope with site notifications rather than placing the obligation on the applicant to do this. Finally, the existing 1982 Act process, in which applicants put up a site notice, was considered to be well understood and to work well for existing licensing regimes. It was suggested that template site notices could be made available to hosts and operators as part of the application pack. Having heard this feedback, I propose to revert to the existing 1982 Act procedures and commit to develop a template site notice to accompany the guidance ...

Reducing public liability insurance requirements

The consultation draft Licensing Order requires public liability insurance providing cover of not less than £5 million. We included an estimate of £100 per annum for a £5 million public liability insurance policy in the BRIA. Airbnb and the Scottish Bed and Breakfast Association raised concerns about the true cost of this requirement and the effect it would have on hosts using their own homes. They have suggested that the Licensing Order should not be prescriptive about how much public liability insurance cover is required but should seek to ensure that adequate cover is in place. I propose to remove the specified figure from the Licensing Order and instead require adequate insurance. We will also make clear that public liability insurance need only be in place for the time that guests are staying at the premises and for the protection of the guests ...

Focused use of inspections

A significant factor in the cost to a licensing authority in implementing a licensing scheme is the inspection of premises. We want licensing authorities only to use inspections as part of a risk-based, intelligence-led approach. We want licensing authorities to allow applicants to self-certify adherence with mandatory conditions on application. The applicant would be breaching their licence conditions if it transpires later that they are not in compliance. Therefore, I propose to set out in guidance the relevant factors to consider in whether to carry out an inspection of a particular premises. These could include, for example:

- other accreditation obtained by the host or operator;
 - feedback from Police Scotland and the Scottish Fire and Rescue Service;
 - peculiarities of the operation (eg very unconventional accommodation);
 - complaints history associated with the host, operator or premises;
 - intelligence from other inspections (which may indicate a higher incidence of issue or non-compliance with hosts or operators or premises of that type or in that area);
- and

- reputational evidence (where available) from guest reviews and internet profile ...

Stronger guidance on fees

A fee cap was suggested at the stakeholder working group as a means of keeping fees affordable for applicants. We expect licensing authorities to set fees on a sliding scale as set out in draft guidance for licensing authorities, letting agencies and platforms and to recover their costs through fees, so an absolute fee cap would not work. However, we do want licensing authorities to keep costs, and therefore the revenue that needs to be raised from licence fees for full cost recovery, as low as possible. Therefore, I am considering specifying an average fee in guidance which licensing authorities should not exceed. The average fee could be calculated in some way from the total fee revenue per year in relation to the total guest capacity in licensed accommodation. It is important to emphasise that the average fee is not a cap: some licence fees would exceed the average fee set out in guidance, but others would be lower ...

Facilitating home sharing and bed and breakfast

We want to facilitate responsible home sharing (which includes bed and breakfast in someone's principal home). Airbnb and SBBA have expressed concern about the impact of some of the mandatory conditions in home sharing, where only some of the rooms are available to guests. We agree that fire safety of furnishings and electrical safety requirements should only apply to rooms that guests use. The other mandatory conditions logically apply to the premises or let as a whole ... We would like licensing authorities to use their powers to grant temporary exemptions in order to facilitate hosts who want to try out home sharing for the first time. Licensing authorities also have the power to grant temporary licences for a period of up to six weeks or, where an application for a full licence is made within that period of six weeks, the temporary licence lasts until the application is finally determined. Again, we would like licensing authorities to take a positive approach to applications in respect of home sharing, in particular ...

Removing natural names from the public register

The consultation draft Licensing Order makes provision for names of hosts and operators (as licensees) to appear on the public register. Concerns have been raised about this. We agree that the publication of hosts' names, especially in the context of home sharing, could be off-putting to potential hosts. We are proposing that the applicant's natural name is not included in the public register but that only a company name is included where (one of) the licence holders is a body corporate.

Short-term let control areas

Matters have proceeded much faster and more easily with the introduction of short-term let control areas. The Town and Country Planning (Short-term Let Control Areas) (Scotland) Regulations 2021, SSI 2021 / 154, were made on 18 March 2021 and came into force on 1 April. They supplement s 26B of the Town and Country Planning (Scotland) Act 1997. Under s 26B a local authority can designate all or part of its area as a 'short-term let control area'. Where this is done, a change of use of a dwellinghouse to use for the purposes of providing short-term lets is deemed to be a material change of use and so constitutes 'development'

under s 26 of the Act. That in turn means that planning permission is needed. This is in addition to the licence already mentioned. Among the exclusions are lets in cases where ‘all or part of the dwellinghouse is the only or principal home of the landlord or occupier’ (s 26B(3)(b)): the idea is that the requirement for planning consent should apply only to lets of whole properties and not to home-sharing. The new Regulations set out the designation procedure, with provision for public notification and consultation, and for approval by the Scottish Ministers.

On 25 June 2021 *Planning circular 01/2021: short-term let control areas* (www.gov.scot/publications/planning-circular-establishing-short-term-control-area/) was issued to guide planning authorities in establishing control areas. Already the City of Edinburgh Council has consulted on designating the whole city as a control area: see <https://consultationhub.edinburgh.gov.uk/sfc/short-term-let-consultation/>. The consultation closed on 5 November 2021 and the results are awaited.

Annexations to electronic documents

Do the rules for annexations to electronic documents, set out in reg 4 of the Electronic Documents (Scotland) Regulations 2014, SSI 2014/83, apply to all electronic documents or only to those which are needed in order to comply with the requirement of writing in s 1(2) of the Requirements of Writing (Scotland) Act 1995? The wording of reg 4 suggests the former; but if that is correct, annexations can only be employed for electronic documents containing (at least) an advanced electronic signature. The issue has now been resolved by a replacement reg 4 which is inserted into the 2014 Regulations, with effect from 1 April 2022, by reg 4 of the Registers of Scotland (Digital Registration, etc) Regulations 2022, SSI 2022/65. Under the replacement reg 4, separate provision is made for annexations in respect of s 1(2) documents and non-s 1(2) documents, and the problem disappears.

Land registration

Digital submission service

Improvised in haste to cope with the closure of the RoS offices during Covid-19, the digital submission service is to be made permanent and, in the ordinary case, mandatory. This follows a consultation exercise by the Keeper which ran from 22 December 2020 to 1 February 2021 and elicited a highly favourable response from 223 consultees. An analysis of the responses can be found at www.ros.gov.uk/about/publications/consultations-and-surveys/2021/digital-submissions-consultation-analysis/digital-submissions-analysis.

Initially, the legislative basis of the digital submission service remained sch 7 para 12 of the Coronavirus (Scotland) Act 2020 as extended by the Coronavirus (Extension and Expiry) (Scotland) Act 2021 s 1. But with the enactment of the Registers of Scotland (Digital Registration, etc) Regulations 2022, SI 2022/65, the position is now governed by a new r 7A inserted by reg 2 into the Land

Register Rules etc (Scotland) Regulations 2014, SSI 2014/150. This in turn is to be supplemented by new subsections ((5)–(8)) that are inserted into s 21 of the Land Registration etc (Scotland) Act 2012 by s 24 of the Coronavirus (Recovery and Reform) (Scotland) Bill, currently before the Scottish Parliament.

Digital registration system

Deeds presented using the digital submission service are not, of course, digital deeds but merely digital copies of paper deeds – what at the Registers has been dubbed ‘posh paper’. Furthermore, what is ‘digital’ about the process is merely, as the name implies, the submission of the application. Registration itself is not digital, as it had been under ARTL. Plans have been around for a number of years for the replacement of ARTL with a sleeker and faster system, and the necessary legislation has been in place since the passing of the Registers of Scotland (Digital Registration, etc) (Scotland) Regulations 2018, SSI 2018/72. This is to involve a wholly digital process – application, deed, registration – carried out within a system provided and managed by the Keeper. So far, though, this ‘digital registration system’ has been available only for discharges of standard securities, and that only on an optional basis. The case-builder system, discussed immediately below, may indicate a new way forward.

Case-builder system: Register Land and Property (‘RLP’)

A new case-builder system, known as Register Land and Property (‘RLP’), went live in June 2021. It pulls together different RoS stages in a transaction – the application for an advance notice, the application for registration of either or both of a disposition or standard security (but not yet other deeds), and the digital submission service – into a single ‘case’ with a single portal. A key feature is that information, once inputted, is then used to populate other parts of the process. Another is the ability to track the progress of a transaction. For details, see www.ros.gov.uk/services/register-land-and-property. So far, around 400 firms have registered to take part, and RoS are receiving over 500 cases per week.

This is seen by RoS as a possible first phase in the development of a digital registration system (see above). Subsequent phases could allow the generation of conveyancing deeds within the RLP system and, ultimately, the execution of such deeds by means of a qualified electronic signature (QES).

Electronic signatures

Digital deeds require digital execution. RoS has its own brand of electronic signature, applied by a smartcard, and this is what lenders currently use for discharges. But this is only one example of a large and complex range of such signatures. For the bewildered, or even the fairly knowledgeable, the Law Society has recently produced a handy 18-page *Guide to Electronic Signatures* (available at www.lawscot.org.uk/media/370786/electronic-signatures_v8.pdf). As well as explaining what is on offer, and from whom, the *Guide* gives advice both as to the use of electronic signatures and the evaluation of documents which

purport to have been signed in that way. As the *Guide* points out, electronic signatures can be divided into three broad groups: 'simple', 'advanced' and 'qualified'. The first can mean anything from a signature by finger on a pad when a parcel is delivered to pasting an electronic image of a signature into a document. By contrast, the others – advanced and qualified electronic signatures – are only available through e-signing platforms such as DocuSign eSignature and Adobe sign. In cases where writing (whether by means of 'traditional' or an electronic document) is needed in terms of the Requirements of Writing (Scotland) Act 1995, it is necessary, in the case of the latter, to use either an advanced electronic signature ('AES') or a qualified electronic signature ('QES'). A QES must be used if the (electronic) document is to be probative, and hence eligible for registration in the Land or Sasine Register; an AES is sufficient for formal validity under the 1995 Act. See ss 9B and 9C of the 1995 Act, read with regs 2 and 3 of the Electronic Documents (Scotland) Regulations 2014, SSI 2014/83. The signature enabled by the Law Society smartcard is a QES and, until recently, was the only QES signature available in the Scottish market. Today others (such as Adobe and DocuSign) have entered the market and, in contrast to the Law Society's version, offer a cloud-based method without the need for physical tokens or cards.

Recently, there has been a certain amount of pressure on RoS to accept for registration electronic documents more widely provided that they are executed with a QES. This would be to anticipate the future development and expansion of the Keeper's digital registration system, although such documents would not be generated within that system. The Keeper's public response was given in a blog dated 12 July 2021 (<https://insideros.blog/>):

RoS' approach to the acceptance of electronically signed deeds has been intertwined with the creation, signing and submission of structured deeds within our systems. In other words, RoS has always envisaged obtaining operational benefits (through automation and re-use of data) from the introduction of a digital registration service in parallel with opening up the land register to electronically signed deeds. A query received, which suggested, in simple terms, allowing electronically signed deeds to be submitted via the current digital submission service has certainly provided some food for thought ... However, following internal discussions, I do not think the solution proposed is as straightforward as it might seem at first ... This would require IT development work, and specifically, the diversion of IT development resource from other work currently ongoing within RoS targeted at reducing the arrear. Given that RoS would see no operational benefit from opening the digital submission service to unstructured electronically signed deeds, I am unwilling to re-allocate this resource within the current development cycle.

Our development roadmap anticipates that we will be in a position to pilot the creation of simple QES signed deeds towards the end of this financial year, at which point some of the necessary changes required to open up the digital submission service to electronically signed deeds will be in direct contemplation. It may be that at that point, alongside the pilot offering, we open up to allow the submission of electronically signed deeds through the digital submission service, and this is something we are now considering.

As this blog implies, the new digital registration system is likely to be built on the existing digital submission system. This will be on a phased basis, beginning with digital applications before moving on to fully digital deeds.

Meanwhile the Books of Council and Session, too, are to be opened to digital deeds with effect from 1 October 2022, as a result of reg 7(3) of the Registers of Scotland (Digital Registration, etc) Regulations 2022, SSI 2022/65.

Completion of the Land Register

Currently around 70% of title sheets and 47.5% of the land mass of Scotland are on the Land Register. Nonetheless, as we move into 2022 it is clear that the 2024 deadline for completion will not be achieved. This is because the level of voluntary registrations is too low – and, even if it was higher, it is not clear that RoS would have capacity to deal with all of the applications.

In response, as previously indicated, the RoS strategy is to divide land into (i) land where transactions are common and (ii) land which rarely shifts (which includes, eg, social housing).

For (i) RoS will try to get everything on to the Register by 2024 if possible, including by using Keeper-induced registration ('KIR'). This is so as to achieve 'functional' completion, ie completion for all cases where, because of likely future transaction levels, there is a conveyancing gain to be achieved. An update in progress is given in a blog dated 20 October 2021 (<https://insideros.blog/>). Something like 2.5 million addresses fall into this category, of which about 83% are already on the Land Register.

For (ii) RoS accept that the land will remain for now on the Register of Sasines and will instead seek to attach mapping data to the relevant search sheets. This is known as 'unlocking Sasines': see *Conveyancing 2020* p 88. There will be a special version of the digital map in which viewers can click on an area and, if it is still on the Register of Sasines, get a link to the search sheet rather than to a title sheet. This is designed to answer the 'Who owns Scotland?' question. A pilot is underway and, after some initial difficulties, the results are apparently promising.

Registration arrears

Registration arrears have been a problem for a number of years now. RoS had hoped to eliminate them by September 2020 but Covid forced the shutting of the office and delayed the training and availability of those who were to sort out the arrears, as well as diverting some to the urgent business of managing new, digital applications. Since then, matters have been made worse by the property boom leading to a high number of applications for registration. Efforts are now being made to catch up and the expectation is that arrears will be eliminated during the course of the new corporate plan (2021–26).

Until the pandemic struck, the approach adopted had been to attack the issue from both ends, ie both the tackling of existing arrears and the rapid disposal of new applications in order to avoid new arrears. Now, in an arrangement sometimes described as 'turning off the tap and baling out the bath', the latter

is being prioritised with the idea, in due course, of releasing sufficient resources to deal with the former. The view from Register House is given in blogs dated 29 June and 7 July 2021 ([https:// insideros.blog/](https://insideros.blog/)).

Understandably, those with elderly applications waiting to be processed are unhappy. In the November 2021 issue of the *Journal of the Law Society of Scotland* (p 6), J Keith Robertson, a seasoned critic on this topic (see *Conveyancing 2020* pp 88–89), wondered how solicitors would be treated if they ran up similar delays: ‘I can only imagine the censure from the SLCC which would fall on the head of any solicitor who took money for a job in 2017 and had still not completed it.’ Mr Robertson continued:

The effect of this policy after nine months of operation is already clear. Although many more recent applications are being processed and completed, the overall arrear has still risen from 79,056 cases in March 2021 to 94,649 cases at the end of September. Meanwhile, RoS’s own figures show that the number of cases cleared from the 2017–2019 part of the backlog over the four month period from the beginning of May to the end of August totals less than 2,500. At that rate, clearing even the pre-pandemic part of the backlog would take almost seven years.

Mr Robertson has a closer look at the figures in an article which appeared in the December 2021 issue of the *Scottish Law Gazette* (at p 77).

Digital extracts

Digital extracts of deeds in the Land and Sasine Registers have replaced paper extracts. They have digital seals and a digital certificate to guarantee authenticity, and they carry the same legal standing as traditional paper-based extracts.

Fee increases

Following a consultation in 2020 (for which see *Conveyancing 2020* p 90), the Registers of Scotland (Fees) Order 2014, SSI 2014/188 was amended with effect from 1 April 2021 by the Registers of Scotland (Fees) Amendment Order 2021, SSI 2021/139. The result is an across-the-board increase in registration fees, the first major increase since 2011. Full details can be found at <https://kb.ros.gov.uk/fees/registration-fees> and only a few examples need be given here. The fee for registration of a disposition for a consideration of between £150,001 and £200,000 is increased from £370 to £400. Comparable increases are made throughout the fee table with, at the very top, the cost of registering a disposition for a consideration of more than £5 million increasing from £7,510 to £8,250. The registration of a standard security now costs £80, or £60 where the digital registration system is used. The new fee for advance notices is £20. In a rare piece of good news, the fees for rejection or withdrawal of an application have been dropped.

Annual Report and Accounts 2020–21

Many of the matters mentioned above are covered, in greater or lesser detail, in RoS’s *Annual Report and Accounts 2020–21* which was published on 22 September 2021.

Webinar recordings

Recordings of a number of past webinars are available at www.ros.gov.uk/about/events/past-events/webinar-recordings. These include the recent webinar on the Register of Persons Holding a Controlled Interest in Land as well as webinars on topics such as interpreting plans reports, avoiding rejections, and ScotLIS.

Proposed Moveable Transactions Bill

Included in the Scottish Government's *A fairer greener Scotland: Programme for Government 2021–22* (p 119), which was published on 7 September 2021, was a commitment to introduce in the current session of Parliament a Moveable Transactions Bill along the lines recommended by the Scottish Law Commission in its *Report No 249 on Moveable Transactions* (2017). This will be covered in next year's volume.

Anti-money laundering guidance

An extensively revised edition of *Anti-Money Laundering: Guidance for the Legal Sector* (www.lawscot.org.uk/media/370253/lsg-aml-guidance-20-january-2021-2.pdf) was published on 20 January 2021. Prepared by the Legal Sector Affinity Group (which includes the Law Society of Scotland) and running to some 212 pages, it is organised around 36 (new) High-level Compliance Principles. The new edition is introduced by Graham MacKenzie of the Law Society on p 40 of the March 2021 issue of the *Journal of the Law Society of Scotland*. The purpose of the guidance, he explains, is:

to add colour to the underlying regulations [ie the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, SI 2017/692, as amended]. It helps legal professionals understand how to comply with their AML obligations by offering more focused, practical advice, guidance and support across all the main aspects of the UK regime. The guidance also serves to set out the Society's supervisory expectations of firms. Practice units are not required to follow the guidance; however, the Society will consider whether firms have complied with this guidance when undertaking AML supervisory inspections and you may be asked by us to justify a decision to deviate from the guidance.

On the important subject of client due diligence ('CDD'), Mr MacKenzie writes:

This new section highlights that CDD is far wider than simply verifying and documenting a client's identity. It is about gaining and documenting a sufficient understanding of the client's background, sources of funding and the purpose and nature of the matter you are being engaged in ... It also sets out our supervisory position regarding 'longstanding relationships'. While 'knowing the client and their background' will, of course, be helpful in taking a risk-based approach and undertaking holistic due diligence, a personal or longstanding relationship with a client does not negate or rescind the client due diligence requirements of the regulations.

Risk management

An article in the September 2021 issue of the *Journal of the Law Society of Scotland* (p 44) by Kenneth Law of the master policy team at Lockton lists and discusses ‘ten red flags for conveyancers’, all of which have crossed his desk in the past year. These are:

- Who exactly is your client?
- Have you checked the client has capacity?
- Do they understand the purchasing process?
- Who is meant to own the property after settlement?
- Have your client account details been provided securely?
- Does your terms of business letter exclude liability for environmental law and/or contaminated land matters?
- Has your client asked you to delay concluding missives?
- Has the seller owned for at least 6 months?
- Is the property built of prefabricated concrete?
- Keep an eye on your time limits!

RoS Property Market Report 2020–21

The *Property Market Report 2020–21* (www.ros.gov.uk/about/news/2021/property-market-report-2020-21), published by Registers of Scotland on 29 June 2021, contains a great deal of interest. The average price of residential property was up 6/7% compared to the previous year at £194,100, but the volume of sales fell by 6.5% to 95,428, reflecting the effect of Covid-19 especially in the first quarter. The sale of new-builds fell by 26%. There were 256 sales of houses for over £1 million, 56% of which were in Edinburgh, at an average price of £1.49 million. Around one-third of sales were funded by cash and the remaining two-thirds by a secured loan.

Unsurprisingly, the market for commercial property was more badly affected by Covid-19. There were 3,463 sales (down by 17% from the previous year) and 428 registered long leases (down 43%).

Scottish Standard Clauses, edition 4

Introduction

A new edition, the fourth, of the Scottish Standard Clauses, has been prepared and came into effect on 1 March 2021. Along with previous editions, it is available at www.rfpg.org/standard-clauses.html. As well as the usual client guide there is also an explanatory note giving the main changes (and also things which were considered but not in the end changed). A handy checklist sets out the questions which should be asked of clients prior to framing a formal acceptance. As always, the profession bears a large debt of gratitude to those whose time and expertise is spent on producing new editions of this

now indispensable set of standard clauses. Only the most important changes need be mentioned here.

Clause 7.3

A new clause 7.3 provides that:

The seller will be deemed to assign to the Purchaser at settlement all rights the Seller may have as homeowner arising from any and all information provided to the Seller by any factor or managing agent in relation to the Property.

The drafting is a little odd. If the missives are to act as an assignation of the seller's rights then the clause should simply say: 'The seller assigns to the Purchaser.' What is offered, however, is only a deemed assignation – whatever that is.

Leaving that difficulty aside, the aim of the clause is apparently to pass on to the purchaser any rights against the factor – arising, for example, under the law of delict or under the Property Factors Code of Conduct – that may have been held by the seller and arises out of information provided by the factor. One might question the policy. It makes sense, of course, where the claim relates to an ongoing matter which will affect the purchaser as the new owner. But it makes little sense where the claim relates to a matter which has now been sorted but in respect of which the seller still has an outstanding pecuniary claim, for example for damages. The clause, in short, seems too broadly drafted. According to the explanatory note, the clause was drafted in response to the decision of the Upper Tribunal in *Lynas v James Gibb Property Management Ltd* [2019] UT 22 (*Conveyancing 2019* Case (10)); but it would not in fact apply on the facts of *Lynas* because the information in that case was provided to the purchaser and not, as the clause requires, to the seller.

Clause 8.3

This clause might have been changed in the light of the decision in *Cooper v Skene*, 2 March 2016, Aberdeen Sheriff Court, but was not. Rather than go into details here we refer to the discussion in *Conveyancing 2018* pp 139–40.

Clause 18.1.7

This new clause reads:

The Seller warrants that they are not aware of any current application to the Registers of Scotland to rectify or realign the Title Sheet for the Property.

The use of gender-free drafting will be noted – and, quite properly, the entire document has now been gender-proofed – although traditionalists (like the authors) will be unsettled that this is only achieved (as so often today) by using a plural personal pronoun ('they') with a singular verb ('warrants'). The reference to 'realign' is puzzling. One does not apply for realignment: it occurs automatically as a result of the provisions in Part 9 (ss 86–95) of the Land Registration etc (Scotland) Act 2012.

Clause 27

This, the 'entire agreement' clause, has been substantially recast in the light of the decision of the Sheriff Appeal Court in *Anwar v Britton* [2018] SAC (Civ) 27, 2019 SLT (Sh Ct) 23 (for which see *Conveyancing 2018* pp 133–38). The revised clause has been borrowed from the Property Standardisation Group style offer. The clause provides that:

The Missives (with the exception of items relied upon by virtue of Clauses 1.1.3 and 31) will represent and express the full and complete agreement between the Seller and the Purchaser relating to the sale/purchase of the Property at the date of conclusion of the Missives and will supersede any previous agreement between the Seller and the Purchaser relating to it. Neither the Seller nor the Purchaser has been induced to enter into the Missives on account of any prior warranties or representations.

The particular issue in *Anwar v Britton* was whether the 'entire agreement' clause, in its previous version, prevented the purchaser from founding on an alleged pre-contractual misrepresentation; and although it was held that the clause did not have that effect, it was a close-run thing and the quality of the drafting was questioned. The issue is touched on in the second sentence but the meaning seems unclear. Is this intended as a warranty, so that in the event of a pre-contractual misrepresentation having occurred, the affected party has a contractual remedy against the other party for breach of warranty? Or is it rather to be viewed as a definitive statement of fact, which would prevent either party from founding on pre-contractual misrepresentations? If it is the latter, the policy seems open to question.

Clause 35

This, the final clause of the standard clauses, is a new provision dealing with the grant or existence of title indemnity policies which, as the explanatory note says, are an increasingly common part of current practice. It covers both new and existing policies and deals with such issues as confirmation of full disclosure, payment of premiums, and the absence of grounds on which the policy could be avoided.

Cladding of external walls in high-rise buildings**Introduction**

The fire risks caused by certain types of cladding of external walls have become a major issue following the devastating fire at Grenfell Tower in London on 14 June 2017. The matter was covered in some detail in last year's volume (*Conveyancing 2020* pp 100–03) and a helpful update can be found in an article by Brian Smith, 'Cladding and external wall systems – an update' (2021) 66 *Journal of the Law Society of Scotland* July/Online. Useful material can also be found in Stewart Brymer, 'Unsafe cladding' (2021) 175 *Greens Property Law Bulletin* 1.

The Scottish Government now prepares a High Rise Inventory, updated every year and derived from data provided by local authorities. The latest edition was published on 8 November 2021 (www.gov.scot/publications/high-rise-inventory) and gives a total of 780 high-rise domestic buildings (ie buildings higher than 18 metres) in Scotland, representing 46,619 individual flats. Just under half of the buildings (378) are in Glasgow; Edinburgh has 136 and Aberdeen 67. The majority date from the 1960s. The median height is 31.25 metres and the highest 71.5 metres. Around a third are owned by registered social landlords. Only 38 of those buildings (5%) are identified as containing the aluminium composite material ('ACM') which was used in Grenfell Tower, although other types of cladding can also be combustible.

When is an EWS1 form needed?

The EWS1, certifying (hopefully) that the external-wall materials are unlikely to support combustion, is now a familiar addition to conveyancing practice and has allowed purchasers of flats in high-rise buildings to obtain mortgage finance. In a welcome development, RICS published new guidance (in force from 5 April 2021) to aid its surveyor members in deciding when an External Wall System ('EWS') assessment is or, importantly, is not required: see www.rics.org/uk/upholding-professional-standards/sector-standards/valuation/valuation-of-properties-in-multi-storey-multi-occupancy-residential-buildings-with-cladding/. The opening sentences of para 2.1 set the tone:

Requesting an EWS1 for buildings where there is no visible cladding or a low risk of remediation work creates long and unnecessary delays to the buying, selling or re-mortgaging of such properties. It also prevents the limited pool of competent experts from focussing their assessments on properties where there is a significant risk to the safety of occupants. A valuer should always have a rationale to justify the request for an EWS1 form.

The guidance then proceeds to provide criteria for where remediation work to cladding or balconies that may materially affect the value of the property is likely to be needed, and hence an EWS1 form required. The need depends on the number of storeys in the building:

For buildings over six storeys, an EWS1 form should be required where:

- there is cladding or curtain wall glazing on the building or
- there are balconies which stack vertically above each other and either both the balustrades and decking are constructed with combustible materials (eg timber) or the decking is constructed with combustible materials and the balconies are directly linked by combustible material.

For buildings of five or six storeys, an EWS1 form should be required where:

- there is a significant amount of cladding on the building (for the purpose of this guidance, approximately one quarter of the whole elevation estimated from what is visible standing at ground level is a significant amount) or

- there are ACM [aluminium composite material], MCM [metal composite material] or HPL [high pressure laminate] panels on the building or
- there are balconies which stack vertically above each other and either both the balustrades and decking are constructed with combustible materials (eg timber), or the decking is constructed with combustible materials and the balconies are directly linked by combustible materials.

For buildings of four storeys or fewer, an EWS1 form should be required where:

- There are ACM, MCM or HPL panels on the building.

The statement of criteria then concludes with a characteristic disclaimer:

It is important to note that a decision by a valuer not to request an EWS1 form during the valuation process provides no assurance that there are no fire or life safety risks, but only considers whether there is a likelihood that remediation work affecting value will be needed, based on the presence or absence of cladding and other attachments to the building. Buyers should always be advised to seek a copy of the existing fire risk assessment for the building before purchasing.

On the topic of fire risk assessments, the Building Standards Division of the Scottish Government issued, on 4 August 2021, the *Scottish Advice Note: Determining the fire risk posed by external wall systems in existing multi-storey residential buildings* (www.gov.scot/publications/scottish-advice-note-determining-fire-risk-posed-external-wall-systems-existing-multi-storey-residential-buildings/), giving (often highly technical) advice as to the need for and the methods of conducting fire risk assessments.

And for whose benefit?

Almost at the very start of the EWS1 form, in bold script, is the following warning:

This review is for the sole and exclusive use of the client organisation named below. No responsibility is accepted to any third party for the whole or any part of its contents. For the avoidance of doubt, the term 'third party' includes (but is not limited to): any lender who may see the review during the process through which they come to make a loan secured on any part of the Subject Address; and any prospective purchaser who may see the review during the process through which they come to purchase an interest in any part of the Subject Address.

Although there has been some loose talk of the seller who instructed an EWS1 'assigning' its benefits to the purchaser and the purchaser's lender, it is apparent (assuming the limitation of liability just quoted to be valid and enforceable) that the expert signing the form has no duty of care to such third parties, and that such a duty can only arise if it is voluntarily assumed by the expert. That is why note 4 to the form states that: 'Should there be a desire for a third party to rely on this form, they should contact the signatory's organisation.' Some providers will agree to extend the form to buyers and lenders; others will agree but only on payment of a further fee. In its latest *External Wall Systems Update*, issued in March 2021 (www.lawscot.org.uk/news-and-events/law-society-

news/external-walls-system-update-march-2021/), the Law Society offers the following comment:

We have received an increase in enquiries around the assignation of the duty of care. We felt it important to clarify that assigning the duty of care is not a Law Society of Scotland requirement. We highlighted this as a risk of which solicitors should be aware in our External wall systems update September 2020, however it is a matter for the solicitor to take their purchaser and lender clients' instructions as to whether they require the duty of care to be assigned.

Single building assessments

An ongoing problem is that, for reasons of professional indemnity cover, providers of EWS1 forms will only issue forms to individual owners. And whereas in England a flatted building generally has a single owner (the flats themselves being held on long lease), in Scotland each flat has typically a separate owner. The unhappy result is that, usually, EWS1 forms in Scotland cover an individual flat and not the whole building.

A solution, however, appears to be on the way. In a report published on 19 March 2021 (www.gov.scot/publications/ministerial-working-group-mortgage-lending-cladding-report-march-2021/) it was recommended (p 10):

that ultimately the aim in Scotland should be that an EWS1 assessment is no longer required to support a valuation for buying, selling or remortgaging flatted property and that the need fulfilled by EWS1 should be met through a new approach of a single building assessment, launched with Scottish Government funding. It is expected that the single building assessment will be broader in scope than the EWS1 but, where applicable, also provide equivalent information.

This recommendation has been accepted by the Scottish Government: see www.gov.scot/policies/building-standards/single-building-assessment/. Apart from the question of public funding, the most important point about the proposed single building assessment is that it is an assessment of the whole building and not merely of an individual flat. Once done, it will not need to be done again as and when flats in the building come on the market. This one-off aspect also makes best use of the still limited number of experts who are available to provide assessments. A further advantage will be to add to the knowledge already amassed through the High Rise Inventory (see above); it is envisaged that the results of single building assessments should be publicly available, eg through a database or portal (p 11).

Remediation costs

In addition to an undertaking to meet the cost of single building assessments, the Scottish Government will also provide some financial assistance for such remediation works as assessments (whether single building or through the EWS1 process) show to be necessary. But how much money will be available and how it will be distributed is not yet clear. Money is available at a UK level (see

in particular www.gov.uk/government/news/government-to-bring-an-end-to-unsafe-cladding-with-multi-billion-pound-intervention) and will presumably percolate down to Scotland in due course.

New requirement for interlinked smoke alarms

One result of the Grenfell Tower disaster is the introduction of new rules for smoke alarms in domestic premises. Since 1 February 2022 every home in Scotland has required to have ‘interlinked’ fire alarms. Where alarms are interlinked, all will go off if one goes off. According to Scottish Government guidance (www.mygov.scot/home-fire-safety):

Every home will need to have:

- 1 smoke alarm in the room you spend most of the day, usually your living room
- 1 smoke alarm in every circulation space on each storey, such as hallways and landings
- 1 heat alarm in the kitchen

All smoke and heat alarms should be mounted on the ceiling and be interlinked. Check the manufacturers’ guidance on each alarm for instructions on where the alarm should be placed.

If you have a carbon-fuelled appliance, like a boiler, fire, heater or flue you must also have a carbon monoxide detector. This does not need to be linked to the fire alarms. Gas cookers and hobs do not need a carbon monoxide detector ...

There are 2 types of interlinked fire alarms that meet the new rules:

- sealed battery alarms – which should be tamper-proof long-life (which can be up to 10 years) batteries. You can fit these alarms yourself.
- mains-wired alarms – these are cheaper than tamper proof long-life battery alarms, but should be installed by a qualified electrician. These should be replaced every 10 years.

Both types of alarm are interlinked by radio frequency without the need for WiFi. If the carbon monoxide alarm is battery operated, it must have a sealed battery for the duration of its lifespan, which may be up to 10 years.

Code of practice for commercial property relationships

A UK-wide *Code of practice for commercial property relationships during the COVID-19 pandemic*, available at www.gov.uk/government/publications/code-of-practice-for-the-commercial-property-sector, was published by the Ministry of Housing, Communities and Local Government in June 2020 and updated in April 2021. A revised code of practice was then issued on 9 November 2021: www.gov.uk/government/publications/commercial-rents-code-of-practice-november-2021. Although not legally enforceable the code of practice offers valuable guidance for resolving disputes relating to rent owed as a result of premises having been closed or having had business restricted during the Covid-19 pandemic.

Joint statement on evictions in private-sector residential tenancies

Important measures to limit evictions in residential tenancies during the Covid-19 crisis were enacted by the Coronavirus (Scotland) Act 2020 and the Coronavirus (Scotland) (No 2) Act 2020, and these were extended by the Coronavirus (Extension and Expiry) (Scotland) Act 2021 s 1 until 31 March 2022, with the possibility of further extension until 30 September 2022. Included in the measures were increased judicial discretion as to when to order eviction, an extension of the notice periods from 84 days to six months, and the introduction of pre-action requirements. Further details can be found in *Conveyancing 2020* pp 63–64. In addition, a limited amount of Scottish Government funding has been made available, through local authorities, to assist tenants affected by the Covid-19 crisis to pay their rent: see www.lawscot.org.uk/news-and-events/legal-news/grants-available-for-covid-hit-tenants-in-arrears/.

On 25 June 2021 a joint statement was issued by representative bodies for local authorities, housing associations and private landlords, setting out a commitment to taking eviction action only as a last resort: see www.gov.scot/publications/joint-working-on-evictions-private-housing-joint-statement/. The statement reads:

In responding to the effects of the coronavirus pandemic, there are many examples of private landlords and letting agents who have gone further than ever before to engage with tenants as more people find themselves in difficulty for the first time because of Covid. As the country comes out of lockdown it is our shared commitment to make sure that tenants in hardship because of Covid continue to get support to pay their rent and living expenses and we will continue to work together collectively to ensure this is done.

The Scottish Government will continue to explore all options for policy and financial support to enable tenants to work with their landlords and letting agents; to be aware of their rights and responsibilities and support them to address financial hardship due to Covid-19. Alongside existing support of extended notice periods, Discretionary Housing Payments and the Tenant Hardship Loan Fund this will include a new £10m Grant Fund package to support tenants in crisis who are struggling to pay their rent because of financial difficulty caused by the pandemic and help landlords to support them.

Where a private tenant has suffered financial hardship because of the Coronavirus pandemic, eviction action should be an absolute last resort, when all other avenues have been exhausted and a tenancy is no longer sustainable. We advise that private landlords and letting agents continue to work to the following principles – for the remainder of the pandemic and throughout recovery:

- Intervene early to keep people in their homes and give them the support they need to stay there.
- Landlords and letting agents should work with tenants who are struggling and support them to make arrangements to pay rent through a plan that is manageable for them in the long term.
- All landlords and letting agents should be flexible with their tenants, signposting them to the range of financial support that is available to help prevent rent arrears as part of the pre-action protocols required prior to any eviction application to the Tribunal or Sheriff Court.

- Landlords and letting agents should act compassionately and quickly to support people who are in financial hardship and wish to work with their landlord to reduce arrears.

Paying rent is an important tenant responsibility and, where a tenant is able to do so, they must continue to pay their rent. To help do this, private landlords and letting agents from across the country have worked flexibly with their tenants to help them access the wide range of support on offer, and to sustain tenancies and prevent eviction action – as demonstrated in the annexed case studies.

A new deal for tenants?

Background

The private rented sector in Scotland has more than doubled in size in the past 20 years and now covers 14% of homes (around 340,000). Over the same period the social housing sector has suffered a marked decline, mainly due to the sale of council houses under the right-to-buy scheme (which ended in 2016). Today 14% of homes are provided by local authorities, and 10% provided by around 150 housing associations. Six local authorities have ceased to manage housing stock altogether, due to stock transfers to housing associations.

The increase in size of the private rented sector has been matched by an increase in attention by Government and Parliament. Developments in the last few years have included (i) HMO regulation (2000), (ii) landlord registration (2006), (iii) a new repairing standard (2007), (iv) tenancy deposit schemes (2012), (v) tenant information packs (2013), (vi) a much-enhanced jurisdiction for what was formerly the Private Rented Housing Panel and is now the Housing and Property Chamber of the First-tier Tribunal (2014), (vii) a registration system for letting agents (2014), and (viii) the replacement of assured and short assured tenancies by private residential tenancies, complete with security of tenure and a limited form of rent control (2017).

More change is on the way. A consultation paper on a draft Housing Strategy, *A New Deal for Tenants*, was published on 20 December 2021 (www.gov.scot/publications/new-deal-tenants-draft-strategy-consultation-paper/). The consultation closed on 31 March 2022, and the intention is to finalise the Housing Strategy before the end of 2022. Although a substantial document, running to 107 pages, the consultation paper is notably short on detail as to what is being proposed. Instead there is to be a series of further consultations on individual policies. The main policy areas are considered below. Some at least of the proposals are likely to feature in a Housing Bill promised for 2023.

Termination and eviction

Of the 18 grounds on which a private residential tenancy can be brought to an end, by far the most common, at least in contested cases, is arrears of rent (pp 37–38). Although, under the Private Housing (Tenancies) (Scotland) Act 2016, some grounds are mandatory and others are at the discretion of the Housing and Property Chamber of the First-tier Tribunal, all are currently discretionary by virtue of the Coronavirus (Scotland) Act 2020. In an earlier consultation – *Covid*

Recovery: a consultation on public services, justice system and other reforms (17 August 2021, available at www.gov.scot/publications/covid-recovery-consultation-public-services-justice-system-reforms/) paras 129–135 – the Scottish Government had already suggested that this discretionary system be made permanent, and this is now provided for by ss 33–35 of the Coronavirus (Recovery and Reform) (Scotland) Bill, which was introduced to the Scottish Parliament on 25 January 2022. See p 77 above. The Bill also (in ss 36 and 37) makes permanent the pre-action requirements first introduced by the Coronavirus (Scotland) (No 2) Act 2020. The new consultation paper has nothing much to add on this topic except to suggest (at pp 54–57) the introduction of extended notice periods, enhanced Tribunal discretion, or other measures to give tenants more time in the case of winter evictions.

Rent controls

Some statistics on rents in the private rented sector are given below, in the next section. Such figures as exist show that, by and large, rent levels over the last ten years have increased at the same rate as inflation (consultation paper pp 20–22 and 69–70). But there are local and regional variations in both directions, with rents in Glasgow and Lothian having risen substantially above the rate of inflation. Private-sector rents are much higher than those for social housing – around twice in the case of a two-bedroom property (respectively £693 and £359 per month in 2020/21). But housing costs as a proportion of income are the same – 25% – in both sectors. The consultation paper expresses dissatisfaction at the quality of the available data which, it says, are based on averages and fail to reflect the full range of rental level (pp 74–78). What is really needed is data for each and every one of the 340,000 private tenancies in Scotland. The proposed Housing Bill, therefore, is to include provisions requiring landlords to supply the necessary information.

Despite the lack of robust data, the ‘Scottish Government has already committed to taking action so that the rented sector offers a range of high-quality homes that are affordable for those who choose to live in it, and where the affordability, accessibility and standards of the whole rented sector improve and align’ (p 79). In other words, there is to be rent control. Of course, some degree of rent control already exists for private residential tenancies. In terms of the Private Housing (Tenancies) (Scotland) Act 2016, (i) rent increases are limited to once a year, (ii) tenants can challenge increases by requesting a rent officer to set the rent, and (iii) local authorities can keep rents under control by applying to Scottish Ministers to designate an area as a ‘rent pressure zone’. For details, see *Conveyancing 2016* pp 86–87. Only the first of these can be said to have been successful (pp 79–80). No rent pressure zones have been established, and only 89 applications have been made to rent officers since the Act came into force on 1 December 2017. Various reasons are suggested for this failure, although they do not include the possibility that tenants might generally be satisfied with their rent levels. In case tenants are put off applying to a rent officer because of a fear that the rent will be increased

rather than reduced, the 2016 Act is to be amended so that only downwards-only adjustments are permitted.

Against this background the paper proposes that, by the end of 2025, there will be introduced 'an effective national system of rent controls, with an appropriate mechanism to allow local authorities to introduce local measures' (p 80). No details, however, are given (or perhaps even exist), and there is to be a separate consultation on the subject 'later in this Parliament' (p 82). The paper acknowledges the risk that rent controls might cause the withdrawal of properties from the market which in turn could raise rent levels due to the imbalance of supply and demand.

A new housing standard

At present, most private tenancies are subject to the repairing standard in s 13 of the Housing (Scotland) Act 2006 (as to which see *Conveyancing 2005* pp 26–28). In 'a shift away from the existing Tolerable Standard towards the underlying principle that good quality housing is a human right', the Scottish Government is to introduce a new housing standard which will apply to all houses, whether rented or owner-occupied (p 96). No details are provided. Instead there is to be a consultation on the underlying principles followed by a draft housing standard in 2023 followed by legislation in 2024/25. The last of these will provide for a phased implementation up to 2030.

A new housing regulator

To match the Scottish Housing Regulator, established for the social housing sector by the Housing (Scotland) Act 2010 (see *Conveyancing 2010* pp 50–51), there is to be a new housing regulator for the private rented sector, although its precise functions and form are likely to be different (p 101). 'Private rented sector regulation', the consultation paper explains (p 102), 'will be based on clearly defined standards of quality, affordability and fairness that reflect the aim of tenure neutral outcomes'. Again, no details are available, and again there is to be a consultation 'later in the parliament'.

A right to personalise a rented home?

The consultation paper (pp 49–53) asks whether there should be a statutory right to 'personalise' a privately rented home, eg by redecoration, and, if so, subject to what constraints (such as an obligation to return the home in its original state). And should there be a right to keep a pet?

Unclaimed deposits

Tenancy deposit schemes have been in place since 2012, operated by three approved schemes. But not all tenants reclaim their deposit at the end of the lease. As at October 2021 there were 13,554 unclaimed deposits amounting to some £3.5 million. The main non-claimants are students, and especially overseas

students. What is to be done with this money? The consultation paper proposes (pp 47–48) that, after five years, unclaimed deposits should be used to benefit private-sector tenants in general, for example by funding the provision of tenant advice or advocacy services.

Private-sector rent statistics

Private sector rent statistics: 2010–2021, published on 16 November 2021 (www.gov.scot/publications/private-sector-rent-statistics-scotland-2010-2021/), gives both all-Scotland figures and figures by area. In respect of the year from 1 October 2020 to 30 September 2021:

- Average 2-bedroom rents increased above the average 12 month UK CPI inflation rate of 1.5% in 10 out of 18 areas of Scotland, with the largest increases being 7.1% in West Dunbartonshire and 6.8% in the Ayrshires. An additional four areas saw an increase above 0.5% but below CPI inflation of 1.5%. Three areas saw little change in average rents compared with the previous year (annual changes within $\pm 0.5\%$), whilst the average rent in Lothian decreased by 2.9%.
- These regional trends combine to show an estimated 0.6% annual increase in average 2-bedroom monthly rents at a Scotland level.
- At a Scotland level there were estimated increases in average rents for 1-bedroom (0.6%), 2-bedroom (0.6%) and 4-bedroom (1.2%) properties, with average rents for 3-bedroom properties showing no change (0.0%), and rents for 1-bedroom shared properties falling by 0.4%.

Taking the 11-year period from 2010 to 2021:

- Lothian and Greater Glasgow have seen cumulative increases in average rents above the rate of inflation between 2010 and 2021 across all property sizes.
- Forth Valley and Fife have seen cumulative increases in average rents above the rate of inflation for all property sizes except 1 bedroom properties.
- Argyll and Bute and North Lanarkshire have seen cumulative increases in average rents of less than the rate of inflation across all property sizes between 2010 and 2021.

Regulation of letting agents: monitoring and compliance

Part 4 (ss 29–62) of the Housing (Scotland) Act 2014 introduced a registration system for those, including solicitors, who act as letting agents for private-sector residential tenancies. This followed, and indeed was modelled on, earlier schemes for the registration of private-sector landlords (Antisocial Behaviour etc (Scotland) Act 2004 Part 8) and property factors (Property Factors (Scotland) Act 2011). The new provisions acknowledged both the size of the private-rented sector and also the problems which some agents cause. The official Policy Memorandum listed some of them (para 211): ‘agents going out of business and losing all monies held on behalf of landlords and tenants; the use of poorly drafted and legally inaccurate tenancy agreements; and tenants being charged illegal premiums for accessing privately rented accommodation’. For further details, see *Conveyancing 2017* pp 90–91.

The primary legislation has since been supplemented by the Letting Agent Registration (Scotland) Regulations 2016, SSI 2016/432. Existing letting agents were required to register by 30 September 2018; those wishing to enter the business for the first time must register before they begin. The registration process is handled centrally, by the Scottish Government.

A new publication from the Scottish Government, published on 6 September 2021 (www.gov.scot/publications/regulation-letting-agents-monitoring-compliance-enforcement-framework-updated-2021/), indicates the steps that are to be taken to monitor standards and ensure compliance. The main criterion for accepting an application for registration is that the applicant is a 'fit and proper person' to carry out letting agency work, and in determining that question Scottish Ministers are to have regard to all the circumstances of the case but including, in particular, whether the applicant has been convicted of certain offences (such as those involving fraud or dishonesty), practised unlawful discrimination, or failed to comply with the Letting Agent Code of Practice: see 2014 Act ss 32(2) and 34. A gloss is provided by the new publication (para 24):

Matters that may cause serious concern about an individual's fit and proper status to undertake letting agency work include, but are not limited to:

- i. convictions of a serious nature or which call into question the honesty and integrity of the individual, for example violence, sexual offences, fraud, money laundering, identity theft and tax-related offences;
- ii. numerous letting agent enforcement orders or letting agent enforcement orders that relate to serious breaches of the Code, for example illegal eviction or mishandling of client money;
- iii. non-compliance with a letting agent enforcement order without reasonable excuse, for example failure to pay compensation or undertake the steps required by the Tribunal;
- iv. multiple or serious contraventions of any housing law, for example being found to have illegally evicted a tenant;
- v. failure to disclose convictions or any other relevant matters; and
- vi. adverse finding, or pending disciplinary hearing or investigation, or expulsion or unfulfilled sanctions/disciplinary action by another regulator, professional body or voluntary redress scheme either in Scotland or in another jurisdiction.

There will also be monitoring of those who are accepted on to the register. These will be divided into three 'monitoring compliance categories' (paras 27–34). Those in the first or 'normal' category will be subject to 'random sampling': 'For example, review of published information and using the power to obtain information in relation to thematic issues identified as areas of concern eg complaints, repairs, handling client money.' Those in the third or 'enhanced' category will receive 'planned monitoring': 'For example tailored use of power to obtain information and compliance visits (where necessary, these may be unannounced).'

Law reform: Scottish Law Commission

Heritable securities

Discussion Paper No 173 on Heritable Securities: Default and Post-Default, published in December 2021, is the second discussion paper in the Scottish Law Commission's review of the law of heritable securities. The first, *Discussion Paper No 168 on Heritable Securities: Pre-default*, appeared in June 2019. This second discussion paper intimates that the Law Commission plans to issue a third discussion paper on this project in 2023. Its subject will be the somewhat technically challenging areas of sub-security arrangements and security in respect of non-monetary obligations. The project will conclude then with a single report and draft Bill, which it is hoped will be published in 2025.

The new discussion paper proposes a welcome overhaul and simplification of the enforcement regime for standard securities. This draws substantially on comparative law. In future the concept of 'default' would concern only the secured obligation and not the security itself, contrary to the somewhat muddled position under the Conveyancing and Feudal Reform (Scotland) Act 1970. But the broad policy of the Home Owner and Debtor Protection (Scotland) Act 2010 would be preserved. Thus where the security is over a dwellinghouse and the debtor is a natural person, additional steps would, as at present, be required for enforcement, including compliance with pre-action requirements and the obtaining of a court order. The discussion paper considers the remedies which should be available to enforcing creditors, namely ejection of the debtor, entering into possession, leasing, sale and foreclosure. It looks also at the subjects of ranking and expenses. In total, there were 69 questions for consultees to consider with a closing date for responses of 1 April 2022.

Commercial leases

Meanwhile, in December 2021 the Scottish Law Commission issued a draft Leases (Automatic Continuation etc) (Scotland) Bill for consultation. This follows on from its *Discussion Paper on Aspects of Leases: Termination* (Scot Law Com DP No 165) of May 2018 and concerns only commercial leases. Comments were invited on this by 28 January 2022. See also pp 139 and 173 below.

New repairs app for tenements

An app has been developed by Novoville which leads owners through the steps required to carry out a common repair in a tenement and puts them in touch with firms that can carry out the work. The app is available at <https://sharedrepairs.novoville.com/>. It is backed by Trusted Traders, the Scottish Government and the City of Edinburgh Council. According to its website (<https://novoville.com/home/shared-repairs/>):

Novoville was selected by the City of Edinburgh Council to solve the challenge of carrying out the maintenance and repairs of shared areas in housing blocks. This initiative was part of the Scottish Government-backed CivTech Accelerator

programme, which harnesses entrepreneurial tech innovation to solve specific public sector challenges.

Novoville's response is to completely integrate the market for repairs and maintenance in the locality. By directly engaging traders, the council, homeowners and other stakeholders, and providing them with a dedicated ecosystem where they can each play their part, Novoville streamlines and simplifies dealing with a major source of issues for the city and its residents alike.

The Novoville Shared Repairs app encourages, supports and enables private owners of a unit (a flat or a shop) in a block (tenement) to proactively take responsibility for planning and organising repairs, and carrying it out in accordance with local rules and regulations. The system also helps councils address their challenges both as a competent authority, and as the landlord of thousands of social units in the area. Property managers (factors), surveyors and housing associations are also included in the ecosystem, and have hailed the project as a game-changer for their industry.

Merger of the Land Court and Lands Tribunal

The Scottish Land Court and the Lands Tribunal for Scotland are to merge, the Scottish Government announced on 8 September 2021, and the necessary legislation will be brought forward during the current Parliament: see www.gov.scot/publications/consultation-future-scottish-land-court-lands-tribunal-scotland-scottish-government-response-amalgamation-questions/. This followed on from a public consultation (see *Conveyancing* 2020 p 103) and from an analysis of the responses (www.gov.scot/publications/scottish-land-court-lands-tribunal-scotland-consultation-future-land-court-lands-tribunal-scottish-government-analysis-responses/) published on 8 June 2021. Those responding to the consultation were evenly divided as to the merits of a merger, with the Faculty of Advocates, for example, against and the Court of Session judges in favour. If there was to be a merger, there was general agreement that the Lands Tribunal should be subsumed into the Land Court. There was some support for the combined jurisdiction to be extended beyond its present remit.

In an interview in the October 2021 issue of the *Journal of the Law Society* (p 46), the current Chairman of the Land Court and President of the Lands Tribunal, Lord Minginish, owned up to having originated the idea of a merger. The case for a merger, he said, could be summed up in the three words: simplicity, coherence and flexibility:

Simplicity because it replaces two bodies, which already have the same judicial head and which both deal with land issues, with one. Coherence, in that it resolves certain statutory anomalies and complexities where, presently, both bodies have a role to play in the same or similar processes (for example, the tenant farmer's right to buy under the Agricultural Holdings (Scotland) Act 2003, and the community and crofting community right to buy under the Land Reform (Scotland) Act 2003). Flexibility in that it allows the deployment of the expertise available in both bodies across the range of the unified jurisdiction.

Having the Lands Tribunal become part of the Land Court and not the other way round preserves the identity of a long-established, highly-regarded and

characteristically Scottish court – all as shown in the illuminating and hugely enjoyable book which was published to mark the court’s centenary in 2012: *No Ordinary Court: 100 years of the Scottish Land Court*. In addition, as Lord Minginish points out:

The Lands Tribunal has always worked more like a court than a tribunal: the cases it hears are mainly individual v individual, rather than individual v the state; and witnesses are put on oath and cross-examined as they would be in court. So the Lands Tribunal is a very atypical tribunal, and that is one reason why it makes sense for the tribunal to join the court, rather than the other way round.

Land reform

Survey of attitudes to land reform

As part of the forthcoming five-year evaluation of the Land Reform (Scotland) Act 2016, the Scottish Government commissioned research from Ipsos MORI Scotland and Scotland’s Rural College on the public’s understanding, attitudes and priorities for land reform. Their report, *Attitudes to Land Reform* (www.gov.scot/publications/attitudes-land-reform/), was published on 5 March 2021. The research, conducted between spring and autumn 2020, involved an evidence review, eight interviews with expert stakeholders, a mixed mode (online and telephone) survey of 1,501 respondents aged 16 and over, and a deliberative stage which involved 10 online workshops and 12 interviews. In summary the report found (pp 5–6) that:

There is low awareness of the Scottish Government’s land reform agenda as a whole (though slightly more awareness of some specific aspects such as CRtB and access rights). However, once explained to participants, there is considerable support for the overall aims and for specific policies on diversification of land ownership, vacant and derelict land, access rights and community involvement in decision-making. Concerns tended to relate to elements of implementation rather than the policies themselves. These included:

- a view that, while current access rights probably strike the right balance, more should be done to educate the public about their responsibilities, there should be more clarity about landowners’ responsibilities in respect of allowing access, and there should be guidance on what to do in the event of a dispute;
- a concern that communities may lack the resources and expertise to manage assets, and may be susceptible to volunteer fatigue in the longer term and therefore that support should be provided;
- a concern about the relative cost-benefits of large-scale buyouts (including as land values rise). This was related by some directly to value for money in terms of the number of people likely to benefit. It also highlights the issue of rising land values as a future challenge not just in economic but also social terms.

There is an evident appetite among the participants for greater involvement in decisions about land use. Initiatives to encourage this should tap into the pride that is felt in Scotland’s land, but also the concerns about vacant and derelict land, about the lack of community facilities and about land not being used to benefit local communities.

The term ‘land reform’ is perceived as somewhat unclear and is associated with undeveloped, rural land. It is not connected with tangible issues and initiatives that affect people. This has implications for how land reform is positioned. A greater emphasis on the urban elements and buildings in rural towns and villages, may help engage more of the public and help them see the relevance of land reform to their own lives. Examples of successful community buy-outs (particularly urban examples) and repurposing of vacant and derelict land should be publicised.

Early involvement in decisions about how land should be used should also be encouraged. Additionally, decision makers need to consider how the structures and processes involved in making decisions about land use may act as barriers to meaningful community engagement. The findings demonstrate that, although people in the most deprived areas are less likely to have been involved in decisions, they show a similar level of interest in being involved in the future. They are also more likely to be affected by vacant and derelict land in their area. This suggests a need to prioritise and support engagement activities in these areas.

Proposed Land Reform Bill

Included in the *Programme for Government 2021–22* was the announcement by the Scottish Government (at p 86) that:

We will legislate within this Parliament to tackle the concentration of land ownership, which can have detrimental effects for rural communities in particular. Subject to devolved competence constraints, we will aim to bring forward a Land Reform Bill to tackle the scale and concentration of land ownership across rural and urban Scotland, including provision for a public interest test to apply to transfers of particularly large scale landholdings, with a presumption in favour of community buy-out when the test applies. We will double the Scottish Land Fund from £10 million to £20 million per year by 2026 to provide support for community ownership projects in urban and rural areas, responding to the increased popularity of the fund, which was over-subscribed last year for the first time since 2003.

The important proposal that a public-interest test should apply to certain types of transfer of land derives from the work of the Scottish Land Commission. That work is considered in the next section. Usefully, it provides some detail as to what the ultimate legislative provisions might look like.

Possible legislative measures to address Scotland’s concentration of land ownership

Background

In the spring of 2018 the Scottish Land Commission (*Coimisean Fearainn na h-Alba*) issued a call for evidence from those with experience of living or working in parts of Scotland where most of the land is owned by a small number of people. There were more than 400 responses. The question they were asked was whether there were any benefits / disadvantages of land being owned by a very small number of people and whether they had experience of these benefits / disadvantages. In addition, a literature review was carried out for the Scottish Land Commission by Jayne Glass, Rob McMorran and Steven Thomson of Scotland’s Rural College

and published in March 2019. Its purpose (para 1.3) was to describe and interpret recent and older research related to concentrated and large-scale land ownership in Scotland and other countries.

On the basis of both the empirical research and the literature review, the Scottish Land Commission published, on 20 March 2019, a 70-page *Investigation into the Issues Associated with Large scale and Concentrated Landownership in Scotland*. Of the five authors involved, three were from the Land Commission itself (Shona Glenn, James MacKessack-Leitch, and Katherine Pollard) and the other two from Scotland's Rural College (Jayne Glass and Rob McMorran). This *Investigation* in turn formed the basis of a report and a set of formal recommendations by the Scottish Land Commission to Scottish Ministers: *Review of Scale and Concentration of Land Ownership: Report to Scottish Ministers* (20 March 2019). Both documents, and all others referred to in this section, are available at www.landcommission.gov.scot/all-publications. See also *Conveyancing 2019* pp 108–11.

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

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

For this reason we do not advocate a simple area limit on the amount of land an individual can own, as we do not believe this would address the underlying issues. Instead we conclude that interventions to address the adverse effects of concentrated market power are required, as well as systemic change to diversify the pattern of ownership.

The evidence demonstrates a pattern of market and social power associated with land ownership that is consistent with characteristics of monopoly power in other economic sectors. As in other sectors, it would be in the public interest to put in place controls to manage the risks associated with excessively concentrated power and prevent monopoly positions emerging.

The research has identified strong evidence that harmful land monopolies exist and appear to be causing significant and long-term detriment to the communities affected. Our recommendations focus on the core issue of concentration of power, rather than scale per se. However, given that large scale holdings amplify the risks of concentrated ownership, scale is an appropriate criteria in targeting interventions in a proportionate way, though other risk factors will also be appropriate criteria.

A number of recommendations were made, three of which have been followed up and expanded upon in a new paper by the Scottish Land Commission published on 4 February 2021.

The new paper

The new paper, *Legislative Proposals to address the impact of Scotland's concentration of land ownership*, devotes a chapter (chs 5–7) to each of the three recommendations under consideration. It seems likely that this paper will have a considerable influence on the shape of provisions in the forthcoming Land Reform Bill (see above). The main paper is supplemented by a separate four-page summary.

Back in 2018, the Scottish Land Commission had published commissioned research, entitled *Research on interventions to manage land markets and limit the concentration of land ownership elsewhere in the world*: see *Conveyancing 2018* pp 116–17. Approval requirements for the ownership of land were found to exist in 18 of the 22 countries surveyed, either in respect of foreign ownership (12 countries) or of ownership by anyone of agricultural land (6 countries). Outright bans on foreign ownership were uncommon, as were upper limits to the amount of land that any one individual or entity could own. Where upper limits did exist, they tended 'to be targeted at foreign land acquisitions and/or used as planning control mechanisms, rather than being used to restrict ownership rights or as mechanisms for redistribution'. Indeed, it was notable that the motivations for restrictions of various kinds were often rather different from the issue under consideration by the Scottish Land Commission, namely the concentration of ownership of land.

On the basis of this research from 2018, the new paper concludes (para 2.3), with perhaps a little exaggeration, that:

The findings from this research were clear: Scotland is an outlier. Although in Scotland there are no legal restrictions on who can own land or how much they can own, such restrictions are commonplace elsewhere in the world.

Such restrictions would not, says the paper, be contrary to the ECHR, and an entire chapter (ch 4) is devoted to human rights issues (although there is no technical analysis of the law).

Each of the three recommendations made by the paper may now be considered in turn beginning with the one which is likely to be of greatest interest to conveyancers.

Regulating land transfers: a public-interest test for significant acquisitions

In the same way as the Competition and Markets Authority regulates corporate mergers and acquisitions in the public interest, so, it is envisaged, a body (probably the Scottish Ministers: see para 8.1) would regulate land acquisitions in circumstances where they are 'likely to create or perpetrate a situation in which excessively concentrated power [of ownership] could act against the public interest' (para 7.1). There would be power to block the acquisition, or to allow it only subject to conditions, such as that part of the land acquired should be sold on, or that specified management practices should be adopted.

Most transactions would be unaffected. Scoping criteria would be enacted which would exclude most acquisitions from being subjected to the public-interest test. The suggestion from the Scottish Land Commission is that the test should only be applied to acquisitions where one of the following criteria is satisfied:

- The land being acquired is above a stipulated threshold in terms of area. This would be high enough to exclude family farms and small businesses but low enough to include modest estates. The paper does not suggest an actual figure, other than saying that holdings over 10,000 hectares would always be in scope and those under 1,000 hectares would always be exempt.
- The land accounts for more than a specified minimum proportion of the total land area of either a Remote Rural Area (per Scottish Government Urban Rural Classification: <https://data.gov.uk/dataset/f00387c5-7858-4d75-977b-bfdb35300e7f/urban-rural-classification-scotland>) or an island. The paper suggests a threshold of between 30% and 50%.
- The land has previously been subject to a statutory land rights and responsibility review – a proposed new mechanism which forms one of the paper's other recommendations (see below).

If an acquisition is in scope, in the sense just described, then it would automatically be referred to the Scottish Ministers for review by reference to a public-interest test. In principle, all types of acquisition would be covered: acquisition by purchase or inheritance but also indirect acquisition by acquiring shares in a company which owns the land. Such a referral would, of course, be very bad news for the potential acquirer, and would lead to considerable delays (assuming that the acquisition was not simply abandoned).

As for the test itself, the paper is doubtful as to whether a fixed definition of 'public interest' is possible or desirable. But guidance should be provided, perhaps on a statutory footing. Such guidance would focus on two key questions. First: would the proposed acquisition create or perpetuate a monopoly situation? In order to answer that question (para 7.5):

the Land Commission believes it would be helpful to identify characteristics of concentrated landownership that could create a structural risk of excessive power. Examples of the type of structural characteristics that may be relevant include situations where the landowner would own or control:

- The majority of the stock of privately rented residential properties;
- Strategic local infrastructure – eg slipways, petrol stations or sites for telecommunications infrastructure;
- Important community or cultural facilities such as hotels or shops (particularly where there is only one in the locality);
- The majority of the effective local housing land supply;
- A significant proportion of local employment; and/or
- A significant proportion of local demand for goods and services.

Assuming the answer to this first question is yes, there is then a proposed second question: is there reason to believe that such a situation could harm the public interest? Here a number of factors might be relevant, such as: whether the acquisition might contribute to high prices for sites for housing development or business premises; whether it would result in an under-provision of sites for housing or other development; whether the acquirer is unlikely to provide reasonable support for efforts to develop the local economy; and whether tenants are likely to lose their homes or be unable to continue their business due to a decision to use the land in question for other purposes.

Obviously, the sooner the Scottish Ministers know of a potential acquisition within scope, the quicker the public-interest test can be applied and the quicker the parties to the transaction will know where they stand. The paper advocates advance notification of acquisitions, coupled where appropriate by a statutory duty of notification (for example by solicitors involved in the acquisition). The fact, however, that an acquisition proceeds without notification and without otherwise coming to the attention of the Scottish Ministers would not prevent the public-interest test being applied after the event. If the decision was then to block the acquisition, the acquirer would presumably have to unscramble the transaction.

Insisting on LRSS-compliant planning: mandatory management plans

The other two recommendations contained in the Scottish Land Commission's paper can be dealt with much more briefly. Whereas the public-interest test seeks to control acquisitions, the other recommendations are directed at controlling existing land use and management. As neither is expressly mentioned in the announcement about the forthcoming Land Reform Bill (above), it is uncertain at the time of writing whether they will form part of that Bill.

The first recommendation is to introduce a requirement that all landholdings above a certain size prepare and engage on a management plan which takes full account of the Land Rights and Responsibilities Statement ('LRRS') (for which see below). The paper explains matters in this way (para 5.1):

This recommendation arises from the reasonable expectation that any landholding operating at scale should prepare and engage on a management plan that demonstrates delivery against the LRRS and connects with local priorities, opportunities, and public policy. The requirement to prepare and, importantly, engage on a management plan would address some of the risks of concentrated ownership, by moderating the

power of decision-making through wider involvement and influence. It could provide the necessary basis for transparency of objectives, collaboration, and widening the influence on, and benefits from, decision-making.

While a management plan might reasonably be considered good practice for all landholdings, the caveat that this recommendation should only apply to landholdings above a certain size is intended to ensure that the proposal would not create disproportionate administrative burdens on smaller landholdings. It is not, for example, envisaged that the proposal would apply to most family farms.

It is anticipated that the plans would be required to set out how the management of the landholding supports the principles of the LRRS and contributes to relevant land use, economic and community development priorities, and opportunities as expressed in community plans, regional and national policy. It is envisaged that the plans would be required to include a community engagement plan setting out how community engagement is embedded.

It is envisaged that enforcement could be based on a range of cross compliance mechanisms, such as being a pre-requisite for access to regulatory consents and fiscal support.

Monitoring behaviour: land rights and responsibilities reviews

But what if landowners fail to have regard to the Land Rights and Responsibilities Statement ('LRRS')? In that case the paper recommends an intervention ('review') by an appropriate body (preferably the Scottish Land Commission itself: see para 8.1) following clyping to the Land Commission 'by anyone with a defined legitimate interest in the landholding in question' (para 6.3). In order that landowners should be clear as to what is expected, a set of 'practical codes of practice that articulate the principles of the LRRS' would be put in place (para 6.2). The LRRS 'protocols' already produced by the Land Commission (see *Conveyancing 2019* pp 111–12 and *Conveyancing 2020* p 113) 'could provide a basis for this'. The act of clyping would not be decisive in itself, because 'it should only be possible to instigate a review if a credible allegation that one of the LRR codes of practice has been breached is made and, in the opinion of the administering authority, investigating the breach would be in the public interest' (para 6.3). The outcome of the review would be a report, publicly available, containing recommendations for action. These might include a direction on how to comply with the codes of practice, or on changing operational or management practices. Failure to comply could attract a financial penalty, or perhaps cross-compliance penalties. As explained above, it would also be one of the trigger events for the application of the public-interest test in the event that the land was later disposed of. By contrast with the other two recommendations of the Scottish Land Commission, there is no suggestion that this power to conduct LRRS reviews should be confined to landholdings above a certain size.

Five-year review of the Land Rights and Responsibilities Statement

Part 1 (ss 1–3) of the Land Reform (Scotland) Act 2016 requires the Scottish Government to issue and keep under review a 'land rights and responsibilities statement' ('LRRS') having regard to certain criteria such as human rights,

community empowerment, diversity of land ownership, and sustainable development (s 1). In implement of the Act, and following consultation, a final version of the Statement (www.gov.scot/Publications/2017/09/7869) was published on 28 September 2017. Scotland was apparently the first, and is still perhaps the only, country in the world to have such a document. For an account of the background to the LRRS and a (highly favourable) evaluation of its significance, including ‘for legal practitioners, legal academics, and law reformers’, see Jill Robbie and Elsabé van der Sijde, ‘Assembling a Sustainable System: Exploring the Systemic Constitutional Approach to Property in the Context of Sustainability’ (2020) 66 *Loyola Law Review* 553 especially at 558–66.

The LRRS itself comprises a ‘Vision’ and six ‘Principles’:

Vision

A Scotland with a strong and dynamic relationship between its land and people, where all land contributes to a modern and successful country, and where rights and responsibilities in relation to land are fully recognised and fulfilled.

Principles

1. The overall framework of land rights, responsibilities and public policies should promote, fulfil and respect relevant human rights in relation to land, contribute to public interest and wellbeing, and balance public and private interests. The framework should support sustainable economic development, protect and enhance the environment, help achieve social justice and build a fairer society.
2. There should be a more diverse pattern of land ownership and tenure, with more opportunities for citizens to own, lease and have access to land.
3. More local communities should have the opportunity to own, lease or use buildings and land which can contribute to their community’s wellbeing and future development.
4. The holders of land rights should exercise these rights in ways that take account of their responsibilities to meet high standards of land ownership, management and use. Acting as the stewards of Scotland’s land resource for future generations they contribute to sustainable growth and a modern, successful country.
5. There should be improved transparency of information about the ownership, use and management of land, and this should be publicly available, clear and contain relevant detail.
6. There should be greater collaboration and community engagement in decisions about land.

Since 2017 the LRRS has been widely publicised, not least by the Scottish Land Commission as part of its ‘Good Practice’ programme. Among other measures the Land Commission has issued a series of ‘protocols’ explicating various aspects of the LRRS: see *Conveyancing 2019* pp 111–12 and *Conveyancing 2020* p 113.

Section 2 of the 2016 Act requires that the LRRS be reviewed, and if necessary revised, at five-yearly intervals. In preparation for the first such review the Scottish Government issued, on 5 November 2021, a consultation document: *Review of the Land Rights and Responsibilities Statement* (www.gov.scot/publications/review-of-land-rights-and-responsibilities-statement-a-consultation/). This asks whether changes might be needed, especially in the

light of the increased emphasis in the last few years on climate change. More precisely, it proposes (in para 3.5) a revised version of the ‘Vision’, as follows (suggested additions indicated in italics):

A Scotland with a strong and dynamic relationship between its land and people, where all land contributes to a modern and successful country *and supports a just transition to net zero*, and where rights and responsibilities in relation to land *and natural capital* are fully recognised and fulfilled.

A ‘just transition’, the paper explains (para 2.5), ‘means reaching a net zero and climate resilient economy, in a way that delivers fairness and tackles inequality and injustice’. (For more on this topic, see the report of the Just Transition Commission, *A National Mission for a fairer, greener Scotland*, which was published on 23 March 2021: www.gov.scot/publications/transition-commission-national-mission-fairer-greener-scotland/). And ‘natural capital’ (paras 2.7 and 2.8) is:

a concept that recognises our natural environment as an asset that provides vital benefits to our society and economy. Natural capital assets come in many different forms: from populations of wild species (eg birds, fungi, animals); to soils and minerals; to the ability of landscapes to absorb and store carbon or protect us from flooding. Scotland’s rich natural capital means that we are ideally placed to lead the way in adopting nature-based approaches to tackling the climate emergency whilst simultaneously addressing the biodiversity crisis. This includes measures like peatland restoration, woodland creation and sustainable agriculture.

The consultation closed on 28 January 2022.

New Land Use Strategy

The first Land Use Strategy was laid before the Scottish Parliament in 2011, in implement of s 57 of the Climate Change (Scotland) Act 2009: see *Conveyancing 2011* pp 75–76. In 2016, as the legislation required, it was replaced by a second Land Use Strategy: see *Conveyancing 2016* pp 104–05. This largely carried forward the 2011 Strategy but with the addition of nine ‘policies’. The final annual progress report on that Strategy was published on 2 September 2021: see www.gov.scot/publications/second-annual-progress-report-land-use-strategy-2016-2021/. But meanwhile, another five years on, the second Strategy has been replaced by a third: *Scotland’s Third Land Use Strategy 2021–2026: Getting the best from our land* (www.gov.scot/publications/scotlands-third-land-use-strategy-2021-2026-getting-best-land/).

Some of the background is explained in the opening pages. The second Land Use Strategy had been swiftly followed by the Land Rights and Responsibilities Statement (see above), containing six principles ‘which should underpin every decision about land’, including: ‘greater collaboration and engagement between those making decisions about land and those affected by such decisions; increased transparency about land; and, for those who have land rights, the responsible exercise of those rights’ (p 7). The relationship between these two documents is not explored, but perhaps needs to be.

The paper continues (pp 8–9):

The overarching purpose of the third Land Use Strategy remains the same: demonstrating our ambition for sustainable land use. This new Strategy, however, comes at a time when both the urgency and scale of change needed is unprecedented. As a result this Strategy is different in scope and tone from its predecessors.

Many new and ambitious policies have recently been introduced or are being developed: through our Environment Strategy, Climate Change Plan update, the upcoming Biodiversity Strategy, the new National Planning Framework and many others. Therefore the third Strategy does not set out new policies. Instead it seeks to make land use more understandable and accessible to everyone, in support of a shift in the way we think about land, towards more inclusive conversations around how we use land and who should be involved in those decisions.

It moves away from a sector by sector approach towards an overarching holistic picture of what sustainable land use in Scotland could look like. It looks beyond its formal five year duration to our 2032 and 2045 targets and efforts to tackle the twin crises of climate change and biodiversity loss. It also highlights the actions we are taking right now across Scotland.

It is anticipated that the third Strategy will be followed by a delivery plan, that will contain more details on the policies and actions that will be taken over the course of this Strategy's five year span and beyond.

Yet while consultation on the new Strategy 'highlighted the need for the vision and objectives to evolve with changing circumstance', there was 'no consensus on the specific wording' (p 11). As a result, the decision was taken to leave the (first) Land Use Strategy from 2011 unchanged, but shorn both of its original '10 principles for sustainable land use' and also the nine 'policies' which were added in the second Strategy of 2016. The new – third – Land Use Strategy thus comprises simply a 'vision' and three 'land use objectives'. The vision is:

A Scotland where we fully recognise, understand and value the importance of our land resources, and where our plans and decisions about land use will deliver improved and enduring benefits, enhancing the wellbeing of our nation.

And the three land use objectives are:

- Land based businesses working with nature to contribute more to Scotland's prosperity.
- Responsible stewardship of Scotland's natural resources delivering more benefits to Scotland's people.
- Urban and rural communities better connected to the land, with more people enjoying the land and positively influencing land use.

The remainder of the paper (pp 12–39) considers a number of other topics, including the next National Planning Framework, regional land use partnerships, and specific sectors such as enclosed farmland, semi-natural land, and rivers and water bodies.

Community ownership of land

Extent

The latest figures on community ownership in Scotland, published on 28 September 2021 (www.gov.scot/publications/community-ownership-

scotland-2020/), show that the number of 'assets' in community ownership in Scotland has increased from 82 in 2000 to 612 in 2020. This doubled the area in community ownership, which rose from 56,343 hectares in 2000 to 191,261 hectares in 2020. 58% of that land area, however, is represented by only four assets. Of the total of 612 assets, 268 comprise land, 220 comprise buildings, and 117 both land and buildings. More than six out of ten community-owned assets are located in remote rural areas.

Funding: Scottish Land Fund

An important source of funding for community buy-outs is the Scottish Land Fund, financed by the Scottish Government to the tune of (at least) £10 million per year. An evaluation of the Fund and, especially, of its administrative processes carried out on behalf of the Scottish Government was recently completed (www.gov.scot/publications/scottish-land-fund-evaluation/) and makes a number of recommendations. It also describes the application process and gives figures as to success rates and the distribution of funding among different types of project.

The initial ('stage 1') application to the Scottish Land Fund is for technical assistance funding, which can range from £2,500 to £30,000. There is some weeding out at this stage: of the 493 applications made in the period 2016–21, just over one-fifth were turned down. Around 70% of applicants who are successful at stage 1 go on to apply for acquisition funding in stage 2, and most receive funding. The sums that can be awarded range from £10,000 to £1 million, although, exceptionally, an award of £4.4 million was made to acquire the Isle of Ulva as well as some land on nearby Mull. A complete list of acquisitions funded can be found at www.tnlcommunityfund.org.uk/media/documents/scottish-land-fund/Scottish-Land-Fund-awards.pdf?mtime=20201130144545&fo cal=none. According to the evaluation report (p 27), 70% of community groups who applied for stage 2 funding also received funding from another source. (For other likely sources of funding, see *Conveyancing* 2019 p 106–07.) Perhaps unsurprisingly, 59% of the funds disbursed over the last five years – some £23 million – was spend on acquisitions in remote rural areas (p 18).

Community rights to buy: some statistics

For a community to assert a pre-emptive right to buy, under Part 2 (ss 33–67B) of the Land Reform (Scotland) Act 2003, in the event that the property comes on the market, the community must apply to the Scottish Ministers for a 'community interest in land' in respect of that property. If the application is successful, the community interest is registered in the Register of Community Interests in Land (www.ros.gov.uk/our-registers/register-of-community-interests-in-land). There are currently around 250 registered interests. A report commissioned by the Scottish Government on *Attitudes to Land Reform* and published on 5 March 2021 (www.gov.scot/publications/attitudes-land-reform/) gives (at p 8) some figures on success rates. By the end of 2018 only 24 of the registered community interests in land had been activated, resulting in communities acquiring the land or building using the full legislative process. But a number of further acquisitions

will have taken place in the shadow of the legislation and without going through the statutory procedure. On these matters see also para 31-18 of W M Gordon and S Wortley, *Scottish Land Law*, 3rd edn, vol II (2020).

The much younger community right to buy abandoned, neglected or detrimental land, in force only since 27 June 2018, requires an application to the Scottish Ministers which is registered in Register of Applications by Community Bodies to Buy Land (<https://roacbl.ros.gov.uk/>): see Land Reform (Scotland) Act 2003 Part 3A (ss 97B–97Z) and *Conveyancing* 2015 pp 75–76. So far, only three applications are disclosed on the register, two in Helensburgh and one in Scone. Two were rejected and the Scottish Ministers declined to consider the third on the basis that two separate areas of land, with different owners, had been combined within a single application. See further Jill Robbie, ‘Babes in the Woods: The Decision of the Scottish Ministers on the Application of Helensburgh Community Woodlands Group to Exercise the Right to Buy Abandoned, Neglected or Detrimental Land’ (2021) 25 *Edinburgh Law Review* 347.

Woodlands: ownership and management

Ownership

On 1 December 2020 estimates for different ownership types of woodland across Great Britain, including Scotland, were published: www.forestryresearch.gov.uk/tools-and-resources/national-forest-inventory/what-our-woodlands-and-tree-cover-outside-woodlands-are-like-today-8211-nfi-inventory-reports-and-woodland-map-reports/. The statistical report presents the analyses of a survey of woodland owners carried out between 2012 and 2015. The key data in relation to Scotland are (www.gov.scot/publications/woodland-ownership-key-data/):

Ownership type	Woodland area (000) ha	% of country woodland area
Public Forest Estate, managed by Forestry and Land Scotland (see below)	527.9	38.4
Local authority	7.0	0.5
Other public (ie not PFE or local authority)	21.4	1.6
Charity funded by voluntary subscription	37.0	2.7
Private forestry or timber business	57.7	4.2
Private, personal	546.1	39.8
Private, business: companies, partnerships and syndicates	146.6	10.7
Private, community	13.8	1.0
Mixed	2.6	0.2

Management: Forestry and Land Scotland draft corporate plan

Forestry and Land Scotland (*Coilltearachd agus Fearann Alba*) was established as an executive agency of the Scottish Government on 1 April 2019, following completion of the devolution of forestry to the Scottish Parliament as a result of the Forestry and Land Management (Scotland) Act 2018. As the main successor body to the Forestry Commission, Forestry and Land Scotland ('FLS') manages the forests and land owned by Scottish Ministers. A *Forestry Strategy 2019–2029* for Scotland was published in 2019: see *Conveyancing 2019* pp 119–20. Now FLS has issued a draft *Corporate Plan 2022–25* for the purposes of consultation: see www.gov.scot/publications/forestry-land-scotland-draft-corporate-plan-2022-2025-consultation/. Under the draft, the proposed 'priorities' include:

Supporting a sustainable economy

- Increasing commercial opportunities for the long term benefit of the national forests and land.

Looking after Scotland's national forests and land

- Tackling the Climate Emergency.
- Protecting our forests from new and existing threats.
- Responding to the Biodiversity Challenge

Scotland's national forests and land for visitors and communities

- Adapting to changing visitor and tourism requirements.
- Increasing opportunities for communities to benefit from the national forests and land.

Shared equity schemes

First Home Fund

The First Home Fund is one of a number of shared equity schemes run by the Scottish Government: for this scheme and the others, see *Conveyancing 2019* p 105 and *Conveyancing 2020* pp 113–15. The First Home Fund, which was launched on 18 December 2019, provides first-time buyers with an interest-free loan of up to £25,000 to help buy a house. This is converted into an equity stake in the house, calculated as the amount of the loan as a percentage of the lower of the purchase price and the property valuation. There is an application fee of £550. The loan will normally be repaid when the house is sold. The scheme is open to all first-time buyers in Scotland and can be used to help buy both new-build and existing properties. There is no means-testing and no price limit. In its first year of operation, the Fund was allocated £200 million; in its second year, beginning on 1 April 2021, only £60 million was made available and this was fully used up within the first five days: see www.lawscot.org.uk/news-and-events/legal-news/first-home-fund-runs-out-of-money/.

A report was published on 24 February 2021 evaluating the first year of the scheme's operation: see *First Home Fund Evaluation: Synthesis of Quantitative and Qualitative Analysis* (www.gov.scot/publications/first-home-fund-evaluation-synthesis-quantitative-qualitative-analysis/), and also, for more details of the

qualitative material, a further report available at www.gov.scot/publications/qualitative-evaluation-scottish-government-first-home-fund-shared-equity-scheme/. According to the main report there has been considerable uptake of the scheme: nearly 10,000 applications have been approved or settled, equivalent to 30% of all new mortgages to first-time buyers. It was used widely across Scotland and across different property types, although properties bought using it are typically more expensive than the average first-time buyer purchase (pp 7–8).

Around 28% of those whose views were sought said that they could not have bought a property that would meet their needs without the First Home Fund. This rate of ‘additionality’ is significantly below the rate of the other shared equity schemes – Open Market Shared Equity (47%) and New Supply Shared Equity (39%) – although it is higher than for Help to Buy (Scotland) (28%) (pp 11–13).

Wider housing market evidence does not as yet suggest that the First Home Fund has put significant upward pressure on first-time buyer prices, but it also does not suggest that the scheme has led to a marked increase in first-time buyer activity (p 13).

New Supply Shared Equity with Developers

Properties purchased with assistance from the New Supply Shared Equity with Developers scheme have either a 10- or 19-year shared equity agreement in place, with the equity in the property being split among the home owner, developer and Scottish Government. Where a 10-year agreement was entered into, at the end of the 10-year period the owner is obliged to purchase the equity stakes of the developer and the Scottish Government. The first of these agreements having reached that point in April 2021, the Scottish Government published a document of *After Sales Guidance* on 25 May 2021 (www.gov.scot/publications/new-supply-shared-equity-with-developers-scheme-after-sales-guidance/) indicating what steps now need to be taken. In cases where owners are unable to buy out the shares of the developer and Scottish Government, the suggestion is that either the original agreement is varied or the owner enters into a new shared equity agreement with the Scottish Government. Sale of the property is a third option.

Socialising the provision of land for housing

In an important new paper which will be of particular interest to those with developer clients, *Land for Housing: Towards a Public Interest Led Approach to Development* (www.landcommission.gov.scot/all-publications/), the Scottish Land Commission (*Coimisean Fearainn na h-Alba*) puts forward some radical proposals for ‘a socialised approach’ to providing land for housing. This builds on a series of papers published by the Land Commission in 2020 (for which see *Conveyancing 2020* pp 112–13).

The nature of the problem, as the Land Commission sees it, is set out in the paper’s opening page:

At present, strategic land promotion in Scotland – the process of identifying and making sites ready for development – is carried out largely by the private sector, but

the private sector is motivated by a need to generate value for shareholders, not society as a whole. This means that decisions about what to build, where to build it, and when tend to be driven not by the public interest, but by what will maximise private profit.

To achieve that, housebuilders tend to focus on building larger high value homes on greenfield sites in growth areas. The result is that not enough homes are built – particularly in rural Scotland and regeneration areas – and those that are delivered aren't suitable for everyone. The profit motive also tends to focus effort and investment on those aspects of housing delivery that create private rather than social value, such as luxury kitchens and integral garages rather than greenspace and good transport links. The focus is on building housing developments rather than creating great places.

The result of this is failing town centres, a persistent legacy of post-industrial dereliction in Scotland's most deprived communities, a population-sapping lack of affordable housing in our most fragile rural communities, and the spread of car-dependent suburbs around our towns and cities. ...

Over the past three or four decades the financialisation of housing has become a defining feature of the UK economy. Housing has become an asset rather than somewhere to live. This has created a gulf between the housing 'haves' and 'have nots', fuelling intergenerational inequality and enforcing divisions between those lucky enough to inherit housing wealth and those less fortunate ... This is not sustainable. Scotland urgently needs to shift to a more balanced growth path.

To this problem the solution, says the Land Commission (para 6.3.1), is 'that the public sector should become the main promoter of strategic development land. As with education and health, the role of land promotion in shaping place-making and delivering housing is too important to leave to the private sector alone'. But this is necessarily a long-term aim. In order not to drive volume house-builders away, any changes should be introduced step-by-step. Furthermore, even under the new arrangements the private sector would continue to play an important part (para 2.2):

The intention of these proposals is not to displace commercial housing delivery. Rather the objective is to encourage and facilitate it, particularly in parts of the country where it would otherwise be unlikely to take place, and to ensure that it happens in a way that better supports good place-making. By playing a more active role in strategic land promotion the public sector can enable the private sector to deliver more homes of all tenures.

The proposed first step would be to create a network of 'Place Pioneers', mainly by using public money to build affordable housing on publicly-owned land in town centres. Some further details are given in chapter 3. For example (para 3.2):

We propose that Place Pioneers should comprise a three-way partnership between public landowners, government and public bodies. Public landowners would be expected to commit surplus land (at existing use value) as a contribution to the project with capital funding to make sites development ready provided by the Government.

Key planning agencies would then contribute expertise and support using their technical knowledge to identify the best sites for development to meet local housing needs and then to address issues such as infrastructure provision and flood management. To enable this to happen it would be important that the initial seed

funding for Place Pioneers included an appropriate budget for staff resource alongside necessary capital investment.

The capital invested could be recouped by sale of the houses and then ‘recycled’ into new projects.

With Place Pioneers having rebuilt the capacity of the public sector to promote land for housing and development (para 3.1), it would then be time to move on to the next stage. This would be to establish ‘Regenerative Partnership Zones’ to deal with site assembly and development in cases where ownership was fragmented. Vacant and derelict land in post-industrial areas would be a particular target. (See *Conveyancing 2020* pp 117–18 for the Scottish Land Commission’s earlier work on the topic of vacant and derelict land.) Chapter 4 has some of the details. First, an area would be designated as a Regenerative Partnership Zone. Then the relevant local authority would select a development partner, through open competition, and form a joint venture company. The company would have exclusive development rights within the zone. Land assembly would be assisted by giving the company powers of compulsory purchase. Existing landowners could either join the development partnership, in return for either space or a financial return, or could sell to the company.

In due course a new Land Agency would be created, which would assist with the initiatives already described and provide expertise of the kind local authorities may lack. Other countries have already some rough equivalents, including England (with Homes England) and Ireland (with the Land Development Agency). The Land Agency would be active, too, in those rural areas which are neglected by the private sector, providing ‘a pipeline of sites for community-led development’ (para 6.3.1).

Finally, the Scottish Land Commission returns (in chapter 5), albeit rather inconclusively, to a topic which has engaged its attention before (see *Conveyancing 2018* pp 115–17 and *Conveyancing 2019* p 113): methods of capturing uplifts in land value.

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⌘ PART IV ⌘
COMMENTARY

COMMENTARY

CONVEYANCES AS CONTRACTS¹

Concurrent liability?

A disposition is a contract. So is an assignation. So too, in feudal times, was a feu disposition or feu charter. All conveyances, in short, are a type of contract, binding the parties – the granter and grantee – to the obligations imposed and accepted under the deed.² Admittedly a conveyance is much more than a contract. It conveys existing rights, such as ownership of land, as well as sometimes creating new rights, such as real burdens and servitudes. But its contractual status remains of significance. It is easily overlooked.

Which provisions of a disposition are contractual? The answer is: any obligation undertaken by any of the parties.³ A familiar example is warrandice, which is a contractual guarantee of title binding on the granter. But grantees can be bound too. Where a disposition seeks to impose real burdens or servitudes in respect of the property being disposed, the obligations so imposed bind the grantee contractually (by acceptance of delivery of the disposition)⁴ before they bind the grantee as real rights (by registration of the disposition).⁵ Importantly, the contractual obligation in such cases is a prelude to a real obligation – unlike, say, warrandice, which is and remains a contractual obligation throughout. And indeed it is mainly real burdens and servitudes that give rise to this interplay between contractual rights and real rights.

Take the case of a use restriction – say, no cats or dogs (or lions) – being imposed in a disposition as a real burden. The grantee is bound as a matter of contract as soon as the disposition is delivered. On registration the grantee is bound for a second time, but as a real burden. What is the relationship between these two binding events? Does contractual liability last only for the few days it takes to register the disposition, at which point it is replaced by liability under the real burden? Or is there, rather, concurrent liability, so that the grantee is

¹ This section is by Kenneth Reid.

² K G C Reid, *The Law of Property in Scotland* (1996) para 392. An unusual feature is that only one of the parties, the granter, signs. The contract is concluded on acceptance of delivery by the grantee.

³ G L Gretton and K G C Reid, *Conveyancing* (5th edn, 2018) paras 11-21 to 11-24.

⁴ This is despite the fact that the grantee has not signed. In terms of the Requirements of Writing (Scotland) Act 1995 s 2(1), it is only the granter who must sign.

⁵ While a servitude is a real right, a real burden is real in the strictest sense only where it imposes negative rather than affirmative obligations: see Title Conditions (Scotland) Act 2003 s 9.

bound *both* under the real burden and also under the contract? (We can leave until later why the answer to this question may matter.)

For real burdens created on or after 28 November 2004 the question is settled by statute. Section 61 of the Title Conditions (Scotland) Act 2003 provides that:

Incidental contractual liability which a constitutive deed (or a deed into which a constitutive deed is incorporated) gives rise to as respects a prospective real burden, ends when the deed has been duly registered and the real burden becomes effective.

So liability under the real burden replaces liability under the contract.¹ Conversely, for real burdens created before 28 November 2004 the dominant view is that contractual liability continues notwithstanding the creation of the real burden, resulting in concurrent liability.² Strictly, however, the question has been an open one because the issue had not come before the courts. But now, finally, there is a case.

The new case

*West Lothian Council v Clark's Trs*³ has appeared on these pages before.⁴ In what seems likely to be the final stage of the litigation, the Sheriff Appeal Court was tasked with considering the issue of concurrent liability. The facts, so far as relevant, were as follows. By a feu disposition recorded GRS Midlothian on 7 November 1985, Lothian Regional Council feued West Muir Farm in West Calder to a Mr George Clark. Among the real burdens in the deed was a right of pre-emption. With the abolition of the feudal system, on 28 November 2004, the pre-emption ceased to be enforceable against Mr Clark as a real burden. The question to be determined was whether it continued to be enforceable against him – or rather his executors, because Mr Clark had now died – as a contract or whether, following feudal abolition, the pre-emption was at an end. And behind that question was a second and more fundamental question: was the original contractual status of the pre-emption brought to an end back in 1985 when the pre-emption was constituted as a real burden on the recording of the feu disposition, or did the contractual pre-emption survive so that there was concurrent liability both as a contract and as a real burden?

Relevant to the first question was s 75(1) of the Abolition of Feudal Tenure etc (Scotland) 2000 which provides that:

¹ If, however, it turns out that, despite registration, the real burden has *not* become 'effective' – for example, because it fails to comply with the requirements as to content set out in s 3 of the Title Conditions (Scotland) Act 2003 – the contractual liability will continue.

² Scottish Law Commission, *Report No 168 on Abolition of the Feudal System* (1999) para 4.88; K G C Reid, *The Abolition of Feudal Tenure in Scotland* (2003) para 2.6; R Rennie, *Land Tenure and Tenements Legislation* (2nd edn, 2005) p 57. See also the Opinion of Professor Roderick Paisley quoted in *West Lothian Council v Clark's Trs* [2021] SAC (Civ) 11, 2021 SLT (Sh Ct) 267 at para 26.

³ [2021] SAC (Civ) 11, 2021 SLT (Sh Ct) 267, 2021 SCLR 235. The Opinion of the court was given by Sheriff Principal D L Murray; also sitting were Sheriff Principal D C W Pyle and Appeal Sheriff R D M Fife.

⁴ *Conveyancing* 2019 pp 173–78; *Conveyancing* 2020 pp 190–94.

As respects any land granted in feu before the appointed day, nothing in this Act shall affect any right (other than a right to feuduty) included in the grant in so far as that right is contractual as between the parties to the grant (or, as the case may be, as between one of them and a person to whom any such right is assigned).

But while this provision preserves contractual rights held by the superior, it does not (other than by excluding feuduty) say which terms of the grant in feu might fall into this category. It does not, in other words, answer the second question.

For Mr Clark's executors it was argued that contractual liability ended when, on 7 November 1985, liability as a real burden began. Consequently, when the pre-emption was extinguished as a real burden, on 28 November 2004, it was extinguished in its entirety. The contract had long since gone. In support of this analysis, two types of argument were made, one general, the other specific to the feu disposition. The former emphasised the 'absurdity' of concurrent liability.¹ If the council² could enforce both as a real burden and as a contract, it would be open to the council to create a multiplicity of creditors by assigning the contractual right to a third party. With pre-emptions in particular, that would hardly be workable. After all, only one person could buy the property. As for the feu disposition, the wording, properly construed, conferred a pre-emption on the council only in its capacity as feudal superior. Once the council ceased to be superior, it necessarily ceased to have any right to the pre-emption.

Neither argument found favour with the Sheriff Appeal Court.³ If, as Mr Clark's executors conceded, the delivery of the feu disposition brought contractual liability into existence, it was difficult to see why this should not endure beyond the creation of the real burden. On what legal basis would the contract come to an end?⁴ In short, the Sheriff Appeal Court was satisfied that initial contractual liability was undisturbed by the later creation of a real burden. Liability simply became concurrent. Hence the extinction of one basis of liability (the real burden) had no effect on the other basis (the contract).⁵ This decision can probably be regarded as settling the law.⁶

1 Paragraph 6.

2 Following the disbandment of regional councils, West Lothian Council was the statutory successor of the granter of the feu disposition, Lothian Regional Council.

3 Only the second argument was fully engaged with. A point which might have been made against the first argument is that multiplicity of creditors is a feature of real burdens even without taking account of contractual rights; for it is always open to the benefited proprietor in a real burden to divide the benefited property to the effect of multiplying those entitled to enforce the burden.

4 This is a more developed version of the line of reasoning that appears in para 26.

5 In reaching this view the court gave some weight to s 61 of the Title Conditions (Scotland) Act 2003 (which provides that, in the case of real burdens created on or after 28 November 2004, contractual liability ceases when liability as a real burden begins). 'We observe', said the court at para 26, that the introduction of s 61 'so as to prevent dual validity as both contract and real burden in future is a recognition that prior to the commencement of the section such dual validity was recognised'. That, however, is not the case. On the contrary, the Scottish Law Commission recommended the introduction of s 61 not to reverse the previous law but because the previous law was uncertain: see *Report No 161 on Real Burdens* (2000) paras 3.40–3.45.

6 It cannot, however, be said that the decision contains an exhaustive examination of the issues.

Some practical implications

A number of practical implications of the decision in *West Lothian Council v Clark's Trs* may be mentioned. First, in a question between the original parties, a disposition or other conveyance is a contract and creates contractual liability. This is often overlooked.

Secondly, this contractual liability is not displaced in respect of obligations which come, by registration of the deed, to be created as real burdens. Instead there is concurrent liability, as both a real burden and as a contractual term. But this is only true of real burdens created before 28 November 2004;¹ thereafter the creation of a real burden has the effect of extinguishing the contractual term.²

Thirdly, the extinction of one basis of liability has no effect on the other basis of liability. So if a real burden is extinguished, for example by the Lands Tribunal or (as in *West Lothian Council*) as a result of the abolition of the feudal system, the contractual term remains and can be enforced against the original grantee of the disposition or other conveyance. Importantly, the contractual term cannot be varied or extinguished by the Lands Tribunal.³

Fourthly, there are different periods of negative prescription. Whereas only five years are allowed to enforce in respect of a breach of a real burden, the equivalent period for contractual terms is 20 years.⁴

Fifthly, by contrast with real burdens,⁵ there is no requirement of interest to enforce in respect of contractual terms. In cases of concurrent liability that may sometimes make enforcement of the contractual term more attractive than enforcement of the real burden.

Finally, contractual liability comes to an end when the original grantee ceases to own the burdened property.⁶ That will often have occurred, of course. Yet cases where the original grantee still owns are surprisingly common, especially if the grantee is a body corporate or a trust. Moreover, universal (as opposed to singular) successors take on the obligations of their author and so count as the original grantee for these purposes. So in *West Lothian Council* itself, Mr Clark's executors stood in for Mr Clark, the original grantee, and were equally subject to the contractual pre-emption.⁷

1 A special rule for community burdens, however, is given in Title Conditions (Scotland) Act 2003 s 119(7). Here the contractual term is extinguished by the creation of the real burden regardless of when the burden was created.

2 Title Conditions (Scotland) Act 2003 s 61.

3 The jurisdiction of the Lands Tribunal, under s 90(1)(a) of the Title Conditions (Scotland) Act 2003, is restricted to 'title conditions' (as defined in s 122(1)).

4 Respectively Title Conditions (Scotland) Act 2003 s 18 and Prescription and Limitation (Scotland) Act 1973 s 7 (the contractual term being an 'obligation relating to land' and hence not subject to the short negative prescription: see sch 1 para 2(e)).

5 Title Conditions (Scotland) Act 2003 s 8.

6 For a brief discussion, see Scottish Law Commission, *Report No 181 on Real Burdens* (2000) paras 3.40 and 3.41. It is unclear whether contractual liability is likewise terminated when the granter ceases to own the benefited property; the decision in *West Lothian Council* (where the granter, following feudal abolition, had ceased to hold the feudal superiority) suggests a negative answer.

7 Paragraph 29.

TACIT RELOCATION¹

Continuing leases

A lease requires to have an end date (ish).² But if one or both of the parties fails to act in the run-up to that date so as to show an intention that the lease should expire, the lease will continue for an additional period. For leases longer than one year, that period is a further year.³ This is because of tacit relocation.

Tacit relocation (literally, silent re-letting) has its origins in Roman law and it is recognised in other European countries.⁴ In Scotland, it is no longer a universal doctrine because agricultural and residential tenancies are subject to statutory regimes with specific rules on termination.⁵ The common law on tacit relocation is therefore today an issue for commercial leases. In practice it can be problematic. As we will see below, the Scottish Law Commission is working on reform of this area. In that connection it received the following evidence in relation to tenants:⁶

Stakeholders have given us many examples of businesses reading their lease, not realising the existence of the implied term, and assuming that they can walk away from the premises at the termination date without having to do anything other than hand back the keys on the last day. These businesses often commit themselves to a new lease of alternative premises without realising that through their silence they have already committed themselves to a further year of rent on their current premises. In the small business sector, the cost of having to pay rent on two different properties can lead to businesses collapsing.

For landlords likewise there is the peril of the lease continuing, when perhaps they have a new tenant lined up who is willing to pay a higher rent or they want to redevelop the property.⁷

How then is tacit relocation to be avoided? Under the current law there appear to be two main ways.

The first is for a formal written notice to quit to be timeously served by either landlord or tenant. This will normally be done under ss 34 to 37 of the Sheriff Courts (Scotland) Act 1907 which provide for various notice periods. It is now generally accepted that it is necessary to do this only in order to use the removing procedures under the 1907 Act.⁸ Failing this, there are common law notice periods, with a general minimum of 40 days.⁹

The second means of avoiding tacit relocation is by actings inconsistent with the continuation of the lease which are communicated to the other party prior to

¹ This section is by Andrew Steven.

² At least to qualify as a real right. Cf *Carruthers v Irvine* (1717) Mor 15195.

³ Bell, *Principles* § 1265; R Rennie et al, *Leases* (2015) para 11-05.

⁴ J Rankine, *The Law of Leases in Scotland* (3rd edn, 1916) p 598; Scottish Law Commission, *Discussion Paper No 165 on Aspects of Leases: Termination* (2018) paras 2.23–2.33.

⁵ In particular, the Agricultural Holdings (Scotland) Act 1991, the Housing (Scotland) Act 2001, and the Private Housing (Tenancies) (Scotland) Act 2016.

⁶ *Discussion Paper on Aspects of Leases: Termination* para 2.41.

⁷ *Discussion Paper on Aspects of Leases: Termination* para 2.42.

⁸ See *Lormor Ltd v Glasgow City Council* [2014] CSIH 80, 2014 SLT 1055, discussed in *Conveyancing* 2014 pp 35–37.

⁹ Rennie et al, *Leases* para 20-21.

the notice period at common law. The leading modern case is *Signet Group plc v C & J Clark Retail Properties Ltd.*¹ There the tenant had ceased to run its business from the leased premises and departed before the date on which the notice to quit was due. But the tenant did not inform the landlord of this. The court held that the lease did not expire at the ish.

A further possibility is a clause in the lease disapplying tacit relocation. But while one sheriff court decision² has held this to be effective, there is not higher authority.

2021 saw a new case on whether actings falling short of formal notice were sufficient to exclude tacit relocation: *Rockford Trilogy Ltd v NCR Ltd.*³

The Rockford case

Facts

Rockford Trilogy Ltd was the landlord of premises known as Trilogy 2, Trilogy Business Park, Eurocentral, Motherwell. NCR Ltd was the tenant. The lease was for a period of 17 years, commencing on 27 March 2003 with the ish on 26 March 2020. In this action the landlord sought declarator that, because neither party had served a notice on the other 40 days prior to the ish, the duration of the lease was extended by tacit relocation until 26 March 2021.

Towards the beginning of his decision, the Lord Ordinary (Clark) stated:⁴

In passing, I note that one of the productions suggests that the [tenant] remained in possession after 26 March 2020, but it is important to emphasise that any continuation of possession was not relied upon for any purpose by either party.

Discussions between the parties about the tenant's continued occupancy of the premises had begun around June 2019. The landlord's agents supplied general heads of terms for this, as well as for other premises in the business park. In December 2019 the landlord served a schedule of dilapidations on the tenant. On 20 January 2020 the landlord's agents sent an email to the tenant's agents offering a 12-month agreement for no rent, but with the tenant being liable for all charges relating to their occupation. This prompted the following reply from the tenant's agents on 21 January 2020:

Thank you for your email yesterday and the landlord's offer. As we discussed NCR are ready to commit to a relocation nearby and have advised that the only way they would consider remaining at the building is if the dilapidations are capped at £300k together with the nil rent proposed for 12 months. Do you think this is something the landlord might agree to in order to retain NCR as an occupier of Trilogy?

Further correspondence between the respective agents followed. Heads of terms for a two-year licence of the ground floor of the existing premises were

¹ 1996 SC 444, 1996 SLT 1325.

² *MacDougall v Guidi* 1992 SCLR 167.

³ [2021] CSOH 49, 2021 SLT 1525, 2021 Hous LR 67 affd [2021] CSIH 56, 2021 GWD 36-484.

⁴ [2021] CSOH 49 at para 2.

sent by the landlord's agents to the tenant's agents on 6 February 2020 but these were expressly stated not to form part of a legally binding contract. Then on or around 26 February 2020 the landlord's solicitor wrote to the tenant:

Our clients have been in touch with us today to advise that they have not received notice from [the tenant] to bring the Lease to an end as at the contractual expiry date, and that as the minimum notice period for service of a termination notice (40 days prior to expiry) has now elapsed, they are treating the Lease as continuing for a further period of one year from 27 March 2020 on the same terms and conditions (including rent), by virtue of the Scottish common law doctrine of tacit relocation. The next quarterly payment date under the Lease is 28 February 2020, and they will therefore be invoicing rent for the full quarter.

Two days later the tenant's agents left a phone message with the landlord's agents stating that the terms contained in the heads of terms had been agreed.

Outer House

Before the Lord Ordinary, the landlord argued under reference to Bell's *Principles*¹ that, for tacit relocation to be excluded, there had to be 'clear and explicit' communication from the tenant that it intended to leave. Moreover, this must occur prior to the 40-day period required for a notice to quit. While there was case law to the effect that where the parties had been discussing or negotiating a new lease, this would exclude tacit relocation,² properly analysed it showed that the parties required to have reached agreement on the new arrangement. Here there was no agreement reached on a licence given the express statement in the heads of terms about these not being legally binding. In any case, the telephone acceptance had come too late.

The response of the tenant was that tacit relocation rested on a presumption that, 'if the parties remain silent, they tacitly consent to continue their relationship on the same terms'.³ This implied consent could be withheld by the service of a notice to quit or by '[a]ny overt intimation by a party that it did not consent to the continuation of the lease'.⁴ There was no requirement for this to be done prior to 40 days before the ish. In any case, the correspondence between the parties before February 2020 (ie outwith the 40-day period) showed 'a common intention that a lease would not continue on the terms then in place'.⁵

Lord Clark held that 'the classic means of [excluding tacit relocation] is by service of a notice to quit, but informal notice that the lease is not to continue will suffice'.⁶ Further, where the parties had entered into a new agreement that is inconsistent with the lease continuing on its present terms, this too would exclude tacit relocation. Moreover:⁷

¹ Bell, *Principles* § 1271.

² Rennie et al, *Leases* para 11-09.

³ [2021] CSOH 49 at para 29 under reference to Rennie et al, *Leases* paras 11-04, 11-07 and 11-08.

⁴ Paragraph 30 under reference to *McDonald v O'Donnell* [2007] CSIH 189, 2008 SC 189.

⁵ Paragraph 32.

⁶ Paragraph 35.

⁷ Paragraph 35.

There is nothing in the authorities to suggest that such an agreement must be reached before the last date on which notice may competently be given, which is consistent with the simple principle that such an agreement, whenever reached, will supersede any implied consent to tacit relocation.

The logic is compelling. Applying the law to the facts, Lord Clark held that tacit relocation had been excluded by the correspondence between the parties and in particular the email of 21 January 2020 (quoted above). This made it clear that the tenant was not willing to stay on unless it was offered alternative terms.

Lord Clark further held that no later agreement had been entered into between the parties. He gave two reasons.¹ First, the email from the landlord's solicitor of 26 February 2020 had superseded the offer of heads of terms of 6 February 2020. Second, no binding agreement had been reached between the parties. It was in his view possible for a non-legally binding agreement² to exclude tacit relocation where it had been made more than 40 days before the ish. Prior case law had shown that resiling from such an agreement would be something which the other party could not stop, but there was no suggestion that this would bring tacit relocation back into play.³

Inner House

The landlord reclaimed to the Inner House where the case was heard by the Second Division. It was argued by the landlord that the Lord Ordinary had erred in not regarding the email of 21 January 2020 as merely one part of a long period of negotiation between the parties. The correct analysis of what was said by the tenant's agents in that email was that it amounted to a taking up of a bargaining position to seek leverage for more favourable conditions. In response, the tenant's position was that the email gave clear intimation that the tenant intended to leave.

Having set out the parties' arguments, the Inner House disposed of the case in a mere four paragraphs. There was a single question to be decided. Did the email show that there was no tacit consent to the lease continuing? In the opinion of the court, given by the Lord Justice-Clerk, Lady Dorrian, it did:⁴

[T]he issue was whether there was intimation that, whatever else, [the tenant] would not remain on the existing terms. The Commercial Judge was correct to interpret this email as providing sufficient intimation that the [tenant] would not continue under the lease on its current terms. That was inconsistent with implied consent to the prolongation of the lease, and was enough to exclude the operation of tacit relocation. The reclaiming motion must therefore be refused.

1 Paragraph 42.

2 Typically an oral agreement where s 1 of the Requirements of Writing (Scotland) Act 1995 demands writing.

3 *Buchanan v Harris and Sheldon* (1900) 2 F 935; *Sutherland's Tr v Miller's Tr* (1888) 16 R 10 (mis-cited in the decision); *Kirkpatrick's Exrx v G & A Kirkpatrick* 1983 SLT 191.

4 [2021] CSIH 56 at para 14.

Assessment

The requirements for tacit relocation to be excluded as stated in the *Rockford* case are undemanding. An email in clear terms sent to the other party will suffice. In *Signet Group plc v C & J Clark Retail Properties Ltd*, mentioned above, the tenant had actually vacated the premises but the lack of communication of this to the landlord meant that there was still tacit relocation. In contrast in *Rockford* the circumstances as to possession did not form part of the arguments of either party. Indeed it seems from the statement by Lord Clark which was quoted above that the tenant remained in possession after the ish.

The *Rockford* decision provides a rather easy mechanism to ensure that a lease will not tacitly relocate: an email communication. Nonetheless, it has its limitations. The communication, being unilateral, still needs to be made before it becomes too late to serve a notice to quit. Normally, this is at least 40 days prior to the ish. It will also continue to be necessary to serve a formal notice to quit timeously to have the benefit of the removal procedures sanctioned by the 1907 Act.

In the long run, it may be that the impact of *Rockford* is limited. This is because new legislation in this area of law is in prospect.

Reform

The Scottish Law Commission has begun a review of aspects of the law of leases. Its focus is commercial leases, on the basis that agricultural and residential leases are already the subject of detailed statutory regulation. The Commission published a discussion paper on *Aspects of Leases: Termination* in 2018.¹ The issues considered were tacit relocation, notices to quit, apportionment of rent, the Tenancy of Shops (Scotland) Act 1949, irritancy and *confusio*. The main impetus for reform is uncertainty in the current law, which has a negative impact on business.

Much more recently, in December 2021, the Law Commission published a draft Leases (Automatic Continuation etc) (Scotland) Bill for consultation. The consultation closed on 28 January 2022. The Bill runs to 37 sections and a schedule. There are no provisions on the 1949 Act or *confusio*: the Commission has decided to leave these for the present.² As may be obvious from the short title to the draft Bill, the Commission has decided to rename tacit relocation as 'automatic continuation'; this is justified as part of the Commission's 'aim to promote clarity in the law'.³ The renaming is sensible, as the current term is apt to confuse the lay person. But whether 'automatic' is an improvement is perhaps more questionable. Admittedly, the word 'automatically' appears twice in the Outer House decision in *Rockford* and once in the Inner House where it is said that: 'All that requires to be intimated is a lack of consent to the continuation of

¹ Scot Law Com DP No 165, 2018.

² For explanation, see www.scotlawcom.gov.uk/law-reform/law-reform-projects/proprietary-aspect-of-leases/.

³ See *Notes on the Draft Leases (Automatic Continuation etc) (Scotland) Bill* (available at www.scotlawcom.gov.uk/files/4316/3914/4944/Explanatory_notes_-_draft_Leases_Automatic_Continuation_etc_Scotland_Bill.pdf) p 1.

the lease; the effect of such an intimation is that the lease will not automatically be renewed.¹ But continuation is not automatic in the strict sense of the word. It requires the tacit consent of the parties. A parallel may be drawn with the law of rights in security, where there is a category of tacit or implied rights such as the landlord's hypothec² and lien. These are sometimes said to arise by operation of law (*ex lege*), but they are not commonly referred to as 'automatic' securities.

The single-section Part 1 of the draft Bill restricts the scope of the legislation to commercial leases by excluding leases for which there are existing statutory regimes.³

It is Part 2 which deals with automatic continuation of leases beyond their term. Section 2 provides for this to happen unless there is either, first, notice or consensus or, secondly, an express term in the lease excluding continuation after the term. The latter ground deals with the uncertainty in the current law on contracting out of tacit relocation which was referred to above. It will be a matter for the parties whether they choose to have such a clause.

In relation to the first ground, s 3(1) provides:

3 Termination of lease by notice or consensus

- (1) A lease to which this Act applies ends on its termination date if –
 - (a) the landlord gives the tenant valid notice requiring the tenant to give up possession of the subjects of the lease on that date ('notice to quit'),
 - (b) the tenant gives the landlord valid notice that the tenant intends to give up such possession at the end of the period of the lease ('notice of intention to quit'),
 - (c) the tenant gives up possession of the subjects of the lease –
 - (i) with the acquiescence of the landlord, and
 - (ii) in circumstances which indicate that both parties intend the lease to end on that date.

As can be seen, paras (a) and (b) deal with formal notices. More detail on these is provided in subsequent sections.⁴ These regulate, among other things, the effect of mistakes in the notice, the form of delivery, and cases where there are co-landlords, co-tenants or sub-leases.

In contrast, para (c) deals with the exclusion of continuation by reason of 'consensus'. The provision appears not to be foreshadowed by any question or proposal in the Commission's 2018 discussion paper. Nor do the consultation document and explanatory notes issued with the Bill offer elucidatory discussion, except perhaps for the following in the consultation document:⁵

On the subject of tacit relocation, the Bill provides for ... (c) codification of the common law governing the circumstances in which automatic continuation is excluded (the

¹ See [2021] CSIH 56 at para 13. See also [2021] CSOH 49 at paras 20 and 22.

² See most recently A Sweeney, *The Landlord's Hypothec* (Studies in Scots Law vol 10, 2021).

³ Draft Leases (Automatic Continuation etc) (Scotland) Bill s 1.

⁴ Draft Leases (Automatic Continuation etc) (Scotland) Bill ss 9–26.

⁵ *Consultation on Draft Leases (Automatic Continuation etc) (Scotland) Bill* (available at www.scotlawcom.gov.uk/files/2116/3914/4875/Consultation_document_final_-_draft_Leases_Automatic_Continuation_etc_Scotland_Bill.pdf) p 6.

giving of notice; consensual handover of keys at termination; removal of tenant remaining in possession after the termination date).

Thus the purpose of the provision is to provide for the disapplication of tacit relocation by consensus. As we have seen, Lord Clark pointed out in *Rockford* that the parties are free to make an agreement whereby the lease will end. But under the draft Bill it is only or mainly tacit (not express) agreement that is provided for. This in turn must be accompanied by the giving up of possession.

The provision is said to codify the common law. It is not, however, a codification of the law as set out in *Rockford*. Under the draft Bill an email from a tenant's agent stating that the tenant would only stay in particular circumstances, which is part of ongoing correspondence on behalf of the parties, would clearly not suffice. Of course, the fact that under the proposed legislation tacit relocation of the lease can be expressly excluded at the outset is relevant here as it removes the need for a notice to quit.¹ Nevertheless, the Law Commission may wish to look again at s 3 in the light of *Rockford*.

The draft Bill goes on to retain the continuation period of a further year for leases of one year or longer, but makes it possible to specify in the lease a shorter period of not less than three months.² Part 3 of the draft Bill deals with miscellaneous issues, including limited reform of the law of irritancy to require notification of heritable creditors, as well as apportionment of rent. Following the conclusion of the consultation, the Law Commission's final report is expected later in 2022. It will be covered in next year's volume.

SERVITUDES³

Servitudes and gates

It is 29 years since access servitudes and the installation of gates last featured in these pages. Since then, countless gates have been installed, opened and, usually, shut again all over Scotland without troubling the law reports. But now, finally, there is a new case: *Skene v Braveheart Hotels Ltd.*⁴

The new case is best approached by looking again at the case which we discussed all these years ago. This was what has come to be recognised as the leading case in this whole area of law, *Drury v McGarvie*.⁵ What we wrote at the time was this:⁶

[I]n *Drury v McGarvie* the First Division considered the position where a gate is placed across an access road. It is well established that the servient proprietor is entitled to put

¹ Under s 6 of the draft Bill a provision in a lease excluding automatic continuation can be rendered ineffective by the parties' behaviour at the ish, in particular if the tenant stays in possession.

² Draft Leases (Automatic Continuation etc) (Scotland) Bill s 7.

³ This section is by Kenneth Reid.

⁴ [2021] SC DUN 25, 2021 GWD 16-239.

⁵ 1993 SC 95.

⁶ *Conveyancing: What Happened in 1992?* p 40. Up until 1999 the volumes in this series were not published and so exist only in their original version as prepared for the seminars.

up a gate, at least where (as in this case) the purpose is to prevent stock from straying. The particular complaint of the pursuers (who were the dominant proprietors in the servitude) was that, being elderly and suffering from physical disabilities, they were unable to open the gate. So in effect they were being deprived of their servitude. But it was held that, since a servitude is a *real* right, the *personal* circumstances of the current dominant proprietors were not relevant. The proper test was whether the gates could be opened by an ordinary able bodied adult without material inconvenience, and there were insufficient averments to the effect that this test had not been satisfied.

Drury v McGarvie has ‘many similarities’ to the new case, as the sheriff in that case observed.¹ In *Skene v Braveheart Hotels Ltd*, as in *Drury v McGarvie*, the servient proprietor had installed gates which the dominant proprietor (and pursuer) found troublesome to open. The pursuer sought an order requiring the defender to remove the gates. The defender (and servient proprietor) was a company, Braveheart Hotels Ltd, and the private road in question gave access to Fernie Castle in Fife which the defender operated as a hotel and wedding venue.² There had been a certain amount of bad blood between the parties and on one occasion the police had been called.³

The law was not in doubt, in light of the decision in *Drury v McGarvie*.⁴ As the sheriff explained:⁵

A gate across an access road obviously causes some inconvenience to those exercising the servitude such as drivers of vehicles because it requires them to dismount from their vehicles and open the gate before they pass through. Nevertheless the courts have consistently upheld the general right of the owner to erect gates provided they do not interfere, in a fair and reasonable sense of that expression, with the public right of passage⁶ (*Drury v McGarvie* at page 99D–E). Only evidence to the effect that the installation of the gate will create a material inconvenience to the dominant proprietor will prevent its installation. What constitutes a material inconvenience will vary from case to case and is a question of fact. No general rule can be laid down that gates are either permissible or impermissible in all cases (Cusine and Paisley, *Servitudes and Rights of Way*, paragraph 12.96).

The law being clear, the issue to be determined was thus a purely factual one. In the sheriff’s view, this could be reduced to three essential questions:⁷

Does the erection of the gates in this case constitute an unreasonable obstruction on the pursuer’s right of access? Do they cause a material inconvenience to the pursuer

¹ At para 55. The sheriff was L A Drummond QC.

² <http://ferniecastle.co.uk/>. The defender’s title was registered under title number FFE10307.

³ The police incident arose out of the pursuer taking to opening the gates using the bar at the front of his off-road utility vehicle, resulting in damage to the gates. As a result, the defender was successful in a counterclaim to interdict the pursuer from damaging the gates by driving a vehicle at them. In turn one of the directors of the defender company was said to have been ‘unwelcoming’ towards other road-users: see para 59.

⁴ In addition, the law is set out and analysed in detail in D J Cusine and R R M Paisley, *Servitudes and Rights of Way* (1998) paras 12.96 ff in passages which were founded on by both sides to the dispute and by the sheriff.

⁵ Paragraph 54.

⁶ The reference to a *public* right of passage in the context of servitudes is puzzling.

⁷ Paragraph 56.

exercising his servitude right? Would a person of average strength and agility be able to open the gates without material inconvenience?

A two-day proof was held. There were gates at each end of the road but the main difficulty, it was accepted, lay with the eastern gates. The pursuer's evidence¹ was that they were hard to open because they were installed incorrectly and dragged along the ground. They were tied up with rope, which presented a further difficulty. The pursuer had recently had a hip operation and so struggled to open the gates; but even a person of average strength would be in difficulties. The pursuer did not re-close the gates as he considered he was under no obligation to do so. Evidence of others also attested to the difficulty of opening the gates. But, as the sheriff pointed out, much depended on the direction of opening. If the gates were opened *away* from the Castle then, indeed, the problems described by the pursuer and his witnesses occurred. But if, conversely, they were opened in the direction of the Castle, the evidence was that they did not stick but opened relatively easily. And that indeed was how they were intended to be opened, as a notice indicated.²

With this finding the pursuer's case fell away. Pushed in the correct direction, the gates opened with relative ease. There was no reason for ordering their removal.

Two other factors supported the defence to the action. In the first place, there was a ready alternative route in respect of which the pursuer's servitude also ran. This was a second road leading off the road which ran past the Castle. Although single-track, there were sufficient passing-places to make it serviceable – or so the sheriff found on the evidence – as a two-way road.³ If the pursuer wished to be spared the labour of opening the gates he could use this alternative route instead.

Then there was the question of the purpose of the gates. For the pursuer it was argued that 'the extent of the inconvenience which must be tolerated by the dominant proprietor is proportional to the necessity of installing the gates by the servient proprietor'.⁴ If there was no sufficient purpose, or so this argument seemed to imply, gates could not be erected at all. Whether that is the law is unclear and was not resolved by the case.⁵ In *Drury v McGarvie* the gates had been needed to restrain livestock. In *Skene v Braveheart Hotels Ltd* the purpose of the gates, according to the defender, was to force traffic to slow down, thus reducing the potential danger to hotel guests, including children, at the front of

¹ Paragraph 10.

² Paragraph 49.

³ Paragraph 51. The pursuer had strongly resisted that view, arguing that the road was unsafe to operate in two directions for a number of reasons including potholes, poor sightlines, narrowness, running alongside a burn, and inadequate passing places. The road had recently been improved in relation to some of these matters.

⁴ Paragraph 31.

⁵ The sheriff said merely that the purpose was 'of relevance' (para 56). See also the discussion in DJ Cusine and RRM Paisley, *Servitudes and Rights of Way* (1998) para 12.97. The opening sentence is: 'It is clear that the courts may take into account the nature of the properties to assess whether a gate would be permissible.' If gates are erected merely to spite the dominant proprietor and with no other purpose, they would require to be removed on the principle of *aemulatio vicini*. But that is a rare and extreme case.

the hotel. Although viewed with some scepticism by the pursuer, this explanation was accepted by the sheriff. The gates, she found, had been erected ‘for reasons of public safety, notably the protection of hotel guests’.¹ That was a sufficient justification.

One final matter may be mentioned. Even if the pursuer had succeeded on the evidence he would not have succeeded as to remedy. The pursuer sought removal of the gates. But the proper remedy, said the sheriff, would have been to require the gates to be properly hung so that they opened more easily.² Indeed this was something which the pursuer could have attended to for himself, for ‘The pursuer has a right to alter or adapt the gates to his convenience and a right to enter onto the servient land to carry out the works required to maintain his servitude right, albeit that it would have to be carried out at his own expense.’³

Implying ancillary rights

Introduction

With servitudes, you may get more than the servitude actually says; for, in addition to the right or rights expressly set out in the grant (or reservation) in question, the law can imply certain subsidiary or ancillary rights. The leading modern case is *Moncrieff v Jamieson*, decided by the House of Lords in 2007,⁴ and for a while that was where matters rested. In the last two or three years, however, there have been further cases which give a clearer idea of what rights might and might not be implied. In *Moncrieff v Jamieson* itself a servitude right of way was held to carry as an ancillary right a right to park, in circumstances where no other parking was available for a considerable distance. The same conclusion was reached in *Johnston v Davidson*,⁵ a decision of the Sheriff Appeal Court from 2020, even though alternative parking was more readily at hand. Conversely, in *Macallan v Arbuckle*⁶ the court rejected the idea that the holder of a servitude of way had an implied right to use the verges of the road as passing places. Interest in this topic continues to grow. Professor Roderick Paisley has recently completed a comprehensive study of ancillary rights which, in setting the law of Scotland in a historical and comparative context, transforms our understanding of the subject. It will be published in the first half of 2022 as *Rights Ancillary to Servitudes*.⁷

¹ Paragraph 56.

² Paragraph 58.

³ Paragraph 58, founding on *Drury v McGarvie* 1993 SC 95 at 103F. On the power of dominant proprietors to carry out works on the servient tenement, see Cusine and Paisley, *Servitudes and Rights of Way* paras 12.123 ff.

⁴ [2007] UKHL 42, 2008 SC (HL) 1.

⁵ [2020] SAC (Civ) 22, 2021 SCLR 17; for discussion, see *Conveyancing 2020* pp 138–41.

⁶ 2022 GWD 10-159 (a decision from 2019); for discussion, see *Conveyancing 2019* pp 149–52. The case was re-fought in 2021 with the same result: [2022] SC DUN 5, 2022 GWD 10-160 affd [2022] SAC (Civ) 9, 2022 GWD 10-161, discussed at p 8 above.

⁷ It will be published by W Green under the auspices of the Scottish Universities Law Institute. We are grateful to Professor Paisley for making a copy of the text available to us in advance.

A further new case on ancillary rights, *McCabe v Patterson*, in the sheriff court in 2020,¹ reached the Sheriff Appeal Court in 2021.² For a number of reasons it is the most important decision on implied ancillary rights since *Moncrieff v Jamieson*. In the first place, after a period of loose judicial expressions and doctrinal drift, it restates the test as to when ancillary rights can be implied into servitudes. Secondly, it decides that, while the test is designed with express servitudes in mind, ancillary rights are also available for servitudes constituted by prescription. Thirdly, it decides that a right can be ancillary to a servitude even if the right itself is not of a kind capable of existing as an independent servitude.³ Finally, *McCabe v Patterson* confirms that the rule that a servitude must not be repugnant to ownership applies equally to ancillary rights; on the facts of the case, this rule was seen as fatal to the implication of the ancillary right in question.

The test for implying ancillary rights

As laid down in *Moncrieff v Jamieson*, the test for implying ancillary rights has two limbs.⁴ In order for an ancillary right to be implied the right must be ‘necessary for the convenient and comfortable use and enjoyment of the servitude’.⁵ That is the main requirement. But in addition, according to Lords Hope and Neuberger, the right must also have been in the reasonable contemplation of the parties at the time when the servitude was created.⁶ This is because, in implying rights, the court will wish to consider the terms of the servitude itself and the circumstances surrounding its creation. In putting words into the mouths of the parties, the court must try to gauge the parties’ original intentions. The two parts of this dual test perform a different function, as Professor Paisley brings out in his new book. As is characteristic in the law of servitudes, they seek to strike a balance between the interests of the dominant and the servient proprietors. The first part ‘imposes an objective gateway or threshold related to the importance of the asserted ancillary right for the proper functioning of the particular servitude’.⁷ The second restricts ancillary rights to such rights as the parties would have regarded as acceptable had the possibility been drawn to their attention, the underlying objective being the ‘avoidance of prejudice to the servient proprietor or, otherwise expressed, the avoidance of any unwarranted increase in the burden on the servient tenement in the exercise of the asserted ancillary right’.⁸

1 [2020] SC GLA 14, 2020 GWD 11-155; for discussion, see *Conveyancing 2020* pp 141–43.

2 [2022] SAC (Civ) 2, 2022 GWD 6-93. The opinion of the court was given by Appeal Sheriff A M Cubie. Also sitting were Sheriff Principal M W Lewis and Appeal Sheriff W H Holligan. For detailed analysis of the decision, see R R M Paisley, *Rights Ancillary to Servitudes* (2022, forthcoming) para 13.02(e).

3 Paragraphs 66–71. In this respect the sheriff had mis-stated the law, as we pointed out at the time: see *Conveyancing 2020* pp 142–43. The point need not be pursued further here.

4 For a discussion, see *Conveyancing 2007* pp 111–17.

5 [2007] UKHL 42, 2008 SC (HL) 1 at para 29 per Lord Hope.

6 Paragraph 30 per Lord Hope and para 113 per Lord Neuberger.

7 Paisley, *Rights Ancillary to Servitudes* para 12.06(a). A detailed analysis of this part of the test can be found in ch 13 of the same work.

8 Paisley, *Rights Ancillary to Servitudes* para 12.06(b). A detailed analysis of this part of the test can be found in ch 14 of the same work.

In the case law since *Moncrieff v Jamieson* there has been a tendency for the first part of the test to be mis-stated (becoming a test of reasonable necessity for the dominant tenement rather than for the servitude) and for the second part to be lost sight of altogether. Both are put right by the Sheriff Appeal Court in *McCabe v Patterson*.¹ The first part of the test is expressed in this way: ‘an ancillary right exists if it is necessary for the comfortable use and enjoyment of the servitude’.² As for the second part: ‘An ancillary right should have been in contemplation, ie fall within the range of things that a dominant proprietor might reasonably be expected to do in the exercise of his right to the comfortable use and enjoyment of the servitude’.³ It is to be hoped that these clear statements settle matters for the future.

The kind of ancillary rights that might be necessary for a servitude may change over time, and the relevant date for assessment is the date at which the right in question is said to be needed, as opposed to the date on which the servitude was created.⁴ As the Sheriff Appeal Court said in *McCabe*:⁵

We take the view that the ancillary rights need not be static but can develop, or evolve. In *Chalmers*⁶ the servitude comprehended an effective water supply system. So, the mechanism by which rights are exercised may be permitted to alter with changing technology.

Application to prescriptive servitudes

Moncrieff v Jamieson and the cases which followed were concerned with express servitudes. A novelty of *McCabe v Patterson* is that the alleged servitude, assuming it to exist at all,⁷ was constituted by positive prescription. That, said the Sheriff Appeal Court, did not matter. Ancillary rights could be implied into prescriptive servitudes as well as into express servitudes.⁸ Yet there are difficulties here which were not explored by the court in the course of its (very brief) analysis.

One is that, with prescriptive servitudes, what you possess is what you get, so that the measure of the right is the extent of the possession (or use) which was taken over the 20 years needed for positive prescription. As the familiar maxim has it: *tantum praescriptum quantum possessum*. To recognise ancillary rights without prior possession is to circumvent – some might say, to subvert – that long-established principle.

A second difficulty concerns the doctrinal foundation of ancillary rights. Hitherto these have been seen as implied terms of an express grant (or

1 Self-consciously: see para 59. Both parties had accepted that previous formulations were too loose.

2 Paragraph 60.

3 Paragraph 62. Nonetheless, when it came to applying the test to the facts of the case, the Sheriff Appeal Court paid no attention to this second part: see paras 100–104.

4 Paisley, *Rights Ancillary to Servitudes* para 13.06.

5 Paragraph 72.

6 *Chalmers Property Investment Co Ltd v Robson* 2008 SLT 1069.

7 A question which could only be determined after consideration of the evidence at a proof.

8 Paragraph 65.

reservation) of a servitude. But with prescriptive servitudes there can (usually) be no implied term because there is (usually)¹ no document or agreement into which such a term could be implied.²

At the least, this latter difficulty requires some adjustments to the second part of the dual test (rights within the reasonable contemplation of the parties at the time when the servitude was created) in order to accommodate prescriptive servitudes. That is presumably why, in its formulation of this aspect of the test, the Sheriff Appeal Court artfully avoided any mention of the parties' intentions: the Court's formulation is, rights which 'fall within the range of things that a dominant proprietor might reasonably be expected to do'.³ For his part Professor Paisley would prefer a more direct appeal to underlying purpose, proposing as a dual test that a prescriptive servitude carries '[i] all ancillary rights required to support the carrying out of activities that are reasonably necessary for the comfortable enjoyment of the servitude and [ii] which are not prejudicial to the servient proprietor or, otherwise stated, which do not occasion an unwarranted burden on the servient tenement'.⁴

The case itself

Following this long introduction we are now ready to tackle the case itself. In *McCabe v Patterson*, the defenders (and appellants) claimed a servitude of parking over the pursuers' (and respondents') land in Baillieston, Lanarkshire, which, said the defenders, had been constituted by positive prescription. On that issue the sheriff allowed a proof. As ancillary to the alleged servitude the defenders also claimed a right to lock the gates which gave access to the pursuers' land by means of a combination padlock. The gates were elderly but the padlock was new, so that the right to use it could not, it seems, be established by prescription – hence the claim being based on an implied ancillary right. The facts on the ground were that the land in question, although belonging to the pursuers, was used exclusively by the defenders for parking their vehicles and for other purposes. The defenders operated a commercial garage and the justification for the lock was to keep the vehicles safe. In a spirit of neighbourliness, the defenders offered to disclose the combination number to the pursuers, so that they could take access to their own land. The sheriff refused to admit to proof the averments about having a right to lock the gate. That refusal was the subject of the appeal to the Sheriff Appeal Court.⁵

1 Except where prescription is being used to fortify a grant, under s 3(1) of the Prescription and Limitation (Scotland) Act 1973. Most cases of prescription fall within s 3(2), there being no deed to found on.

2 Towards the end of the nineteenth century the idea had emerged that prescriptive servitudes were properly explained as the product of a presumed grant by the servient proprietor, but this idea died away in the course of the twentieth century. See A Peterson, *Prescriptive Servitudes* (Studies in Scots Law vol 7, 2020) paras 4-35 to 4-39 and 5-01 to 5-04.

3 Paragraph 62; see also Paisley, *Rights Ancillary to Servitudes* para 17.02.

4 Paisley, *Rights Ancillary to Servitudes* para 17.03(a).

5 The defenders also challenged – unsuccessfully – the terms of an interdict to prevent them using the land for storage on the basis that it was insufficiently precise.

Could a right to lock the gate be said to be an ancillary right within the dual test described above? At first instance, the sheriff had been clear that the answer was no:¹

The question of what ancillary rights are necessary for the comfortable use and enjoyment of the servitude, will be guided by practical considerations (Lord Hope, *Moncrieff* at paragraph 26). The practical considerations averred by the defenders arise, it is said, from the need to protect vehicles from vandalism and theft. While the defenders refer to the need to protect stock and property, such a need is not referable to the right to park vehicles. However, the question is not whether an ancillary right is desirable or presents the least costly means of enjoying a servitude right. The defenders' need to protect vehicles could of course be addressed by other security measures such as the installation of CCTV cameras, use of security guards, warning signs, wheel clamps or steering wheel locks, none of which would involve the assertion of further rights against the servient proprietor.² The defenders fail to set out why the locking of a gate and thus the controlling of entry and egress to the servient tenement is necessary for the reasonable and comfortable use of the dominant tenement. I have little difficulty concluding that it is not; it does not strike the right balance between the interests of the servient and dominant proprietors.

In what was a rather brief analysis, this conclusion was not disturbed by the Sheriff Appeal Court. 'The ancillary right sought may be desirable or convenient or economical or commercially preferable to the appellants, but it is not a necessary component of the right to park.' A right to lock a gate might attach to a servitude of storage but parking was a different matter.³

As often with implied ancillary rights, other views are possible, indeed plausible – which makes the outcome of cases in this area of law particularly hard to predict. Professor Paisley regards the decision as 'somewhat ungenerous' and as failing to acknowledge the risk of vandalism and theft, especially overnight.⁴

In the end, however, the decision turned largely on another matter. It is reasonable to suppose that a right cannot be ancillary to a servitude unless it complies with the characteristics required of all servitudes. In particular, an ancillary right, like the servitude which it augments, must be praedial in nature, and must not be so far-reaching in effect that it is repugnant to the ownership of the servient proprietor.

It was repugnancy that concerned the court in *McCabe v Patterson*.⁵ Repugnancy is usually evaluated by what rights would remain with the owner

1 [2020] SC GLA 14, 2020 GWD 11-155 at para 92. The sheriff was Aisha Y Anwar.

2 This is not so, as Professor Paisley has pointed out. A number of these measures would undoubtedly 'involve the assertion of further [ancillary] rights against the servient proprietor'. See Paisley, *Rights Ancillary to Servitudes* para 13.02(e).

3 Paragraph 104.

4 Paisley, *Rights Ancillary to Servitudes* para 13.02(e).

5 The court considered this issue first, on the basis (presumably) that if a right was disqualified as repugnant with ownership, there was no need to go on to consider whether it could be implied as an ancillary right: see para 90.

were the servitude or ancillary right to be allowed. But this can mask the reason for the rule. This is that servitudes must keep within the compass of the limited real right that the law allows. If the rights conferred were so extensive as to come close to or even mimic ownership, then they would no longer be a servitude but some new type of real right which the law does not recognise. At bottom, therefore, the doctrine of repugnancy is about preserving the fixed list (or *numerus clausus*) of permitted real rights.¹

If the defenders in *McCabe* were to be permitted to lock the gate, then they would have significant control over access to the land – a degree of control which might seem the privilege of an owner rather than of a person whose right was only one of servitude. That was the firm conclusion of the sheriff at first instance:²

[W]hile the servient proprietor may build over the servient tenement, build under it and advertise on hoardings around it without interfering with a servitude right of parking, access to any such buildings or hoardings would be controlled by the dominant proprietor, if a servitude of locking a gate were to be recognised ... Moreover, were the servient proprietor to undertake any activity upon his property (as simple as perhaps providing a bench for community use), which involved allowing members of the general public access to the servient tenement, provided he does not interfere to any material extent with the reasonable exercise of the dominant proprietor's servitude rights, there would be obvious practical difficulties in supplying all such persons with the combination for the padlock to the gates. A servitude right to lock a gate would represent an unwarranted interference with the servient proprietor's rights of ownership.

The Sheriff Appeal Court was content to adopt this view without elaborating on it.³

One other matter, particular to the facts, influenced the appeal court. It is accepted law that, in respect of a servitude of way, the *servient* proprietor is not allowed to lock a gate, even if a key is provided to the dominant proprietor.⁴ But, reasoned the court, 'if the law is that the servient proprietor, with the benefit of ownership, cannot lock a gate which interferes with a servitude right, then it must be the case that the dominant proprietor is similarly restricted in relation to the erection and locking of a gate which excludes the servient proprietor'.⁵ The logic, as far as it goes, is strong. But whether a rule which applies to a servitude of way is of equal application to a servitude of parking – where security measures may be desirable or even necessary – is far from clear.

¹ A point also made by Professor Paisley: see *Rights Ancillary to Servitudes* para 3.23.

² [2020] SC GLA 14 at para 99.

³ Paragraph 95. At paras 75, 76 and 94 the court appeared to pick up a remark of Lord Scott in *Moncrieff v Jamieson* at para 59 to the effect that: 'I would, for my part, reject the test that asks whether the servient owner is left with any reasonable use of his land, and substitute for it a test which asks whether the servient owner retains possession and, subject to the reasonable exercise of the right in question, control of the servient tenement.' But it is not obvious what is meant by the possession/control distinction, at least in the context of Scots law.

⁴ D J Cusine and R R M Paisley, *Servitudes and Rights of Way* (1998) para 12.98.

⁵ Paragraph 89.

Access rights for repairs

A conveyancing quiz

This section is about access rights for repairs and the decision of the First Division in *Soulsby v Jones*.¹ We will get there shortly. But first, a conveyancing quiz. How many ways are there to create a servitude? A servitude can be created by express grant or reservation in a registered deed, obviously; by positive prescription, of course; and, although far less commonly, a servitude can also be created by implied grant or reservation in a split-off conveyance. That's three ways. The first and the third are based on the agreement, express or implied, of the parties. According to the Lord President, Lord Carloway, in *Soulsby v Jones*, prescriptive servitudes are based, not on agreement, but on the failure of the servient proprietor 'to intervene in the face of an assertion of right'.²

Can there also be other methods of creation? In particular, can a servitude come into being by operation of law and without either a registered deed or prescriptive possession, simply on the basis that the servitude is 'necessary'? That was one of the questions to be determined in *Soulsby v Jones*.

Servitudes *rebus ipsis et factis*

The parties in *Soulsby* owned adjoining houses in Elie, Fife. Between the houses was a strip of land which, though narrow, was sufficiently wide to allow maintenance to be carried out. For some of its distance, the strip was a passageway, owned in common by both parties. For the rest, the strip was on land which belonged solely to the defenders. The dispute concerned the latter part of the strip. Narrow at the best of times, it had been made narrower still by the erection of an extension to the defenders' house. Although the pursuer had objected to the extension at the time, the building work had gone ahead. Arguing that he had a servitude over the strip for the purposes of carrying out repairs, the pursuer sought the removal of the extension to the extent that it was built on the strip. The case was argued mainly on the basis that a servitude had been established by prescription (an argument which failed on the evidence and which has failed again on appeal),³ but there was a second-string argument to the effect that there was a servitude by force of law – that a servitude arose by virtue of the fact that repairs could not be carried out in any other way.

For this view there was the merest glimmer of prior authority. In our annual volume for 2017⁴ we noted a case which, though decided in 1958, had only just come to light.⁵ This was *Brydon v Lewis*⁶ in which the owner of the lower flat in

1 [2021] CSIH 48, 2021 SLT 1259. As well as the Lord President, Lord Carloway, the court comprised Lords Menzies and Malcolm. Lord Carloway gave the opinion of the court.

2 Paragraph 24. On the justifications for prescriptive servitudes, see A Peterson, *Prescriptive Servitudes* (Studies in Scots Law vol 7, 2020) paras 1-05 to 1-08. Chapters 2 to 5 of the same work trace doctrinal development and justifications.

3 For this aspect of the case, see p 11 above.

4 *Conveyancing 2017* pp 162–65.

5 Due to perseverance on the part of Professor Roderick Paisley.

6 12 February 1958 (debate) and 26 August 1958 (proof), Edinburgh Sheriff Court.

a tenement was held to have a servitude right – born, apparently, of necessity – to take access over her upstairs neighbour’s garden in order to repair one of the external walls of her flat. As an unreported decision of a sheriff in which the result proceeded on a concession, this could not be regarded as high authority.¹ At best it was suggestive of a way in which the law might, just possibly, develop.

If such a servitude were to be found to exist it was necessary to determine its legal basis. The pursuer’s first plea-in-law characterised it as a ‘necessary incident’ of the pursuer’s right of property² – which seemed to hark back to the recognition, in *Bowers v Kennedy*,³ of a right of access to otherwise landlocked land as being a ‘necessary concomitant’ of property.⁴ Strictly, though, a *Bowers v Kennedy* right is not a servitude,⁵ although it so closely resembles one that the differences are not readily apparent.⁶ By the time the litigation in *Soulsby v Jones* reached the First Division, however, the pursuer’s argument had broadened somewhat. In cases of necessity, argued the pursuer, a servitude could be said to arise *rebus ipsis et factis*, ie by the mere facts and circumstances themselves. So where maintenance could not otherwise be carried out, a servitude supplied the necessary right of access.⁷

The argument was evidently a novel one, for there is little authority to support the existence of servitudes *rebus ipsis et factis* in Scots law.⁸ In the course of a careful analysis of that topic, Cusine and Paisley speculated that:⁹

It is possible that constitution *rebus ipsis et factis* may be employed to justify the existence of a servitude where it would be equitable to do so and where other doctrines are inapplicable. Suitable circumstances might include those where the dominant and servient tenement have never been in single ownership, implied grant or reservation therefore being inapplicable. A potential instance might be the servitude of ‘laddergang’.¹⁰

On balance, however, Cusine and Paisley were doubtful as to whether this method of constitution could really be said to exist.¹¹ In rejecting the pursuer’s

1 It also had the speciality that the owner of the ground-floor flat was subject to a real burden requiring that maintenance be carried out. Whether that factor is entitled to any weight is a matter on which opinions have differed.

2 Paragraph 2.

3 2000 SC 555.

4 *Bowers v Kennedy* 2000 SC 555 at para 16 per Lord President Rodger. For discussion, see *Conveyancing 2000* pp 52–54.

5 As Lord Rodger emphasised in *Bowers v Kennedy* at para 17. It was perhaps partly for that reason that the Lord President in *Soulsby v Jones* said (at para 24) that for the pursuer to suggest ‘that a servitude has been created as a “necessary incident” of the pursuer’s right of property, is self-contradictory’.

6 The one clear difference – which may even be the reason for the approach taken in *Bowers* – is that, unlike servitudes, the right is not subject to negative prescription.

7 Paragraph 17.

8 Only *Preston’s Trs v Preston* (1860) 22 D 366 gives unequivocal support.

9 D J Cusine and R R M Paisley, *Servitudes and Rights of Way* (1998) para 11.13.

10 ‘Laddergang’ is the right to rest a ladder on a neighbour’s ground in order to carry out repairs: see Cusine and Paisley, *Servitudes and Rights of Way* para 3.32. This was more or less the servitude being sought by the pursuer.

11 Cusine and Paisley, *Servitudes and Rights of Way* para 11.17.

argument, the Lord President likewise thought that servitudes could not be constituted *rebus ipsis et factis*.¹

Policy reasons point in the same direction. It is one thing to say that a neighbour can use your ground to carry out repairs if that ground happens to be available and unbuilt-on (as to which see below). It is quite another to say that, because there is a right to carry out repairs, your ground *cannot* be built on either now or in the future. Yet that is the obvious implication of the right being classified as one of servitude. And it was the foundation of the pursuer's case in *Soulsby*: if there was a servitude for repairs, the defenders could not build; and having wrongfully built, in breach of the servitude, they were now bound to remove the building.

So whatever legal basis was claimed for an access servitude for repairs – whether *rebus ipsis et factis* or as a necessary incident of property or just sheer necessity – there were cogent grounds for rejecting such a servitude. At first instance the Lord Ordinary had identified four such grounds,² which the Lord President summarised with approval as follows:³

It would, in many situations, sterilise land next to walls. There is no authority for such a concept. It would contradict the principle of freedom in the use of land. It has the potential to allow one owner to create a servitude by building a wall along his boundary without any agreement from his neighbour.

The Lord Ordinary's gloss on the last of these points is sufficiently important to be worth quoting in full:⁴

[T]he logical consequence of the pursuer's argument is that by building right up to the boundary of his property, a proprietor may create a servitude right of access for the purpose of maintenance, which sterilises the neighbouring property to the extent of preventing its proprietor from exercising the liberty to build on his own land. There would in effect be a race to be first to build to the boundary, and the unilateral imposition of a servitude right.

Having failed on a case based on prescription, therefore, the pursuer also failed on a case based on a servitude of necessity. The fact that the only practical means of carrying out repairs was from the property of a neighbour did not, of itself, confer a servitude right to do so.

A residual right of access for repairs?

Just as important as what *Soulsby v Jones* decided is what it did not decide. It did not challenge servitudes of access for repairs as such. Even if they cannot arise by

¹ Paragraph 27. In rejecting servitudes *rebus ipsis et factis* the Lord President should not be taken as limiting the creation of servitudes to the three standard methods (express grant/reservation, implied grant/reservation and positive prescription) mentioned in paras 23 and 24 of his opinion. The question as to whether other methods of constitution might be possible is a complex one on which the court was (presumably) not addressed, as it was not relevant to the issue to be decided. Interested readers are referred to Cusine and Paisley, *Servitudes and Rights of Way* ch 11.

² *Soulsby v Jones* [2020] CSOH 103, 2021 SLT 286 at para 356 per Lady Carmichael. For discussion of the Outer House decision, see *Conveyancing 2020* pp 130–33.

³ Paragraph 25.

⁴ [2020] CSOH 103, 2021 SLT 286 at para 356.

force of law, as a matter of necessity, they can at any rate be created by registered deed or by prescription.¹ Nor, strictly, did the case decide whether a neighbour's land can be used to carry out repairs, if the land happens to be available for such use (typically by being unbuilt on)² and if the repairs cannot reasonably be carried out in any other way. The only authority on that question, however, is decidedly in favour. This is a passage from the lectures of Baron David Hume, delivered to his students at Edinburgh University in academic year 1821–22:³

[A]n owner's interest must yield sometimes to the immediate interest even of an individual where this is out of all proportion to the owner's interest in preventing the interference, or where the matter in question, though immediately concerning an individual, does at the same time, in its consequences, though remotely, concern the neighbourhood too ... On the like [ie this] ground I think it may be maintained with respect to conterminous properties in a Burgh, which in many instances, owing to the crowded situation of the building, cannot be repaired without some temporary interference, as by resting ladders on the next area, or suspending a scaffold over the next area, that this slight and temporary inconvenience must be put up with, from the necessity of the case.

Importantly, the Lord President in *Soulsby v Jones* said that Hume's view 'is sound in principle' even if the right Hume identified 'is not a servitude'.⁴ Its correct doctrinal attribution remains a matter for another day.⁵

Postscript: Bell or not Bell?

In dismissing the idea that servitudes could be constituted *rebus ipsis et factis*, the Lord President began his survey of the authorities with an institutional work, the *Principles of the Law of Scotland* by George Joseph Bell. According to the Lord President (at para 27):

Bell was entirely clear when, citing *Cochrane v Ewart* (1860) 22 D 358 (affirmed as *Ewart v Cochrane*) he wrote (at para 992) that: 'A servitude cannot be constituted *rebus ipsis et factis*.'

- 1 That they can be created by prescription was the working assumption in the detailed consideration in the case as to whether there had been sufficient prescriptive possession. As, however, the taking of access for repairs is typically intermittent and infrequent, there will be real difficulty in amassing sufficient possession. That was the whole difficulty of the pursuer's case in *Soulsby v Jones* insofar as it turned on prescription.
- 2 Though, as was pointed out in the course of the evidence in *Soulsby v Jones*, even where land *has* been built on, it may be possible and indeed necessary to use the building to launch the repair.
- 3 *Baron David Hume's Lectures 1786–1822* vol III (ed G Campbell H Paton; Stair Society vol 15, 1952) 206–07. The passage had been quoted in full, and apparently without disapproval, by the Lord Ordinary (Lady Carmichael): [2020] CSOH 103, 2021 SLT 286 at para 348. In argument the pursuer also quoted an equivalent passage from a Roman-Dutch writer, Johannes Voet, who has had considerable (if mainly indirect) influence on Scots law. This was Voet's *Commentarius ad Pandectas* (1707) 8.2.14, quoted in the standard English translation by Percival Gane (*The Selective Voet* (1955–58) vol 2, 455): see para 337 of Lady Carmichael's judgment.
- 4 Paragraph 26.
- 5 The most plausible attribution is common interest: see K G C Reid, *The Law of Property in Scotland* (1996) para 359(9).

But there is an obvious difficulty with this passage. Bell died on 23 September 1843 at the age of 73.¹ He cannot have cited a case which was not decided until 1860.

The explanation lies in the editions of the *Principles* produced after Bell's death. Bell was responsible for four editions of the work, the last of which was published in 1839. A fifth edition followed in 1860, prepared by Bell's brother-in-law, Patrick Shaw. Thereafter there were a further five editions, all by William Guthrie. Guthrie's aim was both to update the text and also to expand the treatment of topics to make what was originally a student work suitable for use by practitioners.² Each successive edition was longer than its predecessors so that the final edition, the tenth of 1899, was a far bigger book than that left behind by Bell in 1839. The passage quoted by the Lord President in *Soulsby v Jones* was written not by Bell but by Guthrie. It appeared for the first time in the eighth edition of 1885 – an edition which was so greatly expanded that it had to be published as two volumes – and it was repeated in the final two editions, including the tenth edition apparently used by the Lord President. Bell himself had nothing to say about servitudes *rebus ipsis et factis*.

In all five of the editions for which he was responsible, Guthrie was careful to identify which passages were by Bell and which were additions of his own. Until the tenth and final edition the material by Guthrie was put within square brackets. In the tenth edition, as Guthrie noted in the preface, there was a slight change in practice:

Many friends advised me to abandon the device of marking the additions to Professor Bell's text by square brackets, and ... to make no distinction between what is old and what is new. I have not thought it right to do this; but in the text I have substituted single inverted commas for square brackets.

The passage quoted by the Lord President lies within single inverted commas.

As it happens, William Guthrie (1835–1908)³ was himself a lawyer of distinction who edited for a time the main law journal of the period, the *Journal of Jurisprudence*, prepared three editions of Erskine's *Principles* (in addition to his editions of Bell), made a widely used translation of volume 8 of Friedrich Carl von Savigny's *System des heutigen römischen Rechts*,⁴ and contributed to legal literature on his own account.⁵ Nonetheless Sheriff Guthrie's views on the law are hardly of the same standing as those of George Joseph Bell.

There is a larger point here. Institutional works often had a second life after the author's death, with the (Victorian) editors of later editions seeking to bring the text up to date. Sometimes this updating was confined to footnotes. At other

¹ Bell was born in the same year as Beethoven, on 26 March 1770.

² On Bell's *Principles*, see K G C Reid, 'From Text-Book to Book of Authority: The *Principles* of George Joseph Bell' (2011) 15 *Edinburgh Law Review* 6.

³ See G W T Omond rev N Wells, 'Guthrie, William', in *Oxford Dictionary of National Biography* vol 24 (2004) 321. An obituary was published at (1908) 16 *SLT (News)* 77.

⁴ As *Private International Law* (1869, 2nd edn 1880).

⁵ In addition to journal articles, Guthrie was the author of *The Law of Trades Unions in England and Scotland under the Trade Union Act of 1871* (1873).

times, as with Bell's *Principles*, new passages were added into the original text. These posthumous editions can easily mislead, as *Soulsby* shows,¹ and are best avoided (except by legal historians). The proper edition to use is always the last prepared by the author himself.² Today there is no point in consulting the tenth edition of Bell's *Principles*. It is merely an obsolete textbook, stating the law of Scotland as at 1899. Those wanting to know what Bell actually wrote should use the final edition for which Bell was personally responsible, the fourth edition of 1839. Happily it is readily available, having been reprinted in 2010 by the Edinburgh Legal Education Trust. It costs less than a bottle of wine in a restaurant.³

ASSIGNING STANDARD SECURITIES – AGAIN⁴

Introduction

A bombshell from Banff

If an award had been made for the least welcome conveyancing case of 2017, it would have probably gone to *OneSavings Bank plc v Burns*.⁵ A sheriff court decision from Banff⁶ on what is required to effect a valid assignation of an all-sums standard security (answer: more than had been thought in practice) led to considerable gnashing of teeth amongst lawyers acting for banks.⁷ But, within months, further case law failed to follow the Banff decision and calm was restored. Additional reassurance was provided by the knowledge that the Scottish Law Commission was about to commence a thorough review of the law of heritable securities and would doubtless consider the issue. Nevertheless, none of the cases which followed soon after *OneSavings* contained a full examination of the issues. This year has seen a new decision with the most detailed judicial consideration to date: *Guidi v Promontoria (Chestnut) Ltd*.⁸

1 The same mistaken attribution in respect of the same passage in Bell's *Principles* seems to be made by Lord Marnoch in *Moncrieff v Jamieson* 2005 1 SC 281 at para 29, although Lord Marnoch cites the work rather than the author.

2 These are: (i) for Stair's *Institutions* the second edition of 1693; (ii) for Bankton's *Institute* the first (and only) edition, in three volumes, of 1751–53; (iii) for Erskine's *Institute* the first edition of 1773; and (iv) for Bell's *Commentaries* the fifth edition, in two volumes, of 1826. Both Bankton's *Institute* and the first edition of Erskine's *Institute* are available in modern reprints, the former by the Stair Society (as Stair Society vols 41–43, 1993–95) and the latter by the Edinburgh Legal Education Trust (2014). The second edition of Stair's *Institutions* is available on Google Books, but the modern tercentenary edition by David Walker (1981), being based on the second edition, is generally an acceptable substitute. The Edinburgh Legal Education Trust intends to reprint the fifth edition of Bell's *Commentaries* in 2022 or 2023; until that occurs, the standard, seventh, edition by John (later Lord) McLaren (2 volumes, 1870) should be used: this reproduces the text of the fifth edition (and indicates its pagination) while providing updates in the form of additional footnotes within square brackets.

3 £30.

4 This section is by Andrew Steven.

5 *OneSavings Bank plc v Burns* [2017] SC BAN 20, 2017 SLT (Sh Ct) 129, 2017 Hous LR 55.

6 Professor Steven's birthplace, although there is no connection.

7 See eg '*OneSavings Bank plc v Burns*: Enforcement concerns for lenders in the Scottish market place' available at https://shepwedd.com/sites/default/files/OSB_v_Burns_overview_0.pdf.

8 [2021] SC GLW 59, 2021 SLT (Sh Ct) 441, 2021 Hous LR 88.

The statutory background

Standard securities have now been around for over 50 years. They were introduced by the Conveyancing and Feudal Reform (Scotland) Act 1970. The legislation is of its time, pre-dating modern commercial practices such as securitisations which involve the bulk assignation of standard securities.¹ It is also renowned, not necessarily in a good way, for the highly prescriptive forms set out in its schedules, something noticed during its Parliamentary passage.²

For assignations of standard securities the starting point is s 14(1):

Any standard security duly registered or recorded may be transferred, in whole or in part, by the creditor by an assignation in conformity with Form A or B of Schedule 4 to this Act, and upon such an assignation being duly registered or recorded, the security, or, as the case may be, part thereof, shall be vested in the assignee as effectually as if the security or the part had been granted in his favour.

The next step accordingly is schedule 4. This sets out the alternative forms which can be used. Form B provides for an assignation endorsed on the standard security deed itself. Even in the heyday of paper Sasine deeds it is unlikely that this method was commonly used and certainly it is not used today. In contrast, form A is for a stand-alone deed. It states:

I, A.B. (*designation*), in consideration of £ hereby assign to C.D. (*designation*) a standard security for £ (or a maximum sum of £ , to the extent of £ being the amount now due thereunder; *in other cases describe as indicated in Note 2 to this Schedule*) by E.F. in my favour (or in favour of G.H.) registered in the Land Register of Scotland on over title number (or recorded in the Register for on) (*adding if necessary, but only to the extent of £ of principal*); With interest from .

Note 2 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 (e.g., 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 first part of note 2 can be seen to set out additional words which are to be used where a standard security is for an uncertain amount; and as standard securities in practice are almost universally granted for all sums, this wording

¹ See A J M Steven, 'Mortgage Law Reform in Scotland: Fifty Years Apart', in S Farran, R Hewitson and A Ramshaw (eds), *Modern Studies in Property Law*, vol 11 (2021) ch 10.

² 'I am rather intrigued by these Schedules, which are worse than mathematical conundrums and pose problems greater than those involved in finding one's way through a psychedelic labyrinth' (George Willis MP, *Hansard*, House of Commons, First Scottish Standing Committee, 21 April 1970, col 501).

is normally engaged. But what must also be factored in is s 53(1) of the 1970 Act which provides:

It shall be sufficient compliance with any provisions in this Act which require any deed ... to be in conformity with a Form or Note, or other requirement of this Act, that that deed ... so conforms as closely as may be ...

The breadth of this provision has been tested in relation to form 4 for assignments of all-sums standard securities.

The earlier cases

Prior to 2017 and the Banff bombshell, the only case which appears to have considered directly the requirements for assignment under the 1970 Act was *Sanderson's Tr v Ambion Scotland Ltd*.¹ This involved a single all-sums standard security. The assignment did not comply with note 2 of schedule 4 because it did not state a monetary amount. The facts, however, were unusual in that the loan contract between the debtor and the original creditor (assignor) for which the standard security had been granted was also signed by the assignee. This meant, in the words of Lord Dunpark, that the assignee was not a 'stranger to the debtor'² and the failure to state the amount did not invalidate the assignment.

While not reported until 1994, *Sanderson's Tr* was a case from 1977. Forty years later came the *OneSavings Bank* case. It involved the assignment of a portfolio of standard securities. For banking lawyers it was not all bad news, as the sheriff (Philip Mann) ruled that a bulk assignment is competent, even although the 1970 Act does not make this explicit. The unwelcome part of the decision, however, was that an omission to specify the monetary amount still due renders the assignment invalid.³ *Sanderson's Tr* was distinguished on the basis of its facts. The sheriff held that the amounts outstanding required to be stated in the schedule to the assignment which listed the standard securities. For lawyers dealing with such assignments this was unwelcome because of the difficulties in obtaining up-to-date information for large numbers of loan transactions.

Only two months later the Outer House decision of Lord Bannatyne in *Shear v Clipper Holding II SARL*⁴ departed from Sheriff Mann's conclusion, albeit in what was merely a decision given in interim interdict proceedings and therefore presumably without full argument. Note 2, he found, was not mandatory in relation to specifying the amount of debt still due. Lord Bannatyne referred to a case from the English Court of Appeal⁵ and a Privy Council case from Montserrat⁶ as authorities for 'a more flexible'⁷ approach to statutory interpretation. Of course these are not standard security cases. It is easy to think of previous examples

¹ 1994 SLT 645. See G L Gretton, 'Assignment of all-sums standard securities' 1994 SLT (News) 207.

² 1994 SLT 645 at 650.

³ For discussion of this and the following cases see *Conveyancing* 2017 pp 118–27.

⁴ 26 May 2017, available at www.addleshawgoddard.com/globalassets/insights/litigation/shear-v-clipper.pdf.

⁵ *Newbold v Coal Authority* [2013] EWCA Civ 584, [2014] WLR 1288.

⁶ *Central Tenders Board v White* [2015] UKPC 39, [2015] BLR 727.

⁷ *Shear v Clipper Holding II SARL* at para 2.

of the 1970 Act being interpreted inflexibly, not least *Royal Bank of Scotland v Wilson*.¹ For Lord Bannatyne, however, the debtor in challenging the validity of the assignation was 'doing nothing more than relying on a technicality to delay payment'.² But the same could be said of the *Wilson* case which went all the way to the Supreme Court.

Shear, however, was to be followed in two subsequent bulk assignation cases decided in the sheriff court. In *Promontoria (Henrico) Ltd v The Firm of Portico Holdings (Scotland)*,³ Sheriff Derek Hamilton at Greenock held that the amount owed by the defender, a debtor under one of the assigned securities, had been a matter of dispute for several years and in these circumstances it was therefore 'wholly understandable and reasonable' to omit this from the deed.⁴ Finally, there is the decision of Sheriff William Holligan at Edinburgh in *Clipper Holdings II SARL v SF and SFX*.⁵ He too concluded that leaving out the debt did not invalidate the assignation.

The Guidi case

Facts

But now, after a gap of three years, there is a new case: *Guidi v Promontoria (Chestnut) Ltd*.⁶ In 2011 Giovanni Guidi granted a standard security over his house at 7 Sweethope Gardens, Bothwell in favour of Clydesdale Bank plc ('the bank'). This secured the amount due by him to the bank under a guarantee which he had granted in respect of the debts of Fieldoak Ltd. Mr Guidi was a director and shareholder of this company. His liability under the guarantee was capped at £450,000. In 2015 the bank purported to assign to Promontoria (Chestnut) Ltd by means of a bulk assignation its rights against Fieldoak, as well as the guarantee and the standard security.

Promontoria subsequently called up the debts due by Fieldoak and, on non-payment, appointed a receiver to the company. It then sought payment by Mr Guidi of the capped sum due under the guarantee. A charge for payment was served upon him on the basis of the warrant for summary diligence within the standard security document. When he did not pay, Promontoria sequestered him. In an earlier action which was sisted pending the determination of the present action, Mr Guidi petitioned for recall of the sequestration.⁷

In the present action Mr Guidi sought (i) production and reduction of the charge for payment and (ii) declarator that Promontoria had no right or title to the guarantee and standard security, and that the title sheet for his house was

1 [2010] UKSC 50, 2011 SC (UKSC) 66. See *Conveyancing 2010* pp 129–49.

2 *Shear v Clipper Holding II SARL* at para 3.

3 [2018] SC GRE 5, 2018 GWD 6-87.

4 At para 26.

5 18 January 2018, unreported.

6 [2021] SC GLW 59, 2021 SLT (Sh Ct) 441, 2021 Hous LR 88.

7 Mr Guidi has mounted a long-running public campaign on the basis that the bank mis-sold loans to him. See eg 'MPs back businessman on hunger strike at Clydesdale Bank', *The Guardian*, 30 August 2019, available at www.theguardian.com/business/2019/aug/30/mps-back-businessman-on-hunger-strike-at-clydesdale-bank.

manifestly inaccurate in showing that the standard security had been validly assigned to Promontoria. Behind these pleas, the principal basis of Mr Guidi's case was that the assignation was invalid as it failed to conform to the 1970 Act. Promontoria in turn argued that the action should be dismissed on the basis that Mr Guidi's pleas were irrelevant and lacked in specification. This led to a two-day debate at which Mr Guidi was successful.¹ The decision of the sheriff (Stuart Reid) runs to 137 pages,² although the final part deals with the issue of production of documents.³

The assignation documentation

There were three parties to the 2015 assignation. It was granted by the bank in favour of Promontoria with the consent of National Australia Bank Ltd (defined in the document as 'the Seller')⁴ and was executed in counterpart. The main body of the deed had seven clauses and comprised eight pages. Attached to it was a schedule of around 20 pages, much of which was redacted in the version lodged in process. Section A of part II of the schedule had a list of facility agreements, commercial and personal agreements, floating charges and standard securities, including:

Scots Law Personal Guarantee by Giovannia Guidi ('GG') in favour of the [Bank] for the liabilities of Fieldoak up to £450,000 plus costs and interests dated 12 August 2010.

Scots law standard security by GG in favour of [the Bank] (Title Number LAN100490) registered on 15 July 2011.

These were collectively referred to as 'Relevant Pool B Loan Assets'. It appears that they were not confined to rights under Scots law.

Clause 2.1 of the deed made provision for the assignation. But it is not straightforward. It was 'subject to the terms of this [deed]' and was 'with effect on and from the Effective Time in relation to each Specified Loan Asset'. 'Effective Time' was defined in clause 1.1 of the deed as 'the Settlement Date immediately following the receipt by the Seller of the Purchase Price for the Specified Loan Assets'. 'Settlement Date' was defined as '4 September 2015 (or such other date as may be agreed by the parties to [the deed] in writing)' and 'Specified Loan Assets' were defined by reference to the schedule. In addition, the deed, in clause 2.2, imposed certain duties on Promontoria. A further complication, in clauses 1.1 and 1.2, was that the deed was to be interpreted in part by reference to a separate document – a Sale and Purchase Agreement – that was not lodged in process. The contrast with the brief form A of the 1970 Act, quoted above, is striking. And despite the length of the deed, the amounts due under the standard securities

¹ This was described in *The Mail on Sunday* on 10 October 2021 as Mr Guidi winning a 'David and Goliath' court battle: see www.pressreader.com/uk/the-scottish-mail-on-sunday/20211010/281883006517790.

² Or apparently 302 paragraphs, but there is some duplication of numbering, so the figure is higher.

³ As to which see p 49 above.

⁴ The exact role of the National Australia Bank Ltd is unexplained in the case, but between 1987 and 2016 the Clydesdale Bank plc was a member of the National Australia Bank Group.

as at the date of the assignation (which date can be seen to be uncertain) were missing. Whether the deed departed sufficiently far from the statutory style to be invalid was what the court had to decide.

Statutory interpretation

Sheriff Reid based his decision firmly on general principles of the construction of statutes. He began by setting out what he termed the 'traditional approach'¹ of deciding whether a statutory requirement is mandatory or directory. Where it is mandatory, non-compliance results in invalidity; if it is merely directory, a failure to comply does not necessarily mean nullity. Drawing on English authority, the sheriff criticised this analysis as unsatisfactory because it did not help decide (i) why the wording fell into a particular category, or (ii) the legislature's intended consequence of non-compliance. The modern and in his view preferable approach was to use 'ordinary' statutory interpretation. In this regard, he referred to Lord Steyn in *R v Soneji*² who stated:

the rigid mandatory and directory distinction, and its many artificial refinements, have outlived their usefulness. Instead the emphasis ought to be on the consequences of non-compliance, and posing the question whether Parliament can be fairly be have taken to have intended total invalidity. That is how I would approach what is ultimately a question of statutory construction.

Subsequent English case law has drawn a distinction between legislation in the public law and private law spheres. In regard to the latter, it was stated by Sir Terence Etherton C in *Osman v Natt*³ that the court must decide whether the wording to be used is of 'critical importance' or merely of 'secondary importance or merely ancillary'. The construction of the statute is to be objective and not depend on the individual circumstances of the parties involved in the case. *Osman* involved a statutory notice served by tenants in order to acquire the freehold of the leased property. It was followed in two more recent property law cases: *Elim Court RTM Co Ltd v Avon Freeholds Ltd*⁴ and *Cheerupmate2 Ltd v Franco De Luca Calce*.⁵

The sheriff in *Guidi* then turned to the Scottish authorities. Here the mandatory / directory approach could also be found.⁶ But, in the sheriff's view, the correct methodology at least in private law cases was that set out in the modern English cases. For this he offered a number of justifications. First, he founded on three Inner House cases which identified the relevant exercise here as being one of 'pure statutory interpretation'.⁷ Secondly, he referred⁸ to a recent

1 *Guidi* at para 141.

2 [2005] UKHL 49, [2006] 1 AC 340 at para 21, referred to in *Guidi* at para 143.

3 [2014] EWCA Civ 1520, [2015] 1 WLR 1536 at paras 33 and 34.

4 [2017] EWCA Civ 89, [2017] 3 WLR 876.

5 [2018] EWCA Civ 2230, [2019] 1 WLR 1813.

6 *Guidi* at para 147.

7 At para 150. The cases are *Johnston v Pettigrew* (1865) 3 M 954; *Department of Agriculture for Scotland v Goodfellow* 1931 SC 556; and *Rae v Davidson* 1954 SC 361.

8 At para 151.

case on enforcement of standard securities, *Legal & Equitable Nominees Ltd v Scotia Investments Ltd Partnership*.¹ Here the court determined that the effect of certain discrepancies in a notice of default was a matter of statutory interpretation of the 1970 Act. Thirdly, he pointed out that both *Soneji* and *Osman* drew on a Scottish House of Lords decision: *London and Clydeside Estates Ltd v Aberdeen District Council*.² Fourthly, he regarded the English cases as being of ‘significant persuasive value’ when considering the senior judges involved, the fact that there was consistent Commonwealth authority, and the compelling nature of the logic.³ Finally, he said that provisions such as s 53 of the 1970 Act with wording like ‘as nearly as may be’ or ‘as closely as may be’ should be viewed as *de minimis* clauses. In his view: ‘[i]n order to distinguish the fundamental from the frippery, material from the *de minimis*, the substantive from the ancillary, one must first ascertain the purpose of the wording’.⁴

This general analysis is full and well stated. It will be surprising if a higher Scottish court were not to draw on it in a later case.

Interpreting the 1970 Act

In interpreting the 1970 Act Sheriff Reid’s starting-point was to ascertain the purpose of the wording in schedule 4. Drawing on the Halliday Report,⁵ which recommended the reforms which led to the 1970 Act, he gave the purpose as being ‘to provide a simple mechanism for the effectual transfer of a real right in security over land from an assignor to an assignee ... Simplicity carries with it the notion of certainty.’⁶ In addition, there was a need for parties other than the assignor and assignee to know whether the assignation was effective, including the debtor, other creditors, and the Keeper.

Having identified the purpose as simplicity, the sheriff concluded that deviations from the statutory wording which were ‘material, essential or substantive’ to this purpose would result in a deed failing to comply with the statutory wording whereas deviations which were ‘immaterial, inessential or ancillary’⁷ to that purpose would not.

Material elements

In relation to the assignation forms in schedule 4 Sheriff Reid took the following elements to be material:

- (i) the structural form of the document (in particular that it is unilateral);
- (ii) the identities of the assignor and assignee;
- (iii) the description of the standard security being assigned;

¹ [2019] SAC (Civ) 23, 2019 SLT (Sh Ct) 193. See *Conveyancing 2019* pp 58–60.

² 1980 SC 1. See *Guidi* at para 153.

³ *Guidi* at para 154.

⁴ Paragraph 155.

⁵ Scottish Home and Health Department, *Conveyancing Legislation and Practice* (Cmnd 3118, 1966).

⁶ Paragraphs 159 and 160.

⁷ Paragraph 163.

- (iv) the operative clause (the wording which sets out the extent of the assignation and leads to a *de praesenti* transfer of the security); and
- (v) the relevant Register of Sasines or Land Register details in relation to the standard security being assigned.¹

Element (ii) is indisputable: the parties to a deed must be identified, and their names and addresses are essential. So too is element (iii) under the 'specificity principle' of property law. Element (v) seems merely to be a sub-category of element (iii), a conclusion confirmed later in the judgment where the sheriff explained that a form A assignation had the following elements:

- (a) the type of standard security (whether for a fixed amount, up to a maximum amount of debt, or for all sums);
- (b) in the case of fixed- or maximum-amount securities, the relevant amounts;
- (c) the names of the original grantor and grantee of the security; and
- (d) the registration details of the security.²

In his opinion all of these were essential to the description. Indeed it is a general rule of land registration law that the title number must be given in an application for the registration of a deed affecting a registered plot.³

Element (iv) – the operative clause – is obviously material too. It needs to be clear that what is going on is an assignation and not some other transaction. That leaves element (i) – the form of document. This the sheriff discussed in some detail.

Unilaterality, unconditionality, and exclusivity

For Sheriff Reid there were four justifications for the assignation deed requiring to be in the form set out in schedule 4.⁴ Two concern unilaterality. First, a unilateral deed would normally be simpler than a bilateral or multilateral deed. Secondly, in Scottish conveyancing practice there was a long history of the use of unilateral deeds to transfer real rights in land. Bilateral or multilateral documents were more appropriate for the earlier stage of a transaction where the parties agree what is to happen, as for example in missives of sale.

While, however, there is force in these observations, they seem pressed too far. The traditional one-sentence unilateral disposition is hardly very simple, particularly when it runs over several pages.⁵ Non-unilateral deeds are by no means unknown. The old feu contract was an example. Assignations of commercial leases are commonly done in bilateral form.⁶ Even where a deed is

¹ Paragraph 167.

² Paragraph 175.

³ Land Registration etc (Scotland) Act 2012 s 26(1)(c).

⁴ Paragraphs 169–172.

⁵ No wonder that modern styles have sought to move away from this, albeit still with a unilateral form. See eg www.psglegal.co.uk/residential.php.

⁶ See eg www.psglegal.co.uk/leases_management.php.

unilateral in form it will often impose obligations on the grantee, for example, to pay a price. By accepting delivery of the deed, the grantee is accepting these obligations.¹

A third justification suggested by Sheriff Reid was that, in a unilateral deed, it was easier to discover the ‘granter’s unconditional intention to effect a *de praesenti* transfer of the real right in security’.² This does not seem a live issue, although no doubt a deed conditionally assigning a standard security would be problematic. Thus it appears never to have been suggested that Donna could dispense to Eric with a condition providing that, despite the disposition being registered, Eric does not become owner until certain obligations are performed.³ If such a condition were to be inserted, however, the result is probably that it is ineffective rather than that the transfer itself fails.⁴

A final requirement of form, according to the sheriff, was that the deed assigns exclusively a standard security and not other rights such as floating charges or personal guarantees. He noted that the assignation of the latter could not be registered in the Land Register.⁵ Again this is not a convincing argument. Where there is a standard security in terms of schedule 2 form A of the 1970 Act, such as the one granted by Mr Guidi (ie with both personal obligation and security elements in the same document), which is assigned by a schedule 4 form A assignation, both the right to performance of the personal obligation and the security will be assigned. The assignation will be registered in the Land Register, even although an assignation of a personal right alone is not so registrable. The Keeper’s task is to update section C of the title sheet and to insert the assignee as the holder of the standard security. Provided that it is sufficiently obvious that the standard security is being assigned she will be able to do so.

Immaterial elements

What then were the ‘immaterial, inessential or ancillary’ parts of the statutory form of assignation? According to Sheriff Reid these were: (i) the consideration for granting the assignation; (ii) the currency of the secured debt; (iii) the interest clause; and (iv) the amount of secured debt as at the date of the assignation (in the case of maximum-amount or all-sums standard securities).

It was the last of those which merited most discussion, given the earlier case law. The sheriff noted, first, that having to include a statement of the debt could hardly contribute to the simplicity objective which he had identified:⁶

1 See eg H L MacQueen, ‘Delivery of Deeds and Voluntary Obligations’, 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) 102 at 104.

2 Paragraph 170.

3 See R G Anderson, *Assignation* (Studies in Scots Law vol 1, 2008) para 10-51. See also German Civil Code s 925(2). Compare the position as regards claims (personal rights): Anderson, *Assignation* paras 10-54 to 10-56, and Scottish Law Commission, *Report No 249 on Moveable Transactions* (2017) paras 5.73–5.80.

4 This is the position in German law: see the previous footnote.

5 The relevant provision here is s 49 of the Land Registration etc (Scotland) Act 2012.

6 Paragraph 184. On the difficulties with standard securities in respect of an obligation *ad factum praestandum*, see *Conveyancing 2017* pp 136–41.

In many cases it will be far from simple, if not utterly impracticable, to calculate precisely the sum due by a debtor at the date of an assignation, given that a standard security can competently secure payment of an unascertained contingent or future indebtedness, or even performance of an obligation *ad factum praestandum*.

Banking lawyers can be heard cheering. The sheriff's view was that the wording in the statutory form 'merely reflects a commonly accepted conveyancing practice'.¹ Under reference to Professor Halliday's commentary on the 1970 Act,² he stated that ordinarily the personal obligation secured by a standard security was confined to a debt owed to an assignor. Thus say Angela is lent £100,000 by the Blue Bank to whom she grants a standard security. The Blue Bank assigns the right to repayment of the debt to the Coral Bank along with the standard security. The Coral Bank can only enforce the security to recover the £100,000 (plus interest and expenses). Without a separate agreement with Angela, it cannot rely on it for further advances that the Coral Bank has made to her.

The sheriff accepted, however, that drafting could achieve a different result. Before 1970 'it would have been unorthodox, if not heretical, to draft a heritable security of a capped fluctuating amount to cover any indebtedness due or to become due not only to the original creditor, but also the creditor's assignee'.³ In this regard he made reference to the old bond of cash credit and disposition in security, which was regulated by the Debts Securities (Scotland) Act 1856, but strangely not to the *ex facie* absolute disposition, which was the most widely used form of heritable security prior to 1970. Nowadays, however, the standard security allowed for a more flexible result meaning that wide drafting could 'at a stroke transform [the assignee's] unsecured debt into secured debt, like the alchemist's dream of turning metal into gold'.⁴ This result, however, might not necessarily be a palatable one.

Applying the law

Having set out his conclusions as to the material and immaterial elements of the statutory form, the sheriff's application of these to the deed in hand was unsurprising. He found that it deviated materially from the statutory style for three reasons.⁵ First, it was not unilateral. Secondly, it did not demonstrate an unconditional intention to transfer the assigned standard securities immediately. Rather it suffered from 'labyrinthine conditionality'.⁶ Thirdly, it did not just assign standard securities but 'a mixed bag of multiple [other rights]'.⁷ In contrast, the failure to state the outstanding debt as at the date of assignation – the problem which worried courts in earlier cases – was inconsequential, even though it had been central to Mr Guidi's arguments.⁸ But the overall result was an invalid

¹ Paragraph 186.

² J M Halliday, *The Conveyancing and Feudal Reform (Scotland) Act 1970* (2nd edn, 1977) para 9-03.

³ The first para 193. As noted above, there is mis-numbering in the judgment.

⁴ The second para 193.

⁵ Paragraphs 222–226.

⁶ Paragraph 224.

⁷ Paragraph 225.

⁸ Paragraph 229.

assignment.¹ We understand that leave to appeal to the Sheriff Appeal Court has been granted. Given the importance of the issues raised this is welcome.

Reduction of the charge

One of Mr Guidi's aims in seeking to have the assignment declared invalid was to remove the basis for the charge for payment served against him by Promontoria. In turn this would mean that his sequestration which followed on from that was not justified. The sheriff granted decree for production of the charge with a view to reduction.² The charge followed from the summary diligence clause in the standard security. This in the sheriff's view was its only basis.³ He had earlier colourfully noted that the 'assignment of a standard security brings to the boil the simmering tension between the real and personal rights which are forced to cohabit under the roof of a statutory construct, particularly in the context of a Form A standard security'.⁴

It is not clear, however, that the assignment deed's failure (on the sheriff's view) to transfer the standard security necessarily means that it failed to transfer to Promontoria the bank's right to the performance of the personal obligation. The summary diligence clause relates to that obligation and not to the real right in security.⁵ Previous case law has shown that one may be assigned without the other.⁶

Land registration aspects

Section 14(1) of the 1970 Act, quoted earlier, provides that registration in the Land Register (or recording in the Register of Sasines) is necessary to vest the standard security in the assignee. Somewhat inexplicably Promontoria did not aver that the assignment had been registered,⁷ although Mr Guidi did aver that the title sheet to his property was manifestly inaccurate in terms of ss 65 and 80 of the Land Registration etc (Scotland) Act 2012 in showing the assignment. In fact, this averment is misconceived. Manifest inaccuracy is the standard to be applied by the Keeper in rectification cases. It is not the standard to be applied by a court or tribunal which instead determines disputes by the usual standard of balance of probabilities. If, applying that standard, it concludes that there is an inaccuracy, then, from the standpoint of the Keeper, that inaccuracy is now manifest. Parties who aver that an alleged inaccuracy is manifest impose on themselves a too-high standard of evidence. Indeed, if an alleged inaccuracy is indeed manifest, litigation would not normally be needed in the first place, because the Keeper would be willing to proceed without a court order.

¹ A second unilateral assignment of the standard security which Promontoria strangely did not found on was also said by the sheriff to be defective because of its wording: see paras 238–248.

² Paragraph 8.

³ Paragraph 227.

⁴ Paragraph 128.

⁵ See further, in the context of reform, Scottish Law Commission, *Discussion Paper No 168 on Heritable Securities: Pre-default* (2019) paras 6.18 and 6.29.

⁶ See *UK Acorn Finance Ltd v Smith* 2014 Hous LR 50, discussed in *Conveyancing 2014* pp 177–80.

⁷ Paragraph 223. See also above at p 50.

A search against the property in December 2021 reveals the standard security in Section C of the title sheet along with the following note:

The above Standard Security was assigned to PROMONTORIA (CHESTNUT) LIMITED a company incorporated under the laws of the Republic of Ireland with registered number 547502, whose registered office is at 1 Grant's Row, Mount Street Lower, Dublin 2, Ireland conform to Assignment registered 11 Sep. 2015.

Assuming the sheriff's conclusion that the assignment was ineffective is not overturned on appeal, Mr Guidi will presumably seek rectification of the inaccuracy in the Register under s 80 of the 2012 Act. If that happens, there is the issue of whether Promontoria may successfully claim under s 77 of that Act for loss it has suffered as a breach of the Keeper's warranty. This warranty would have been granted by the Keeper under s 73 as there is no statement of exclusion on the title sheet.¹ There are various grounds, however, under which the Keeper could potentially resist a claim. The inaccuracy caused by the invalid assignment could be argued to be something of which Promontoria or their solicitors ought to have known because of the failure to comply with the statutory form.² Separately, not complying with the form might be argued to breach the duty of care to the Keeper under s 111 of the 2012 Act in relation to the application for registration.³ As against that it might be counter-argued that the form of the deed presented was plain to the Keeper and she chose to accept it. Another defence to a warranty claim is that the loss could have been avoided by the applicant 'taking certain measures which it would have been reasonable ... to take'.⁴ Presumably the assignment could be redrafted and re-registered.

Practical implications

Pending the result of the appeal and further case law,⁵ the position can be described as follows. (i) A bulk assignment of standard securities is competent. (ii) The assignment deed should be in unilateral form, unconditional, and exclusive to standard securities (and their secured debts). (iii) It is not necessary to state the debt outstanding as at the date of the assignment.

Reform

Finally, as noted earlier, the Scottish Law Commission is working on a large-scale review of mortgage law. In 2019 it published its *Discussion Paper on Heritable Securities: Pre-default*.⁶ This considers assignment.⁷ It proposes that the same deed may be used to assign multiple standard securities.⁸ Further, there would be no

1 Land Registration etc (Scotland) Act 2012 s 75(3).

2 LR(S)A 2012 s 78(b).

3 LR(S)A 2012 s 78(c).

4 LR(S)A 2012 s 78(d).

5 See also L King, 'The end of *OneSavings*? *Guidi v Promontoria (Chestnut) Ltd*' (2021) 175 *Green's Property Law Bulletin* 3.

6 Scot Law Com DP No 168 (2019).

7 Chapter 10.

8 Proposal 48(b).

mandatory form of assignation deed.¹ Rather, the ‘assignation would simply have to be clear in its own terms’.² There would thus be no need for unilaterality or exclusivity (although these matters are not expressly discussed). The consequences of conditionality would be left to the general law. We understand that the proposals were supported by consultees. The decision in *Guidi* may increase that support.

The Commission also considers the issue of whether there should be any limitations on the debts which a standard security may secure. The Commission is relatively at ease with it securing future advances made by the assignee following an assignation.³ Thus, drawing on the example given earlier, imagine that Angela’s standard security in favour of the Blue Bank is drafted to secure not only debts due to the Blue Bank but also to the Blue Bank’s assignees. Following the assignation, the assignee, the Coral Bank, lends £50,000 to Angela. This becomes secured. But here the Coral Bank has effectively simply stepped into the Blue Bank’s shoes. Future advances by the Blue Bank will now be unsecured.⁴

What is far more controversial is whether pre-assignation debts due to the assignee or debts originally owed by third parties should, as a matter of policy, be allowed to be secured. In the words of an Australian judge who is quoted by the Commission and then by Sheriff Reid in *Guidi* as ‘beautifully encapsulat[ing]’ the issue:⁵

[W]hen a person gives an ‘all obligations’ mortgage or debenture he does not ordinarily contemplate that the property the subject of the security will secure not only his present and future obligations to the mortgagee or debenture holder but also any debt or liability of his which may be assigned by a third person to the secured creditor. It does seem strange that a man may lock up his counting-house and go home for the night, in the comfortable knowledge that his only secured creditor is his banker, to whom he owes a trifling sum secured by the usual boundless bank instrument, and unlock the door in the morning to find that, by virtue of assignment of the large but unsecured debts owed by him to his fellow merchants, and indeed to the butcher, the baker and the candlestick maker, all his unsecured debts have gone to feed his banker’s insatiable security, so that every one of his debts is now secured.

Sheriff Reid comments that the *contra proferentem* interpretation principle might offer some protection to debtors here but ultimately ‘the desirability of seeking to curtail parties’ freedom of contract in this respect is a matter for

¹ Proposal 48(a). This reflects similar proposals for other deeds relating to standard securities.

² Paragraph 10.36.

³ Paragraph 10.67.

⁴ Without a further standard security or the right to repayment of the advances being assigned to the Coral Bank.

⁵ *Re Clark’s Refrigerated Transport Pty Ltd (in liquidation)* [1982] VR 989 at 995 per Brooking J. This is quoted in Scottish Law Commission, *Discussion Paper No 168 on Heritable Securities: Pre-default* (2019) para 10.59 and in *Guidi* at para 195. See also G L Gretton, ‘Assignations of all-sums standard securities’ 1994 SLT (News) 207. Compare R G Anderson, ‘Assignation 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.

the SLC to consider and the Scottish Parliament to determine'.¹ With this we may all concur.

COMMON AREAS AND COMMON SENSE²

Common areas in residential developments are a gloomy subject. For some years now the news from the courts has been bad. And it is we, the conveyancing profession, who are to blame – or so it is said. Time and again we have failed, in our deeds of conditions, to identify with sufficient clarity the part or parts of the development which are to be held and maintained in common. And for this earlier neglect the moment of reckoning has now arrived. At first it was grants of common property which were held by the courts to fail, leaving developers as the unexpected owners of areas which they had fully intended to pass on to the proprietors of the individual houses.³ More recently it has been maintenance burdens in respect of the common areas which have been held to fail.⁴ Almost every year brings a new case; almost every year the gloom increases. But not in 2021. The decision of the First Division in *BAM TCP Atlantic Square Ltd v British Telecommunications plc*⁵ offers a glimmer of hope. It may even mark a shift in judicial attitudes.

A detailed account of the facts is not needed.⁶ The case concerned a commercial development in the centre of Glasgow which was to be sold as two units (the 'Phase I Land' and the 'Phase II Land'). The developer, Pardev (Broomielaw) Ltd, registered a deed of conditions on 10 June 1997. Condition 13.1 provided, succinctly, that:

The Common Parts will be owned in common by the Phase I Proprietor and the Phase II Proprietor.

In the usual way, the deed of conditions was then incorporated into the split-off disposition of the Phase I Lands which was granted in favour of the defender, both in the pertinents clause (for the grant of common property) and in the burdens clause (for the real burdens). That disposition was registered on 2 July 1997. Later there was a dispute as to whether the common parts had in fact been carried by the disposition. The description of the common parts, it was said, was insufficiently certain.

¹ Paragraph 195.

² This section is by Kenneth Reid.

³ *PMP Plus Ltd v Keeper of the Registers of Scotland* 2009 SLT (Lands Tr) 2 (*Conveyancing* 2008 pp 133–49); *Lundin Homes Ltd v Keeper of the Registers of Scotland* 2013 SLT (Lands Tr) 73 (*Conveyancing* 2013 pp 106–16); *Miller Homes Ltd v Keeper of the Registers of Scotland* 2014 SLT (Lands Tr) 79 (*Conveyancing* 2014 pp 134–39).

⁴ *Marriott v Greenbelt Group Ltd*, 2 December 2015, Lands Tribunal (*Conveyancing* 2015 pp 138–51); *Greenbelt Group Ltd v Walsh* [2019] SAC (Civ) 9, 2019 Hous LR 45 (*Conveyancing* 2019 pp 131–32); *Scottish Woodlands Ltd v Majekodunmi* [2019] SAC (Civ) 28, [2020] Hous LR (*Conveyancing* 2019 pp 128–31); *Duffus v Malcolm Allan Housebuilders Ltd* 2020 GWD 16-236 (*Conveyancing* 2020 pp 201–04).

⁵ [2021] CSIH 44. In addition to the Lord President (Lord Carloway) the court comprised Lords Menzies and Doherty.

⁶ It is given elsewhere: see p 25 above.

The applicable law is clear enough. In order for a disposition to convey property, whether in sole ownership or as common property, the property must be capable of identification *as at the date of registration of the disposition*. It will not do to describe the property in terms which are only clarified by some future event – such as whatever land is left in the development once all the units have been sold. Ownership is transferred at the date of registration, and it is at that date that certainty is needed.¹ In *BAM TCP Atlantic Square Ltd* this rule was described, rather grandly, as the *de praesenti* principle;² but, as often with rules rendered in Latin, the expression is little more than a statement of the obvious.

How did the deed of conditions in the present case match up to that standard? Was it possible, when the disposition was registered on 2 July 1997, to say for sure what did and what did not comprise the common parts? As so often, the answer lay somewhere in the thicket of definitions with which the deed of conditions began.³

There the ‘Common Parts’ were defined as meaning ‘the Podium and the Vehicular Access’ but the dispute concerned only the second of these. The definition of ‘Vehicular Access’ opened with ‘those structures *to be constructed*’ before going on to list two access ramps to the basement level of the projected buildings, and accompanying turning circles. The definition closed with the words:

which Vehicular Access is shown indicatively outlined in red but unhatched on the Ground Floor Plan and the Basement Plan.

Lord Doherty was alert to the difficulties. As of 2 July 1997 no work had yet begun on the construction of the Vehicular Access (or Podium). There was not even agreement on where, precisely, the ramps and turning circles should be built. It was true that the *land* existed, and was ‘shown indicatively outlined in red but unhatched on the Ground Floor Plan and the Basement Plan’. But an ‘indicative’ marking fell some way short of a definitive description; and in any event the common parts comprised, not the land itself, but the structures – ramps and turning circles – which were to be built on top of it. In Lord Doherty’s view, the common parts ‘were not sufficiently identified for there to have been an effective conveyance of them ... on 2 July 1997’.⁴

But Lord Doherty was in a minority. In upholding the validity of the description the Lord President struck a note that was almost too confident:⁵

1 The same is true of the creation of real burdens: see Title Conditions (Scotland) Act 2003 s 4(1).

2 It is also sometimes referred to as the specificity principle. The Lord President offered the following definition of the *de praesenti* principle (para 33): ‘The principle is that it is not competent to convey an area of land which is ascertainable only by reference to an uncertain future event. A conveyance operates *de praesenti* and the real right is acquired on registration.’

3 ‘The Deed’, the Lord President observed (at para 6), ‘is bedevilled with defined terms’.

4 Paragraph 67. In criticising this conclusion, Ken Swinton suggests that ‘Lord Doherty appears to misunderstand what had been decided in *PMP Plus Ltd*’: see ‘A not so common property issue’ (2021) 89 *Scottish Law Gazette* 52 at 54. We do not see it in that way.

5 Paragraph 34.

There is no difficulty with the ascertainment of the boundaries of the land which was to form the common parts, even although, at the time of both the Deed of Conditions and the disposition to the first defenders, the ramps had not been constructed. The land is clearly delineated in both the basement and ground floor plans attached to the Deed. Even in the unlikely event of the ramps never being built, the area delineated in red on the ground would have vested in the first defenders as common property with Pardev, as the then owners of the Phase II land, once the first defenders' interest in the land, as contained in the disposition to them, came to be registered. There is, in short, no uncertainty.

That was 1:1. In exercising the casting vote Lord Menzies confessed to have been 'initially attracted' by the view ultimately espoused by Lord Doherty. But in the end he was won over by the view of the Lord President.¹

On the facts this was clearly a knife-edge decision. Of greater importance was the manner in which the majority decision was reached. The conflict between the *de praesenti* principle on the one hand, and the need for flexibility on the part of developers on the other, was frankly acknowledged. Descriptions of common parts required to be read against that background. Some judicial leniency – or so the implication seemed to be – would not be out of place. The Lord President put matters in this way:²

If the *de praesenti* principle were to be applied in the manner sought by the pursuers, it would operate as a substantial obstacle to developers of multi-occupation phased development sites for which they wish to set out *ab ante* the rights and obligations of potential purchasers in connection with what is intended to be used as common property (cf Gretton & Reid: *Conveyancing* (5th ed) para 12.29 on inconvenience and excessive legality). The use of the Deed of Conditions by Pardev was a common, sensible and appropriate use of a single document setting out the conditions to be incorporated by reference in subsequent split off dispositions. In practical terms, no doubt the nature of the structures to be built would already have been the subject of extensive planning and building warrant procedures. The nature and location of the structures was described in a manner which met the *de praesenti* principle.

Lord Menzies, in turn, emphasised that it was 'appropriate to seek to construe the deed of conditions (and plans) in such a way as to reflect a practical approach to the registration of title, and (where possible) to avoid holding that a title is ineffective from uncertainty'.³

Do these reflections mark a new road forward – or merely a cul-de-sac, to be followed by the grinding of reverse gears? The next cases on the topic may indicate the direction of travel.

1 Paragraph 49.

2 Paragraph 36.

3 Paragraph 55.

SERVICE OF PROPERTY NOTICES BY SHERIFF OFFICER?¹

Introduction

In matters concerning heritable property it is often necessary to serve a notice, the two commonest examples being notices to quit² and calling-up notices. In some cases the matter is simply governed by the contract, for instance notices exercising break options in a commercial lease, but often statutory provisions apply. Unfortunately such provisions are often unsatisfactorily drafted.

In the first place there are what may be called sector-specific sets of rules. Leaving aside documents which initiate an action in a court or tribunal, such as initial writs, with which we are not here concerned, the two sectors which mainly touch on conveyancing are, as already mentioned, notices to quit and calling-up notices. As to the latter, there is a single set of provisions, to be found in the Conveyancing and Feudal Reform (Scotland) Act 1970, whilst as to the former there are several sets of provisions to be found in different statutes, depending on which type of lease or tenancy is in question.

In addition, there are two provisions which are not sector-specific, one being s 7 of the Interpretation Act 1978,³ which is brief, and a longer version in s 26 of the Interpretation and Legislative Reform (Scotland) Act 2010, the latter applying to statutes of the Scottish Parliament, and also to Scottish statutory instruments, postdating the 2010 Act itself.⁴ How these provisions (s 7 of the 1978 Act and s 26 of the 2010 Act) interact with sector-specific provisions is not free from difficulty.

Calling-up notices

First, calling-up notices. In the 2011 case of *Santander UK plc v Gallagher*⁵ it was held that service by sheriff officer is not competent. But in the following year the opposite was held: *Bank of Scotland plc v Stevenson*.⁶ Both were first-instance decisions in the sheriff court. The matter therefore cannot be regarded as settled. We are not aware of any decision on the matter since 2012. However, in our view the second of these decisions is the more persuasive.

Notices to quit

2021 has brought with it two new decisions on the service of notices to quit by sheriff officers. Of the two the more important is probably *Uddin v Henderson*.⁷ A

¹ This section is by George Gretton.

² Such notices have various names. As will be seen, in the Private Housing (Tenancies) (Scotland) Act 2016 they are called 'notices to leave'. At common law such terms as 'notice of removal' or 'warning to remove' were used. But nothing turns on this question of name.

³ This was then new, ie no equivalent provision was in the previous statute, the Interpretation Act 1889.

⁴ For completeness, reference must also be made to the Scotland Act 1998 (Transitory and Transitional Provisions) (Publication and Interpretation etc of Acts of the Scottish Parliament) Order 1999, SI 1999/1379, sch 1 para 4 which mirrored the terms of s 7 of the 1978 Act.

⁵ 2011 SLT (Sh Ct) 203, 2011 Hous LR 26 (*Conveyancing 2011 Case* (63)).

⁶ 2012 SLT (Sh Ct) 155, 2012 Hous LR 60 (*Conveyancing 2012 Case* (61)).

⁷ [2021] UT 15, 2021 Hous LR 28.

flat at 6 Walls Street, Glasgow was let as an assured tenancy under the Housing (Scotland) Act 1988. The landlord sought to terminate the tenancy on the ground of non-payment of rent. Notice to quit was served by sheriff officer, and the question was whether that was valid.

The dispute turned on the Act of Sederunt (Messengers-at-Arms and Sheriff Officers Rules) 1991¹ r 14(1)(c) which says that a sheriff officer can 'execute a citation or serve *any document required under any legal process*'. Was a notice to quit a 'document required under any legal process'? One obvious way to interpret that phrase would be to say that it means the service of a document issued by a court or tribunal, and that was the approach urged by the tenant. But the Upper Tribunal (Sheriff Ian Miller) preferred a broader interpretation, so as to include the service of documents necessary as pre-litigation steps. Accordingly he held that service of notice to quit by sheriff officer is competent.

The other 2021 case in this area is *Smith v MacDonald*.² There was a tenancy of 23 Moravia Avenue, Bothwell, Lanarkshire, under the Private Housing (Tenancies) (Scotland) Act 2016. The landlord wished to terminate the tenancy on the ground that the tenants were not paying the rent. The 'notice to leave' (the slightly friendlier term used by the 2016 Act) was served by sheriff officer. Section 62 of the 2016 Act says that the notice must 'specif[y] the day on which the landlord under the tenancy in question expects to become entitled to make an application for an eviction order to the First Tier Tribunal'. This date is based on counting forward from the date when the tenant receives the notice. The tenants received the notice on the day that the sheriff officer delivered it, and accordingly the date inserted in the notice was based on counting forward from then. The notice was also sent by post.

The First-tier Tribunal rejected the landlord's application on the ground that, albeit that the tenants did *in fact* receive the notice on the day when the sheriff officer served it, under the terms of the 2016 Act they were *deemed* to have received it two days after the posting of the notice, and accordingly the date inserted in the form was wrong, and so the landlord's claim failed. Why? Because s 62(5) says that 'it is to be assumed that the tenant will receive the notice to leave 48 hours after it is sent'.

The landlord appealed, and the Upper Tribunal allowed the appeal. The Upper Tribunal (Sheriff Iain Fleming) took the view that s 62(5) applies only to postal service, and postal service is not the only competent means of service, citing s 26 of the Interpretation and Legislative Reform (Scotland) Act 2010, which, though it also has a '48 hour' rule for postal service, allows personal service.

The case seems really to boil down to the question of whether service of a notice to quit by sheriff officer is competent, ie the same issue as in *Uddin*. If it is competent then the date of service is the date of actual service by the sheriff officer. *Uddin*, it might be added, was not cited, but the decision in that case was

¹ SI 1991/1397.

² [2021] UT 20, 2021 Hous LR 76.

probably not yet available when the appeal in *Smith* took place.¹ Thus neither case mentioned the other.

Whilst the two cases thus reached the same conclusion, namely that service of a notice to quit by sheriff officer is competent,² they reached that conclusion by different routes. *Uddin* reached that conclusion on the basis of the Act of Sederunt (Messengers-at-Arms and Sheriff Officers Rules) 1991 and did not cite the Interpretation and Legislative Reform (Scotland) Act 2010, whilst *Smith* reached the same conclusion on the basis of the 2010 Act and did not cite the 1991 Act of Sederunt.

So can notices to quit be served by sheriff officer? We now have authority in the affirmative, at any rate from the Upper Tribunal.

Two final notes. The first is that the Sheriff Courts (Scotland) Act 1907, as amended, provides that notices to quit can be served by sheriff officer in all cases covered by sections 34 to 38 (inclusive) of the Act.³ This was not mentioned in the 2021 cases. On this topic *McAllister's Scottish Law of Leases* says: '[T]he weight of authority strongly favours the interpretation that they only apply where the removing procedures introduced by the 1907 Act are to be used.'⁴

Secondly, in a draft Leases (Automatic Continuation etc) (Scotland) Bill, which has been put out by the Scottish Law Commission for consultation,⁵ and which is about commercial leases, it is expressly provided that notices to quit can be delivered by sheriff officers.⁶

TENEMENTS: VOTING FOR OTHERS TO PAY⁷

Mysteries

*DH v SI*⁸ is a mysterious case. The mystery begins with the names of the parties, cloaked as they are in anonymity. It continues with the address of the tenement with which the case is concerned, which is teasingly given as 28–42 '[redacted] Road, Falkirk'. But the real mystery lies in the circumstances of the case itself.

Part of the roof of the tenement at 28–42 [redacted] Road, Falkirk needed to be repaired. There were eight flats in the tenement. In terms of the titles, the owner of each flat was liable for a one-eighth share of the cost. G, the owner of one of the flats, sent a voting form round each of the flat-owners with the tempting proposal that sole liability for the costs of the repair should be borne by DH and

1 *Uddin* was decided on 19 February 2021 and *Smith* on 6 April 2021, but the appeal proceedings in *Smith* may well have taken place before 19 February.

2 As was said above, this seems the real issue in *Smith*, though the case did not take that as its focus.

3 See Sheriff Courts (Scotland) Act 1907 sch 1 r 34.8(1). Cf Act of Sederunt (Summary Cause Rules) 2002, SSI 2002/132, sch 1 r 30.7, with the same provisions.

4 L Richardson and C Anderson, *McAllister's Scottish Law of Leases* (5th edn, 2021) para 10.34.

5 See www.scotlawcom.gov.uk/news/consultation-on-draft-leases-automatic-continuation-etc-scotland-bill/.

6 The provision can be found in ss 13(2)(b) and 14.

7 This section is by Kenneth Reid.

8 [2021] SC FAL 014, 2021 SLT (Sh Ct) 231.

SI, the owners of two of the other flats.¹ Why G did this is unclear, but one reason may have been that the section of roof in question was, it appears, directly above the flats owned by DH and SI. The voting forms were completed and returned. The proposal was approved: in other words, a majority of owners voted that *others* should pay for the roof repairs. As the sheriff noted wryly, 'altruism did not win the day'.²

Which way DH voted is not known. But if he was unhappy with the decision this did not prevent him from instructing and paying for the repairs. Neatly, the total cost was £8,000. In this action DH sought to recover from SI one-half of that cost. Hitherto SI seems to have played no part in the matter, or to have cast a vote in the ballot.

At this point readers may be rubbing their eyes. Can a majority of owners vote to discharge their liability for repairs – even where the titles say otherwise? If so, this is an idea which is likely to catch on, and catch on fast.

Admittedly DH, in seeking to recover half of the cost of repairs (£4,000) from SI, had some law on his side. The Tenement Management Scheme ('TMS') provides a set of default rules which apply to all tenements except to the extent that the titles make alternative provision.³ These are more extensive than is sometimes realised. TMS r 3 lists the matters on which flat-owners can, by a majority, reach a binding decision – a 'scheme decision' in the language of the TMS. Although (necessarily) limited in range they include, in r 3.1(g), the following:

to determine that an owner is not required to pay a share (or some part of a share) of such scheme costs as may be specified by them.

That was exactly what a majority of owners had done. 'Scheme costs' are, essentially, costs due under the TMS, including the cost of maintenance in pursuance of a scheme decision.⁴ And so in voting to exempt themselves from liability, the majority had, indeed, determined 'that an owner is not required to pay a share (or some part of a share) of such scheme costs as may be specified by them'.

Admittedly this was not exactly what the Scottish Law Commission had in mind when, back in 1998, it had prepared the draft legislation on which the Tenements (Scotland) Act 2004 was based. On the contrary, the Law Commission thought that the power in r 3.1(g) might possibly be exercised 'on compassionate grounds, or perhaps for practical reasons. For example, it might be more sensible to accept a percentage of the total share from an impecunious owner than to attempt to sue him for the full amount.'⁵ But r 3.1(g) imposes no stipulation as to motivation. Compassion indeed has no place in the law of the tenement. On the face of the provision there was nothing to prevent the owners of 28–42 [redacted] Road, Falkirk from doing precisely as they had done.

¹ Or, strictly, SI and SI, being the initials of the two defenders.

² Paragraph 13. The sheriff was Derek D Livingston.

³ Tenements (Scotland) Act 2004 s 4. The TMS is set out in sch 1 of the Act.

⁴ TMS r 4.1.

⁵ Scottish Law Commission, *Report No 162 on the Law of the Tenement* (1998) para 5.82.

But there was a catch. The legislation contains several provisions for the protection of minorities, among which is one specifically targeted at r 3.1(g).¹ This is TMS r 3.5:

A vote in favour of a scheme decision under rule 3.1(g) is not to be counted if –

- (a) the owner exercising the vote, or
- (b) where the vote is exercised by a person nominated by an owner –
 - (i) that person, or
 - (ii) the owner who nominated that person,

is the owner or an owner who, by virtue of the decision, would not be required to pay as mentioned in that rule.

So a vote in favour of self-exemption is not to count. Of the eight votes available to be cast at 28–42 [redacted] Road, therefore, only two (those of DH and SI) could be used. And even if, improbably, both DH and SI had voted to exempt the others from liability, they would have been three short of the threshold of five needed for a majority decision.² Despite appearances to the contrary, therefore, there was, as the sheriff put it, ‘no decision’.³

For DH the consequences were a mixed blessing, but surely a blessing overall. From SI he was able to recover only £1,000, not the full £4,000 sued for. So to that extent his action was unsuccessful.⁴ On the other hand he was now entitled to claim, by request or if necessary by further litigation, £1,000 from each of the other owners in the tenement.

A postscript

One other matter should be mentioned. Although the sheriff accepted SI’s defence based on TMS r 3.5, as described above, his main ground of decision was a quite different one:⁵

[I]t appears to me that the purported use of the Tenant Management Scheme (‘TMS’) here as set out in the Tenements (Scotland) Act 2004 was incompetent. Section 4 of the 2004 Act effectively makes the TMS a fall back scheme where either provisions in the title deeds do not exist (in this case allocating repairs liabilities) or are in some ways defective or lacking. The titles provide for a 1/8th allocation of costs for each of the owners in the properties between 28 and 42 [redacted] Road, Falkirk. This is contained in the burden section of the various titles which provide for a 1/8th share of the cost of repairs and renewals of all subjects which are common or mutual to the tenement. In my view the titles are clear with the roof being stated to be common property and there being provision

1 Others include Tenements (Scotland) Act 2004 s 5 and TMS r 2.10. For background, see Scottish Law Commission, *Report No 162 on the Law of the Tenement* (1998) paras 5.19–5.32.

2 Could this difficulty have been avoided by holding a succession of votes in which the intended non-contributors were exempted one by one, so that in each case the majority was voting for the exemption of someone else? This seems too obvious an evasion to be permissible.

3 Paragraph 15.

4 Paragraph 18.

5 Paragraph 11.

in the titles. It is therefore not competent to simply impose a scheme decision in relation to the liability for repairs. The claimant states that s 4(5) of the 2004 Act is applicable but, in my view, there is quite clearly a tenement burden and that subsection only applies in relation to scenarios where there is no tenement burden enabling owners to make a decision. Accordingly the scheme is inapplicable, at least in relation to liability in this case under s 4(6), in that the deeds provide for liability. In short whilst I agree with the claimant's position that the rules of the TMS apply except in so far as inconsistent with the burdens in the titles the titles here make provision for liability.

This line of reasoning proceeds on a misunderstanding.¹ The TMS is indeed 'a fall back scheme', and s 4 of the 2004 Act, in successive subsections, works its way through each of the main TMS rules, explaining in painstaking fashion whether and if so to what extent the rule applies. In consequence, as the sheriff says, 'the scheme is inapplicable, at least in relation to liability' because the express maintenance provision in the title displaces the default rule (r 4) of the TMS. That is the effect of s 4(6) of the Act. So liability for the repair fell to be determined by the maintenance provision, and this stipulated for the equal liability of all eight owners. So far so uncontroversial.

But that is not the end of the matter. TMS r 3.1(g) allows owners to depart from the allocation of liability that would otherwise apply to the repair – whether that allocation is by virtue of a real burden or under TMS r 4. Were that not so, there would be no point in the provision. Under r 3.1(g), in short, an owner can be excused from that which would otherwise be due. That is exactly what the owners in the present case purported to do. And while TMS r 4 was indeed excluded by the maintenance burden in the titles, there was nothing in the titles to exclude r 3.1(g).² In principle, therefore, the owners were entitled to make a scheme decision under r 3.1(g). The fatal defect, as already explained, was that most of their votes could not count.

MAINTENANCE COSTS AND UNCHALLENGEABLE CERTIFICATES³

*Bryson v Salmond*⁴ raises a novel point in the law of real burdens. It was an action for payment of a share of maintenance costs in respect of an upmarket residential development of four houses built at Floors Farm in Strathaven, Lanarkshire. One of the houses, known as 1 and 5 Floors Farm, as well as the farm itself, were

¹ It should be pointed out that the parties represented themselves, so that the sheriff did not have the benefit of full legal argument.

² In this connection s 4(5) of the Tenements (Scotland) Act 2004 provides that: 'The provisions of rule 3 of the Scheme shall apply to the extent that there is no tenement burden enabling the owners to make scheme decisions on any matter on which a scheme decision may be made under the rule.'

³ This section is by Kenneth Reid.

⁴ [2021] SAC (Civ) 29, 2022 SLT (Sh Ct) 50. The opinion of the court was delivered by Sheriff Principal C D Turnbull. Also sitting were Sheriff Principal D L Murray and Appeal Sheriff W H Holligan. For comment by Craig Anderson, see 2022 SLT (News) 34.

the property of the pursuers (and respondents).¹ The defenders (and appellants) owned the house at 2 Floors Farm.²

2 Floors Farm had been split off from the main subjects in 2010, but the maintenance burdens at issue were contained in a later deed, a deed of amendment and constitution of real burdens from 2017. By the time of the deed's registration the defenders were just about to become the owners of 2 Floors Farm and they may be taken to have agreed to the contents of the deed.³

The 2017 deed made arrangements for the shared maintenance of certain parts of the development which remained within the ownership of the pursuers but in respect of which the defenders enjoyed the benefit of servitudes. The actual maintenance was to be carried out by the pursuers,⁴ with a share of the cost being reimbursed by the defenders. So far as the obligation on the defenders was concerned, clause 5.1 provided as follows:

The Two Floors Farm Proprietors will be responsible for, and will pay promptly to the Five Floors Farm Proprietors, an equitable share of the cost of maintenance and repair of the Access Road, the General Drainage Pipes, the Security Gates, the Gate Equipment and the Biodisk System, and which equitable share shall be based on an equality of contribution by the number of parties and proprietors (declaring that for as long as the One Floors Farm Property and the Five Floors Farm Property are owned by the same party or parties, that party or parties shall be regarded as together constituting one proprietor for the purposes of this paragraph) entitled to exercise proprietorial or formal servitude rights in respect of the Access Road, the General Drainage Pipes, the Security Gates, the Gate Equipment and the Biodisk System at any one time.

This was good, unexceptionable drafting, setting out with clarity the parts to be maintained (which were themselves subject to further definition in the deed) and also the share of maintenance allocated to 2 Floors Farm. If the clause had stopped at this point, in all probability no litigation would ever have taken place.

But the clause did not stop there. Instead it went on to say that the amount due from time to time would be determined by a certificate issued by the pursuers. The relevant provision was clause 5.2:

Save in the case of manifest error, the sum or sums due by the Two Floors Farm Proprietors to the Five Floors Farm Proprietors from time to time in respect of the maintenance and repair of the Access Road, the General Drainage Pipes, the Security Gates, the Gate Equipment and the Biodisk System will be established by certificate signed by the Five Floors Farm Proprietors and sent by Recorded Delivery or Registered Post to the Two Floors Farm Proprietors, the certificate of postage being sufficient evidence that such certificate has been received by the Two Floors Farm Proprietors.

¹ Title number LAN197195.

² Title number LAN207524.

³ The deed of amendment and constitution of real burdens was registered on 2 October 2017 and the disposition in favour of the defenders was registered on 17 October 2017. It was the defenders' authors and not the defenders who were parties to the deed.

⁴ In terms of clause 3.1.

On 10 January 2020 the pursuers sent a certificate to the defenders in terms of clause 5.2, accompanied by a spreadsheet detailing items of expenditure. The total sum requested was £8,945.41. The defenders queried a number of items, asked for further documentation as to work costs, and refused to pay, whereupon the pursuers raised an action for payment of the full amount.

To this action various defences were put forward of which the most important concerned the effect of clause 5.2.⁵ A certificate issued under that clause, said the defenders, was not unchallengeable. Such a certificate must be prepared in good faith and in accordance with the terms of the clause. Beyond that, a distinction fell to be made between matters of judgment and matters of fact such as the figures or work claimed for. The latter at least could be challenged.⁶

At first instance this defence was rejected. In terms of clause 5.2, the certificate could only be challenged on grounds of ‘manifest error’; and ‘manifest error’, said the sheriff, was confined to matters which were ‘plain and obvious or easily demonstrable without extensive investigation’. The defenders’ complaints did not fall into that category. On the contrary, they involved a factual dispute of the very kind that the clause was intended to avoid.⁷

On appeal, the Sheriff Appeal Court accepted that it would not usually be possible to go behind the certificate:⁸

The appellants’ challenges to the sum certified that are predicated upon the good faith of certain items are misconceived. The appellants say that because of a ‘complete lack of vouching and absence of specification’, they are disputing whether or not these items were actually carried out. Adopting such an approach would ... rob real burden 5.2 of any meaning or content. The Certificate would not establish the sum due by the appellants to the respondents. On the appellants’ argument, all a recipient of such a certificate would need do is assert that certain of the certified work had not been carried out, thus entitling them to enquiry. That is misconceived standing the proper interpretation of real burden 5.2.

Yet there were occasions on which a challenge would be allowed. Clause 5.2 itself contemplated cases of ‘manifest error’. Quoting with approval two decisions of the Outer House concerning the preparation of accounts⁹ – for there was no prior authority in the context of real burdens – the Sheriff Appeal Court thought that ‘manifest error’ was restricted to errors which were obvious and

5 Other defences were (i) that, on a proper construction of clause 5.2, the certificate was not binding and challenges were not limited to manifest errors, and (ii) that the pursuers were acting as property factors, that they had failed to register as such under the Property Factors (Scotland) Act 2011, and that accordingly the payment could not be recovered. Both failed. Only the former was pursued on appeal to the Sheriff Appeal Court.

6 Paragraph 11.

7 The sheriff was Daniel Kelly QC and his opinion, in Hamilton Sheriff Court, was issued on 1 October 2020. The sheriff’s views are set out in full in paras 5–8 of the judgment of the Sheriff Appeal Court.

8 Paragraph 21.

9 *Montgomery v Cameron & Greig and Others* [2007] CSOH 63; *Macdonald v Livingstone* [2012] CSOH 31, 2012 GWD 11-218. A further source of assistance, not in the event drawn upon, would have been a recent decision of the Court of Appeal in England in the context of leases: *Sara and Hossein Asset Holdings Ltd v Blacks Outdoor Retail Ltd* [2020] EWCA Civ 1521, [2021] 2 P & CR 18, [2021] L & TR 10, [2021] 1 P & CR DG13.

clear beyond reasonable contradiction. That was a high standard, certainly, but it was not unattainable. Some of the work claimed for in the present case went beyond the ‘maintenance and repair’ permitted under clause 5, and this was sufficiently obvious as to count as a ‘manifest error’. Among the items of work so rejected were the removal and replacement of a gate, the installation of a new kiosk for the Biodisk system, and the installation of new electric cables. To that limited extent, therefore, the defence to the action succeeded.

What can be learned from this decision? First and most obviously, that ‘unchallengeable’ certificates are prejudicial to the interests of the debtor – in this case, to the burdened proprietor in the real burden. If a certificate cannot be challenged except on the narrowest of grounds, then the debtor is placing himself in the power of the creditor. Debtors should think twice before agreeing to this. In *Bryson v Salmond* the Sheriff Appeal Court thought that the defenders (and appellants) had only themselves to blame for accepting clause 5.2:¹

The appellants chose to purchase Two Floors Farm in the knowledge of the terms of real burden 5.2. Had they been unwilling to accept the terms of that real burden they would not have proceeded with the purchase. Having chosen to do so, the appellants cannot now complain on policy grounds.

Yet the reality is more nuanced. Real burdens are not like contractual terms. Already in place, usually, when a purchase is being considered, they are not freely negotiable by a potential purchaser. It is take it or leave it. In the euphoria, or desperation, of purchase, clients are unlikely to be put off by a title provision which, while unattractive in itself, will probably work out all right in the end (or so they hope).

But secondly, ‘unchallengeable’ certificates may also turn out to be prejudicial to the *creditor*. Designed to prevent disputes, and expensive litigation, they may actually be the cause of them. That was certainly the case on the facts of *Bryson v Salmond*.

READING TITLE SHEETS²

The *whole* title sheet?

There is nothing unusual about title sheet GLA161133. That is why its interpretation by the Lord President (Carloway) in *BAM TCP Atlantic Square Ltd v British Telecommunications plc*³ is of such interest.

The description of the subjects, in the A (property) section, is terse and to the point:

Subjects on the east side of JAMES WATT STREET and west side of YORK STREET, GLASGOW edged red on the Title Plan.

¹ Paragraph 18.

² This section is by Kenneth Reid.

³ [2021] CSIH 44, 2021 GWD 27-36. In addition to the Lord President the court comprised Lords Menzies and Doherty.

The title plan shows an area of land edged in red which is more or less rectangular in shape. In terms of the property section the 'Real Right' with which the title sheet is concerned is 'Ownership', and in terms of the B (proprietary) section, the proprietor is BAM TCP Atlantic Square Limited. So far so straightforward.

Now consider two simple questions. First, what, precisely, are the subjects owned by BAM TCP Atlantic Square Limited ('BAM')? And second, is that ownership (i) exclusive to BAM or (ii) shared, as common property, with one or more other persons?

No conveyancer, we suppose, would be much troubled in giving the answers. In the first place, the subjects owned by BAM are the rectangular area edged in red on the title plan. And in the second place, BAM's ownership is exclusive rather than shared. With the first answer the Lord President would concur. But with the second he would not, or at least not completely. No doubt most of the rectangular area is indeed exclusively owned by BAM, but part, said the Lord President, is co-owned by another party whose name does not appear on the title sheet at all, namely British Telecommunications plc.

The Lord President's reasoning runs something like this. The property and proprietorship sections cannot be read in isolation from the rest of the title sheet. And when the terms of the D (burdens) section are considered it becomes apparent that, in respect of part of the rectangular area, the right conferred is no more than one of common property. This is because there is included in the burdens section a deed of conditions which dates from 1997 when the rectangular area (the 'Phase II Land') was being separated from the other half (the 'Phase I Land') of a larger plot, and the deed of conditions makes extensive provision for 'Common Parts' to be held by the owners of both halves of the larger plot. In particular, condition 13.1 of the deed provides, plump and plain, that: 'The Common Parts will be owned in common by the Phase I Proprietor and the Phase II Proprietor.' As it happens, the entire Common Parts, as defined in the deed of conditions,¹ lie within the area edged in red on the title plan for GLA161133. But that method of representation has to be understood in the light of the deed of conditions in the burdens section. And the effect of the deed of conditions, says the Lord President, is to restrict BAM's ownership of the putative Common Parts to ownership in common with the Phase I Proprietor (British Telecommunications plc).

Evaluation

The Lord President's reasoning has its attractions. It gives effect to the evident intentions behind the deed of conditions; and it brings the title sheet of the Phase II Land (the rectangular area) into line with the title sheet of the Phase I Land, thus neatly avoiding the apparent conflict of title which had led to the litigation

¹ A further point of contention was whether the Common Parts were defined with sufficient precision, but the court held by a majority that they were: see p 168 above.

in the first place.¹ As against that, however, it would require title sheets to be read in a different way from before. The property and proprietorship sections could no longer be taken as a definitive statement of the matters they purport to cover.

First registration in respect of GLA161133 had taken place back in 1997 and, in reaching his decision, the Lord President was influenced by what he took to have been registration practice at that time:²

[O]ne way of plotting subjects, at least prior to the 2012 Act, was to include not only an exclusively owned area but also any common parts within the Ordnance (but not the cadastral) map.³ This would not be inaccurate, even although other common owners would have title sheets delineating the same common area within the totality.

That, thought the Lord President, would explain why common parts had been included within the area edged red in the title plan for GLA161133. It was simply an example of what was, at the time, a standard registration practice.⁴

In fact, however, there was (and is) no such practice. Often, common parts were not mapped at all before the 2012 Act; but in cases where they were mapped they were not included within the red edging of a property's depiction, or at least not without an explanation as to their status.⁵ It is true that, for tenements, the title plan shows the whole 'steading', including the tenement building and the common areas; but that is a special case and is marked out as such. In standard descriptions, common parts would not be lumped together, indiscriminately, with the principal subjects. The rectangular area edged red in GLA161133 was thus the principal subjects owned by BAM and did not include such parts, if any, as were owned in common with another person.

There are other reasons, too, for doubting the Lord President's interpretation. Under the legislation, each section of the title sheet has its own particular function.⁶ The function of the burdens section is to list the real burdens, servitudes and other encumbrances. It is not to describe the property or name its owners: these are the functions, respectively, of the property and the proprietorship sections. Of course, it is open to the Keeper, in the interests of brevity, to incorporate by reference into the property section a passage which appears in full only in the burdens section. Indeed it is not uncommon to do

¹ For details of the litigation, see p 25 above.

² Paragraph 41.

³ It is not clear what distinction is being made here between the 'Ordnance' and 'cadastral' maps. Apart from anything else there was no cadastral map prior to the 2012 Act.

⁴ Paragraph 38. At this point the Lord President cited K G C Reid and G L Grettton, *Land Registration* (2017) para 4.20, but the passage in question says nothing about how common parts were represented on the title plan.

⁵ See I Davis and A Rennie (eds), *Registration of Title Practice Book* (2nd edn, 2000) para 5.52: 'When a *pro indiviso* share is held as an adjunct to other property, for example, a share in a backgreen, no title sheet will be opened for the *pro indiviso* share. It will be registered simply as a pertinent in the title sheet of the main subject.'

⁶ Land Registration etc (Scotland) Act 2012 ss 6–9. The previous law was the same: see Land Registration (Scotland) Rules 1980, SI 1980/1413, rr 4–7.

so. But that requires incorporation by express words.¹ No such words are to be found in title sheet GLA161133. Those who consult the property section of that title sheet will take its terms at face value; and it would be a poor land register that prevented them from doing so.

The proprietorship section, too, is not compatible with the Lord President's interpretation. This states that BAM – and BAM alone – is the proprietor of the subjects edged red on the title plan. There is no suggestion of common property, and no mention of another co-owner.

Finally, there is a technical difficulty. Even if the burdens section were capable of qualifying the property and proprietorship sections, the burdens section in GLA161133 contains nothing which has that effect (as indeed one might expect). In particular, the bald declaration in the deed of conditions, that 'The Common Parts will be owned in common by the Phase I Proprietor and the Phase II Proprietor', is mere verbiage. It could create rights of common ownership if and only if the words were subsequently incorporated into a disposition. There is no indication from the burdens section that that has been done.²

Status

A great deal of respect is due to any view expressed by the Lord President. Yet it seems unlikely that the view discussed above will take root and prosper. For a number of reasons, it cannot be taken as a definitive statement of the law.

In the first place, the view was not advanced by either party at the hearing. No opportunity, therefore, was given to the court to hear competing arguments or explore the wider implications.³

Secondly, and connectedly, the Lord President's view was not necessary for the disposal of the appeal. The question before the court was whether, as the Lord Ordinary had held, a proof before answer should be allowed on the issue of possession. It was decided that it should be allowed. Evidence as to possession was needed in relation to a case advanced on the issues of proprietor in possession and prescription.⁴ Neither was of relevance if the Lord President's view was correct and BAM owned only a half-share in the supposed common parts.⁵

Finally, neither of the other judges in the appeal endorsed the Lord President's view, although Lord Menzies thought that it was 'persuasive'.⁶

1 At para 41 the Lord President agreed that it might have been 'prudent' to include a reference to the deed of conditions in the property section but did not regard the failure to do so as fatal.

2 And indeed if it has been done the grant of common property would appear in the property section.

3 Paragraph 56 per Lord Menzies.

4 For a full explanation, see p 25 above.

5 BAM, the pursuer, was seeking declarator that it was the sole and exclusive proprietor of a vehicular access ramp and turning circle, both of which were included in the putative common parts. As the Lord President noted at para 42, the logical outcome of his view of BAM's title sheet was that the action should simply be dismissed. But the defenders had neither cross-appealed nor indeed advanced the Lord President's argument.

6 Paragraph 56.

RELATIONSHIP BREAKDOWN, MORTGAGE REPAYMENTS AND OBLIGATIONS TO DISPONE¹

*Slight v Tait's Exx*² is a complex and interesting case from many points of view other than conveyancing. But the case does involve an issue that is very much of interest to conveyancers: is formal writing required for an obligation to dispoise heritable property?

Lynn Slight and Margaret Tait cohabited for over 20 years up to 2012, when they entered into a civil partnership. They parted in June 2018. Ms Tait made a new will disinheriting Ms Slight. (Whether Ms Slight made a new will disinheriting Ms Tait is not known.) The following month, ie July 2018, Ms Tait died. Ms Slight raised the present action against the executor for a sum in excess of £100,000, based on breach of contract, or, in the alternative, on the law of unjustified enrichment.

Since 2003 the couple had lived together at 1 Cleuch Avenue, North Middleton, Midlothian. The title had been in joint names, and they had been jointly liable on the mortgage. In 2006 they were considering separating, and Ms Slight disposed her half-share to Ms Tait, and in exchange Ms Tait paid her £50,000 and agreed to take on sole responsibility for the mortgage. But the separation did not, after all, happen, and in 2007 they 'entered into an oral contract in terms of which they would both work towards paying off the loan secured over Cleuch Avenue and that once it was paid off then the property would be transferred into joint names'.³ In the following years Ms Slight made some payments towards the mortgage, and also for home improvements.

By the summer of 2018, when the parties separated, the mortgage had not been fully paid off, and moreover Ms Tait said just before her death that in any event she did not intend to return the title to joint names. In this action the pursuer argued that that constituted anticipatory breach of contract.

The case is a confused one and we will not attempt to disentangle it.⁴ But a few points are worth mentioning. One is that the defender (Ms Tait's executrix) argued that 'resolution of the financial relationship between the parties required to be undertaken within the scope of financial provision on dissolution of the civil partnership in terms of the 1985 Act'.⁵ The sheriff⁶ rightly rejected this. The parties had separated but there had been no action for dissolution (the term used

¹ This section is by George Gretton.

² [2021] SC EDIN 24, 2021 SLT (Sh Ct) 495.

³ As averred by the pursuer: see para 5. This stage of the litigation was a debate, and whether in fact there had ever been such an agreement was a matter for subsequent proof – and of course proving an oral agreement is often difficult. The same caveat applies to other parts of the story.

⁴ As an example, the pursuer argued that 'selling the property ... would have triggered title being returned to joint names as the loan would have been repaid'. As the defender observed, and as the sheriff naturally accepted, at para 98, it was not correct to say that, because 'a sale would have meant that title to the property would have transferred to the new owner'.

⁵ Paragraph 19. The reference to the 1985 Act is of course a reference to the Family Law (Scotland) Act 1985, which, as amended, regulates divorce, and the equivalent for civil partnerships.

⁶ Sheriff Kenneth McGowan.

instead of 'divorce' in relation to civil partnerships). The Family Law (Scotland) Act 1985 was not engaged.¹

In any event, the 1985 Act does not exclude claims based on contract or enrichment. Having said that, this area of law is boggy. Take the case of a traditional couple, transported by a time machine from circa 1955 to the present day. The husband is the breadwinner. The wife is the homemaker. The house is in joint names and the mortgage is paid out of the husband's earnings. If later they become estranged, can the husband claim against his wife one-half of all the mortgage payments he has made, on the general principle of relief as between co-obligants, or on the basis of the law of unjustified enrichment? Or is the law that when spouses make contributions to their marriage, those contributions are normally to be seen as donative? We will not embark here on a discussion of this difficult and inadequately explored area, though mention may be made of *Greenshields v Carey*² in which a repayment by one party of the whole outstanding mortgage was held to be donative, even though the parties in that case were not married.

Both in that case and in the present case there was no dissolution (= divorce) action³ and so the question of how any such claims are to fit in with the 1985 Act could not arise. There are thus two connected but distinct problems: how are such claims, especially though not exclusively relating to a mortgage, to be handled (i) outwith a divorce action, and (ii) within the context of a divorce action? There are more questions here than answers.

The defender also argued, somewhat inconsistently with the previous argument, that on the death of Ms Tait, the only claims that Ms Slight could have would be claims in succession law. Since Ms Tait's final will had disinherited Ms Slight, that would mean Ms Slight's claims to legal rights, which would be based on the deceased's moveable estate. The sheriff rejected this argument,⁴ surely correctly.

Finally, the question of whether writing is needed for a contract to transfer heritable (immoveable) property. That this has been the position in Scots law has been true for more centuries than we would care to count.⁵ Nor is it some peculiar bonnie-Scotland-ism, along with the 'not proven' verdict, the L*ch N*ss M*nt*r, or Outlander filming locations. Most legal systems have comparable rules – many stricter than ours.⁶

Yet the rule is not always understood. There have been two relatively recent decisions, *McFarlane v McFarlane*⁷ and *DWS v RMS*,⁸ holding that in some types of case a formal agreement is not needed. These were rightly rejected in *Brenchley*

¹ See paras 19 and 102.

² [2019] SC LIV 59, 2019 GWD 24-381 (*Conveyancing 2019 Case (72)*).

³ Called a dissolution action for civil partnerships.

⁴ See para 137.

⁵ Its current incarnation is in s 1 of the Requirements of Writing (Scotland) Act 1995.

⁶ By this we do not mean to say that the rule is, as a matter of policy, beyond question. *De lege lata* is one thing. *De lege ferenda* is another.

⁷ [2007] CSOH 75.

⁸ [2016] SC GRE 47, 2016 GWD 22-402 (*Conveyancing 2016 Case (18)*).

v Whyte, decided in 2020.¹ But at least in *McFarlane* and *DWS* some vague – albeit inadequate – explanation was proffered as to why a formal agreement was not required. In *Slight* it was accepted as so obvious that formal writing was not required that no explanation was called for. Section 1 of the Requirements of Writing (Scotland) Act 1995 was not even mentioned. Of course, s 1 of the 1995 Act has a provision about what is sometimes called ‘statutory personal bar’, whereby if an agreement can be proved, albeit not in formal writing, and there have been acts in reliance on that agreement, then the agreement is to be regarded as binding. In the averments of the pursuer there was perhaps a possible foundation for an argument for statutory personal bar. But as already said, no such argument was advanced, since the need for writing was never even considered. We live in a surprising world.

JUDICIAL RECTIFICATION AND THE LOSS OF RIGHTS²

Introduction

All else failing, blunders in deeds can sometimes be corrected by the courts under powers conferred by s 8 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985. But while judicial rectification is thus the conveyancer’s friend, it may also be the property-owner’s enemy, for rectification can take away rights that, under normal scrutiny, seemed perfectly secure. Haltingly, the legislation has come to acknowledge the risks and put some protections in place. But as an important new case, *PHG Developments Scot Ltd (in liquidation) v Lothian Amusements Ltd*,³ shows, there is still some way to go.

In the *PHG Developments* case Lord Pentland referred admiringly to ‘the architecture of the carefully constructed statutory rectification scheme’.⁴ The assessment seems over-generous. Designed primarily with contracts in mind, the rectification legislation has struggled to cope with real rights. The retrospective nature of rectification causes particular problems: however smoothly this may operate for contracts, rewriting history creates substantial difficulties in the case of property rights.⁵

The latest refit of the rectification provisions, and a major one, was carried out by amendments contained in s 55 of the Land Registration etc (Scotland) Act 2012.⁶ There were two key changes, both of which were restricted to deeds registered in the Land Register (as opposed to the Register of Sasines).

1 [2020] SC FOR 08, 2020 GWD 5-74. For discussion of all three cases, see *Conveyancing 2020* pp 199–201.

2 This section is by Kenneth Reid.

3 [2021] CSIH 12, 2021 SC 245, 2021 SLT 325. The court comprised the Lord President (Carloway) and Lords Malcolm and Pentland. The leading opinion was given by Lord Pentland. Lord Malcolm’s judgment is a near-dissent.

4 Paragraph 61.

5 Some of which are outlined in G L Gretton and K G C Reid, *Conveyancing* (5th edn, 2018) para 21-12.

6 For the background, see Scottish Law Commission, *Report No 222 on Land Registration* (2010) ch 29.

First, rectification is no longer retrospective as regards its ‘real effect’; instead, it has real effect only prospectively, and only following registration of the court order in the Land Register.¹ So if ownership or another real right is taken away or altered as the result of the rectification of a deed, this can only take effect prospectively, from the time of registration. History is no longer rewritten. Importantly, though, this change is confined to the *real* effect of rectification. In all other respects, rectification continues to be backdated to the date of the deed itself. As s 8(4) of the 1985 Act says, ‘a document ordered to be rectified under this section shall have effect as if it had always been so rectified’. That provision was to be of significance in *PHG Developments*.

Secondly, the provisions designed to protect third parties (ie those not party to the deed being rectified), contained in s 9 of the 1985 Act, are replaced, for deeds registered in the Land Register, by a brand-new provision, s 8(3A) of the 1985 Act. Valuable as this new provision is, it is in some respects narrower than the provisions it replaces. That too was to be of significance in *PHG Developments*.

The new case

An everyday tale

The essential facts of *PHG Developments Scot Ltd (in liquidation) v Lothian Amusements Ltd* are unremarkable. It concerned a development of 55 flats on the waterfront at Edinburgh’s Portobello. The split-off disposition of each of the flats conveyed:

ALL and WHOLE that [ground floor] flatted dwellinghouse known as [address] the location of which dwellinghouse is delineated in red on the plan annexed and executed as relative hereto (but excepting therefrom such parts thereof as are Common Parts (as that term is defined in the Deed of Conditions aftermentioned)); Which subjects form part and portion of ALL and WHOLE the subjects Harbour Road, Edinburgh and being the subjects registered in the Land Register of Scotland under Title Number MID51821; Together with (One) the fittings and fixtures therein and thereon; (Two) our whole right, title and interest therein and thereto; and (Three) the whole rights, common, mutual and exclusive (if any) and others more particularly described in the Deed of Conditions aftermentioned.

The shared rights in the development – the common parts, servitudes and the like – were not, therefore, spelled out in the dispositions themselves. Instead the terms of a deed of conditions were incorporated by reference for this purpose. That deed, granted by PHG, the developer, had been registered earlier, on 12 May 2015. So far so straightforward. But at this point the story takes an unusual turn.

With an unusual background

Among the shared rights listed in the deed of conditions was a right to park in the basement car-park. Although there were only 55 flats in the building, the car-

¹ Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 s 8A.

park had 73 spaces. The additional 18 spaces had been intended for an adjacent development to be carried out by a different developer, Lothian Amusements Ltd ('LEL'), and missives had been entered into with LEL by the predecessor (and associate company) of PHG¹ for the sale of the spaces. In the event, that development did not proceed. In a subsequent action for damages by LEL for breach of the missives, it was held that PHG's deed of conditions had granted to each of the 55 flats in the main development a servitude of parking over the entire car-park (ie including the additional 18 spaces) and that, furthermore, the wall through which access would have been taken to the adjacent development was, under the deed of conditions, the common property of the 55 flat-owners.² The upshot was that the missives with LEL could no longer be implemented, leaving the seller in breach.

Two ways of proceeding

That problem would be solved, and the missives with LEL could be implemented, if – somehow – the 55 flat-owners could be stripped of their servitude of parking over the additional 18 spaces as well as of their right of common property in the wall. Here judicial rectification provided a possible way forward.

The most direct way of proceeding would have been to seek rectification of the 55 individual dispositions. A petition to this effect would proceed under the first of the two paragraphs (para (a)) in s 8(1) of the 1985 Act. The ground for such a rectification is that 'a document [in this case, the dispositions] intended to express or to give effect to an agreement [in this case, the missives of sale with the flat-owners] fails to express accurately the common intention of the parties to the agreement at the date when it was made'.

A second, if less direct, approach would have been to rectify the deed of conditions and then, consequentially, the 55 dispositions as well. This was permitted by s 8(3) of the 1985 Act: in ordering the rectification of one document (ie the deed of conditions), the court can also order the rectification of any other document (ie the 55 dispositions) 'which is defectively expressed by reason of the defect in the original document'.

Both approaches, however, contained important safeguards for the flat-owners. Rectification, directly, of the dispositions was possible if and only if they were out of line with the missives which they implemented – if, in other words, there was no entitlement under the missives to the servitude and the common property. But if, conversely, the flat-owners were so entitled under the missives, the dispositions would stand and the petition for rectification would fail. The safeguard in respect of the second approach (rectification of the dispositions on the back of rectification of the deed of conditions) was more formidable still. Section 8(3A), a provision which, as already mentioned, was added by the Land Registration etc (Scotland) Act 2012, says that:

¹ This was The Kiln's Development Limited.

² *Lothian Amusements Ltd v The Kiln's Development Ltd* [2019] CSOH 51, 2019 GWD 23-354 (*Conveyancing* 2019 pp 12–13).

If a document [the dispositions] is registered in the Land Register of Scotland in favour of a person acting in good faith then, unless the person consents to rectification of the document, it is not competent to order its rectification under subsection (3) above [ie the provision for consequential rectification].

It may be taken that the flat-owners were 'in good faith' in the sense of not knowing that the deed of conditions was flawed and vulnerable to rectification (if indeed it was). Hence, rectification of the dispositions under this head could proceed only if the flat-owners consented. In other words they must voluntarily agree to surrender the servitude and the right of common property. There was little prospect that they would do so.

Of course, these safeguards exist for a reason. A person should not be deprived of property rights without legal justification or voluntary consent. Yet for PHG, the safeguards stood in the way of a successful petition for rectification.

A third way?

Might there be a third way, which sidestepped the flat-owners' statutory protections? That was the issue tested in *PHG Developments*. Rather than seeking the rectification of (i) the 55 dispositions (only) or of (ii) the deed of conditions plus the 55 dispositions, PHG sought the rectification of (iii) the deed of conditions (only). This, argued PHG, was sufficient to achieve the goal of stripping the 55 flat-owners of their servitude and right of common property. PHG's argument went like this. (a) Rectification of the deed of conditions, if successful, would be retrospective in effect by virtue of s 8(4) of the 1985 Act (except in relation to its 'real effect', as mentioned above). (b) The 55 dispositions incorporated the shared rights set out in the deed of conditions. (c) If the shared rights in the deed of conditions were changed, retrospectively, by rectification, then the same change would occur, automatically, to the shared rights in the 55 dispositions. (iv) Hence, on registration of the order for rectification in terms of s 8A of the 1985 Act, the 55 disponees would, from that point on, lose their common property in the wall and also have their parking servitude restricted.

Of course, even if this was argument was correct, it would only work if PHG were successful in rectifying the deed of conditions. But the prospects of success were reasonable. The petition would proceed, not under para (a) of s 8(1) (as in the case of direct rectification of the dispositions) but under para (b).¹ And that paragraph took account only of the intentions of the grantor of the deed (PHG): all that required to be shown was that the deed of conditions 'fails to express accurately the intention of the grantor of the document at the date when it was executed'. On the evidence it seemed likely that that single hurdle could be surmounted. Of protections for those who, under this approach, were to lose their rights there was no sign.

¹ For the difference between the two paragraphs, see Gretton and Reid, *Conveyancing* paras 21-02 to 21-05. Lord Malcolm, however, was doubtful on the point. At para 8 he said: 'For myself I consider that subsec (1)(a) is aimed at bilateral reciprocal agreements, and subsec (1)(b) at the mechanism by which our law allows a person on his or her own to create legal rights and obligations, namely enforceable unilateral promises.'

Some policy implications

If PHG's approach were correct, it would mean that the flat-owners could be deprived of rights without the benefit of the protections laid down in the 1985 Act. As was argued against that approach, both at first instance and again on appeal to the Inner House, it would mean:¹

that real rights acquired in good faith by the apartment owners could be taken away without their consent or showing that the dispositions in their favour failed to reflect the common intention of an agreement between them and the petitioner, ie the individual missives to which the dispositions gave effect. That startling consequence could not be and was not correct in law.

Admittedly, it could not be assumed that PHG would succeed in having the deed of conditions rectified. And in that respect, as the Lord Ordinary (Lord Tyre) had pointed out at first instance, there was at least some measure of protection for the flat-owners:²

The protections afforded by the 1985 Act to the grantee, in addition to the onus incumbent on the applicant, are (a) the right to enter the court process and oppose the application, and (b) the discretion of the court to refuse rectification even if satisfied that the grantor's intention was not accurately expressed.

But any opposition to the application would have to be on PHG's terms, for the main question before the court would be what PHG did or did not intend in drawing up the deed of conditions. In this inquiry the question of what the disponees had agreed to buy from PHG would be of marginal importance. So if PHG's approach were sound, the flat-owners could be deprived of their rights even although PHG had bound itself in the missives (if that was the case) to confer those very rights.

The position of Sasine deeds

Even if PHG's case were otherwise sound, it could hardly have succeeded if the deeds in question had been registered in the Register of Sasines and not in the Land Register. This is because the protection afforded by s 9 of the 1985 Act would have applied. This prevents rectification if it would adversely affect the interests of those (the 55 flat-owners) who (by buying the flats) acted in good faith in reliance on the terms of the deed of conditions in its unrectified form.

But in the case of Land Register deeds, as already mentioned, s 9 is replaced by s 8(3A) (quoted above), and it was the protection afforded by the latter provision that PHG's tactics were particularly designed to avoid.

The flat-owners' apathy

As it happens, the flat-owners appeared little concerned about the possible loss of their rights. Not one of the 55 lodged answers in opposition to PHG's petition.

1 [2021] CSIH 12 at para 32.

2 [2020] CSOH 58, 2020 SLT 988 at para 31.

The only opposition came from LAL, whose interest – the preservation of its damages claim under the contract in relation to the aborted second development – was at best indirect. Whether LAL was entitled to oppose the petition on the basis of concern, real or invented, for the position of the flat-owners – a concern which the flat-owners were unwilling to advance for themselves – was doubted by the Inner House.¹ At best, it cut away much of the ground from LAL's opposition.

The question to be decided

Strictly, the only question to be decided was whether PHG was entitled to a proof before answer on their application to rectify the deed of conditions. But that question could hardly be considered without considering the more fundamental question of whether, in the event that PHG was successful in its petition, the consequences would be as PHG believed them to be. In other words: if the deed of conditions were to be rectified, would the flat-owners lose their rights to the servitude and the common property?

At first instance the Lord Ordinary thought that the answer was plainly yes.² On appeal, the Inner House has now taken the same view.³ According to Lord Pentland, with whom the Lord President agreed,⁴ s 8(4) of the 1985 Act (giving as a general rule that a document ordered to be rectified has effect as if it had always been so rectified) was decisive of the matter:⁵

[W]here rectification has been ordered, the end result is that the rectified instrument is deemed by law to have always been in its altered terms. This affects third parties just as much as it does the party or parties to the original instrument. So the references in the split-off dispositions to the deed of conditions can thereafter only be understood and applied as being references to the rectified deed; it is as if from the effective date of rectification the unrectified deed of conditions has ceased ever to exist. If the law deems it never to have existed in its original terms, but always in its rectified terms, it follows that the references to the deed in other documents, such as the split-off dispositions, can only be to the rectified deed. Retroactive rectification must be effective for all purposes. This is, in my view, a crucial feature of the statutory rectification scheme.

As Lord Pentland indicates, the loss of rights is prospective, only taking effect from the date of registration of the court order. That is the result of the provision (s 8A) added by the 2012 Act. But this applies, prospectively, a rule which is founded on the otherwise retrospective effect of rectification.

The third member of the court, Lord Malcolm, disagreed with the majority view although without pressing his disagreement to the point of a formal

1 See paras 3 (Lord President Carloway) and 60 (Lord Pentland), but compare para 8 (Lord Malcolm).

2 [2020] CSOH 58, 2020 SLT 988: for discussion, see *Conveyancing 2020* pp 49–52.

3 [2021] CSIH 12, 2021 SC 245, 2021 SLT 325.

4 Paragraph 1.

5 Paragraph 66.

dissent.¹ He had 'difficulty with the proposition that the rights of the purchasers of the apartments can be altered without their consent simply on proof that the deed of conditions did not reflect the intentions of the petitioner'.² Picking up an argument advanced on behalf of LAL, he doubted that the 55 dispositions could be affected by the rectification of the deed of conditions even if that rectification was deemed to be retrospective:³

On the assumption that the deed of conditions is to be seen as a document amenable to retrospective rectification in terms of sec 8(1)(b) and (4) of the 1985 Act, it is questionable that rectification of it alone has any impact on the existing missives and dispositions. If A agrees to purchase a property on the strength of the grant of rights set out in a separate deed, including the right to Y, with the separate deed being incorporated by reference in the missives and the disposition, the subsequent retrospective alteration of that document by removal of Y does not alter the terms of the parties' agreement. It remains a fact that the agreement and the related disposition included Y as per the original deed. It is, to my mind at least, a curiosity that the petitioner insists that the 55 dispositions do not require rectification, yet the purchasers' rights and obligations can be altered without their consent. This would not be arguable if the deed of conditions had been set out in full in either the missives or the dispositions. It would be surprising if such a markedly different outcome resulted from a shorthand incorporation of the deed by reference. In short I have difficulty with the proposition that as a result of rectification of the deed alone the dispositions now refer to the altered document.

Evaluation: linked deeds and freestanding deeds

The decision exposes a gap in the protective framework of the legislation. If deed A is rectified, there can be no consequential rectification of deed B, under the legislation, unless the grantee of deed B (being in good faith) gives his or her consent.⁴ But a protection which works well for freestanding deeds may not work at all if deed B is linked to deed A by incorporating some or all of its terms. That at least is the implication of the majority view in *PHG Developments*. On that view, a second deed linked in this way to the first will be altered – though not 'rectified' – if the first deed is rectified. This is due to the retrospective nature of rectification. That the grantees of the second deed did not consent is irrelevant. They are deprived of their rights anyway.

If that is the law, it seems unsatisfactory as a matter of legal policy. It is also the result of a legislative accident – of the substitution for the usual protective provision for third parties (s 9 of the 1985 Act) of a provision (s 8(3A)) specially crafted for deeds registered in the Land Register. That the substituted provision is narrower than the one it replaces can hardly have been the intention of those

1 This is because (contrary to the view of the Lord Ordinary) he thought that the flat-owners' failure to offer 'even a murmur of a dissent' could be taken as implied consent to the rectification: see para 8.

2 Paragraph 5.

3 Paragraph 7.

4 Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 s 8(3A).

who proposed it.¹ Of course, the majority position in *PHG Developments* can be defended by reference to the letter of the statutory provisions. But, as Lord Malcolm's virtual dissent shows, a purposive interpretation produces a much more satisfactory result.

PROPERTY TAXES IN SCOTLAND²

Overview

Introduction

The overall Scottish tax landscape was, as with all things economic and political in 2021, dominated at the highest level by the continuing impact of Covid-19. But actual tax changes driven by the crisis appeared to be negligible, reflecting to some extent and as always the limited nature of tax devolution. For the moment, the extraordinary level of UK borrowing and the long-term impact of that and other consequences of the pandemic are greater problems for Westminster tax policy than that of Holyrood; and with notable exceptions in LBTT, Scottish landfill tax and non-domestic rates, the tax levers affecting property are primarily UK ones.

Only the last of these Scottish levers can be seen to have been affected by Covid-19 in 2021. Indeed, there was something of a return to normality in tax announcements, as both the UK and Scottish Budgets took place in the familiar time slots of late autumn and early winter. On case law, there were very few decisions from the Scottish tax tribunal, although they included the first significant case on Scottish landfill tax, and an important decision on 'mixed' property and LBTT.

While the tax background for the UK and indeed the world remains dominated by Covid-19, the additional colour in the Scottish palate comes from the very essence of devolution. Discussions and demands focusing on a possible further independence referendum continue, until or failing which further devolution of tax – and other – powers remains a subject of contention.

Framework for Tax 2021

Those arguments, as well as broader themes, were made clear from one side of the debate in the publication by the Scottish Government of a *Framework for Tax 2021*.³ The aim is set out in the accompanying Press Release:

Scotland's Framework for Tax sets out the principles and strategic objectives that underpin the Scottish Approach to Taxation, as well as our approach to decision making, engagement and how we manage and sequence tax policy and delivery.

¹ There is certainly no indication of such an intention when the proposed new provision was put forward by the Scottish Law Commission: see *Report No 222 on Land Registration* (2010) paras 29.25–29.27.

² This section is contributed by Alan Barr of the University of Edinburgh and Brodies LLP.

³ 16 December 2021: www.gov.scot/publications/framework-tax-2021.

The document seeks to be accessible as an aid to transparency and largely succeeds in this, including by avoiding technical jargon. It is a most useful summary of the current legal position on tax devolution, and also on funding of the Scottish Budget more generally.

However, a degree of confusion appears in the early pages, as this 'Framework for Tax' is a different thing from the overall 'Fiscal Framework', which is referred to in this document and is the much broader arrangement which deals with devolved public finances more generally. That Fiscal Framework, the original version of which dates from 2016, is itself under review in 2022, primarily on the block grant adjustment; and there was progress in agreeing the scope of that review in 2021.¹

Returning to the *Framework for Tax 2021*, after a review of the current state of devolved taxes, there is a reminder of the principles to be used in a Scottish approach to taxation. Deriving from and expanding on Adam Smith's four principles of proportionality, efficiency, certainty and convenience, these are augmented by engagement (including transparency) and effectiveness, the last of which includes the specific aim of minimising opportunities for tax avoidance.

There is then set out a range of strategic objectives, aiming at a stable framework from which economic recovery from the pandemic can be managed and with explicit references to the climate change agenda. A matrix for making decisions on tax is set out, followed by the likely sequence in which tax decisions will be made and then implemented. That sequence is said to involve five stages – (i) Engagement & Analysis; (ii) Policy design; (iii) Decision making; (iv) Implementation and (v) Evaluation. This tax policy cycle (itself of course linked to other policy objectives) is then put in the context of both the UK and the Scottish Budgets, explaining how different types of tax change and even new taxes can be implemented where the policy demands it. The Devolved Taxes Legislation Working Group² is to be revived and this may provide the groundwork for a different approach to tax legislation.

The *Framework for Tax 2021* concludes with a programme of intended work for the remainder of this Scottish Parliament, with much emphasis on public engagement. Stability in relation to rates of both income tax and LBTT has been promised;³ and this is put in the context of recovery from Covid-19. Reform of council tax and further changes, including reliefs, in non-domestic rates are promised. There are to be moves towards yet another fiscal framework – this time as between the Scottish Government and local authorities.

1 On the review of the Fiscal Framework and progress made in 2021, see the very helpful article by the Fraser of Allander Institute, *The 2022 review of the Scottish fiscal framework: what's been agreed so far?* (5 November 2021: <https://fraserofallander.org/the-2022-review-of-the-scottish-fiscal-framework-whats-been-agreed-so-far/>).

2 For its original terms of reference, see <https://webarchive.nrscotland.gov.uk/20201016072754/www.gov.scot/publications/devolved-taxes-legislation-working-group-terms-of-reference>, and for its interim report see www.parliament.scot/parliamentarybusiness/CurrentCommittees/114453.aspx.

3 See *A Fairer, Greener Scotland: Programme for Government 2021–22* (7 September 2021: www.gov.scot/publications/fairer-greener-scotland-programme-government-2021-22/documents/) pp 95 and 114.

In matters long delayed although potentially fully devolved, there are to be 'steps to progress' a Scottish aggregates levy and an air departure tax. A digital sales tax is to be explored. Calls for further devolution of taxes centre on the full devolution of income tax, national insurance contributions, and value added tax, the last in substitution for the previously envisaged partial assignment of VAT revenue. It is interesting to note that corporation tax, a previous favourite in demands for further devolution, is not mentioned; nor are any of the main capital taxes. Further links between Scottish Government climate change and tax policies are envisaged.

Finally, and in a direct line from other Scottish policy drives, the following is put forward:¹

The Scottish Land Commission (SLC) are expected to present proposed changes to local and devolved taxation in Scotland that can support Scotland's land reform objectives. They will be considered closely and in line with our strategic objectives. We will continue to support the SLC as they explore Scotland's longer-term options for reform of land and property taxation, ensuring our land reform aims can be met, and that vacant and derelict land in Scotland is brought back in to productive use and Scotland's natural environment is protected.

This may be a further indication that some form of land value tax might yet be forthcoming.

The Scottish Budget 2021

The Scottish Budget, in its return to what is its past and intended future time slot in December 2021, foreshadowed the publication of the *Framework for Tax*.² It also set out a number of policy themes following the consultation which preceded that publication. These fell under three overlapping headings – stability, recovery and reform (each pursued further in the *Framework for Tax*), with some tension of course between the first and the third of these themes. The need for reform was thought to fall particularly on local tax powers. While there was mention of calls for further devolution of tax powers, with commendable transparency the Budget also noted that:³

Some stakeholders also called for the Scottish Government to concentrate on improving the operation of existing national and local tax powers, and the delivery of assigned taxes, before focusing on further tax powers.

Office of Tax Simplification and capital taxes

The Office of Tax Simplification ('OTS') was subject to review by the Treasury after the first five years of its existence. That review endorsed the importance

¹ See *Framework for Tax 2021* p 22. On the Scottish Land Commission's proposals thus far, see *Land and property taxation in Scotland: Initial scoping of options for reform* (December 2020: www.landcommission.gov.scot/downloads/5fd0eef750f58_Alma%20Economics%20-%20Review%20of%20Land%20Tax%20Policy%20Final%20Report%20Dec%202020.pdf).

² *Scottish Budget: 2022–23* (www.gov.scot/publications/scottish-budget-2022-23/) p 16.

³ *Scottish Budget: 2022–23* p 17.

of the OTS's work, and has encouraged it by a formal project on the approach to and interpretation of 'simplification', as well as encouraging more explanation of their reasoning and prioritisation recommendations considered of most value.¹

The letter from the Treasury introducing the report of the review also contained the Government's response to two recent OTS reports.² First, it responded to the two reports on inheritance tax: *Overview of the tax and dealing with administration* (2018) and *Simplifying the design of inheritance tax* (2019).³ Given that the Government is committed to maintaining the normal and residential nil rate bands at their current levels until 2025–26, as well as a wide range of other views expressed on the reform of this tax, the Government has decided to do nothing – or more diplomatically 'has decided not to proceed with any changes at the moment, but will bear your very valuable work in mind if the Government considers reform of IHT in the future'.

With regard to capital gains tax, the OTS had also published two reviews, *Simplifying by design* (2020)⁴ and *Simplifying practical, technical and administrative issues* (2021).⁵ While again wider matters are to be kept under review, five recommendations from the second report have been accepted for implementation and five others will be considered further. The former include (i) extending with immediate effect the window for reporting and paying capital gains tax on disposals of residential property from 30 to 60 days (see below); (ii) extending considerably the no gain/no loss rules for transfers between spouses and civil partners following separation (although there will be further consultation on the details of this change); and (iii) extending roll-over relief on the compulsory purchase of land to cover reinvestment in the form of enhancing land already owned. Matters for further consideration include the rules on nominating for the purposes of principal private residence relief (while rejecting a specific suggestion on the application of relief to developments within the garden of a residence for subsequent occupation by the taxpayer).

Despite a vast amount of recent discussion of reform of the two principal capital taxes, it seems that little will change in the lifetime of the current UK Government – a view perhaps reinforced by the fact that rises in income tax and national insurance (including new levies for health and social care) mean that a historically high proportion of overall GDP will be taken in tax from April 2022.

1 See HM Treasury, *2021 Review of the Office of Tax Simplification: Final Report* (November 2021: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1039595/HMT_Review_of_OTIS_Report_FINAL.pdf).

2 See letter from Lucy Frazer to OTS, 30 November 2021 (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1037178/FINAL_FST_response_to_OTIS.pdf).

3 These were discussed briefly at *Conveyancing 2020* pp 226–27.

4 Office of Tax Simplification, *Capital Gains Tax Review: Simplifying by design* (November 2020: www.gov.uk/government/publications/ots-capital-gains-tax-review-simplifying-by-design).

5 Office of Tax Simplification, *Capital Gains Tax Review: Simplifying practical, technical and administrative issues* (May 2021: www.gov.uk/government/publications/ots-capital-gains-tax-review-simplifying-practical-technical-and-administrative-issues).

Land and buildings transaction tax

Covid recovery and residential rates of tax

As very little was changed in relation to LBTT obligations as a result of Covid, very little needs to be changed back. If penalties have arisen in relation to failures to report or pay, Covid may (but in practice probably will not) provide a reasonable excuse – but the shelf-life for that excuse is definitely expiring as the months go by.¹

The housing market appeared to recover and then to hold up reasonably well; and thus the temporary reduction in residential rates which ran for transactions settling between 15 July 2020 and 31 March 2021 was brought to an end as planned.² This means that LBTT first-time buyer relief (which increases the nil rate band for first-time buyers to £175,000) became relevant again from 1 April 2021, its effects having been briefly subsumed in the temporary rise in the general nil rate threshold.

In December 2021, the Scottish Budget confirmed that rates and bands would remain unchanged;³ indeed, at an earlier stage, the Scottish Government had confirmed that the current rates and bands for residential transactions would remain unchanged for the full term of the current Parliament.⁴ There was no such early promise on rates for non-residential transactions, but this was then given in the December 2021 Scottish Budget, where non-residential rates were described as ‘broadly competitive in a UK context’.⁵

All of this means that the restored residential rates are 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%

The latest operational update from Revenue Scotland contained a number of important developments and confirmations.⁶ These include totally electronic reporting and payment (although there is a willingness to discuss alternatives for taxpayers with particular demanding circumstances); details on contact to and from Revenue Scotland, including penalty notices to agents by Secure Messaging

¹ See www.revenue.scot/legislation/rstpa-legislation-guidance/dispute-resolution/rstp6009 for general guidance on this area.

² Land and Buildings Transaction Tax (Tax Rates and Tax Bands) (Scotland) Amendment (No 2) (Coronavirus) Order 2020, SSI 2020/215.

³ *Scottish Budget: 2022–23* p 19.

⁴ *A Fairer, Greener Scotland: Programme for Government 2021–22* p 95.

⁵ *Scottish Budget: 2022–23* p 19.

⁶ See *LBTT operational update for agents* (last updated 6 October 2021: <https://revenue.scot/news-publications/news/lbtt-operational-update-agents>).

Service within the Scottish Electronic Tax System; a continued willingness to consider alleviating penalties for late payment or returns, but this is restricted to what is defined as the 'Covid period' (23 March 2020 – 31 August 2021); and particularly relief for failure to make three-yearly lease returns during this period, including the ability to make the return within 92 days of a penalty notice, in which case the penalty will be remitted to nil. More generally, taxpayers affected by Covid-19 can discuss matters with Revenue Scotland, although with no guarantee of sympathetic treatment.

Additional dwelling supplement

Those who buy a new main residence may sometimes have difficulty in disposing of their old one. In those circumstances the rule is that the purchase is subject to ADS, because the purchaser will own (at least) two dwellings on the date of settlement of the purchase; but the ADS can be reclaimed if the previous main residence is disposed of within 18 months of the purchase of the new one.¹ For purchase transactions settling between 24 September 2018 and 24 March 2020, however, that period was extended to 36 months.² Although this legislation has already expired,³ those who made a purchase of a new main residence before 25 March 2020 have three years from the date of their purchase to dispose of their previous main residence and reclaim the tax. As noted last year,⁴ the clock is ticking faster, perhaps somewhat surprisingly, for those who have made more recent purchases. So, someone purchasing on 24 March 2020 has until 23 March 2023 to make a disposal and claim relief; someone purchasing on 25 March 2020 had only until 24 September 2021.

It has been promised for some while that there would be a consultation to consider a range of issues in relation to ADS. This has now been fulfilled. In what is one of the more important consultations affecting Scottish solicitors, *The Land and Buildings Transaction Tax Additional Dwelling Supplement: A call for evidence and views* was published on 16 December 2021;⁵ the consultation was open for 12 weeks, until 11 March 2022. An analysis of responses will follow in the summer of 2022 with an outline of next steps; and there will be a further consultation on any legislative changes, with no intention of making retrospective changes.

The consultation was foreshadowed in the Scottish Budget:⁶

The review will not consider whether the ADS should continue, its overall impact or the specific rate at which it should be charged. Rather, our focus will be on the operation of the ADS. As a first step, we will seek views in order to build a clear and

¹ Land and Buildings Transaction Tax (Scotland) Act 2013 sch 2A para 8.

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. See also guidance at www.revenue.scot/news/news/revenue-scotland-updates-guidance-reflect-coronavirus-scotland-no2-act-2020.

³ The change has 'expired' by virtue of the Coronavirus (Scotland) Acts (Early Expiry of Provisions) Regulations 2020, SSI 2020/249, regs 1, 3(b)(ii).

⁴ See *Conveyancing* 2020 p 229.

⁵ See <https://consult.gov.scot/taxation-and-fiscal-sustainability/additional-dwelling-supplement/>.

⁶ *Scottish Budget: 2022–23* p 20.

shared understanding of stakeholder and taxpayer concerns, develop a stronger evidence base on the need for change and identify any propositions for legislative change.

The consultation commences with a useful and fairly detailed description of the ADS and notes its importance in the overall Scottish tax landscape. It is made clear that the supplement is going to continue in existence. This is hardly surprising – in the first five years of its existence it was payable, at least initially, in some 22% of transactions. Repayment claims (on a subsequent disposal of a main residence owned at the time of the affected purchase) were made in approximately one-fifth of the transactions in which ADS was initially due.

Although it is explicitly stated that other issues are open for comment, the consultation identifies four broad themes for enquiry:

- (a) *Timelines for ADS*. This focuses on the two 18-month windows which apply in relation to replacing a main residence, if another dwelling is owned at the time of purchasing the new main residence. If a purchase takes place after disposal of the previous main residence, that purchase must take place within 18 months of the disposal; and if the disposal of the previous main residence takes place after the purchase, that disposal must take place within 18 months after the purchase. Questions are asked as to whether these periods should be extended (specifically with reference to the 36 months which applies elsewhere in the UK); or perhaps in exceptional circumstances rather than generally (with an example being given of properties with dangerous cladding).
- (b) *Specific scenarios*. There are a number of examples given. The first is inherited property, where ownership of a small share even briefly may prejudice a new purchase. There are suggestions of a limited reform to eliminate disproportionate effects from such minor ownership.

The second specific circumstance given is divorce or separation, where continued ownership by a separated partner (who may well have long left the property owned) may prejudice the purchase of a new dwelling by that partner. This is a very limited suggestion of possible reform in an area where anomalies with ADS often arise – it may well be one where more extensive reform is suggested in consultation.

The third and last specific circumstance relates to the treatment of joint buyers, where the failure of all such buyers to meet various tests can prejudice the availability of various relieving provisions, primarily in relation to replacing a main residence. Notably, it highlights circumstances where (it is asserted) repayment is not available following a disposal of a previous residence which has not been occupied *together* by all of the owners of the new residence. An example of the anomalous situation that arises is found in the reported case of *Goudie and Sheldon v Revenue Scotland*.¹ There are also other circumstances where the treatment of joint owners produces what may be seen as unfortunate results.

¹ [2018] FTSTC 3.

- (c) *Transactions involving housing providers.* There may be anomalies affecting the acquisition of properties for affordable housing. For example, housing associations may benefit from reliefs unavailable to local authorities; and housing co-operatives may be thought to need some preferential treatment.
- (d) *Exceptional circumstances.* Views are sought on whether there should be an 'exceptional circumstances' provision, perhaps in relation to reasons for not being able to dispose of a former main residence within the 18-month limit.

As can be seen, the consultation appears somewhat limited, especially as it specifically excludes the rate of tax. There are other issues, some in areas not far from the specifics raised, on which it is hoped the Scottish Government will accept the need for reform. There are limited grounds for optimism, especially as the consultation draws attention to a range of criteria which it will apply in assessing potential changes. Those criteria include fiscal impact, affordability, policy alignment, and deliverability. Additional dwelling supplement is, however, something of a golden goose, the feathers of which any government may be reluctant to restrict from plucking.

Mixed property

Reported litigation on LBTT was meagre in 2021,¹ but there was one important case, *Sloss v Revenue Scotland*.² This was a successful appeal by the purchasers of a property known as Glenburn Hall, on the basis that it was a non-residential transaction. More accurately, it was a 'mixed' transaction (not a statutory term), including both residential and non-residential elements; but such mixed transactions are treated as entirely non-residential for LBTT purposes. This 'all or nothing' approach does not apply when considering additional dwelling supplement: when dwellings are purchased along with other property, there requires to be an apportionment,³ a distinction noted with some bemusement by the Tribunal in the present case).⁴ But the present case did not involve the ADS.

The purchase was of some 68 acres. In terms of Land and Buildings Transaction Tax (Scotland) Act 2013 s 24 (emphasis added):

- (3) A transaction is a residential property transaction if –
 - (a) the main subject matter of the transaction consists entirely of an interest in land that is residential property ...
- (4) A transaction is a non-residential property transaction if –
 - (a) the main subject-matter of the transaction consists of or includes an interest in land that is not residential property ...

¹ Apart from the case on mixed property discussed here, the only other reported decision was *Wind Energy Renewables LLP v Revenue Scotland* [2021] FTSTC 2, which was notable for the issue involved being Revenue Scotland seeking an award (and quantification) of expenses against themselves!

² [2021] FTSTC 1.

³ Land and Buildings Transaction Tax (Scotland) Act 2013 sch 2A para 4(3)(b).

⁴ [2021] FTSTC 1 at para 76.

There was a significant preliminary issue, on whether the taxpayers should be permitted to appeal at all, on the basis that they must have known the position when their original return was submitted (and that submission had been on the basis of the transaction being residential). That having been overcome, the question was whether the entirety of the land purchased should be considered as residential, on the basis that it constituted 'grounds' attached to a clearly residential house.¹ 'Grounds' is something different from 'garden',² but it was agreed that there must be some link with the relevant dwelling for land to be garden or grounds.

Glenburn Hall had some formal garden attached, but the purchase also included a number of fields used for grazing sheep (under a relatively informal agreement with a neighbouring farmer, with whom no money changed hands). The fields could not generally be seen from the house. The sheep were clearly more than ornamental – when the solicitors had a site visit to one of the fields, 'the sheep in that field were definitely noted as they had a distinctive aroma'.³

Neither the fact that the land was registered as agricultural, nor the existence of the grazing lease was crucial to the categorisation – both could be consistent with the land being part of a dwelling's 'grounds'. But the Tribunal found that the grazing arrangements were commercial – and even if they had not been, the pasture here was so extensive as to have no functional use for the dwelling, as such. At least part of the pasture was non-residential and that was enough to make the whole purchase transaction non-residential.

All such decisions are very much on their own facts, but this is a useful decision for taxpayers purchasing houses with extensive land attached – unless and until apportionment is introduced for basic LBTT as well as for ADS.

Scottish income tax

While income tax is not of specific relevance to the taxation of land, income from land is one of the categories of income which is affected by the differing rates (and thresholds) applied to Scottish taxpayers (although not, perhaps ironically, to other taxpayers with income from Scottish land). For 2021–22 the following rates and thresholds were confirmed, which involved inflationary rises in the first four thresholds and the highest threshold being frozen.⁴

¹ Land and Buildings Transaction Tax (Scotland) Act 2013 s 59(1)(b).

² [2021] FTSTC 1 at para 93.

³ [2021] FTSTC 1 at para 49.

⁴ See Scottish Rate Resolution, 25 February 2021: www.scottishparliament.tv/meeting/debate-scottish-rate-resolution-february-25-2021.

Bands	Band name	Rate
Over £12,570–£14,667*	Starter Rate	19%
Over £14,667–£25,296	Scottish Basic Rate	20%
Over £25,296–£43,662	Intermediate Rate	21%
Over £43,662–£150,000	Higher Rate	41%
Above £150,000**	Top Rate	46%

* Assumes individuals are in receipt of the standard UK personal allowance.

** Those earning more than £100,000 will see their personal allowance reduced by £1 for every £2 earned over £100,000.

For 2022–23, the Scottish Budget brought proposals for an inflationary rise in the first two thresholds for Scottish taxpayers, but a freeze of the top two thresholds. The proposed rates and thresholds for 2022–23 are as follows:¹

Bands	Band name	Rate
Over £12,570–£14,732*	Starter Rate	19%
Over £14,732–£25,688	Scottish Basic Rate	20%
Over £25,688–£43,662	Intermediate Rate	21%
Over £43,662–£150,000	Higher Rate	41%
Above £150,000**	Top Rate	46%

* Assumes individuals are in receipt of the standard UK personal allowance.

** Those earning more than £100,000 will see their personal allowance reduced by £1 for every £2 earned over £100,000.

Scottish Government policy was confirmed as maintaining the present income tax *rates* and to increase *thresholds* by no more than inflation over the duration of the current Parliament.² It had previously been confirmed in the UK Budget in October 2021 that the personal allowance will remain fixed at £12,570 until 2025–26; and rates and thresholds in the rest of the UK seem likely to be frozen over the same timeframe. Those policies will all increase the process of ‘fiscal drag’ (particularly in an era of rising inflation), by which increasing numbers of taxpayers find themselves in the higher rates of income tax.

Along with the Scottish Budget for 2022–23 was published an interesting note on the distributional impact of the Scottish Government’s income tax policy, analysing the effects of changes since 2016–17 on different sectors of

¹ *Scottish Budget: 2022–23* p 18.

² *Scottish Budget: 2022–23* p 18.

the Scottish tax-paying community.¹ A much more detailed policy evaluation of the structural changes made to Scottish income tax in 2018–19 has also been published,² analysing the impact of the policy in relation to four key tests – revenue raising, progressivity, protecting lower earners, and supporting economic growth.

Other Scottish property taxes

Scottish landfill tax

Rates of Scottish landfill tax for 2021–22 were set by the Scottish Landfill Tax (Standard Rate and Lower Rate) Order 2021³ at £96.70 per tonne (standard rate) and £3.10 (lower rate). This increase ensures consistency with the planned changes to landfill tax rates in the rest of the UK.⁴

The rates for 2022–23 were set out in the Scottish Budget in December 2021 at £98.60 (standard) and £3.15 (lower), maintaining consistency with landfill charges in the rest of the UK and discouraging ‘waste tourism’.⁵ The credit rate for the Scottish Landfill Communities Fund (‘SLCF’) will be maintained at 5.6%, the same as in the previous year.⁶

Landfill tax, in any jurisdiction, is a very specialised area of law. It is, however, worth mentioning the Scottish Tax Tribunal decision in *Barr Environmental Ltd v Revenue Scotland*,⁷ not for its complex details and evidence on what constituted taxable disposals, prescribed activities and ‘filter cake’ (whatever that might be), but simply to note that the total tax and (extensive) penalties at stake amounted to £99,642,808. This compares with *total* forecast Scottish landfill tax receipts for 2022–23 of £101 million. Revenue Scotland have been largely successful in the litigation thus far, but given the figures involved it may not yet have run its full course.

Aggregates levy

In a terse repeat of a refrain from the last few years, the Scottish Government confirmed that they ‘will continue to progress work on a devolved levy’, but now adding that the necessary primary legislation will be introduced in the current session of the Scottish Parliament.⁸

¹ See *Scottish Income Tax: distributional analysis 2022–2023* (9 December 2021: www.gov.scot/publications/scottish-income-tax-distributional-analysis-2022-2023/).

² See *Scottish Income Tax: 2018–19 policy evaluation* (www.gov.scot/publications/scottish-income-tax-2018-19-policy-evaluation/). See also HMRC, *Estimating Scottish taxpayer behaviour in response to Scottish Income Tax changes introduced in 2018–2019* (www.gov.uk/government/publications/estimating-scottish-taxpayer-behaviour-in-response-to-scottish-income-tax-changes-introduced-in-2018-to-2019).

³ SSI 2021/89.

⁴ *Scottish Budget: 2020–21* (www.gov.scot/publications/scottish-budget-2020-21/documents/) pp 22–23.

⁵ *Scottish Budget: 2022–23* p 21.

⁶ *Scottish Budget: 2022–23* p 21.

⁷ [2021] FTSTC 3.

⁸ *Scottish Budget: 2022–23* p 25.

Non-domestic (business) rates (and council tax)

Following the passage of the Non-Domestic Rates (Scotland) Act 2020¹ containing significant structural reforms, there were limited further general developments made by statutory instrument in 2021.²

More important were the implementation and continuation of various reliefs introduced as part of the response to Covid-19.³ Perhaps the most important was the reduction of the NDR poundage from 49.8p to 49p.⁴ (The amount of non-domestic rates paid is the rateable value of the property, ie its open market rental, or a version thereof, multiplied by the 'poundage'. A revaluation of rateable values has been confirmed to take place in 2023.⁵) The basic poundage was announced in the Scottish Budget for 2022–23 as increasing to 49.8p (which is, however, below what would be an inflationary increase), with the Intermediate Property Rate at 51.1p and the Higher Property Rate at 52.4p.⁶

A key pandemic-driven measure has been the extension of the 100% NDR relief for properties in the retail, hospitality, leisure and aviation sectors. In the 2021 Budget this was announced as finishing in June 2021, but this was later extended for the full financial year 2021–22.⁷ In the Scottish Budget for 2022–23, it was stated that this would be further extended but in a substantially reduced form for at least the first three months of the new financial year. The extension is for the retail, hospitality and leisure sectors, but at only 50% relief for the first three months of 2022–23 and capped at £27,500 per ratepayer.⁸

Further reliefs for properties with rateable values below £95,000 (and for certain specified types of property) were continued for 2021–22.⁹

The business growth accelerator provides 100% relief on new-builds for up to 12 months after first occupation and no rates increases for 12 months after a qualifying property improvement. This relief is extended in the 2022–23 Budget to include the installation of solar panels.¹⁰

Enterprise areas relief is to be extended by one year until 31 March 2023; and two reliefs set annually (small business bonus scheme relief and transitional relief) are to be continued, along with all existing non-Covid-19 reliefs.¹¹

¹ See *Conveyancing 2020* pp 233–34.

² See eg Non-Domestic Rating (Valuation of Utilities) (Scotland) Amendment Order 2021, SSI 2021/59; Non-Domestic Rates (District Heating Relief and Renewable Energy Generation Relief) (Scotland) Amendment Regulations 2021, SSI 2021/64. There was a restriction by imposing a cap on certain reliefs, as a development from reform of state aid rules following Brexit: see Non-Domestic Rates (Restriction of Relief) (Scotland) Regulations 2021, SSI 2021/145.

³ For the main additional reliefs applied in 2021–22, see Non-Domestic Rates (Coronavirus Reliefs) (Scotland) Regulations 2021, SSI 2021/151.

⁴ Non-Domestic Rate (Scotland) Order 2021, SSI 2021/63.

⁵ *Scottish Budget: 2022–23* p 22.

⁶ *Scottish Budget: 2022–23* pp 22–23.

⁷ Non-Domestic Rates (Coronavirus Reliefs) (Scotland) Regulations 2021, SSI 2021/151.

⁸ *Scottish Budget: 2022–23* pp 22–24.

⁹ See Non-Domestic Rates (Levying and Miscellaneous Amendments) (Scotland) Regulations 2021, SSI 2021/65; and also discussion of these reliefs at *Conveyancing 2020* p 234.

¹⁰ *Scottish Budget: 2022–23* p 23.

¹¹ *Scottish Budget: 2022–23* pp 23–24.

Slightly in the other direction, there is to be legislation to help local authorities tackle an avoidance tactic on empty non-domestic properties. This will provide local authorities with a discretion to restrict relief where the occupier has become insolvent.¹ A further anti-avoidance measure will require self-catering properties to be let for 70 days in order to be classed as non-domestic, provision aimed at second homes.²

By contrast with business rates, council tax is not tied to property as such, although it has its origins as the replacement for domestic rates. It was frozen in 2021–22; now local councils are to be given complete flexibility to set their own council tax rates for 2022–23.³

UK taxes on land

Capital gains tax

The period within which a return and payment must be made on a disposal of UK residential land (and on most disposals of land by non-residents) has been extended from 30 to 60 days after settlement of the relevant transaction.⁴ This came into effect for settlements on or after 27 October 2021, although the necessary provision will have to wait for inclusion in the 2022 Finance Act. The rules requiring a return apply only where there is an actual CGT liability on the disposal.

Annual tax on enveloped properties

In relation to the annual tax on enveloped properties ('ATED'), there were increases by CPI inflation from September 2020 in the amounts chargeable for 2021–22.⁵ There will be a similar indexation rise for 2022–23.⁶ A relief was introduced for certain housing co-operatives retrospective to 2020–21⁷ – perhaps surprising others than the writer that housing cooperatives were ever payers of this tax.

Residential property developer tax

This was originally announced in February 2021, loosely connected with the costs of remediating dangerous cladding on tall buildings. Legislation will be

1 *Scottish Budget: 2022–23* p 24. For recent discussion of mitigation/avoidance in this area, see *Hurstwood Properties (A) Ltd and others v Rossendale Borough Council and another* [2021] UKSC 16, [2021] 2 WLR 1125.

2 *Scottish Budget: 2022–23* p 24.

3 *Scottish Budget: 2022–23* p 24.

4 See *Autumn Budget 2021: Overview of tax legislation and rates (OOTLAR)* (www.gov.uk/government/publications/autumn-budget-2021-overview-of-tax-legislation-and-rates-ootlar) para 141, and *Policy paper: Capital Gains Tax payments on property disposal time limit extension* (27 October 2021: www.gov.uk/government/publications/capital-gains-tax-payments-on-property-disposal-time-limit-extension).

5 Annual Tax on Enveloped Dwellings (Indexation of Annual Chargeable Amounts) Order 2021, SI 2021/245.

6 See *Autumn Budget 2021: Overview of tax legislation and rates (OOTLAR)* para 2.21.

7 Finance Act 2021 ss 90, 91.

in the Finance Act 2022, although it came into effect on 1 April 2022. The tax will be charged at 4% on the profits of the largest residential property developers, on profits above £25 million. Details can be found in a policy paper published with the UK Autumn Budget.¹

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. This was to be based on a model of expenditure in Scotland which, unsurprisingly, has proved difficult to establish. It has now been deferred with a commitment to review implementation as part of the wider Fiscal Framework Review; and accompanied by calls for full devolution of the tax.²

While we do not usually cover the often substantial volume of VAT litigation, it is worth mentioning the Scottish case *Ventgrove Ltd v Kuehne + Nagel Ltd*,³ also covered earlier in the volume in a different context.⁴ This concerned a lease which contained a break option under which the tenant was entitled to terminate the lease on payment of £112,500 ‘together with any VAT properly due thereon’. The defender sought to exercise the option to terminate the lease and made a payment of £112,500 but made no payment in respect of VAT. The question was whether the lease was validly terminated, which in turn depended on whether any VAT was properly due on the £112,500. Whether VAT is due on termination payments on leases of land on which the landlord has opted to tax has been a matter of debate for some while, with HMRC changing their view as various cases have gone through the courts. The vacillation is evident from the issue, and then the suspension in January 2021, of *Revenue Customs Brief 12* (2020). That process in general terms left it open to taxpayers to choose whether or not to apply VAT to termination payments affecting taxable leases. The basis for there being no VAT payable is the argument that termination payments are not made for any taxable supply, the position accepted before the issue of *Customs Brief 12*. In the present case, the Lord Ordinary accepted that the suspension of the policy set out in *Customs Brief 12* meant that no VAT was due at the time notice of termination of the lease was given, and that therefore the lease had been effectively terminated.

¹ See *Policy paper – Residential Property Developer Tax* (27 October 2021: www.gov.uk/government/publications/residential-property-developer-tax/residential-property-developer-tax).

² *Scottish Budget: 2022–23* p 25.

³ [2021] CSOH 129, [2022] STC 346.

⁴ See p 35 above.

⌘ PART V ⌘
THE RCI REGIME

THE RCI REGIME¹

Transparency: here, there and everywhere

Double transparency

Ever since the Scottish Parliament wisely passed the Registration Act 1617, establishing the Register of Sasines, ownership of land has been subject to transparency – to use a word that would have puzzled the property lawyers of the time of James VI. Land titles are open to the public gaze.² But nowadays that is not enough. Nowadays it must not only be possible to identify the owner, but also to identify who (if anyone) stands behind the owner, for example, where the owner is a nominee. So we move from the age of single transparency into the new age of double transparency.

In this area there is a new enactment, the Land Reform (Scotland) Act 2016 (Register of Persons Holding a Controlled Interest in Land) Regulations 2021,³ coming into force on 1 April 2022, and introducing the new ‘RCI’ (ie Register of Controlled Interests) regime. There is also a London legislative project to require transparency for ‘overseas entities’, a project that has now resulted in the enactment of the Economic Crime (Transparency and Enforcement) Act 2022. We will examine the 2021 Regulations first, and in some detail,⁴ since they constitute a significant new development from the standpoint of conveyancing practice. As will be seen, in some respects there is scope for debate as to how the Regulations should be interpreted. Later a few words will be said about the London initiative.

The PSC background

As far as UK-incorporated companies are concerned⁵ a transparency regime was introduced by Part 7 of the Small Business, Enterprise and Employment Act 2015, by way of the insertion into the Companies Act 2006 of a new Part 21A. This is the ‘PSC regime’.⁶ It has, as such, no specific connection with land: it applies as much to companies that own no land as to those that do. But it does mean that

1 Part V is by George Gretton.

2 That is not the case everywhere. For example in Germany entries in the Land Register (*das Grundbuch*) can be inspected only by those with ‘a legitimate interest’ (*ein berechtigtes Interesse*). See the *Grundbuchordnung* § 12.

3 SSI 2021/85.

4 But not exhaustive. The Regulations are long and complex.

5 Also (i) LLPs, (ii) Scottish limited partnerships, and (iii) Scottish general partnerships if all the partners are themselves juristic persons: see the Scottish Partnerships (Register of People with Significant Control) Regulations 2017, SI 2017/694.

6 ‘Persons with significant control.’

if heritable property is owned by a UK company¹ – a fact that can be ascertained from the Land or Sasine Register – and if that company is controlled by Mr Big, or Mr Small for that matter, then that fact should, in theory, be discoverable. Conveyancers may think that the PSC regime is more of interest to corporate lawyers than to themselves, and that is indeed true. But it cannot be ignored, and it is connected with the two new transparency regimes, both of which affect land titles more directly. It is the basis of the London legislation on overseas entities, and it has also influenced the 2021 Regulations.

The RCI regime: overview

Introduction

The new Scottish legislation, the Land Reform (Scotland) Act 2016 (Register of Persons Holding a Controlled Interest in Land) Regulations 2021,² is something which all law firms that deal with property will have to be ready to advise clients about. The commencement date was 1 April 2022. Failure to bring about the necessary registrations is a criminal offence, although there is a grace period of one year. Of this, more later.

The RCI Regulations are complex and we have not found them easy to understand.³ Our views may not necessarily be shared by others. We would add that, despite the length of what follows, very many points of detail are skipped over.

The explanatory note attached to the Regulations is brief and of little value. But on 17 December 2020, shortly before the Regulations themselves were enacted, the Scottish Government published the *Register of Persons Holding a Controlled Interest in Land: Explanatory Document*⁴ which is long and is a must-read for those wrestling with the Regulations. It has to a limited extent a ‘soft law’ status, since it was produced under s 42 of the Land Reform (Scotland) Act 2016. But it has its imperfections, one or two of which will be mentioned below.

What, in general terms, are the Regulations about? We quote the *Explanatory Document*:⁵

The overarching purpose of the Regulations is to increase public transparency in relation to individuals⁶ who have control over decision-making in relation to land. They are intended to ensure there can no longer be categories of land owner or tenant⁷ where, intentionally or otherwise, control of decision-making is obscured. In conjunction with other transparency regimes, this means that it will be possible to look behind every category of entity in Scotland, including overseas entities and

1 Or LLP etc.

2 The abbreviation ‘RCI’ will be used here: it is in fact used in the legislation itself.

3 The drafting cannot have been easy. Had we been professional drafters asked to take on these Regulations we would probably have explored the possibilities for early retirement.

4 Available at www.gov.scot/publications/register-persons-holding-controlled-interest-land-explanatory-document/.

5 *Explanatory Document* para 3.

6 For the question whether the Regulations are limited to individuals, see below.

7 As explained below, this term is restricted to the holders of leases registered in the Land Register or Register of Sasines.

trusts, to see who controls land. We do not require double reporting for entities subject to other regimes as we do not want to duplicate existing publicly available information. The Regulations will also aid policy making by enabling a fuller picture of those individuals who have control over decisions about land in Scotland.

The RCI has sometimes been described as a register of land ownership. That is not correct. The registration of land ownership is the province of the Land Register (and the Register of Sasines). The RCI is, in a broad sense, a ‘who pulls the strings?’ register. The RCI does indeed say, in relation to those properties it deals with,¹ who the owner is, but it merely takes that information from the Land Register (or GRS) so as to link that information with what the RCI is about. What is the RCI about? It is about the ‘associates’, the off-property-register persons who, to a smaller or larger extent, are among the campanologists, who pull the ropes. It must be stressed that associates are not owners. If they were owners they would be on the Land Register (or GRS) and accordingly definitionally *not* associates.

The underlying primary legislation and its background

The idea that the property registration system should cover not only ownership but also – to use a vague but often-encountered term – ‘beneficial ownership’² goes back a long way.³ It finally achieved a measure of legislative success in the Land Reform (Scotland) Act 2016, s 39(1) of which provided:

The Scottish Ministers must by regulations make provision (a) requiring information to be provided about persons who have controlling interests in owners and tenants of land, and (b) about the publication of that information in a public register kept by the Keeper of the Registers of Scotland.

The remainder of s 39 said, in lengthy but somewhat general terms, what provisions could be included in the regulations. The Act enabled, and required, regulations to be made, but what actual shape those regulations might take was at that stage unclear. The real sleeves-rolled-up job was left to be done by secondary legislation.

As s 41 of the 2016 Act required, a public consultation was launched in September 2016.⁴ Draft regulations were published in June 2018.⁵ The RCI Regulations were not finally enacted until February 2021,⁶ and there have since

¹ Which will be very much the minority of properties in Scotland.

² As will be seen below, the Regulations in fact involve not ‘beneficial ownership’ as such, but decision-making powers. The two concepts overlap but are not the same.

³ For attempts to include it in what became the Land Registration (Scotland) Act 1979, see K G C Reid, ‘Beneficial Interest and the Land Registration Act of 1979’, 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) 194. For the same in relation to what became the Land Registration etc (Scotland) Act 2012, see K G C Reid and G L Gretton, *Land Registration* (2017) p 45.

⁴ Scottish Government, *Improving transparency in land ownership in Scotland: a consultation on controlling interests in land* (www.gov.scot/Publications/2016/09/6681/): see *Conveyancing* 2016 pp 167–68.

⁵ www.gov.scot/publications/delivering-improved-transparency-land-ownership-scotland-consultation-draft-regulations/: see *Conveyancing* 2018 pp 177–81.

⁶ Land Reform (Scotland) Act 2016 (Register of Persons Holding a Controlled Interest in Land) Regulations 2021, SSI 2021/85.

been amending regulations, enacted in December 2021.¹ These latter are mainly about trusts, and amount to minor rather than major changes. They came into force simultaneously with the principal regulations, that is to say on 1 April 2022.

The basic idea

In most cases the registered owner of heritable property is also the person who makes the decisions about that property. Mr and Mrs McGlumphrey own 'Nia Roo',² a charming retirement cottage at Saltcoats with good views of the coast, and, not least, the birdlife, which Mr McGlumphrey likes to paint. In the Land Register their names appear as the owners. Who makes the decisions about the property? They do. Nobody else is involved in the decision-making. So the RCI regime is not engaged. And that is the common position. For most properties the RCI regime is not engaged. But conveyancers should not be *blasé*. For any type of property the RCI regime *might* be engaged. What if Mr and Mrs McGlumphrey are mere nominees for Shady Investments Inc incorporated in Offshoria, a Caribbean island of soft breezes, azure skies, pristine beaches and dirty money? Are Mr and Mrs McGlumphrey quite what they seem? That is unlikely, admittedly. But it is not impossible, and it is easy to imagine other types of case, involving, for example, commercial property, or rural estates, where the registered owner might easily be subject to some type of direction by an off-register person, so that the ownership is a 'controlled interest'. It is small comfort to reflect that nine clients out of ten, or even 99 out of 100, will be outwith the RCI regime if one has no certainty which clients they are.

The new register is to be kept by the Keeper, and is to be called the Register of Controlled Interests in Land, ie of interests in land which are 'controlled' by a person other than the registered owner or tenant.³ It is to be open to the public, as, of course, is the case with other registers.

Is the Keeper – or anyone else – responsible for proactively policing and verifying the RCI? The answer is negative.

The person⁴ registered as owner or tenant in the Land Register (or GRS) is called the *recorded person* (the 'RP').⁵ If there is, off-register, someone who has to some extent a power to direct what happens, that person is the *associate*, and where there is an associate for a property⁶ then that property is a *controlled interest*

1 Land Reform (Scotland) Act 2016 (Register of Persons Holding a Controlled Interest in Land) Amendment Regulations 2021, SSI 2021/495.

2 More than one property in Scotland bears this name, the meaning of which will need no explanation to those with anagrammatic talent.

3 Regulation 3. The Register's name marks an unexpected (and unwelcome) revival of that most slippery of terms, 'interest in land' – a term which was fastidiously removed from the conveyancing statute book (usually being replaced with 'real right') by sch 12 of the Abolition of Feudal Tenure etc (Scotland) Act 2000.

4 The word 'person' is used often in the Regulations – to be precise, 300 times. Judging by our own experience in perusing the Regulations it is rather easy to become foggy as to which 'person' is being referred to at any particular point.

5 The Regulations themselves use the 'RP' abbreviation, though, oddly, only in reg 26. Everywhere else the unabbreviated expression is used. For more on the concept of 'recorded person', see below.

6 Or, more strictly, for the real right of ownership or registered lease in land.

in land.¹ The concept of ‘associate’ is complex and difficult, and a person may be an associate without having anything like actual control of what happens. Of that, more below. The duty of the registered owner/tenant is to notify the Keeper about the associate,² providing the required information, whereupon the Keeper makes an entry in the RCI.³

The RCI regime is excluded where another transparency regime under UK law applies to the recorded person.⁴ The main example is a company incorporated in the UK, which will be subject to the PSC regime, already mentioned. In other words, if the registered owner/tenant is a UK company,⁵ RCI registration is not required. More about this ‘other transparency regimes’ rule will be said below.

What about other real rights?

In the typical case of a ‘controlled interest’ the ‘interest’ will be ownership of the property in question. But, as already indicated, the Regulations also apply to leases registered in the Land Register (or GRS).⁶ Thus if Mary holds a 125-year lease, registered in the Land Register, of commercial property, as nominee for Hilda, then the RCI regime is engaged. Only registered leases are involved.⁷ So if Mary holds a 15-year lease as nominee for Hilda, the RCI regime is not engaged.⁸ Equally if the lease is for 25 years but (as occasionally happens) it is not registered in the Land Register (or GRS) then the RCI regime is not engaged.

Other types of real right, such as standard securities, servitudes, and proper liferents, are not subject to the RCI regime.

Prospective only? Or retrospective too?

The system applies prospectively, of course. Thus if in August 2023 X buys land as nominee for Y, that will engage the RCI regime.⁹ Does it apply retrospectively? It does.¹⁰ Thus suppose that ABC Ltd bought land in 1999 as nominee for Belinda Big, and that remains the position today, then, as from 1 April 2022, ABC Ltd must notify that fact to the Keeper for registration in the RCI. So as from 1

1 As will be seen, that does not necessarily mean that the associate has control. Much less than full control can result in the engagement of the RCI regime. The expression ‘controlled interest’ should not be taken at face value.

2 Regulation 10.

3 Terminology: strictly speaking though there is a ‘register’ nobody actually ‘registers’ anything. ‘Notice is given’ to the Keeper who then ‘makes an entry’ in the RCI. Sometimes the Regulations use the term ‘notification’ to the Keeper but the meaning is the same. Having said that we will below sometimes, for convenience, speak of ‘registration.’

4 We say ‘under UK law’ because the existence of a transparency regime under non-UK law is irrelevant, even if equivalent. Thus if a Dublin-registered company owns property in, say, Kirkcudbrightshire, that company will be subject to Irish transparency law, but that fact is irrelevant as far as the 2021 Regulations are concerned.

5 Or LLP etc.

6 See in particular reg 2(3)(b).

7 Regulation 3(3)(b).

8 Even if the lease is registered in the Books of Council and Session.

9 At this stage we take the nominee position to illustrate the system. But there can be other types of case which will also engage the RCI regime: of these, more later.

10 Regulation 26(1).

April 2022, when the doors of the new register swung majestically open, with bangers, balloons and a big brass band, there has been – or at any rate should be – a long queue of owner/tenant applicants, stretching, metaphorically, far along Edinburgh's London Road. No doubt it will be raining.

Transitional provisions

The retrospectivity of the new RCI regime is softened by a grace period of one year, meaning that the penal provisions do not apply until 1 April 2023.¹ So if Dugald bought land in 2007 as nominee for Fergus, and that continues to be the position today, that arrangement became registrable as from 1 April 2022, but penalties will not apply unless the notice to the Keeper is delayed beyond 1 April 2023.

As we read the Regulations, the grace period applies not only to (i) existing, ie pre-2022, arrangements, but even (ii) to new ones. Thus it seems that if in July 2022 (ie in the 12-month period between 1 April 2022 and 1 April 2023) Morag buys land as nominee for Euphemia, there is a grace period, lasting to 1 April 2023, as opposed to the normal period of 60 days (for which see below). This is perhaps surprising.

Paying for the new system

On the vitally-important question of fees the Regulations are silent. But we understand that the intention is that the system is to be fee-free. This has two aspects. One is that there is to be no fee for searching the RCI. That point – unlike the next – has had a certain amount of publicity, because it was of interest to the politicians. The other aspect – and this is of course important from the standpoint of conveyancing practice – is that there is no fee for notifications to the Keeper.² (Given that the RCI is to be fee-free, the question arises as to who *will* be paying for it.)

The RCI regime: some concepts and terminology

Introduction

The Regulations are replete with special terminology and special concepts. In what follows we look at some of them. We cannot promise complete enlightenment. One distinction that must be kept constantly in mind is between (i) the person who owns the land (or who has a registered lease of it) who is called the *recorded person* ('RP') and (ii) the off-register person who to some extent can pull the strings, who is called the *associate*.

Controlling interest? Or controlled interest?

The parent legislative provision, s 39 of the Land Reform (Scotland) Act 2016, does not use the concept of *controlled* interest. The concept it uses is that of *controlling*

¹ Regulation 26(2).

² Whilst this is our understanding, we are not aware that there has been any official announcement.

interest. One might suppose that the concept in s 39 is that of an ‘interest’ of some sort in the property in question. Not so. The 2016 Act speaks of ‘controlling interests’ that are ‘in owners and tenants’. The idea of an interest in a person is intriguing. The most obvious type of legal ‘interest’ that could be ‘in’ a person would be the interest of an owner in a slave. But – breaking news – slavery has no existence under the law of Scotland.¹ So what does ‘interest in a person’ mean? We struggle.

Even if ‘controlling interest’ were to be understood as an interest in the property, as opposed to an interest in the person, an associate does not in fact have any ‘interest’ (admittedly a vague term) in the property. An ability to pull strings is not an interest in the property. If the property is held in trust then, it is true, the beneficiaries have what is sometimes called a ‘beneficial interest’ in the property, but in the Regulations beneficiaries of a trust are not, as such, associates.² The concept of ‘controlling interest’, however liberally understood, does not work, whereas the concept of a ‘controlled interest’ does work, albeit imperfectly, because what the RP has is clearly an interest in the property – either ownership or a registered lease. So in the Regulations the concept of ‘controlled interest’ is used, ie what the owner (or registered tenant) has, rather than what the person in the background, the associate, has. The conceptual disconformity – it cannot be disguised that it is such – with the primary legislation is papered over by reg 2(4), which says how ‘controlling interest’ as used in the 2016 Act is to be understood in relation to a statutory instrument, implementing that Act, that does not actually use the concept: ‘For the purposes of section 39 of the Land Reform (Scotland) Act 2016, a person has a controlling interest in an owner or tenant of land if the person is an associate of the owner or tenant.’

As to the reason for the change from ‘controlling interest’ to ‘controlled interest’ the *Explanatory Document* is silent. It itself refers several times to a (non-existent) ‘Register of Controlling Interests’ and also at several places says that what an associate has is a (non-existent) ‘controlling interest’. Indeed, it uses that term, as does the primary legislation, with reference to the person not the property, for example at para 45 speaking of ‘controlling interests in the owner or tenant of the land’. Whatever the convoluted development in thinking may have been, as to the investigation of which we wish the future historian *bonne chance*, the Regulations themselves eschew the concept of ‘controlling interest’ and adhere to that of ‘controlled interest’. So to the ‘controlling interests’ of the primary legislation and, in part,³ the *Explanatory Document*, we bid farewell.

1 *Knight v Wedderburn* (1778) Mor 14545 is the leading case. Coal workers and salt workers were bound to their employers for life, a status that has often been said to be a form of slavery, but not accurately, since they were free in all respects other than the right to change employers without consent. Their special status was abolished by the Thirlage Act 1799, 39 Geo III cap lvi. On this whole subject see, most recently, D J Cusine, ‘Colliers, salters and fishermen of Auchmithie’ 2021 *Juridical Review* 137.

2 Cf para 127 of the *Explanatory Document*. For further discussion of trusts in the RCI regime, see below.

3 The *Explanatory Document* uses the word ‘controlling’ 16 times but also uses the word ‘controlled’ 12 times.

Does 'controlled' mean controlled?

The term 'controlled interest', though vital to the Regulations, is left by them undefined.¹ The term 'control' is indeed defined, as being 'where a person can direct the activities of another';² and yet the Regulations, though they include that situation, also include others, where there is in fact *no* control in the defined sense. In other words 'controlled interest' does not necessarily mean an interest subject to control.³

To illustrate:⁴ Alice and Beth are registered in the Land Register as owners of Blackmains. They hold as trustees. By a deed of assumption and conveyance, registered in the Books of Council and Session,⁵ they assume Clara as trustee, so that now there are three trustees. But Clara has not, or not as yet, completed title. Clara has just one vote among three, so one might naturally suppose that the RCI Regulations are not engaged – because Clara does not have control, or, to say the same thing the other way round, because the proprietors, Alice and Beth, are not controlled by Clara. Yet the RCI regime is in fact engaged. What the two proprietors have is now a 'controlled interest'. Clara is an 'associate' and must be registered as such in the RCI.⁶

To sum up: (i) the fact that there is nobody off-register who can control what happens does *not* necessarily exclude the RCI regime. The regime may still be engaged, depending on the precise circumstances. And (ii) if there *is* somebody off-register who can control what happens, that will often mean that the RCI regime is engaged, but far from always, because there is a major exception, which is where the registered owner is subject to *another* UK transparency regime, such as UK companies and LLPs, SCIOs and public authorities.⁷

Beneficial ownership/interest? Or decision-making role?

As already indicated, the RCI regime is about those behind the scenes who can affect *decision-making*, not about those who ultimately have the *economic benefit* (or 'beneficial ownership' or 'beneficial interest', to use fuzzy terms) in the property in question. The two categories may often coincide, of course, but need not do so. For example, Serafina is a trustee of a charitable trust. She is, however, not named in the title sheet of the property as one of the joint owners. As an off-register trustee she counts as an associate, and is therefore registrable as such,

1 The term is used in regs 3, 10 and 26, but there is no definition. And as already explained the term is not defined in the primary legislation for the simple reason that it is not used in the primary legislation.

2 Regulation 2(2).

3 It is only in one of the five parts of sch 1 – Part 1 – that, to engage the RCI regime, the associate has to be able to direct what the owner/tenant does. In the other four parts the RCI regime can be engaged even without the associate being able to direct matters.

4 This is not a one-off. As will be seen, the same point arises in other situations.

5 The Explanatory Notes at para 115 say that 'a trust deed will also not generally be publically available'. We have no statistics, but it has been the traditional good practice in Scotland for deeds of trust to be registered in the Books of Council and Session. Of course, it is not only Scottish trusts that may be relevant to ownership of immoveable property in Scotland.

6 Schedule 1 para 6(b)(i). For more on trusts and the RCI, see below.

7 See sch 2 to the Regulations, discussed later.

but, this being a charity, she has no economic interest in the property owned by the trust. She acts altruistically, *pro bono publico*. Thus the RCI regime is not about 'beneficial interest' or 'beneficial ownership'.

Another illustration can be seen in the provisions of the Regulations about overseas entities. These provisions are heavily influenced by the PSC regime without, however, following it in all respects. In the latter the regime is engaged if someone has either (i) more than 25% of the shares or (ii) more than 25% of the voting rights.¹ (Of course, these two will usually coincide, but not necessarily.) But in the RCI Regulations, only the second of these – voting rights – can make a person an associate.²

Two terms: (i) 'recorded person' ('RP') and (ii) 'associate'

The concept of the 'recorded person' ('RP') is of great importance in the RCI Regulations. So what is an RP? Regulation 2(1) says that the term 'recorded person' is 'to be construed in accordance with regulation 3(3)'. The provision cited – reg 3(3) – is, however, long and not wholly helpful. It says that an RP is a 'person recorded in the RCI'. That does not, a grumpy reader might point out, move matters many microns forward. After all, since 'associates' are *also* persons recorded in the RCI, the meaning of 'RP' threatens to become inextricable. Indeed, the whole point of the RCI is to identify associates,³ not owners or tenants, since owners/tenants are already identified by the Land Register.⁴ So if anyone is the 'recorded person' one might think it must be the associate. But, with the helpful assistance of a six-pack of Red Bull, it emerges that an RP is a person (i) who is registered as owner/tenant in the Land Register (or GRS) and (ii) who is also registered in the RCI as having an associate. From this it follows that if Prunella Puppet is owner of Greenmains, an estate in Wigtownshire, featured in *Landward*, and also has an associate, Belinda Big, *but* there has been no registration in the RCI, albeit that there *should* have been, then Ms Puppet is not, according to the definitional scheme, an 'RP'. She should be. But she isn't.

But the converse is, we would suggest, not true: that is to say, a person is an 'associate' (assuming that the various requirements are satisfied, as to which see below) *even if* there has been a failure to create the required entry in the RCI. Thus if Ms Puppet stays shtum and does *not* notify the Keeper, whether deliberately or otherwise, Ms Big is, notwithstanding, the/an associate, albeit that Ms Puppet is not an RP.⁵

As will be seen, the RCI regime is confined to the five types of case set out in the five parts of schedule 1 of the Regulations. All of them use the concept of 'associate'. But (i) they do not use the term in the same sense, though there

1 Companies Act 2006 sch 1A paras 2 and 3, as inserted by the Small Business, Enterprise and Employment Act 2015.

2 Regulation 12.

3 Subject to the system of 'security declarations', for which see below.

4 Or Register of Sasines.

5 A *koan*: can there be an associate without an RP, or vice versa? All over Planet Earth, Zen monasteries are, as we speak, adopting this as an unfailing path to swift and perfect enlightenment.

are some commonalities, and (ii) even within each part the term has varying meanings. A fairly detailed examination of these five types of case follows later.

More terminology: (i) ‘on behalf of’, (ii) ‘significant influence’, (iii) ‘control’, and (iv) ‘dealings’

At a number of places the RCI Regulations use the concept of someone holding property ‘on behalf’ of someone else. This concept is not defined. Seemingly (albeit surprisingly) it would *not* cover the case of X owning property as a bare trustee for Y: schedule 1 para 1(a) does not apply to trusts.¹ It would cover a non-trust contractual relationship, such as where X and Y have agreed that X is to be the owner as agent for Y. The term ‘nominee’ would cover such cases, but, with one exception, in the Regulations that term is not used.²

The expression ‘significant influence or control’ is used repeatedly in the Regulations.³ The definition is to be found in reg 2(2):

For the purposes of these Regulations, a reference to –

- (a) control is a reference to where a person can direct the activities of another ...
- (c) significant influence is a reference to where a person is able to ensure that another person will typically adopt the approach that the person desires.

Although that is the general definition, it is supplemented later in the Regulations. Three of the five parts of schedule 1 set out lists of examples of significant influence and control relevant to those particular types of case. These are Part 2 (partnerships),⁴ Part 3 (trusts)⁵ and Part 5 (overseas entities).⁶ These, being merely examples, are non-exhaustive. The three lists differ as among themselves. No examples are given in the Regulations for the other two parts of schedule 1, ie Part 1 (‘contractual or other arrangements with an individual’) or Part 4 (unincorporated bodies).⁷

‘Significant influence’ sounds rather modest, but as will be seen from the definition the meaning of the term is stronger than its everyday meaning would suggest. Someone with ‘significant influence’ calls the shots. How these two (‘control’ and ‘significant influence’) differ in practical terms is not obvious. Nor is it obvious just how, in practical terms, either of them differs from the ‘on behalf of’ concept. Be that as it may, the Regulations use the phrase ‘significant influence or control’ when they are referring to the situation where there really is a ‘controlled interest’ in the literal sense. But, as already said, there are many situations where someone is an ‘associate’ even where that person does not have ‘significant influence or control’.

¹ See sch 1 para 2(a) read with Part 3 of sch 1.

² The exception is in sch 1 para 13(1)(b).

³ Sometimes ‘significant influence and control’. The implications of this varying use of ‘and’ and ‘or’ are not clear to us.

⁴ Schedule 1 para 5(b).

⁵ Schedule 1 para 8(1)(b).

⁶ Schedule 1 para 15.

⁷ Part 4 does not in fact mention the term at all.

Where the Regulations use the ‘significant influence or control’ formula, which they do throughout schedule 1 except in Part 4 (unincorporated associations), they do so by saying that the test applies both (i) where the associate has the *right* so to act or (ii) does *in fact* so act. The formula in Part 1, for instance, is: ‘the associate has the right to exercise, or actually exercises, significant influence or control over the recorded person’s dealings with the land’.¹ Where no actual right exists, proof of *de facto* influence or control is likely to be difficult because, presumably, some sort of pattern of conduct would have to be established.

The formula just quoted uses the term ‘dealings’. What does that term mean in the Regulations? ‘[D]ealings with the land is a reference to disposing, creating real rights over, leasing or changing the use of the land.’² That is a pretty comprehensive definition, in the sense that there is not much that it excludes.³

As well as in Part 1 of schedule 1, the word ‘dealings’ is also used in this connection in Part 5 (overseas entities).⁴ It is not used in Part 4 (unincorporated bodies). In Part 2 (partnerships) and Part 3 (trusts) it is used not directly but by way of example. Thus in the case of trusts, ‘a person who is an individual who has the right to exercise, or who actually exercises, significant influence or control over the recorded person or the trust’ is an associate,⁵ without mention of ‘dealings’, but later in Part 3 we read that ‘examples of significant influence and control include, in particular, where a person ... has significant influence or control over the decision-making of a trustee or trust, particularly in respect of the trustee’s or trust’s dealings with the land’.⁶ Thus the role of ‘dealings’ in the conceptualisation of an associate seems to vary significantly between the five parts of schedule 1.

‘Entity’

The Regulations like the word ‘entity’, using it (or the plural form ‘entities’) 66 times. It is not a defined term. It probably does not include trusts.⁷ At certain places it is equated with ‘non-natural person’,⁸ though that latter term is also used in the Regulations *without* reference to ‘entities’.⁹ At one point the term is used to mean ‘any body corporate or other entity (whether incorporated or not) that is a legal person under the law by which it is governed’,¹⁰ but this is only with reference to Part 3 of schedule 1, not generally. We incline to the view that

1 Schedule 1 para 1(b).

2 Regulation 2(2)(b).

3 Painting the kitchen beige would be an example.

4 Schedule 1 para 12(b)(iv).

5 Schedule 1 para 6(b)(iii).

6 Schedule 1 para 8(1)(b)(vi). For partnership (Part 2 of the schedule) the parallel provision is para 5(b)(iii).

7 This is not stated, but would seem to be the implication inherent in the wording of sch 1 para 12(b)(iii).

8 Regulation 23(4), (6).

9 Regulations 2(1) and 11(2)(b).

10 Schedule 1 para 8.

when the Regulations use the word ‘entity’ what they mean is juristic person (legal person).

The Regulations also use at certain places the term ‘relevant entity.’¹ Unlike ‘entity’ this is a defined term: it means ‘any body corporate or other entity (whether incorporated or not) that is a legal person under the law by which it is governed, other than a person of a type listed in schedule 2’.² Schedule 2 lists entities that are exempt from the Regulations. Thus ‘entity’ seems broader than ‘relevant entity.’

‘Individuals’

In company law, a ‘person with significant control’ is necessarily an individual.³ Is that also the position in the RCI regime?⁴ As noted above, the *Explanatory Document* at para 3 suggests an affirmative answer. In fact the general answer is negative: an associate might be an individual, but equally might not. To this negative answer there are, however, three qualifications. (i) In Part 2 of schedule 1 (partnerships), there are provisions about an individual who can direct the actions of an ‘entity’ that is a partner.⁵ (ii) A parallel provision, relating to trusts, can be found in Part 3 of schedule 1.⁶ (iii) ‘Security declarations’ by associates can be made only by individuals.⁷

The notification duties of RPs and of associates

General

There are three types of information, or notification, duties imposed by the RCI Regulations. They are: (i) duties owed by the owner/tenant to the Keeper; (ii) duties owed by the owner/tenant to the associate; and (iii) duties owed by the associate to the owner/tenant. Each is policed by criminal penalties.⁸ But, to state what is obvious, these duties exist only if there is an associate, ie if the RCI regime is engaged. If there is no associate, none of these duties exists.⁹

RP-to-Keeper notification duties

If there is an associate, then the owner/tenant must notify the Keeper of that fact, giving the prescribed details.¹⁰ This is indeed the core obligation of

¹ Schedule 1 paras 3(b)(iii) and 6(b)(ii).

² This definition actually appears twice: sch 1 paras 5(a) and 8(1)(a).

³ See eg Companies Act 2006 s 790C(2).

⁴ As for owners/tenants, as opposed to associates, Part 1 of sch 1 is limited to the case where the owner/tenant is an individual. But there is no such limitation in the other parts of sch 1, and indeed Part 5 is about ‘overseas entities’ which definitionally are not individuals.

⁵ Schedule 1 para 3(b).

⁶ Schedule 1 para 6(b).

⁷ See Regulation 16(1).

⁸ For which see below.

⁹ To this there is a minor qualification: if ‘an associate ceases to be an associate’ the owner/tenant must notify the Keeper of that fact (reg 12).

¹⁰ Regulation 10.

the entire Regulations. Notice to the Keeper must be effected within 60 days.¹ The prescribed details, which are to be given in 'the specified form',² are as follows:³

In relation to the owner/tenant (ie the RP)

- (a) the person's name, address and, if applicable, registered number;
- (b) the title number of the land or, if not on the Land Register, a sufficient description; and
- (c) the capacity in which the person owns/tenants the land (eg as an individual or as a trustee).

In relation to each associate who is an individual

- (a) the associate's name, contact address, and date of birth;
- (b) any unique reference number allocated to the associate by the Keeper;
- (c) the date on which the associate's association with the person who owns or tenants the land was formed, or a statement that such date is not known; and
- (d) if a security declaration (for which see below) has effect in respect of an associate, a copy of that declaration.

In relation to each associate who is a non-natural person (except for those listed in schedule 2)

- (a) the associate's name, registered office (or equivalent), and registered number (if applicable);
- (b) any unique reference number allocated to the associate by the Keeper; and
- (c) the date on which the associate's association with the person who owns or tenants the land was formed, or a statement that such date is not known.

In relation to each associate who is a non-natural person listed in schedule 2

- (a) the associate's name, registered office (or equivalent), and registered number (if applicable);
- (b) any unique reference number allocated to the associate by the Keeper;
- (c) the date on which the associate's association with the person who owns or tenants the land was formed, or a statement that such date is not known; and
- (d) the paragraph of schedule 2 that applies to the associate.

Obviously, the associate will need to be asked to provide some or all of this information. Indeed, reg 10(5) imposes an obligation on the RP to 'take reasonable steps to verify the accuracy of the associate's required details with the associate', a corresponding duty to provide the information being imposed on the associate by reg 15(2). In addition, the associate must be informed of the right to make a

¹ Regulation 10(7).

² The Keeper has the role of specifying forms: see reg 24.

³ Regulations 10 and 11.

security declaration, and of the associate's duty, under reg 15, to notify the RP about changes to the associate's required details.

There is also a list of updating events that the owner/tenant must notify to the Keeper.¹ The main updating events are (i) where details about an associate change, such as a change of address, and (ii) where the associate ceases to be an associate, eg, where an uninfert² trustee resigns. Again, notice to the Keeper must be effected within 60 days.³

Amending the RCI

Changes to entries in the RCI are called 'amendments'.⁴ These will typically result from the recorded information becoming out of date, but could also be needed where the original information was inaccurate from the outset, as opposed to becoming inaccurate. Amendments will usually be triggered by the recorded person effecting the updating duties just mentioned. But the Keeper has a general power to amend in the event of 'the Keeper ... becoming aware of an inaccuracy in the RCI'.⁵ So the Keeper's amending power is not dependent on the performance by the RP of the updating-information duty, though of course in practice it will, no doubt, be uncommon for the Keeper to become aware of inaccuracies in other ways. We quote from the *Explanatory Document*:⁶

Regulation 5 does not prescribe how the Keeper may become aware of an inaccuracy but this could be as a result of being notified of an inaccuracy by a third party. The Keeper may correspond with persons to help her reach a conclusion. It is not, however, envisaged that the Keeper would investigate suggestions that there was or might be an inaccuracy in the register if the information provided to her did not disclose one.

Within the provision about amendment (reg 5) there is a slight tension between (i) the Keeper's duty to amend following the receipt of an updating notice and (ii) her duty to amend when becoming aware of inaccuracy. What if the Keeper

¹ Regulation 12.

² We apologise to purists for pre-feudal-abolition terminology. For non-purists we are planning to set up a FeudalWorld theme-park, where nostalgic juridical tourists can enjoy that old-time feel-good feudal frisson, collecting, when leaving, their very own exclusive Charter of Novodamus, handwritten, by quill pen, on parchment, entirely in Latin.

³ Regulation 12(2). But the provision is not free from difficulty. 'The notice must be given (a) in a case where the associate has notified the recorded person of the event, as soon as practicable after receipt of the notification, or (b) in any other case, within 60 days beginning with the date on which the event occurred.' How can the RP be obliged, within 60 days, to inform the Keeper of a change of which the RP is unaware? However reg 12(4) contains a 'reasonable excuse' defence, so in practice the problem may not exist.

⁴ See generally reg 5.

⁵ Regulation 5(2)(c). See para 34 of the *Explanatory Document*: 'Regulation 5(2)(c) requires the Keeper to make such amendments to the Register as they considers appropriate if they "become aware of an inaccuracy" in the Register.' (The text quoted here may itself be in need of amendment.) Paragraph 35 says that this is where there is a 'clear' inaccuracy, which perhaps echoes the 'manifest' inaccuracy standard to be found in the Land Registration etc (Scotland) Act 2012 s 80. We would note however that the word 'clear' does not appear in the Regulations (nor does the word 'manifest').

⁶ Paragraph 36.

knows that the updating notice that she has received is inaccurate? Regulation 5 seems to say that the Keeper must both follow the notice and not follow it.

A logical problem?

Returning for the moment to the core duty of the owner/tenant to notify the Keeper of the existence of an associate, there is, we think, a difficulty in the definitional scheme. Regulation 10 says:

This regulation applies to a person who is a recorded person ... A person to whom this regulation applies must provide the Keeper with ... in relation to each associate the required details ...

But an owner/tenant becomes a 'recorded person' only once registration in the RCI has been carried out. As already noted, an owner/tenant who has an associate but who has not notified the Keeper is not a 'recorded person'. So, on the one hand, the notification duties imposed by reg 10 are imposed on recorded persons. Yet on the other hand such persons can be recorded persons only if they have *already* notified the Keeper. The logical difficulty could be put another way: suppose that an owner/tenant, Jane, has an associate but does not notify. Is there a breach of reg 10? How could there be, when reg 10 applies only to recorded persons, and Jane is not a recorded person?

In practice, of course, a court might (and should) rescue the definitional scheme by adopting a purposive approach to interpretation. We therefore confine this issue to the present section, and otherwise ignore it.

RP-to-associate notification duties

After an RP notifies the Keeper, the RP must notify the associate that the Keeper has been notified.¹ This must be done within seven days of the date of notification to the Keeper.² This is perhaps a tight time limit, especially where the associate is furth of the UK. Nothing is said about how the notice is to be given. Presumably s 26 of the Interpretation and Legislative Reform (Scotland) Act 2010 is applicable, allowing a range of delivery methods including registered post and, with prior agreement, delivery by electronic means such as email. One reason why the associate must be notified is that associates are under ongoing obligations, so that they need to be informed of their status.

Associate-to-RP notification duties

Associates are subject to three sets of duties to notify the RP. One is the reactive duty to respond to requests for relevant information, as already mentioned.³ The second is a proactive duty to notify the RP of relevant changes.⁴ The third is as follows:⁵

¹ Regulation 13.

² Regulation 13(3).

³ Regulation 15(1), (2) and also (5), (6).

⁴ Regulation 15(3), (4).

⁵ Regulation 14(1), (2).

[I]f (a) a person ('A') knows, or reasonably ought to know, that A is an associate of a person ('B') who owns or tenants land, and (b) A has not received a notice under regulation 13¹ within 67 days of becoming such an associate [then] A must, as soon as reasonably practicable, give notice to B of the fact that A is an associate of B in respect of the land ...

As will be seen, this provision is applicable only if there has been a failure by the RP to notify the associate.

Some notes on notices

The duties owed by RPs to associates and by associates to RPs must be complied with even in cases where they are arguably pointless. For example, X and Y are registered as owners in the Land Register. They are trustees and they assume Z, but, for the time being at any rate, Z does not complete title. Notice is then sent to the Keeper, but the seven-day notice by X and Y to Z required by reg 13 is omitted. X and Y are then criminally liable.

Next, evidence of notices by RPs to associates and by associates to RPs should be retained, by way of defence against prosecution. How long for? It is difficult to discern any applicable time limit. So: indefinitely.

'The notice [by the owner/tenant to the Keeper] must be given within the period of 60 days beginning with the day on which the associate becomes an associate of the person.'² The Regulations do not say much about how this date – the date when the 60-day clock begins to tick – is to be determined. A common case may be where someone buys property, and there is an associate in the background. Does the clock begin to tick when missives are concluded? When title is completed by registration in the Land Register? Some other time? We take the view that it must be the date of completion of title.

In some cases the trigger event will not be the acquisition of the property, but a change behind the scenes. For instance, Callixta and Caspar are registered in the Land Register as owners of a property, as trustees. In May 2023 they assume Cassandra as a third trustee, but the title sheet is not changed, meaning that Cassandra is now an associate. RCI registration is necessary. The 60-day clock begins to tick on the day of her assumption.

The Keeper is directed to wait at least 30 days after receiving the information before entering it in the RCI.³ The reason? 'This will allow a standstill period for associates to be able to apply for a security declaration and for the Keeper to make a decision prior to any information appearing on the register.'⁴ 30 days is the minimum. The legislation does not set out any maximum. Nor does it even have a 'without undue delay' provision. So someone searching the RCI cannot know how up to date it is. Or isn't. This 30-day delay applies only to initial

¹ That means the notice that the RP is supposed to send to the associate within 7 days after notifying the Keeper.

² Regulation 10(7).

³ Regulation 4(2).

⁴ *Explanatory Document* para 30.

registrations. The updating duty is not so qualified: in such cases the Keeper must act 'as soon as reasonably practicable'.¹

What is an associate?

The five types of case

Now we come to what is perhaps the most difficult issue: when is the RCI regime engaged? Or, to put the same question in other words: when is there an associate in respect of a property? If there is an associate then the regime is engaged and, conversely, if there is no associate then the regime is not engaged.

In this area the conceptual architecture of the RCI Regulations is far from simple. The best starting point is reg 26(1),² which says:

[T]hese Regulations apply in relation to –

- (a) a person ('RP') who –
 - (i) owns or tenants³ land,
 - (ii) is not a person of a type listed in schedule 2,⁴ and
 - (iii) in relation to that land, is associated with a person to whom a Part of schedule 1 applies,
 whether RP became such an owner or tenant, or the association with the person to whom a Part of schedule 1 applies was formed, before or after the commencement of these Regulations, and
- (b) a person who is an associate of RP, whether the association was formed before or after the commencement of these Regulations.

Schedule 1 has five parts, listing five types of situation, and it is to these five types that the RCI regime applies. These have sometimes been called 'examples' of where the RCI regime will apply, or, to say the same thing, that the RCI regime 'includes' these cases, but we think that that is not an accurate way of expressing matters. As we read the Regulations, it is *only* in these five types of case that the RCI regime is applicable.

Each of the five types of case defines 'associate' in its own way: thus it is essential, in perusing the Regulations, to bear in mind that 'associate' does not have a single unitary meaning. Nor, as will become apparent, is there a unitary meaning even within the various cases. But if, under one or other of these five types of case, there is an associate, then the other provisions of the Regulations about 'associates' and about the requirement for RCI entries become applicable.

Having said that, in all five types of case there occurs one kind of associate which is much the same across all five types, namely where the person (the associate) calls the shots⁵ – albeit that this concept is not expressed in exactly the same way in all five parts of the schedule. In Part 1 this 'calling the shots'

¹ Regulation 6.

² Perhaps it would have been better had this provision appeared nearer to the beginning of the Regulations.

³ One must here bear in mind that only long leases are relevant.

⁴ That is to say cases where another UK transparency regime is applicable.

⁵ See the discussion above of the terms 'on behalf of', 'significant influence', and 'control'.

situation is the only one contemplated. In the other four parts it is only one kind of associate, and there are others.

Each of the five types of case, as well as having its own definitions, has its own list of exceptions. Furthermore, there is, in schedule 2, an overarching list of exceptions, so that if one of the items in the schedule 2 list is applicable, then, notwithstanding what any of the five schedule 1 categories may say, the RCI regime is not engaged.

Singular or plural?

Paging through the Regulations one gets the impression that what is contemplated is *one* recorded person and *one* associate. But is that right? Or could there be more than one? In neither the *Explanatory Document* nor the explanatory note is there anything on the matter.¹ The use of the singular² in legislative drafting is, of course, not conclusive: 'In an Act of the Scottish Parliament or a Scottish instrument (a) words in the singular include the plural, (b) words in the plural include the singular.'³

As for the recorded person, it can hardly be doubted that there can be more than one. An obvious case would be where land is registered to Peter, Paul and Mary, who hold as trustees, and there is an off-register person who (for one reason or another⁴) is to be regarded as an associate, so that the RCI regime is engaged. Peter, Paul and Mary should all be entered in the RCI as recorded persons.

Could there be more than one associate? That is more difficult. In general, yes. The Regulations in certain places indicate that at least in some types of situation there can be more than one associate. One is reg 3(3)(d) where it is said that the duty of the owner/tenant exists in relation to 'each associate'. Another is in para 19 of schedule 1 where, anent overseas entities, it is provided that: 'If rights held by a person or rights held by another person are the subject of a joint arrangement between those persons, each of them is treated for the purposes of this Part as holding the combined rights of both of them.' Whatever this may mean (and we are not sure what it means), it implies that, in some situations at any rate, there can be more than one associate. And para 12(b)(i) of schedule 1 says that someone who holds more than 25% of the voting rights in an overseas entity is an associate, which implies that if Jack and Jill each holds 26% they will both be associates. A further example is reg 10(9)(a)(i) where the word is used in the plural in what seems to be a substantive sense. Another example, of some significance, where there can be more than one associate occurs in connection with trusts. As will

1 Though the explanatory note says: 'There is a duty on the person who owns or tenants land ... to provide information about the persons who exercise significant influence or control over them (the associate).' 'Persons' is plural, but it is doubtful whether any inference can be made from this grammatically tottering sentence.

2 The Regulations do sometimes use the plural, ie 'associates', but only grammatically not substantively, though reg 10(9)(a)(i) seems an exception.

3 Interpretation and Legislative Reform (Scotland) Act 2010 s 22. This is different from s 6 of the Interpretation Act 1978 (governing London legislation) which has the proviso 'unless the contrary intention appears'.

4 Schedule 1 Part 3.

be seen below, an uninfert trustee is deemed to be an associate, and obviously it is possible for there to be more than one uninfert trustee.

But there may be cases where probably (but not certainly) there can be only one associate. One species of associate who makes an appearance in all five parts of schedule 1 is the person with significant influence or control.¹ We incline to think that an associate of this kind probably must be singular, though admittedly there would be scope for argument. In this kind of case the associate has to be able to direct operations, and it is not easy to see how that could be done by more than one person, any more than the Royal Scottish National Orchestra when performing Beethoven's seventh symphony² could be simultaneously under the batons of two or more conductors.

There is a connected question. Suppose that several people could, were they to join forces and act in unison, call the shots. Would that make them associates? This question arises in particular in connection with trusts and with overseas entities. Thus with trusts, if all the beneficiaries were to band together they could (subject to certain ifs and buts) wind up the trust. Likewise the shareholders in an overseas entity, though each holding only, say, 1% of the company's share issue, could do what they wished if acting in unison. That is to say, the beneficiaries of a trust collectively could control the trust³ and the shareholders of an overseas entity collectively could control the entity. Does that make them associates? Such a view cannot be correct. As far as overseas entities are concerned, it would render the 25% rule (mentioned above) meaningless. Something comparable is true of trust beneficiaries, and we will return to this point when we discuss trusts below.

Conceptual asymmetry

Schedule 1 lists the five types of case in which the RCI regime is engaged. It might be expected that these five types would be based on either (i) types of owner/tenant or (ii) types of associate. But that is not so. The taxonomy is mixed. Some types are based on who the owner/tenant is, and others are based on who the associate is. For instance Part 5 is headed 'Overseas entities' and covers the case where the owner/tenant is, for example, a Cayman Islands company. The gateway for registrability is, therefore, the identity of the owner/tenant. But Part 4 is headed 'Unincorporated bodies' where the gateway for registrability is not the nature of the owner/tenant (for an 'unincorporated body' cannot appear in the Land or Sasine Register as owner or tenant), but what lies behind the owner/tenant. So in schedule 1 there is some conceptual asymmetry. Unsurprisingly, the asymmetry seems to be causing some confusion, with some supposing that schedule 1 is about cases where the owner/tenant is an individual, a partnership,

1 Though, as already mentioned, the statutory language is not identical across the five parts of sch 1.

2 Or, applying ss 22 of the Interpretations and Legislative Reforms (Scotland) Acts 2010, the Royal Scottish National Orchestras performing the Seventh Symphonies by the immortal composers Beethovens. Unlike Beethoven 7, however, some works are actually designed to have two conductors, such as the *War Requiem* of Benjamin Britten.

3 There are some important qualifications, but we need not explore them here.

a trust, an unincorporated body, or an overseas entity. As explained, that would be a misconception.

We now examine in detail the five parts of schedule 1.

Part 1: contractual or other arrangements with an individual

Ambit

Part 1 of schedule 1 is applicable, according to para 1, where:

the person who owns or tenants the land (the recorded person) is an individual who has entered into a contract or other arrangement under which –

- (a) the recorded person owns or tenants the land for or on behalf of the associate, or
- (b) the associate has the right to exercise, or actually exercises, significant influence or control over the recorded person's dealings with the land.

This covers the nominee case.¹ Cyndie Celeb, the girl-band star, or Brutus Brutal, the dictator, buys a picture-postcard property in Argyll, but, for reasons of privacy or secrecy, takes title in the name of a nominee. The RCI regime is engaged. With reference to (a), the nominee 'owns ... the land for or on behalf of' Cyndie or Brutus. Equally, the property is 'controlled' by Cyndie or Brutus.

Neither in the Regulations themselves nor in the *Explanatory Document* is there an indication of why, in Part 1 of schedule 1, associates are limited to 'individuals'. The explanation must be that, in the case where the owner/tenant is a UK company, LLP etc, the RCI regime is not engaged² whilst if the owner/tenant is an 'overseas entity' Part 5 of schedule 1 will apply. Assuming that to be correct, the restriction to 'individuals' is strictly speaking unnecessary, but should not be criticised on that account.

What the term 'other arrangement' covers is unclear. The obvious answer would be a trust, given that nominee cases are usually trusts (bare trusts), but that can hardly be the right answer, because this type does not apply where 'the person's contract or arrangement with the individual is one to which another Part of this schedule applies',³ and trusts are covered by Part 3 of schedule 1. The heading of Part 1, combined with the wording of para 1(a), would indicate that an 'arrangement' may consist simply in *de facto* influence or control.

Exceptions

Part 1 has a list of exceptions. The inclusion of some seems hardly necessary. For instance it is provided that the holder of a standard security is not, as such, an associate.⁴ It is difficult to see how such a person could, as such, come near to

¹ Though that word is not used in the Regulations (except once, in relation to overseas entities, as to which see sch 1 para 13(1)(b)).

² Because of sch 2.

³ Schedule 1 para 2(a).

⁴ Schedule 1 para 2(b)(i).

meeting the ‘significant influence or control’ test.¹ The list in Part 1 is long. The other four parts have their own lists of exceptions, but they are shorter. There are overlaps: for instance the ‘standard security’ exception is to be found in all five parts, as is the ‘paid professional advisor’ exception. Something more will be said below (after the five parts have been discussed) about the way that the exceptions in the five parts are structured.

The other listed exceptions in Part 1 are as follows:²

- A landlord. (For more on leases, see below.)
- A co-owner. (More is said about ‘family’ cases below.)
- A buyer in the period between conclusion of missives and completion of the buyer’s title. This exception is limited to missives. Sale by roup is not mentioned, nor is a contract of sale constituted by means of a minute of agreement. Nor is anything said about the position between the date of settlement and the date when the buyer completes title. In such cases the state of affairs is typically short-lived, and less than the 60-day time limit. Yet occasionally it may be longer. It is difficult to offer a definite view about such cases.³
- The holder of a power of attorney where ‘the person has been appointed under a power of attorney granted by the individual [ie the owner/tenant]’ under s 15 of the Adults with Incapacity (Scotland) Act 2000.⁴ Ordinary powers of attorney are not mentioned. (For more on this issue, see below.)
- A guardian under the Adults with Incapacity (Scotland) Act 2000. Part 1, however, is about cases where the owner ‘has entered into a contract or other arrangement’ with another party, and so it is hard to see how a guardianship order needs to be excepted, since it is not something an owner enters into.
- Where ‘the person’s contract or arrangement with the individual is one to which the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 apply’.⁵
- An occupier of a property under a service agreement.⁶
- A proper liferenter. Thus if Jane is the owner and Kate has a proper liferent, Kate is not Jane’s associate. Once again, it is not easy to see how Kate could count as an associate anyway. A proper liferenter has, to say what

1 For that test, see above. It must be borne in mind that ‘significant influence’ means something stronger than what the phrase would suggest in ordinary speech.

2 Schedule 1 para 2.

3 If a disposition contains a trust clause, that would strengthen the case for saying that the grantee is the grantor’s associate.

4 In this context it is to be noted that such powers of attorney are publicly registered: see s 19 of the Adults with Incapacity (Scotland) Act 2000.

5 It cannot often happen – we suspect that it never does happen – that title to a timeshare development is vested in an individual.

6 As with so many items on the list, this seems odd. When does it ever happen that a service agreement occupier directs the ‘dealings’ of the owner, bearing in mind the definition of ‘dealings’?

is obvious, extensive rights under Scots property law, but those rights do not include the power to direct 'dealings' by the owner.¹

- The other party to an agreement on financial provision on divorce.
- The other party to a cohabitation agreement. Such agreements remain uncommon, and, where they do occur, seldom give rise to 'significant influence or control' over the owner's 'dealings'.
- The holder of a personal real burden over the land. Again, it is hard to see how the holder of a personal real burden could be said to have 'significant influence or control' over the 'dealings' of the owner.
- A licensee with 'the right to use or exploit land'.
- The holder of a rent-free occupancy right in the land. Once again, it is not easy to see how this could engage the RCI regime anyway.

Family cases

As noted above, where property is co-owned neither party is, as such, the associate of the other. So if Mr and Mrs McGlumphrey co-own a property, neither is (in the normal situation at any rate)² the other's associate. The same would be true of co-ownership by cohabitants or by civil partners. Having said that, the exception³ is puzzling, because an associate is someone *off*-register, and if Mr and Mrs McGlumphrey co-own a property then they are both *on*-register. Perhaps, as with some other exceptions, this is a 'for-avoidance-of-doubt provision'.

What if title is held by just one of the spouses (cohabitants, civil partners)? For instance Gina owns a house and marries Harry, who moves in with Gina, but she does not transfer a half-share to him. Might he be an associate? That would be possible, though unlikely. It would be the case if Harry had 'significant influence or control'. That would go beyond being (as would happen in a typical marriage) a joint decision-maker about the family home. As noted earlier, 'significant influence ... is a reference to where a person is able to ensure that another person will typically adopt the approach that the person desires'.⁴ So if Gina 'typically adopts the approach' that is 'desired' by Harry, then Harry would indeed be an associate, and the RCI regime would therefore be engaged. But, even if it could be proved that Gina left all decisions about money and property to her husband, that would be unlikely to establish that he is an 'associate' because of those two key words 'dealings' and 'typically'. It is not likely that there will be many 'dealings' with the house during the marriage – often none at all.

¹ Thus, for instance, Kate cannot either require Jane to dispoise or forbid her to dispoise. If Jane dispoises to Linda, the disposition is valid without Kate's consent, though of course Kate's rights as *liferentrix* are unimpaired by the disposition.

² It is possible that Mr McGlumphrey is controlled by Mrs McGlumphrey, for one reason or other: this could be a sch 1 Part 1 case. But it would be unusual. If they were acting as nominees for someone else then the RCI regime would be engaged.

³ Schedule 1 para 2(d).

⁴ Regulation 2(2)(c).

Leases

As already noted, the Regulations say that Part 1 does not apply where ‘the person is the landlord of the individual’.¹ By ‘person’ is meant the potential associate, while the ‘individual’ is the tenant under a registered lease. This exception thus applies to the situation where X owns property and Y is the tenant (who in this context must be an individual) under a registered lease. In that situation X, the landlord, is not Y’s associate, notwithstanding the degree of control that the terms of the lease may allow to the landlord. In the case of a registered lease, there are of course two separate parties in the Land Register (or GRS), landlord and tenant. Here we are considering only the tenant.

What if the tenant is not an individual but a company or other entity? In that event Part 1 of schedule 1 is in any event inapplicable, because it applies only to the situation where the owner/tenant is an individual.

Turning the case upside-down, might a tenant be deemed an associate of the landlord? This is not listed as one of the exceptions in Part 1 of schedule 1. But we think that the answer must be negative.² Matters become trickier if the tenant has a purchase option. We regard that as unclear.

Powers of attorney

As mentioned above, the Regulations provide that where there is a power of attorney under s 15 of the Adults with Incapacity (Scotland) Act 2000 the holder of the power is not an associate. Other types of power of attorney are not mentioned. So what about other types of power of attorney? It could be argued (*exclusio unius exclusio alterius est*) that other types of power of attorney are therefore *not* excluded, so that the holder of the power is an associate. But equally there would be scope for arguing that an agent (or mandatory, or holder of a power of attorney) for an owner/tenant merely has *power* to act but does not direct the owner/tenant how to act, and that accordingly the ‘significant influence or control’ test is not satisfied. In a mandate or power of attorney (etc) situation it is (in the normal case) the principal/constituent who has ultimate control.³ To put the same point in other words, an agent/mandatory has power to act for the principal, but cannot dictate to the principal how the principal is to act: the principal remains free to act as he or she sees fit, except in so far as the agent has already acted so as to bind the principal. We cannot offer a confident solution to this riddle. It remains to add that some powers of attorney are very limited in their scope (eg power to execute a particular document) and so on any view would not engage the RCI regime.

1 Schedule 1 para 2(c).

2 Though a systemic problem with the exceptions applies here: it can be argued that the express exception of landlord-to-tenant influence (etc) means that tenant-to-landlord influence (etc) is not excepted.

3 In a continuing power of attorney that would not be the case after incapacity has intervened. But the exception applies not only post-incapacity but also pre-incapacity.

Part 2: partnerships

Ambit

Part 2 of schedule 1 is about partnerships. Its applicability is set out in para 3:

This Part applies to a person (the associate) where –

- (a) the person who owns or tenants the land (the recorded person) –
 - (i) does so as a partner in a partnership or on its behalf or
 - (ii) is a partnership, and
- (b) the associate –
 - (i) is a general partner of the recorded person, but is not registered as owning or leasing the land,
 - (ii) is a general partner of another partnership which is (of itself) a partner of the recorded person,
 - (iii) is an individual who has significant influence or control over a relevant entity which is partner of the recorded person,
 - (iv) is an individual who has the right to exercise, or who actually exercises, significant influence or control over the recorded person or a partnership in which the recorded person is a partner.

There are four types of partnership in Scots private law: (i) ordinary partnerships, governed by the Partnership Act 1890, (ii) limited partnerships, governed by the Limited Partnerships Act 1907, (iii) LLPs, governed by the Limited Liability Partnerships Act 2000, and (iv) civil partnerships, governed by the Civil Partnership Act 2004. At a first reading of para 3 it might seem that it is (ii) that is meant, because it is only in the limited partnership legislation that the term ‘general partner’ is used (by way of contrast with a limited partner). However, from context it is clear that in fact what is meant is *both* (i) and (ii). In respect of (ii), it is true that a limited partner could not normally be an associate because such a partner must not participate in decision-making.¹ But a limited partner could breach that rule, and moreover the RCI could also be engaged where a general partner’s name does not appear in the Land Register, or GRS, as with ordinary partnerships, for which see below. As for (iii), the LLP, that is expressly excluded in schedule 2.² Obviously category (iv), civil partners, is not relevant.

¹ Limited Partnerships Act 1907 s 6(1).

² Schedule 1 para 4(2). It remains to add that certain ordinary partnerships, created with unusual structures, are also excluded from the scope of Part 2 of schedule 1. Schedule 2 para 4(1) says that ‘[a]n eligible Scottish partnership within the meaning of regulation 3(2) of the Scottish Partnerships (Register of People with Significant Control) Regulations 2017’, SI 2017/694, is exempted from the RCI regime. So what then is an ‘eligible Scottish partnership’? Regulation 3(2) of the 2017 Regulations says: ‘An “eligible Scottish partnership” is (a) a limited partnership registered in Scotland (a “Scottish limited partnership”), or (b) a general partnership constituted under the law of Scotland, during any period in which it is a qualifying partnership (a “Scottish qualifying partnership”).’ So what then is a ‘Scottish qualifying partnership’? Regulation 2 of the 2017 Regulations says that it ‘has the meaning given in regulation 3 of the Partnerships (Accounts) Regulations 2008’, SI 2008/569. The latter provision is too long to be quoted here but in practical terms it means a partnership which, though nominally an ordinary partnership, has in substance limited liability because the partners themselves have, ultimately, limited liability.

The details of Part 2 of schedule 1 are complex. Two main types of situation are covered: (i) where not all the partners have a completed title,¹ and (ii) where someone who is not a partner has influence or control. The conceptual structure here is the same as for Part 3 cases (trusts), discussed below.

As for (i), Part 2 of schedule 1 applies where (a) land is held by a partnership, (b) not directly in its own name² but rather by partners on its behalf, and (c) the persons registered as having title are not all the partners.³ For instance, Messrs Stair & Erskine WS, a partnership, under the Partnership Act 1890, have their offices in Edinburgh's Charlotte Square. Title is in the name of those respected but now elderly members of the Edinburgh establishment, James Dalrymple and John Erskine. The firm has assumed a third partner, the young and dynamic George J Bell. In this case the latter, being a partner, but not being registered as a joint owner, is an associate, so that the RCI regime is engaged.⁴ It may be said that the 'interest' is not 'controlled' by Mr Bell, since at partnership meetings he has just one vote out of three, but, as mentioned above, that does not matter. In the Regulations 'controlled interest' does not mean controlled interest.

As for (ii), it is provided that someone also counts as an associate if he or she is an individual with significant influence or control etc.⁵ This provision has a precise match in Part 3 (trusts), and a little more will be said in that place (below).

To what extent Part 2 is necessary may be doubtful. Where partners hold property on behalf of a firm, that is normally – possibly always – a trust, in which case it is covered by Part 3 of schedule 1.

Exceptions

Part 2 has a list of exceptions, far shorter than the corresponding list in Part 1. The main exceptions are creditors and professional advisors: the wording here is the same as in Part 1.

Part 3: trusts

Ambit

As with Part 2, the details of Part 3, about trusts, are complex. The scope is set out in para 6:

This Part applies to a person (the associate) where –

- (a) the person who owns or tenants the land (the recorded person) does so as a trustee of, or otherwise on behalf of, a trust, and

¹ Schedule 1 para 3(b)(i).

² Which is competent (see s 70 of the Abolition of Feudal Tenure etc (Scotland) Act 2000) but, as far as we are aware, is unknown in practice.

³ Schedule 1 para 3(b)(i).

⁴ If, when Bell was assumed, there had also been a registered disposition by Stair and Erskine in favour of themselves and Bell, the result would have been that all three would have been on the title, and in that case there would have been no associate, so that the RCI regime would not have been engaged.

⁵ Schedule 1 para 3(b)(iii), (iv); and see also para 5(b) for examples of significant influence and control.

- (b) the associate –
 - (i) is a trustee of the trust, but is not registered as being the owner or tenant of the land,
 - (ii) is an individual who has significant influence or control over a relevant entity which is a trustee of the recorded person,
 - (iii) is an individual who has the right to exercise, or who actually exercises, significant influence or control over the recorded person or the trust.

Two main types of situation are covered by this provision: (i) where not all the trustees have a completed title, and (ii) where someone who is not a trustee has influence or control. We begin with the first.

Trustees without a completed title (uninfert trustees)

Suppose that heritable property is held in trust, and only some of the trustees hold title in the Land Register (or Register of Sasines). For example, the original trustees of the Smith Family Trust were Kirsty and Donald. They took title to the land in question. After some years they assumed Helena as a co-trustee. But Helena has never completed title. In that case Helena is an associate and so the RCI regime is engaged.¹ This is the case regardless of whether or not the title discloses the fact of trust.

Is Helena, who has not completed title, under the obligation to notify the Keeper? Seemingly not. This may seem obvious, since the duty to notify the Keeper is incumbent on owners, and she is not an owner, because, to use old money, she is uninfert. (But, as will be seen shortly, in one type of case an off-register trustee may indeed be under such a duty.)

What if, when Helena was assumed, Kirsty resigned? Since the deed of assumption and conveyance (and resignation) was not registered in the Land Register,² Kirsty still appears in the Land Register as joint owner. Is she still an owner with the result that she has, for instance, an updating duty to the Keeper? The answer is probably in the negative. When a trustee resigns, the title of that trustee vanishes,³ and someone without a title is not an owner. If that view is right, then if the RCI shows her as an RP that will be an inaccuracy,⁴ and her name should be removed.⁵

To repeat: if all the trustees have a completed title then Part 3 is not engaged.⁶ But there are two qualifications to this, one substantive and one technical. The substantive one is that if the trust is for an 'unincorporated body' then the RCI regime may be engaged even though all the trustees are infert: this is the area

¹ Schedule 1 para 6(b)(i).

² Of course it may have been registered in the Books of Council and Session. But such registration is not relevant.

³ By resignation 'the trustee shall be thereby divested of the whole property and estate of the trust, which shall accrue to or devolve upon the continuing trustees or trustee without the necessity of any conveyance or other transfer by the resigning trustee': Trusts (Scotland) Act 1921 s 20.

⁴ Though not a defined term, this expression is used several times in the Regulations.

⁵ This is the case, referred to in reg 12, of 'a recorded person ceasing to be a person to whom regulation 10 applies'.

⁶ Unless, of course, there is a non-trustee with string-pulling power.

covered by Part 4 of schedule 1, discussed below.¹ The technical qualification is this. Take the example given above where the original trustees of the Smith Family Trust were Kirsty and Donald, and on 1 May 2023 they assume Helena. Suppose that on 29 May the deed of assumption and conveyance is registered in the Land Register, so that now the Land Register shows Kirsty and Donald and Helena as joint owners. Does that mean that the RCI regime is not engaged? The obvious answer is ‘yes’. But is that right? As soon as the deed of assumption and conveyance was executed, Helena became an off-register trustee. The regulations say that the RCI regime was engaged at that moment. It is true that there is a grace period of 60 days, beginning on 1 May. But all that means is that the notification needs to flutter down on to the Keeper’s front doormat not later than 1 May + 60 days. The fact that Helena completes title within that period is not relevant – reading the Regulations literally. We think that in this respect the Regulations would be better read non-literally, ie that provided that the new trustee completes title within 60 days of assumption the RCI regime is not engaged.

Non-trustees with significant influence or control

We now proceed to consider the second type of case, namely where a non-trustee has significant influence or control. The Regulations provide that ‘an individual who has the right to exercise, or who actually exercises, significant influence or control over the recorded person or the trust’ is an associate.² The most important question here is: might beneficiaries be associates? On this topic the *Explanatory Document* says:³

The Regulations do not require registration of beneficiaries as a matter of course. This is because a purely financial interest does not equate to engagement in the governance of a landowning body or entity.

In other words, a beneficiary is not an associate merely by reason of being a beneficiary. But as in the other parts of schedule 1,⁴ somebody may be an associate on the basis of pulling the strings,⁵ and that somebody may happen to be a beneficiary. Practical examples are not easy to think of. One possibility concerns bare trusts, where the trustee simply holds for the benefit of one other person. That situation is not covered by Part 1 of schedule 1, as we have seen.⁶ Is it covered by Part 3? Where there is a bare trust the beneficiary can insist that the trustee should denude.⁷ Hence in a bare trust the beneficiary will, normally at any rate, count as an associate.⁸ In a bare trust for an infant,⁹ the beneficiary

¹ But it should be assumed that in cases of unincorporated bodies, Part 4 applies and Part 3 does not. As will be seen, there are oddities in Part 4, which seem to mean that some cases involving unincorporated bodies do not fall under that part, but under Part 3.

² Schedule 1 para 6(b)(iii).

³ Paragraph 127.

⁴ Except Part 4.

⁵ Schedule 1 para 6(b)(ii), (iii).

⁶ See para 2(a) of sch 1.

⁷ The leading cases are *Miller’s Trs v Miller* (1890) 18 R 301 and *Yuill’s Trs v Thomson* (1902) 4 F 301.

⁸ Cf para 123(iv) of the *Explanatory Document*.

⁹ Similar remarks would be applicable to other cases where the beneficiary is not *capax*.

himself or herself has no influence or control, but in such a case there is a strong argument that the parents count as associates, since they can act in the infant's name.¹

In private trusts it is possible for all the beneficiaries to band together and compel the trustees to denude.² Does that fact mean that the beneficiaries are all associates, and so registrable as such? This point was touched on above.³ The conclusion must be negative. The sole beneficiary of a trust will, normally at least, qualify as an associate, but in our view where there is more than one beneficiary, none of them will be, as such, associates.

Occasionally in a discretionary trust the truster is in *de facto* control and the trustees are mere puppets. As far as the law goes, it is the trustees who make the decisions, but in reality they meekly do the truster's bidding. Since the 'significant influence or control' concept applies not only to *de jure* power but also to *de facto* power, in a case of this type the truster would be an associate, or in other words the RCI regime would be engaged.

Suppose that Posh & Co (Trustees) Ltd holds various properties as trustee for various clients. In each case it may be subject to the direction of the clients. Yet because it is a UK-incorporated company and as such a schedule 2 entity, the RCI regime is inapplicable, and those who pull the strings for the individual properties are not registrable as associates. The reason we mention this case is that it may not have been considered by the drafters. As a UK company it is subject to the PSC regime, and yet that regime does not bite because none of those who pull the strings do so in relation to the company as a whole – only for the individual properties.

One more point. Schedule 1 para 6(b)(ii) says that 'an individual who has significant influence or control over a relevant entity which is a trustee of the recorded person' is an associate. We are unsure what, in practical terms, this is about. It can hardly refer to the case where the recorded person is a trust, because a trust cannot be a recorded person, since a trust has, as such, no juristic personality.⁴ And we are not sure why it is only 'individual' associates who are engaged. It remains to add that the same provision applies in Part 2 (partnerships).

Exceptions

As with the other parts of schedule 1 there is a list of exceptions. They are:⁵

- trustees in sequestration etc;⁶
- Part 2 cases (partnerships);

¹ Schedule 1 para 6(b)(iii).

² There are some qualifications to this statement. In particular not all the beneficiaries may be capable of acting.

³ See the section headed 'Singular or plural?'

⁴ Though there are some juristic persons that are called 'trusts' such as the National Trust for Scotland or the Church of Scotland General Trustees. Such 'trusts', being juristic persons, are not trusts. Their 'trustees' are in fact directors.

⁵ Schedule 1 para 7.

⁶ This seems to cover not only trustees in sequestration but also trustees acting under a trust deed for behoof of creditors.

- Part 4 cases (unincorporated bodies);
- paid professional advisors;
- creditors (including standard security holders);
- ‘a member of the judiciary presiding over proceedings in connection with the trust’;¹ and
- ‘a member of a body which has the right to exercise, or actually exercises significant influence or control over the trust by virtue of a function conferred by an enactment.’²

The amending Regulations

On 22 December 2021 appeared the Land Reform (Scotland) Act 2016 (Register of Persons Holding a Controlled Interest in Land) Amendment Regulations 2021.³ These came into force simultaneously with the principal RCI Regulations, ie on 1 April 2022. They amend the principal Regulations mainly by the insertion of a new reg 23A. This addresses the situation of what happens if, for whatever reason, *all* the trustees who appear in the Land Register (or Register of Sasines) have ceased to be trustees. We stress the word ‘all’ because if there is at least one person who appears in the Land Register (or GRS) and is indeed still a trustee, then there is still somebody on whom the jaws of the Regulations can clench their canines.

We set the scene by quoting the opening of reg 23A as inserted by the amending Regulations into the principal Regulations:

- (1) This regulation applies where –
 - (a) land is owned or tenanted⁴ by a person as (as the case may be) –
 - (i) a trustee of, or otherwise on behalf of, a trust, or
 - (ii) a trustee of, or otherwise on behalf of, the members of an unincorporated body of persons,
 - (b) the person who is registered or recorded as being the owner or tenant (as such trustee or, as the case may be, person holding on behalf of the members of an unincorporated body) has ceased to be a trustee or person holding on behalf of the members of an unincorporated body (for whatever reason), and
 - (c) no other trustee or person holding otherwise on behalf of the trust or, as the case may be, unincorporated body is registered or recorded as being the owner or tenant of the land.

¹ The same provision can be found in sch 1 para 4(d) (partnerships). A somewhat similar provision can also be found in sch 1 para 10(c) (unincorporated bodies).

² Paragraph 122 of the *Explanatory Document* says: ‘Paragraph 7(2)(d) excludes bodies who exercise control by virtue of a statutory function conferred by enactment, as the control would be clear in terms of the legislation.’ This ‘enactment’ provision is also to be found in sch 1 para 13(1) (f) (overseas entities) albeit not in the same form. As noted below in connection with the latter, ‘enactment’ means UK enactment, so that the exception would not apply to non-UK trusts.

³ SSI 2021/495. The amending Regulations are applicable both to trusts and unincorporated bodies. For the latter see below, but since the amending regulations are really about trusts we deal with the subject at this point.

⁴ There might possibly be an argument that this ‘owned or tenanted’ formula is imprecise, for the situation which reg 23A addresses is one in which *none of the persons appearing in the Land Register (or GRS) is now a trustee.*

Regulation 23A goes on to say that in such a situation – where the trustees appearing in the Land Register (or GRS) are in fact no longer trustees – the actual current trustees are to be treated, for the purposes of the RCI regime, as if they held title, thus engaging RCI responsibility.¹ Thus suppose that Nestor, Oberon, Olwen and Ophelia are trustees, with only the first two appearing in the Land Register. Nestor resigns, and then Oberon dies. The effect of the amending Regulations is that, for the purposes of the RCI regime, Olwen and Ophelia, though their names do not appear in the Land Register, are to be treated as if their names did so appear.² They are at one and the same time (i) associates and (ii) deemed owners: two hats.³

The legislation, even as amended, does not seem to address the case of the truly lapsed trust, which is to say the case where there are now no trustees at all, whether infert or uninfert. There may also be other problematic cases: trust law is complex and moreover harbours some unsolved problems.

Part 4: unincorporated bodies

Ambit

The expression ‘unincorporated bodies’ is the term used in the title of Part 4, and ‘unincorporated body of persons’ is the term used in para 9, the threshold provision. The latter says:

This Part applies to a person (the associate) where –

- (a) the person who owns or tenants the land (the recorded person) does so as a trustee of, or otherwise on behalf of, the members of an unincorporated body of persons, and
- (b) the associate –
 - (i) is responsible for the general control and management of the administration of the body, and
 - (ii) is not registered as owning or leasing the land.

To make sense of this one must leap forward a couple of paragraphs, to para 11:

[A] person is responsible for the general control and management of the administration of a body if they hold an office or other official position in that regard (such as chair, treasurer or secretary, however that may be described).

This expression ‘general control’ is used nowhere else in the Regulations. Conversely, the ‘significant influence or control’ formula, used elsewhere, is not used here. What the difference is, we are unsure. The formula ‘the general control and management of the administration of the body’ is also, perhaps, not perfectly easy to grasp. What is under ‘general control and management’ is said to be not the body itself but the *administration* of the body. This distinction

¹ Regulation 23A(2)(a).

² ‘... is to be treated as an owner or tenant of land ...’.

³ Regulation 23A(3). They are deemed owners only for the purposes of the RCI regime, not for other purposes.

is, however, elusive, and we cannot offer a definite explanation. On balance we incline to think that it is merely a question of verbal surplusage.

Whilst it might be argued that Part 4 is about the case where there is a single person who runs an unincorporated body, and does so as holding an 'official position', and who himself (or itself)¹ is not registered as a trustee, we are of the view that Part 4 is not restricted to a single office-holder. As already mentioned, para 11 of schedule 1 says: 'For the purposes of this Part a person is responsible for the general control and management of the administration of a body if they² hold an office or other official position in that regard (such as chair, treasurer or secretary, however that may be described).' And according to the *Explanatory Document*, 'The effect of these proposals is intended to be that the office holders within the management committee be registered as associates in respect of the unincorporated association.'³ Here the term 'office holders' is in the plural, the implication being that there could be more than one associate.

Office-holders as trustees (*ex officiis*)

Section 45 of the Conveyancing (Scotland) Act 1874 provides:

When by the tenor of the title to any land, or any real right in or over land, held in trust duly completed in favour of the trustee or trustees therein named, or any of them, and recorded in the appropriate register of sasines,⁴ the office of a trustee has been or shall be conferred upon the holder of any place or office, or proprietor of any estate, and his successors therein, any person subsequently becoming a trustee by appointment or succession to the place or office or estate to which the office of trustee has thus been or shall be annexed shall be deemed and taken to have a valid and complete title to the land or real right, in the same manner and to the same effect as if he had been named in the completed and recorded title, without the necessity of any deed of conveyance or other procedure.

The precise meaning and scope of this provision would need much analysis. But, in broad terms, when property has been conveyed to persons as office-holders for an unincorporated body, their successors in the same office 'shall be deemed ... to have a valid and complete title to the land' notwithstanding that no actual new entries are made in the Land Register (or GRS). In other words, when old officer-holders are, over time, replaced by new ones, the infeftment of the former is deemed transferred to the latter without any actual new entries in the Register of Sasines or Land Register.

There could be an argument that, in view of s 45, office-holders do not have to be registered as associates, because they are deemed to have completed titles on the property register. On balance we do not think that this argument is right.⁵ Regulation 2(3)(a) says:

1 Part 4 is not restricted to cases where the associate is an individual.

2 'They' (plural) seems to refer to 'a person' (singular).

3 Paragraph 138.

4 Statutory references to the Register of Sasines are deemed to include (subject to one or two exceptions) references to the Land Register: see s 29(2) of the Land Registration (Scotland) Act 1979.

5 We understand the Keeper to be of the same opinion.

[A] reference to a person being the owner of land is a reference to a person –

- (i) who is entered in the Land Register as the proprietor of the land, or
- (ii) whose title to the land is recorded in the Register of Sasines.

This wording points to the conclusion that *actual* appearance in the Land Register or GRS is required.

In this connection mention may be made once more of reg 23A which was added by the amending Regulations¹ and which deals with the case where the trustees named on the property register are no longer trustees. As reg 23A(1)(a)(ii) says, this provision applies not only to trusts but also to unincorporated associations (which in any event typically hold land by means of trust). So if current officer-holders are off-register, they will find themselves subject to the RCI obligations.

Exceptions

Part 4's list of exceptions is brief.² The exceptions are:

- paid professional advisors;
- creditors (including standard security holders); and
- 'a member of the judiciary presiding over proceedings to remove a member of the body from any trust established to hold property on the body's behalf.'

Part 5: overseas entities

An 'overseas entity' is 'a legal entity, other than a person listed in schedule 2, which is incorporated or constituted under, and governed by, a law other than the law of the United Kingdom'.³ The term would thus cover, for example, 'entities' incorporated in Texas, or in the Republic of Ireland, or in the Cayman Islands, or in France, or in the Principality of Liechtenstein, or in Jersey, or in the Isle of Man.⁴

The policy of the Scottish Government is that if an owner/tenant is covered by another UK transparency regime (for example UK-registered companies), the RCI regime should not be engaged, ie there should be no requirement for double disclosure.⁵ The UK government has passed legislation to set up a transparency system for overseas entities.⁶ Hence Part 5 of the RCI Regulations is unlikely to have a long-term future.

The fact that immoveable property is registered in the name of an overseas entity does not necessarily engage the RCI regime. It is only if, standing behind

¹ Land Reform (Scotland) Act 2016 (Register of Persons Holding a Controlled Interest in Land) Amendment Regulations 2021.

² Schedule 1 para 10.

³ Schedule 1 para 17.

⁴ The Channel Islands and the Isle of Man are not part of the UK. This is not only a fact of constitutional law: sch 1 of the Interpretation and Legislative Reform (Scotland) Act 2010 expressly says that in Scottish legislation "'United Kingdom" means Great Britain and Northern Ireland'.

⁵ See below.

⁶ Economic Crime (Transparency and Enforcement) Act 2022: see below.

the entity, there is an associate, in one of the defined senses, that the RCI regime is engaged. Who is an associate for the purposes of Part 5? The answer is a person who:¹

- (i) directly or indirectly holds more than 25% of the voting rights in the recorded person,
- (ii) directly or indirectly holds the power to appoint or remove a majority of the board of directors of the recorded person (or if it doesn't² have a board, the equivalent management body),
- (iii) has the right to exercise, or actually exercises, significant influence or control over a partnership or unincorporated body which is not a legal entity or a trust, but in respect of which head (i) or (ii) would apply if the partnership, body or trust were an individual, or
- (iv) otherwise has the right to exercise, or actually exercises, significant influence or control over the decision-making of the recorded person, particularly in respect of its dealings with the land.

Part 5 is longer and more complex than the other parts, and we do not propose to analyse its provisions in fine detail.³ The *Explanatory Document* contains a good deal of material. As in the other parts there is a list of exceptions,⁴ and as with the other parts it is often difficult to see why they were needed. A director is, as such, not an associate, and likewise an employee is, as such, not an associate. Nor are professional advisors, customers, suppliers or creditors. Nor is 'a person exercising a function under an enactment (such as a regulator, liquidator or receiver)'. This last provision, with its reference to the term 'enactment', is not problem-free. The term 'enactment', when used in Scottish legislation, means UK or Scottish legislation.⁵ It does not include foreign legislation (other than 'retained' EU legislation). So, for example, if ABCDE Ltd, an Irish company that owns land in Scotland, is placed in liquidation by order of the High Court in Dublin, in terms of the Irish Companies Act 1963, the liquidator is, it seems, not covered by the exception.

Further comments on the exceptions

As has been seen, each of the five parts of schedule 1 has a list of exceptions. We are not sure that these work well. There are difficulties reading *within* particular parts, and there are difficulties reading *across* different parts. As to the former a few have already been mentioned. For instance, in Part 1 a buyer under missives

¹ Schedule 1 para 12(b).

² We were surprised by this colloquialism, but on checking, it turns out not to be unique. It is the third time in UK legislative history that it has been used, the previous cases being s 232 of the Revenue Scotland and Tax Powers Act 2014 and reg 100 of the Universal Credit Regulations (Northern Ireland) 2016, NISR 2016/216.

³ The influence on Part 5 of the PSC regime is strong. To take a random example, para 20(1) of sch 1 is a verbatim copy of para 14(1) of sch 1A of the Companies Act 2006. Likewise there are textual affinities with the Economic Crime (Transparency and Enforcement) Act 2022, for which see below.

⁴ Schedule 1 para 13.

⁵ Interpretation and Legislative Reform (Scotland) Act 2010 sch 1.

is said not to be an associate of the selling owner, but nothing is said of rouns or minutes of agreement, or the position of a buyer who holds a delivered but as-yet unregistered disposition. Does that mean that the exception applies only to the missives case? *Expressio unius exclusio alterius est*: the expression of the one is the exclusion of the other. We find it difficult to offer a confident view. It may be that the exceptions are to be seen only as examples.

The same issue arises when reading across the different parts of schedule 1. For instance, in Part 1 it is said that a landlord of the owner is not, as such, an associate.¹ Fair enough. But that provision appears in no other part of schedule 1. Is the implication that if, say, an overseas entity (the subject of Part 5) holds a registered lease, its landlord is in fact an associate? Or take another example. In Part 1 it is said that if one person is the co-owner of land, the other co-owner is not, as such, an associate.² That provision appears in no other part of schedule 1. Is the implication that if, say, an overseas entity co-owns land, the other co-owner is in fact an associate? Or take another example. In Part 1 it is said that if the owner has concluded missives of sale, the contractual buyer is not, as such, an associate.³ But that provision appears in no other part of schedule 1. Is the implication that if, say, an overseas entity concludes missives to sell land, the contractual buyer is in fact an associate? One could continue in this vein for some time.

Perhaps we may be accused of undue pessimism, but we incline to think that the exceptions in schedule 1 are not free from difficulty. We would express the hope that in practice it will be possible for them to be interpreted in a down-to-earth and common-sensical manner.

Schedule 2: the other transparency regimes

The *Explanatory Document* notes the policy of the Scottish Government: 'We do not require double reporting for entities subject to other regimes as we do not want to duplicate existing publicly available information.' Schedule 2⁴ to the RCI Regulations lists four classes of such entities. They are as follows:

- (1) *Charitable incorporated associations*.⁵ This exception applies both to SCIOs⁶ and to their equivalents in England/Wales and Northern Ireland.⁷ The narrowness of this exception should be noted. The exception does not say 'charities registered with OSCR'. Charities can take various forms, including trusts, companies limited by guarantee, bodies established by Royal Charter or by other special means – the University of Edinburgh would be an example. None of these falls under the present exception, though some will fall under one of the next two exceptions.

¹ Schedule 1 para 2(c).

² Schedule 1 para 2(d).

³ Schedule 1 para 2(f).

⁴ Introduced by reg 26.

⁵ Schedule 2 para 1.

⁶ Under the Charities and Trustee Investment (Scotland) Act 2005.

⁷ The Charities Act 2011 and the Charities Act (Northern Ireland) 2008.

- (2) *Companies and other bodies corporate*.¹ UK-incorporated companies are the most important example here. Companies limited by guarantee are included. But companies incorporated furth of the UK are not included, so that for instance a Jersey-registered company would not come under this exemption.² LLPs are also covered,³ as are building societies.⁴ So too are co-operative and community benefit societies,⁵ credit unions,⁶ and friendly societies.⁷ Then there is para 2(3), which is not plain sailing. It says that ‘a body corporate incorporated in, and having a principal place of business in, the United Kingdom’ is exempt. But then it says that this exemption does not apply to ‘(a) a body incorporated by, or registered under, a public general enactment’⁸ or ‘(b) a body not formed for the purposes of carrying on a business that has as an object the acquisition of gain by the body or its individual members’, or ‘(c) a body for the time being exempted from section 1043 of the Companies Act 2006 by a direction of the Secretary of State under subsection (1)(c) of that section’. We do not find para 2(3) easy to make sense of. The *Explanatory Document* is silent.
- (3) *Public authorities*.⁹ These are defined to mean any ‘public authority to which the Freedom of Information (Scotland) Act 2002 or the Freedom of Information Act 2000 applies’. It would thus include the Scottish Government, the Crown, and local authorities. This third case is probably not very important, because it is not, we would imagine, common for there to be ‘associates’ for such bodies.
- (4) *Partnerships other than general partnerships*.¹⁰ This means limited partnerships and limited liability partnerships.

What if an entity is subject to a non-UK transparency regime? That, indeed, will be fairly common: for instance EU member states have comparable transparency regimes.¹¹ But that makes no difference. For instance a Dublin-registered company that owns land in Scotland cannot claim exemption under schedule 2.¹²

Schedule 2 exempts certain types of owners / tenants, not types of associates. So if (i) Clarissa owns land and (ii) there is behind her a person with significant

1 Schedule 2 para 2.

2 But an exemption does apply to certain foreign companies if their shares are quoted: sch 2 para 4(9).

3 Schedule 2 para 4(2).

4 Schedule 2 para 4(4).

5 Schedule 2 para 4(5).

6 Schedule 2 para 4(7).

7 Schedule 2 para 4(8). Unfriendly societies are not exempt.

8 What is a ‘public general enactment’? The Interpretation and Legislative Reform (Scotland) Act 2010, as noted earlier, defines ‘enactment’, but it does not define ‘public general enactment’. The term is discussed in D Greenberg, *Craies on Legislation* (12th edn, 2021) ch 1 s 4.

9 Schedule 2 para 3.

10 Schedule 2 para 4.

11 Directive (EU) 2015/849 ch III.

12 There is one semi-exception, but it will be vanishingly rare in practice: a *Societas Europaea* under Regulation (EC) 2157/2001. See sch 2 para 2(2).

influence or control then (iii) the RCI is engaged, even if that person – the associate – is a schedule 2 entity.

In this connection reg 11(2)(c) contains a provision that we confess puzzles us. It says that as well as the information that is required for any type of entity that is an associate, the information about an associate that is a schedule 2 entity must include specification of ‘the paragraph of schedule 2 that applies to the associate’.¹ As we see it, schedule 2 is relevant to the status of the owner/tenant, but not to that of the associate.

Lastly, a word on ecclesiastical property. As to the Church of Scotland, most of its heritable property is vested in the General Trustees, conform to the Church of Scotland (General Trustees) Order Confirmation Act 1921.² The General Trustees are not in fact a trust but a corporation. Hence the assumption and resignation of General Trustees does not engage Part 3 of schedule 1 (trusts). Are the General Trustees exempt under schedule 2? That turns on the meaning of para 2(3), mentioned above. We think that the General Trustees are not exempt. Where title is vested in the General Trustees, the RCI will often be engaged, because the General Trustees will often (we understand) hold for a congregation in a way that is subject to Part 4 of schedule 1. Some properties of the Church of Scotland are not vested in the General Trustees, but in local trustees. In such cases Parts 3 or 4 of schedule 1 will be engaged.

As for other churches, that – the ‘local trustees’ situation – will be the standard position, for as far as we know they do not have any central corporate body to hold title, ie no equivalent of the General Trustees of the Church of Scotland. Ecclesiastical property can be vested in a SCIO, and that would have the convenience that SCIOs are exempt from the Regulations, but we are not aware that SCIOs have been adopted by any churches. Possibly the advent of the Regulations will make SCIOs a more attractive idea.

Death and dissolution

What happens if one of the parties (recorded person or associate) dies, or, in the case of a company, is dissolved? The rules are set out in reg 23.

Death of recorded person

First, if it is the recorded person who dies, ‘the executor of the individual must, as soon as reasonably practicable notify the Keeper of the individual’s death’. When does an executor become an executor for these purposes? In an intestate case it is presumably the date of decerniture as executor-dative. In a testate case matters are less straightforward, for the person nominated in the will is free not to accept the appointment. We are not sure whether, for the purposes of reg 23, the relevant date would be the date of applying for confirmation or the date when confirmation is granted. What if the ‘recorded person’ is a set of trustees, and one of them dies? In such a case the deceased’s title disappears, and

¹ Regulation 11(2)(c).

² Which we incline to think is not a ‘public general enactment’: see above.

his executor normally has no role in relation to the property and will not and indeed cannot confirm to it.¹ The obvious persons to notify the Keeper would be the surviving trustees. But the updating provisions in reg 12 do not seem to cover the case of a death of a co-trustee. Possibly the deceased's executor comes under the notification duty.

We frame the discussion in terms of Scots succession law. But it must be borne in mind that the recorded person may be English or Irish or anything else, and that fact may create difficulties. In many countries there does not have to be, and commonly is not, an executor, the succession being handled by some version of the system in Roman law. This is generally the true position in the Civil Law systems. Even in England and other Common Law systems there is normally no executor in intestate cases, the position of executor being represented by someone acting through letters of administration. So the obligation on the 'executor' may be problematic.

Whether or not the person to whom the property is subsequently transferred will also be subject to the RCI regime is a separate question. If so, that person must notify the Keeper in the ordinary way,² within 60 days, though here, as in some other cases, there may be uncertainty as to when the 60-day period begins to run.

Death of associate

Secondly, if it is the associate who dies then reg 23 says that 'the executor ... must, as soon as reasonably practicable, notify the recorded person of the individual's death'. As and when that happens the recorded person will then be under a duty to notify the Keeper in terms of the reg 12 updating obligations. The problems about the concept of 'executor' are applicable here too.

'Basic' death

As has been seen, reg 23 deals with the case where there is an RCI registration and one of the parties (RP or associate) dies. Neither in that regulation nor elsewhere is there any provision about what might be called 'basic' death. Jack owns a house. There is nobody in the background who might be an associate so the RCI regime is not engaged. He dies. It may be some time before title passes to a beneficiary or a purchaser. In that period is the RCI regime engaged? In particular, is Jack's executor an associate? The argument might be that the executor is (i) off-register but (ii) in the saddle, and so ought to be registered. Nevertheless we take the view that in this situation the RCI regime is not engaged.³ There is, as far as we can see, nothing in the Regulations that would impose the regime on this state of affairs.

Before leaving the subject of 'basic' deaths, something should be said about docket transfers.⁴ It can easily happen that the grantee of a docket transfer holds

¹ There are some qualifications to what is said above, but, being marginal, they will not be discussed here.

² Regulation 12.

³ We understand that the Keeper is also of this opinion.

⁴ Succession (Scotland) Act 1964 s 15(2).

the property in that way, without completing title, for years or even decades. Thus for an extended period one person appears in the Land Register (or GRS), namely the deceased, whilst another person, the docket grantee, is (i) off-register but (ii) in the saddle. Is the RCI regime engaged? The policy that underlies the Regulations might suggest an affirmative answer, but our view is negative.¹ The reason is the same as before: as far as we can see there is nothing in the Regulations that would impose the regime on this state of affairs.

Winding-up or dissolution of recorded person

Thirdly, 'in the event of the winding-up or dissolution of a non-natural person ... who is a recorded person, the person responsible for dealing with the assets or liabilities of the entity must, as soon as reasonably practicable, notify the Keeper of the winding-up or dissolution'.² This provision is not problem-free. In UK company law, where there is a winding-up, the company still exists as a juristic person, the term 'dissolution' referring to the later stage when the juristic personality of the company is finally extinguished. A company that is being wound up is, so to speak, terminally ill but not yet dead. So when is the liquidator to send the Keeper notice? At the onset of winding-up? Or on dissolution? Or (quite possibly) both? We are not sure of the answer. Under UK company law there can also be cases where the juristic personality of a company is extinguished without any winding-up process. Here the time for notification to the Keeper will be the day of extinction, ie the date of dissolution. That seems reasonably clear, but another difficulty emerges. In a winding-up, 'the person responsible for dealing with the assets or liabilities of the entity' is obviously the liquidator. But in cases where dissolution happens *without* winding-up, the 'person' may not be so easily identifiable. We hesitate to plunge into the complexities of company law, but would cite in particular s 1000 of the Companies Act 2006 (company struck off, and thus dissolved, by the Registrar of Companies for failing to make the necessary returns etc). Section 1000 dissolutions are quite common.

Winding-up or dissolution of associate

Fourthly, 'in the event of the winding-up or dissolution of a non-natural person ("the entity") who is an associate, the person responsible for dealing with the assets or liabilities³ of the entity must, as soon as reasonably practicable, notify the recorded person of the winding up or dissolution'.⁴ Similar comments are applicable here too.

The provisions just mentioned about companies etc will, like the provisions about individuals, have to work internationally. We suspect, however, that there would be fewer problems here.

¹ We understand that the Keeper is also of this opinion.

² Regulation 23(4).

³ The expression 'assets or liabilities' is used, not 'assets and liabilities'. We are not able to explain this.

⁴ Regulation 23(6).

Security declarations

Regulation 16(1) says that ‘an associate who is an individual may at any time,¹ make a declaration that the inclusion in the RCI of one or more of the associate’s required details would put the associate ... at risk of violence, abuse, threat of violence or abuse, or intimidation’. The declaration is submitted to the Keeper. As for the style to be used, reg 16(2) says:

A security declaration must –

- (a) be accompanied by suitable evidence to support the making of the declaration or state that the associate is taking reasonable steps to obtain such evidence,
- (b) include the required details of the associate,
- (c) state the date on which the security declaration is made,
- (d) be signed by the associate.

There is no requirement that the declaration be witnessed, let alone notarised. As for (a), schedule 3 to the Regulations is headed ‘Evidence to support security declarations’ and is detailed. Here is a random selection, to give the flavour:

- ‘A non-harassment order, interdict or interim interdict made under section 8 or 8A of the Protection from Harassment Act 1997.’²
- ‘Any interdict with an attached power of arrest made under section 1 of the Protection from Abuse (Scotland) Act 2001.’³
- ‘A forced marriage protection order or interim forced marriage protection order made under any of the following provisions, (i) Part 4A of the Family Law Act 1996, (ii) section 2 and paragraph 1 of schedule 1 of the Forced Marriage (Civil Protection) Act 2007, (iii) section 1 of the Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Act 2011, or (iv) section 5 of the Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Act 2011.’⁴
- ‘A restraining order on acquittal made under article 7A(1) of the Protection from Harassment (Northern Ireland) Order 1997.’⁵
- An attestation by ‘any director of social services in Wales within the meaning of section 6(A1) of the Local Authority Social Services Act 1970.’⁶

Keeping all these statutory references up to date in the years ahead may not prove easy.

Is the schedule 3 list exhaustive, in the sense that the ‘suitable evidence’ to be submitted to the Keeper has to be from that list? Yes and no. Regulation 16(4) says that the evidence must be an item from the schedule 3 list except that, ‘where such evidence is not reasonably obtainable’, it may comprise ‘such other evidence as the Keeper considers appropriate in the circumstances’. The Keeper’s decision

¹ ‘At any time.’ There is thus no deadline for a security declaration to be made.

² Schedule 3 para 1(2)(a)

³ Schedule 3 para 1(2)(g).

⁴ Schedule 3 para 1(2)(h).

⁵ Schedule 3 para 1(2)(p).

⁶ Schedule 3 para 2(3)(g).

is appealable to the Lands Tribunal.¹ The *Explanatory Document* has some detail about security declarations, including two flowcharts.²

Enforcing the RCI regime

Failure by owners/tenants to comply with their duties is an offence, and the same is true for failure by associates. But failure has no *civil* consequences. The RCI Regulations are policed solely by the criminal law.³ For example, the Keeper will process a land registration application even if there should have been at the same time, but was not, a notification by the applicant in relation to the RCI.

The penalty, which is the same for both breaches by owners/tenants and by associates, is a fine of up to level 5⁴ on the standard scale, currently £5,000.⁵ To what extent will that be sufficient to motivate compliance? We have no idea.

We also have no idea how enthusiastic procurators fiscal will be about investigating and prosecuting the offences created by the new legislation. Possibly they may feel that they have other fish to fry. If they are unenthusiastic that would not be without precedent: there are many other areas of statutory law policed by criminal offences that more or less never get prosecuted in real life. The Companies Act 2006 contains many examples.

Is the criminal liability strict, or are there defences? The answer is that all the offences are allowed 'reasonable excuse' defences,⁶ though the wording is not precisely the same throughout.⁷

Sometimes the persons concerned – the owner/tenant, the associate, or both – will be furth of Scotland, and indeed furth of the UK, so that enforcement would not be straightforward, and perhaps even be impossible. In this context it should be borne in mind that the default rule in international law is that fines imposed by the courts of one country are not normally enforced by the courts of another.

In some cases there will be more than one owner/tenant – for instance where there are trustees. No doubt they should act together in making the necessary notifications to the Keeper. But if no notification is made, they are presumably all criminally liable, so that if there were, say, three trustees, the total fine could be up to £15,000, like landing on Mayfair with three houses. We say 'presumably' because on such issues the Regulations are silent. What if some of the parties concur in notifying the Keeper but others refuse: would the non-signers be liable? What if the trustees (or other joint owners/tenants) cannot agree on the terms of the notification to the Keeper, and send in different notifications? We are able to offer no answers.

Antecedent to prosecution is detection. If an owner fails to make the necessary notification to the Keeper, or makes a notification but it is inaccurate, or fails to

¹ Regulation 18.

² See paras 72 ff.

³ By contrast, the Economic Crime (Transparency and Enforcement) Act 2022 has civil consequences, as explained below.

⁴ Regulations 10(10), 12(6), 13(6), 14(4), 15(8), 17(6) and 20(3).

⁵ For the 'standard scale' system, see s 225 of the Criminal Procedure (Scotland) Act 1995.

⁶ See regs 10(8), 12(4), 13(5), 14(3), 15(7), 17(5) and 21(1).

⁷ See in particular the wording of reg 21(1).

make an updating notification, how likely is it that this will come to light? Again we are able to offer no answers.

Searchability and the provisions about numbering

The RCI is to be searchable both by person and by property. Regulation 9(2) provides:

The Keeper must ensure that a person is able to search the RCI for data by reference to the following criteria –

- (a) in relation to the land, its title number, or a description that is sufficient for it to be identified,
- (b) in relation to the recorded person, the person's name or, if applicable, registered number,
- (c) in relation to the associate, the associate's name, registered number or unique reference number.

Here the 'unique reference number' means the number that the Keeper is to allocate to each associate.¹ As for 'registered number' that is defined to mean 'any unique number allocated to a non-natural person for the purposes of identifying them' – in other words a company registration number or equivalent (if there is one, which there may not always be for foreign juristic persons).² It will be seen that whilst the 'unique reference number' can belong only to associates, the 'registered number' may apply to associates and also to RPs. Thus if land is held by Edwina as nominee of ABC Ltd, the latter being a company registered in Offshoria, the latter will have two numbers in the RCI, namely its Offshorian company number, whatever that may be, and the RCI number allocated by the Keeper.

Some implications for practice

At the time of writing no guidance has been issued by the Law Society. As academics, we hesitate to tell practitioners what is to be good practice. Nevertheless, for what it is worth, here are a few suggestions.

One possibility would be avoidance. Terms of engagement would say something like: 'As to the Controlled Interests Regulations, dearest client, you are on your own unless you specifically ask us and we agree to advise, which we won't.' Tempting though that might be, we doubt whether it would be sustainable. This is not an area where there are other professionals for clients to consult. Accountants might be able to help in certain cases, such as looking at the structure of an overseas company to see whether anyone has an indirect voting control over 25%. But essentially the Regulations are not about accountancy. Indeed, however much lawyers may struggle to understand them, other professionals would struggle more, much more. Moreover in cases where the Regulations are engaged, registration with the Keeper will be needed, and

¹ Regulation 7.

² Regulation 2(1).

here there is an obvious role for lawyers. We incline to think that clients would expect that advice in this area would be given standardly by property lawyers. It should be borne in mind that in practice many individuals and companies – and indeed other juristic persons – affected by the Regulations will not be aware even of their existence, let alone of the way they may affect their own particular circumstances.

The difficulties, in any event, should not be exaggerated. When acting in the purchase of land it will usually be obvious if the RCI regime is at least potentially engaged. That will always be so when acting on behalf of trustees, a partnership, an unincorporated association, or a non-UK company or other overseas entity. Acting for any one of these should cause a red light to flash on the dashboard. Of course it may turn out that there are no associates and hence no need for registration in the RCI. But the position will need to be investigated and enquiries made of the client.

The main risk is not in cases such as this – the cases covered by Parts 2 to 5 of schedule 1 – but in cases covered by Part 1 of the schedule, ie cases where X is buying/leasing property on behalf of someone else (Y). If X is then to hold the property to Y's order, Y is an associate and registration in the RCI is needed. Cases like this are not common. But they are also not readily visible. Left to his or her own devices, client X will probably make no mention of the existence of Y. Yet the issue is potentially pervasive, for *any* client could, in theory, be acquiring on behalf of an undisclosed person. The only way to be sure is to ask the client.

We suggest, therefore, that when acquiring property for a client, the client should be asked whether there is an associate. That question would have to be phrased carefully, because, as indicated above, the concept of 'associate' is complex and elusive. It would scarcely help real-world purchasing clients simply to be asked: 'Will there be an associate within the meaning of the Land Reform (Scotland) Act 2016 (Register of Persons Holding a Controlled Interest in Land) Regulations 2021 (as amended)?' Equally, it would hardly make sense to ask the client a set of questions running to several pages covering every possibility. With some hesitation, we suggest a middle course. Something on the following lines – no doubt capable of improvement – might work. We have tried to keep it simple, and possibly it might be criticised for being too simple. If the answers, or some of them, are already known, the text can be adjusted accordingly.

Under Scots law, not only the holder of the legal title must be registered, but also anyone (though there are some exceptions) who, though not holding legal title, has influence on what happens to the property. This is by virtue of the Land Reform (Scotland) Act 2016 (Register of Persons Holding a Controlled Interest in Land) Regulations 2021. Details are complex; to help us ascertain whether the 2021 Regulations apply in your case we would ask you to answer the following questions. By way of background we would explain that in a majority of cases the Regulations are not in fact applicable.

- (1) If you are a company or other entity (juristic person, legal person) established outwith the UK, is there anyone (whether an individual or not) who controls, directly or indirectly, more than 25% of the voting rights? (Note: (i) The UK does

not include the Channel Islands or the Isle of Man. (ii) The 2021 Regulations do not apply where the legal title is held by a UK-registered company.)

- (2) Are you acquiring the property on behalf of a trust, or a partnership, or an unincorporated body?
- (3) Are you acquiring the property as nominee for someone else? Or will there be anyone apart from you who will be able to direct or control or influence what happens with the property (whether such a person is an individual or not)?

If the answer to any of these questions is 'yes', or 'maybe' or 'haven't the faintest idea' then please discuss with us so that we can advise you whether registration under the 2021 Regulations is required.

What has been said above is tailored to the case of a client acquiring heritable property – cases, therefore, where registration in the Land Register will also be needed. But from the standpoint of the practitioner there are two other situations to consider.

The first is that the client needs to be advised that, even after the property has been acquired, it may happen in future that a registration in the RCI may be necessary – as a result of events of which the law firm may well be unaware. And this is true even if the RCI regime is not engaged at the time of acquisition. For instance John Smith, who buys a property in 2023, may have, at that time, no associate, but might acquire an associate five years later. It is hardly possible to frame a statement to the client that will cover all possibilities, but something on the following lines might be appropriate:

If in future anything happens whereby someone who does not hold legal title takes on a role in which they can influence or direct or control what happens to the property, you should consult us, or other legal advisers, to determine whether a registration (or an additional registration) may be required.

This is admittedly a bit vague, but a detailed account of the various triggers in the Regulations would hardly make sense to most clients. The wording that we suggest, though no doubt capable of improvement, would hopefully be sufficient to alert the client. Of course, future events may in fact very well *not* trigger a need for registration. Everything will depend on the facts and circumstances of the case.

The other situation about which something must be said is that of clients who already hold property under circumstances that may engage the RCI regime – and who perhaps did so for many years before 1 April 2022. This is merely an aspect of the more general question of how law firms should alert clients to changes in the law, being changes that may need an active response, though it is rather sharper than the usual cases (changes in tax planning strategy, for instance, responding to the convolutions of the latest Finance Act) in that the criminal law is involved. The honest upright and law-abiding client who has held property for the past ten years, with an associate in the background, will suddenly become a criminal if he or she does not timeously bring about the requisite registration. Our view is that there is no 'duty to trawl' the firm's files. That would involve substantial costs, and would, however carefully done, be very hit-and-miss. In any event it is very often uncertain whether a client is in fact still a client.

What about a duty to search the RCI? We do not think that there is any need for that in ordinary conveyancing matters. But in certain types of case there might be a duty to search. For instance the trustees of the XYZ trust, unhappy with the service they have been receiving from Utterly Hopeless & Co LLP, decide that in future you will act for them, and you are very happy to accept them as clients. The trust holds immoveable property in Scotland. It is arguable that you should search both the Land Register (or GRS) and the RCI. If it turns out that there are uninfert trustees, and that they are not in the RCI, then RCI registration can and should be effected. Or, in the alternative, steps could be taken to complete the title of the uninfert persons.

Evaluation

Is it all worth it? This question can be subdivided. (i) Will there in fact be compliance, and will the information registered in the RCI be accurate?¹ (ii) To the extent that there is compliance will public benefits flow from that compliance, and, if so, what public benefits? (iii) To the extent that there are public benefits, will they outweigh the costs of the RCI itself (whoever may in fact be paying for it – see above) and the compliance costs of those who own property, bearing in mind that the new law will have to be considered, to some extent, even in those cases (the majority) where the RCI regime is not in fact engaged? Will its burdensome effects be, as we have heard suggested, grossly disproportionate to any benefits? To all these questions we are unable to offer answers. We close by offering, without comment, a passage from a well-respected work: ‘The Regulations are a veritable minefield for the unwary or the careless. It is more than likely that many individuals to whom these Regulations are to apply, will fail to comply with the various duties and requirements completely innocently and unintentionally.’²

The London initiative

As mentioned earlier, there is a separate initiative in London, which is about transparency where land in the UK is held by an overseas entity. Although the legislation has been in the offing for some years, there have been persistent delays, and indeed some speculation that the Government intended to bury it, though the official position remained that enactment was intended.³ The original intention was for there to be a standalone Bill; indeed a draft, called the Registration of Overseas Entities Bill, was published back in 2018.⁴ Later the intention was to include the provisions in a future Companies Bill.

¹ As for the PSC regime it is said that the compliance rate is 98% (see para 86 of the *Explanatory Document*). But one also hears it said that the reliability of the data is often dubious.

² A Stewart and E Sinclair, *Conveyancing Practice in Scotland* (8th edn, 2020) para 2.63. This passage referred to the draft Regulations, which, however, did not differ greatly from the final Regulations as enacted in 2021.

³ Thus in November 2021 there was an announcement in the UK Parliament that ‘the Government intend to introduce legislation ... as soon as parliamentary time allows’: see <https://hansard.parliament.uk/Commons/2021-11-02/debates/21110252000006/RegisterOfBeneficialOwnersOfOverseasEntitiesUpdate/>.

⁴ See *Conveyancing* 2018 p 176.

While this volume was at proof stage, in February 2022, Russia invaded Ukraine. One of the countless consequences was that the UK Government decided to introduce the Economic Crime (Transparency and Enforcement) Bill, containing, among other things, the provisions about overseas entities.¹ The first reading was on 1 March 2022, and the Bill was rushed through both Houses of Parliament, obtaining Royal Assent on 15 March. A legislative consent motion was passed by the Scottish Parliament on 9 March. When the legislation will come into force is uncertain.

We cannot here discuss the Economic Crime (Transparency and Enforcement) Act 2022 in detail: such discussion must be reserved for a future date. But a few words – a very few – can be said.²

The provisions for registration of overseas entities are contained in Part 1 (ss 1–39) of the Act. Section 1 gives the gist:

This Part –

- (a) sets up a register of overseas entities, which will include information about their beneficial owners (sections 3 to 31), and
- (b) makes provision that, broadly speaking, is designed to compel overseas entities to register if they own land (sections 32 and 33).

The new register is to be kept by the Registrar of Companies for England and Wales, regardless of where the property is in the UK. Registration in the new register is required not only for ownership of land (as s 1 says) but also for registered leases. The deadline for registration is six months after commencement of the legislation. Thus if XYZ Ltd, registered in Offshoreland, owns land which it acquired in 2016, and the new legislation is commenced in October 2022, the company must register in the new register by April 2023. Failure so to do will result in criminal penalties. In addition, amendments are made to the Land Registration etc (Scotland) Act 2012,³ whereby the Keeper must reject registration applications in favour of unregistered overseas entities.

As indicated earlier, it is likely that, when the new provisions come into force, the provisions about overseas entities in the Scottish RCI Regulations will be revoked, although there may be a period of overlap when registration under both regimes is needed.

¹ These provisions, which constitute Part 1 of the Act, are essentially the same as the draft published in 2018, but there are some significant differences in detail. On these differences see www.gov.uk/government/publications/economic-crime-transparency-and-enforcement-bill-2022-overarching-documents/factsheet-the-register-of-overseas-entities-web-accessible.

² For a useful account of the Act and its background, see Ali Salchi and Steve Browning, *Economic Crime (Transparency and Enforcement) Bill 2021-22* (House of Commons Library: <https://researchbriefings.files.parliament.uk/documents/CBP-9486/CBP-9486.pdf>).

³ Parallel changes are also made to the land registration legislation in England and Wales, and in Northern Ireland.

⌘ P A R T V I ⌘
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 <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.

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	1973 disposition. Pedestrian right of way.	Rerouting of path as part of garden redesign.	Refused (opposed).

<i>Name of case</i>	<i>Servitude</i>	<i>Applicant's project in breach of servitude</i>	<i>Application granted or refused</i>
<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>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.

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 *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)

EE Ltd v Duncan

2021 SLT (Lands Tr) 1, 2020 Case (23) *rev* [2021] CSIH 27, 2021 GWD 17-252, 2021 Case (14)

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 GWD 15-225, 2021 Case (17)

McCabe v Patterson

[2020] SC GLA 14, 2020 GWD 11-155, 2020 Case (13) *affd* [2022] SAC (Civ) 2, 2022 GWD 6-93, 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)

Ruddiman v Hawthorne

[2019] CSOH 65, 2019 GWD 29-463, 2019 Case (18) *affd* [2020] CSIH 46, 2021 SLT 111, 2020 Case (16)

Savage v Thomson

2020 GWD 30-389, 2020 Case (27) *affd* sub nom *Thomson v Savage* [2021] CSIH 22, 2021 SLT 1101, 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, 2020 Case (14) *affd* [2021] CSIH 48, 2021 SLT 1259, 2021 Case (9)

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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